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Myrna S. Raeder

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Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines

Myrna S. Raeder*

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* Professor of Law, Southwestern University School of Law. This Article grew out of my work on sentencing for the Ninth Circuit Gender Bias Task Force. The opinions stated herein are strictly my own. Special thanks are due to my colleague Professor Karen Smith and to Professor Kathleen Daly for their thoughtful comments. The Bureau of Prisons Research Staff, and Phyllis Newton and her staff at the United States Sentencing Commission graciously provided certain information that was not otherwise available.

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I. INTRODUCTION

The United States Sentencing Commission drafted the Sentencing Guidelines in accord with congressional instructions in order to assure that guidelines and policy statements were entirely neutral as to sex.¹ As a result, the Guidelines explicitly mandate that sex is not relevant in the determination of a sentence.² However, such legislated equality poses difficulties for many women whose criminal behavior and history, as well as family responsibilities, cannot easily be shoehorned into a punitive pro-prison model for sentencing males assumed to be violent and/or major drug dealers. For example, female offenders are often mothers who have sole or primary responsibility for the care of their children, a consideration virtually ignored by the current Guidelines. Many women who are sentenced, particularly in drug conspiracies, are the wives or girlfriends of male defendants who have fathered their children. They may find themselves involved in criminal activity because of social and cultural pressures or occasionally as a result of

1. 28 U.S.C. § 994(d) (1992).

2. UNITED STATES SENTENCING GUIDELINES MANUAL § 5H1.10 (1992) (policy statement) [hereinafter U.S.S.G.].

more obvious means of coercion such as battering. Harsh mandatory minimums combined with the inflexible Guidelines regime result in lengthy incarceration of such women whose actual role in drug cases is often quite limited. Similarly, although property offenses, which constitute a significant percentage of female crime, result in lower average sentences than other types of offenses, Guidelines sentencing requires some incarceration for women who pre-Guidelines would have been sentenced to straight probation.

This Article reviews the criminological literature concerning female offenders and pre-Guidelines sentencing disparity in order to better determine the effect of the Guidelines in current sentencing practice.³ A large amount of statistical data pertaining to women offenders is incorporated both to paint a portrait of those who have been caught up by the criminal justice system and to evaluate differences in pre- and

3. I chose to use the term "sentencing disparity" interchangeably with "preferential" or "differential" sentencing, even though disparity can more narrowly refer to a pattern of unlike sentences for like offenders. See, e.g., Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 933 (1990). The reason for treating these terms broadly is that the literature usually focuses on whether women obtain better sentencing results, without engaging in multivariate analysis to determine whether such preference is due to gender disparity or can be justified by other factors. Even the more sophisticated studies, which attempt to control for prior criminal history and/or offense characteristics, rarely control for caretaking responsibilities of the males and females being studied. See *infra* notes 46-51, 133-43 and accompanying text.

As a practical matter, information that would enable such analyses is often lacking in public records. This is true even in the Guidelines regime. In providing sentencing information to the Ninth Circuit Gender Bias Task Force, Phyllis Newton, Staff Director of the Sentencing Commission commented:

While we have provided information on the number of dependents, we are unable to differentiate one type of dependent from another (e.g., child from spouse). As well, we are unable to identify whether a defendant was a single parent or was living with dependent children prior to sentencing. Our definition of dependents may limit the usefulness of these tables for your analyses.

Letter from Phyllis Newton, Staff Director, United States Sentencing Commission, to Professor Myrna Raeder at 2 (May 26, 1992) (on file with author). I appreciate being given permission by Ms. Newton, to use the letter and accompanying 1991 data in this Article [hereinafter May 26, 1992 SC Responses]. I also wish to thank the Commission for updating some of this material to include 1992 data [hereinafter March 17, 1993 SC Responses] (on file with author).

In retrospect, it is not surprising that this information is not currently obtainable, since the Guidelines assume that family information is typically of little or no value in sentencing decisions. However, such absence makes it more difficult to examine gender questions raised in guidelines sentencing.

post-Guidelines sentencing. Since gender information is often difficult to ascertain, some of the data is fairly general. To the extent possible, the Article examines statistics which highlight trends before and after 1989. However, I recognize that the Guidelines should not be viewed in isolation, but as an extension of an ongoing effort favoring more punitive sentencing.

My thesis is that the Guidelines, which are designed to reduce race, class and other unwarranted disparities in sentencing males, ignores factors that are integral to the lives of many female offenders.⁴ Ironically, the downplaying of family and community ties in order to ensure that indigent minority males were not disadvantaged in sentencing resulted in women being sentenced more harshly than previously. Treating men and women fungibly for sentencing purposes overlooks the role played by gender in criminality. While some courts creatively interpret the Guidelines to avoid Draconian results, it is time to recognize sex-based anomalies in sentencing. Where necessary, courts should modify the Guidelines to encourage single parenting departures. Pregnancy and primary parenting responsibilities should also be grounds for discretionary departures. The objective should not merely be to mete out equal sentences to females, but rather to guarantee that they re-

4. This essay focuses solely on female offenders. Questions about gender sensitivity in guidelines practice also arise concerning female victims. For example, in 1991, the Basic Rape Sentence for violation of § 18 U.S.C. 2242 (Supp. 1992), produced a guidelines sentence of 5.8 years. Guideline sentences for robbery, kidnapping and even relatively minor drug offenses have higher base times or mandatory minimums. While many stranger-rape encounters produce a higher sentence due to the presence of other factors such as weapons or kidnapping, the 5.8-year average applied to most acquaintance rapes. Therefore, a subtle message may be sent that acquaintance rape is not a significant offense in comparison to other crimes. See NINTH CIRCUIT GENDER BIAS TASK FORCE REPORT: PRELIMINARY DISCUSSION DRAFT 163 (1992) [hereinafter TASK FORCE REPORT].

In addition, gender expectations can intrude upon sentencing departure issues. For example, in *United States v. Saunders*, 943 F.2d 388, 392 (4th Cir. 1991), a trial judge denied a request for a downward departure from a conviction of aggravated sexual abuse where the male defendant claimed that he and the victim smoked crack together and she was reputed to exchange sex for drugs. The court appropriately recognized that the law protects all people. Similarly, gender roles can be implicated when determining whether a prostitute is a vulnerable victim. Compare *United States v. White*, 979 F.2d 539, 545 (7th Cir. 1992) (affirming an upward adjustment) with *United States v. Sabatino*, 943 F.2d 94, 104 (1st Cir. 1991) (reversing an upward adjustment).

Recognition of differing gender effects can be seen in *United States v. Newman*, 965 F.2d 206, 211 (7th Cir. 1992). In *Newman*, an adult woman who had been sexually abused as a child was found to be a vulnerable victim of a fraud committed by a male who had entered a romantic relationship with her. In reaching this conclusion, the Seventh Circuit relied on articles indicating the susceptibility of such women to sexual exploitation as adults.

ceive just sentences which reflect their dissimilar patterns of criminality and family responsibilities. Currently, the lofty goal of gender neutrality has backfired, wreaking havoc in the lives of female offenders and their children who are forgotten by the Sentencing Guidelines structure. I also call for the establishment of a federal task force focusing on female offenders so that a rational sentencing policy concerning women can be created and integrated into the Guidelines structure. In addition, the task force would consider appropriate programs and facilities for sentenced women and their families. Finally, I join the chorus of voices urging reconsideration of the severe sentences dictated by mandatory minimum drug statutes.

II. WHO ARE FEMALE OFFENDERS?

Society has always viewed female offenders as an aberration.⁵ Dating from at least the mid-eighteenth century, women have comprised a much smaller percentage of criminal offenders than their percentage of the general population.⁶ Traditional theories of female criminality focused on the whore/madonna distinction, which assumed that some women were destined to be evil and others to be placed upon pedestals.⁷ With the advent of the women's movement, attention shifted from the traditional approach to predicting the effects of "women's liberation." Criminologists began to recognize that socialization of women dating from childhood, rather than biology, was the reason for their relative absence in crimes other than property offenses.⁸ A few com-

5. Overviews of theories concerning female criminality include Meda Chesney-Lind, *Women and Crime: The Female Offender*, 12 SIGNS 78 (1986) [hereinafter, Chesney-Lind, *Women and Crime*], Kathleen Daly & Meda Chesney-Lind, *Feminism and Criminology*, 5 JUST. Q. 497 (1988), and JOCELYN M. POLLOCK-BYRNE, *WOMEN, PRISON & CRIME* ch. 2 (1990).

6. Unexpectedly, some empirical evidence depicts women offenders as being much more prevalent in the late 17th and early 18th centuries, committing a substantial portion of all felony offenses. See Malcolm M. Feeley & Deborah L. Little, *The Vanishing Female: The Decline of Women in the Criminal Process, 1687-1912*, 25 LAW & SOC'Y REV. 719, 732, 750 (1991). See also N.E.H. HULL, *FEMALE FELONS: WOMEN AND SERIOUS CRIME IN COLONIAL MASSACHUSETTS* 67 (1987).

7. See generally KAREN DECROW, *SEXIST JUSTICE* (1974); Dorie Klein, *The Etiology of Female Crime: A Review of the Literature* in *WOMEN, CRIME, AND JUSTICE* 65 (Susan K. Datesman & Frank R. Scarpitti eds., 1980).

8. See generally D. Hoffman-Bustamante, *The Nature of Female Criminality*, 8 ISSUES IN CRIMINOLOGY 117 (1973). More recently this has evolved into a power-control theory, which focuses on parental controls and attitudes towards risk-taking. See

mentators envisioned large numbers of females being lured to a life of crime either because of greater opportunity⁹ or the desire to mimic male behavior.¹⁰ The anticipated increase of violent crime by women never materialized.¹¹ While property and drug offenses have soared,¹² this has not been attributed to the women's movement, but rather to the 'feminization of poverty.'¹³

The obvious factor to which criminologists now attribute most female misconduct is economic marginalization.¹⁴ Certainly, the \$687 average monthly income of federally sentenced female defendants supports the importance of this theory in analyzing female crime.¹⁵ Generally, "it is

John Hagan & Fiona Kay, *Gender and Delinquency in White-Collar Families: A Power-Control Perspective*, 36 CRIME & DELINQ. 391 (1990).

9. See, e.g., Rita J. Simon, *Women and Crime Revisited*, 56 SOC. SCI. Q. 658, 661 (1976).

10. See, e.g., FRED A ADLER, *SISTERS IN CRIME: THE RISE OF THE NEW FEMALE CRIMINAL* 15 (1975).

11. Statistics describing 1989 federal prison admissions classify only 3.5% of federal crimes committed by females as violent, compared to 8.2% of male federal offenses. CRAIG PERKINS, BUREAU OF JUSTICE STATISTICS, NATIONAL CORRECTIONS REPORTING PROGRAM, 1989 Table 5-2 at 53 (1992) [hereinafter BJS, 1989]. Moreover, men were responsible for 95.2% of all violent offense committed by people admitted to federal prison in 1989. *Id.*, Table 5-4 at 55. See also Roland Chilton & Susan K. Datesman, *Gender, Race, and Crime: An Analysis of Urban Arrest Trends, 1960-1980*, 1 GENDER & SOC'Y 152, 153-54 (1987).

One interesting fact emerges from the fiscal year 1991 and 1992 federal sentencing data concerning manslaughter, a relatively infrequent category of federal crime due to jurisdictional restrictions. Women were responsible for 10 manslaughters, or 17% of all manslaughters in 1991. UNITED STATES SENTENCING COMMISSION 1991 ANNUAL REPORT Table 17. In 1992, females committed 22% of all manslaughters. UNITED STATES SENTENCING COMMISSION 1992 ANNUAL REPORT Table 13. All Sentencing Commission data is based on the fiscal year that spans October to September, whether or not otherwise specifically noted in this Article. While these numbers are too small to be significant, they raise the specter that even in federal court, some women's violence is actually imperfect self defense or a failed Battered Woman's Syndrome defense.

12. See *infra* notes 18-20 and accompanying text.

13. See, e.g., Gloria Leventhal, *Female Criminality: Is 'Women's Lib' to Blame?* 41 PSYCHOL. REP. 1179 (1977) (finding that the female inmates had much more traditional views than the control group of college students). See also CLARICE FEINMAN, *WOMEN IN THE CRIMINAL JUSTICE SYSTEM* 26-28 (1986). Professor Feinman concludes that any link between the women's movement and female criminality is unrealistic, particularly since the demographics of female prisoners, who are often poor uneducated minority women, has little in common with the typical portrait of the white middle or upper class feminist.

14. See, e.g., Chilton & Datesman, *supra* note 11, at 167-68.

15. UNITED STATES SENTENCING COMMISSION 1991 ANNUAL REPORT Appendix B (containing national data and demographic information on sentenced defendants). Female income was 87% of that for male sentenced defendants. Similarly, a nationwide survey of female offenders found that 60% received welfare. AMERICAN CORRECTIONAL

the absence, rather than the availability of employment opportunity for women [that] seems to lead to increases in female crime.¹⁶ Economic marginalization is consistent with social control theory, which predicts that as women have less daily informal social control in their lives due to their growing representation in the labor market and as heads of households, increasing numbers will enter the criminal court system.¹⁷

Economic marginalization also helps to explain the continuing high percentage of female property crime,¹⁸ particularly among urban non-White women.¹⁹ Indeed, one study of urban larceny crimes found that

ASSOCIATION, *THE FEMALE OFFENDER: WHAT DOES THE FUTURE HOLD?* 7 (1990) [hereinafter *ACA*].

Obviously, economic marginalization should be viewed as only a partial explanation for criminality, since the vast numbers of law-abiding citizens who are poor belie any suggestion that poverty dooms a person to a life of crime.

16. NGAIRE NAFFINE, *FEMALE CRIME: THE CONSTRUCTION OF WOMEN IN CRIMINOLOGY* 98 (1987), quoted in RITA J. SIMON & JEAN LANDIS, *THE CRIMES WOMEN COMMIT, THE PUNISHMENTS THEY RECEIVE* 9 (1991).

17. Candace Kruttschnitt, *Women, Crime, and Dependency*, 19 *CRIMINOLOGY* 495, 509 (1982). See also PAT CARLEN, *WOMEN, CRIME AND POVERTY* 112-14 (1988).

18. See, e.g., Kathleen Daly, *Gender and Varieties of White Collar Crime*, 27 *CRIMINOLOGY* 769, 790 (1989). One possible reason for increasing theft statistics may relate to the growing willingness of storeowners to prosecute for larceny crimes. See, e.g., FEINMAN, *supra* note 13, at 29.

Property crimes accounted for 32.8% of all crimes committed by women who were admitted to federal prison in 1989 in comparison to 18.1% of crimes committed by men. BJS, 1989, *supra* note 11, Table 5-2 at 53. Even in relationship to total crime, women committed a significant number of such crimes as embezzlement (42.5%), forgery (25.9%) and larceny (20.2%), given that they constituted only 10.6% of offenders. See *id.*, Table 5-4 at 55.

Sentencing statistics from October 1990 through September 1992 confirm this trend. Although women comprised just 16.7% of those sentenced in federal court in fiscal year 1991, they were responsible for 31.1% of larcenies, 27.9% of frauds, 60.9% of embezzlements and 16.6% of forgeries/counterfeitings. Moreover, these offenses accounted for 48% of female crimes, compared with 19% of male crimes and 24% of all federal crimes. See UNITED STATES SENTENCING COMMISSION 1991 ANNUAL REPORT Table 17. Similarly, in fiscal 1992 females' respective shares of property crimes were 32.8%, 26.2%, 58.6% and 23.4%, constituting 48% of crimes committed by women, compared to 20% of male offenses. See UNITED STATES SENTENCING COMMISSION 1992 ANNUAL REPORT 47 & Table 13.

19. Chilton & Datesman, *supra* note 11, at 166-68.

Information from the Federal Bureau of Prisons tabulating offenses by sex and race shows that in fiscal year 1988, property, extortion, fraud and bribery offenses constituted 32.4% of crimes for which Black females were incarcerated and 23.6% of crimes for which White females were imprisoned. Comparative statistics for 1989 were 27.7% and 18.6%, respectively. While property crimes decreased as a cause of

non-White women and White men had similar larceny arrest rates. Furthermore, the study indicates that more than seventy-five percent of the total increase in female larceny arrests from 1960 to 1980 was the result of increased arrests of non-White women.²⁰ Similarly, economic marginalization can provide a partial rationale for the relative rise of drug offenses committed by women who have few employment skills,²¹ although drugs can also be considered a separate cause of crime. Drug offenders now account for a significant portion of female federal crime. From January 1989 through September 1990, thirty-nine percent of women sentenced under the Guidelines had committed drug offenses, as compared with nearly fifty percent of sentenced males.²² Moreover, in January 1993, sixty-eight percent of federal female inmates were incarcerated for drug offenses.²³

To date, not enough attention has been given to the realities of women's lives in evaluating their criminality. For example, the recognition that women offenders often get into trouble because of their associations with men,²⁴ has not adequately been addressed.²⁵ Many fe-

incarceration because of the influx of drug offenses, in both years property crimes accounted for nearly 9% more of the Black female inmate population than of the White female inmate population. See OFFENSE BY SEX AND RACE FOR BUREAU OF PRISONS DESIGNATED POPULATION ONLY, FY 1988 Table 15 (on file with the author); OFFENSE BY SEX AND RACE FOR BUREAU OF PRISONS DESIGNATED POPULATION ONLY, FY 1989 Table 15 (on file with author).

20. Chilton & Datesman, *supra* note 11, at 158-60.

21. Drug offenses comprised 44.5% of all offenses for which women were admitted to federal prison in 1989. The comparative percentage for male drug offenses was only 39.6%. BJS, 1989, *supra* note 11, Table 5-2 at 53. The higher drug incarceration rate for women probably reflects differences between male and female crime patterns. Men are typically incarcerated in large numbers for violent crimes as well as drugs, while the percentage of violent crimes for female offenders is quite low. Property crimes constitute the other major offense grouping that results in female imprisonment. However, the Guidelines provide more flexibility in property sentencing than in drug sentencing.

22. See I UNITED STATES SENTENCING COMMISSION, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING Table 7 at 58 (December 1991) [hereinafter DECEMBER 1991 SENTENCING COMMISSION REPORT]. The statistics from fiscal years 1991 and 1992 are only slightly less bleak. In 1991, drugs accounted for 36% of female federal sentencings, and 47% of male federal sentencings. See UNITED STATES SENTENCING COMMISSION 1991 ANNUAL REPORT Table 17. In 1992, drug offenses comprised 34% of female federal sentencings and 46% of male federal sentencings. See UNITED STATES SENTENCING COMMISSION 1992 ANNUAL REPORT Table 13.

23. OFFICE OF RESEARCH AND EVALUATION, FEDERAL BUREAU OF PRISONS, JANUARY 1993 CHARACTERISTICS OF INMATES IN THE FEDERAL BUREAU OF PRISONS, Source Sentry Extract Files (January 9, 1993) [hereinafter 1993 INMATE CHARACTERISTICS] (on file with author).

24. See, e.g., FEINMAN, *supra* note 13, at 26. See *infra* notes 450-518 and accom-

male offenders become involved in criminal behavior when they run away from home to escape family abuse or neglect and discover that life on the streets involves prostitution and petty theft.²⁶ Profiles of female offenders which focus primarily on state prisoners are generally disheartening.²⁷ A recent national survey of approximately 2000 female offenders found that one third had been sexually abused, nearly thirty percent had attempted suicide, more than fifty percent came from a single parent or broken home, fifty percent came from families in which a family member had been incarcerated, and most were drug users.²⁸ Further, approximately eighty percent²⁹ of the female adults had children, about seventy percent of offenders with children were teen-age mothers, sixty-two percent were single mothers,³⁰ and fifty-seven percent were non-White.³¹ Similarly, in 1980 the a typical incarcerated fe-

panying text discussing the fact that many reported federal criminal decisions involving women mention the involvement of male intimates.

25. Obviously, feminists may justly fear that recognizing the importance of such behavior reinforces stereotypical thinking about female offenders. However, patterns of socialization that are ingrained in our society cannot be dismissed by wishful thinking. Rather, recognition should lead to questions about whether and how society can evolve attitudes about appropriate male/female relationships. In the meantime, this article is a pragmatic attempt to address sentencing policy for female offenders within the current social structure.

26. Chesney-Lind, *Women and Crime*, *supra* note 5, at 87. See generally, Kathleen Daly, *Women's Pathways to Felony Court: Feminist Theories of Law Breaking and Problems of Representation*, 2 U.S.C. REV. OF LAW AND WOMEN'S STUDIES 11 (1992); Lisa Maher, *Reconstructing the Female Criminal: Women and Crack Cocaine*, 2 U.S.C. REV. OF LAW AND WOMEN'S STUDIES 131 (1992); Tracy Thornburg & Diane Trunk, *A Collage of Voices: A Dialogue with Women in Prison*, 2 U.S.C. REV. OF LAW AND WOMEN'S STUDIES 155 (1992).

27. While there are similarities between the backgrounds of many male and female offenders, gender must be factored into any explanation of female criminality. For example, dissimilar gender patterns exist concerning physical and sexual victimization, socialization, single parenting, offenses committed, and economic opportunities. As a result, how females become criminals and the types of crimes they commit differ significantly from the male model of criminality. See generally Meda Chesney-Lind, *Girl's Crime and Woman's Place: Toward a Feminist Model of Female Delinquency*, 35 CRIME & DELINQ. 5, 21-26 (1989), and articles cited in note 26.

28. ACA, *supra* note 15, at 6.

29. The former Chief of the Female Offender Section of the Federal Bureau of Prisons also estimated that 80% of women inmates are single parents. Ann d'Anteuil Bartolo, *A Journey to Understanding and Change*, 3 FED. PRISONS J. 15 (Spring, 1992).

30. See ACA, *supra* note 15, at 6-7, 50-51.

31. *Id.* at 50-51.

male was a young, poor, unskilled, unmarried mother, who was a member of a minority group and had committed a drug-related or property crime.³² A recent survey of more than 440 incarcerated mothers showed less than twenty percent were married, more than sixty-five percent were a member of a minority group, sixty-five percent regularly used drugs or alcohol, sixty-five percent were not employed, only nine percent had an annual income of over \$25,000, and at some time in their lives fifty-three percent had been physically abused and forty-two percent had been sexually abused.³³ Even federal data shows that 21.9 percent of women compared to 4.8 percent of men had been physically or sexually abused.³⁴ While 73.2 percent of male abuse was solely physical, only 28.3 percent of female abuse was solely physical.³⁵ In other words, a number of female offenders have been victims of sexual or physical abuse as well as of an economic system that undervalues women's labor, making it difficult to support themselves if they have small children.³⁶ Since victimized women tend to have low self-esteem and view the world more pessimistically,³⁷ poverty, racism, and sexual discrimination may propel a number of them into criminal behavior.³⁸ Yet these factors are only now beginning to be integrated into any unified theory of female crime.³⁹

32. See FEINMAN, *supra* note 13, at 39 (citing U.S. COMPTROLLER GENERAL, WOMEN IN PRISON: INEQUITABLE TREATMENT REQUIRES ACTION 3-4 (U.S. General Accounting Office, 1980). A 1980 profile of 75 mothers incarcerated in county jails corresponded with this description. ANN M. STANTON, WHEN MOTHERS GO TO JAIL 119 (1980).

33. BARBARA BLOOM & DAVID STEINHART, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, WHY PUNISH THE CHILDREN? 20-22 (1993).

34. Federal Bureau of Prisons, Office of Research and Evaluation Table 5 (April 27, 1993) (on file with author) [hereinafter April 27, 1993 BOP Responses]. I particularly appreciated the Bureau's tabulating the responses to survey questions which were relevant to this Article. These are preliminary results of a 1991 representative sample of the federal prison population.

35. *Id.*, Table 6.

36. POLLOCK-BYRNE, *supra* note 5, at 25. See generally Meda Chesney-Lind & Noelle Rodriguez, *Women Under Lock and Key: A View from the Inside*, 63 PRISON J. 47 (1983).

37. Crista Brett, *The Cycle From Victim to Victimizer*, 3 FED. PRISONS J. 59, 62 (1992); see *United States v. Roe*, 976 F.2d 1216, 1218 (9th Cir. 1992).

38. Chesney-Lind, *Women and Crime*, *supra* note 5, at 93-94.

39. Pat Carlen, in WOMEN, CRIME AND POVERTY (1988) reflects that early imprisonment of young women minimizes their future opportunities to enter traditional economic and social relationships. Since such women "perceive themselves as being marginalized and therefore, having nothing to lose, [they] decide that law-breaking is a preferable alternative to poverty and social isolation." *Id.* at 13. While her work is based on English and Scottish female offenders, it appears relevant in an American setting. According to Professor Meda Chesney-Lind, gender, race and class play special roles in the lives of women swept into the criminal justice system that must be factored into a theory transcending simple profiles of offenders. *Patriarchy, Prisons,*

It may be that the 'feminization of poverty,' in combination with the relative hopelessness of their lives is largely responsible for the increasing number of female offenders who are single mothers.⁴⁰ Undoubtedly, single mothers are disproportionately an impoverished group. For example, recent census statistics concerning poverty describe a 35.6 percent poverty rate for single female householders compared to a six percent poverty rate for married-couple families.⁴¹ The effect is more dramatic for Black and Hispanic single mothers than for White single mothers, with 51.2 percent, 49.7 percent and 28.4 percent of those mothers, respectively, falling below the poverty level.⁴² This Article will later focus on the challenge to equitable sentencing posed by single mothers who are trapped by a Guidelines regime based upon a male model of sentencing. The objective of eliminating unwarranted sentencing disparity resulted in guidelines that concentrate primarily on the offense and the offender's prior criminal history, while discounting other offender characteristics such as motivations, family obligations and amenability to rehabilitation.⁴³ By robbing single mothers of the chance to have judges sentence them based on narratives which fully portray the contexts of their lives, the Guidelines often needlessly disrupt the lives of their children.⁴⁴

and Jails: A Critical Look at Trends in Women's Incarceration, 71 PRISON J. 51, 64 (1991) [hereinafter *Trends in Women's Incarceration*]. For a detailed analysis of the criminalization of women offenders, see Kathleen Daly, *Women's Pathways to Felony Court: Feminist Theories of Law Breaking and Problems of Representation*, 2 U.S.C. REV. OF LAW AND WOMEN'S STUDIES 11 (1992).

40. See POLLOCK-BYRNE, *supra* note 5, at 3, 24; SIMON & LANDIS, *supra* note 16, at 10; see also Chilton & Datesman, *supra* note 11, at 167.

41. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, CURRENT POPULATION REPORTS, CONSUMER INCOME SERIES P-60, NO. 181, POVERTY IN THE UNITED STATES: 1991 Table 1 at 1.

42. *Id.*

43. For a discussion of the history and purpose of the Guidelines see generally Nagel, *supra* note 3.

44. Much literature concerning feminist jurisprudence has focused on narratives and the importance of context in women's lives. Not surprisingly, the Guidelines grid, which attempts to fit all offenders into the same Procrustean bed without regard to the characteristics defining their individuality, poses significant difficulty for female offenders whose lives are shaped by their gender roles and expectations. Obviously, male offenders are also depersonalized by the grid, but females are defined by their relationships to a much larger extent than are males in our current social structure.

III. DID FEMALE OFFENDERS RECEIVE PREFERENTIAL SENTENCING BEFORE IMPLEMENTATION OF THE GUIDELINES?

Historically, women have always been perceived as obtaining preferential treatment at sentencing, which affected both the nature and length of their sentences. However, little interest existed in studying female sentencing until well into the 1970s when feminists began to analyze the reasons for such disparity.⁴⁵ Surprisingly, the empirical research which was undertaken about sentencing disparity did not yield consistent results. In her 1983 review of the then existing literature, Professor Ilene H. Nagel, who is a currently a member of the United States Sentencing Commission, concluded that to the extent there is any preferential treatment, females benefit from favorable sentencing, and that preferential treatment appears more pronounced in the least severe sentencing options.⁴⁶ However, while the effect of gender was demonstrably present, it was small relative to other factors such as the statutory seriousness of the charged offense, and the existence of a prior criminal record.⁴⁷ The meager research discussing gender as a sentencing factor in federal courts supports this proposition.⁴⁸

Later published empirical data also reaches varying results. One state study found that women received shorter sentences for felonies even when men and women had comparable backgrounds, but the study did not analyze parenting responsibilities.⁴⁹ Another review of state practice concluded that although women received differential sentencing from men, sex was not a powerful predictor of outcome and accounted

45. Several thorough, informative reviews of female sentencing literature exist including Ilene H. Nagel & John Hagan, *Gender and Crime: Offense Patterns and Criminal Court Sanctions*, in 4 CRIME AND JUSTICE 91 (Michael Tonry & Norval Morris eds., 1983) [hereinafter *Offense Patterns*], Lola Odubekun, *A Structural Approach to Differential Gender Sentencing*, 29 WL CRIM. JUST. ABSTRACT 343 (1992), and Sally S. Simpson, *Feminist Theory, Crime and Justice*, 27 CRIMINOLOGY 605 (1989).

46. *Offense Patterns*, supra note 45, at 129, 132.

47. *Id.* at 134.

48. See John Hagan et al., *The Differential Sentencing of White-Collar Offenders in Ten Federal District Courts*, 45 AM. SOC. REV. 802 (1980) (finding that while gender was not critical, it remained a factor in sentencing after controlling for other variables). See also DAVID WEISBURD, STANTON WHEELER, ELIN WARING AND NANCY BODE, CRIMES OF THE MIDDLE CLASS 132 (1991) (based on the data originally used in Stanton Wheeler, David Weisburd and Nancy Bode, *Sentencing the White Collar Offender: Rhetoric and Reality*, 47 AMER. SOC. REV. 641 (1942)).

49. Matthew Zingraff & Randall Thomson, *Differential Sentencing of Women and Men in the U.S.A.*, 12 INT'L J. OF THE SOC. OF LAW 401, 410 (1984). All sentences of selected felonies and misdemeanors committed in North Carolina from 1969 through 1977 were studied. *Id.*

for only 1.2 percent of the variance, even without any controls for variables such as prior record and the presence and ages of children.⁶⁰ Thus, while pre-Guidelines sentencing practices clearly identify gender as a reason for preferential sentencing, the effect of this factor was unclear.⁶¹ Moreover, isolating the effect of other variables which are more prevalent in a female population, such as sole or primary caretaking responsibility for young children, might have eliminated any perceived disparity based solely on gender.

Given that the commentators did not agree about the extent to which gender-based sentencing disparity existed, it was predictable that no single justification would emerge to explain its cause. Early attention focused on concepts of chivalry⁶² and paternalism⁶³ as reasons for the disparity. Chivalry refers to protectiveness by male judges who wish to

60. William Wilbanks, *Are Female Felons Treated More Leniently by the Criminal Justice System?* 3 JUST. Q. 516, 521, 528 (1986). Over 180,000 felonies processed by California criminal courts in 1980 were examined from arrest to sentencing. *Id.* at 520.

61. See generally Kathleen Daly, Gender, Race and Discrimination Research: Disparate Meanings of Statistical "Sex" and "Race Effects" in Sentencing (1991) (unpublished ms., Dept. of Soc. University of Michigan) (on file with author). Professor Daly reviewed 50 statistical studies of which 26 show "sex effects" favoring women. Of 38 studies controlling for prior record, 17 show such differences. *Id.* at 1. However, she notes that a statistical study finding sex effects may not be indicative of discrimination against men. *Id.* at 24. In other words, the character of social offense, previous law-breaking, and support and care for others is gendered and should make a difference in sentencing. *Id.* at 22.

62. See generally Etta Anderson, *The Chivalrous Treatment of the Female Offender in the Arms of the Criminal Justice System: A Review of the Literature*, 23 SOC. PROBS. 350 (1976).

63. Stuart S. Nagel & Lenore J. Weitzman, *Women as Litigants*, 23 HASTINGS L.J. 171, 173 (1971). See also Christy Visser, *Gender, Police Arrest Decisions and Notions of Chivalry*, 21 CRIMINOLOGY 5, 6 (1983).

Paternalism does not necessarily dictate leniency. Professor Meda Chesney-Lind has written extensively about female juveniles who are detained more frequently than males for status crimes because of judicial paternalism. See, e.g., Meda Chesney-Lind, *Judicial Paternalism and the Female Status Offender: Training Women to Know Their Place*, 23 CRIME AND DELINQ. 121 (1977); Chesney-Lind, *Women and Crime*, *supra* note 5, at 78. In 1987, girls were still more likely than boys to be confined for status offenses and less serious delinquency. Ira M. Schwartz et al., *Federal Juvenile Justice Policy and the Incarceration of Girls*, 36 CRIME & DELINQ. 503, 513-15 (1990). Similarly, in the past the use of indeterminate sentencing statutes resulted in longer female incarceration in order to rehabilitate women. Elizabeth F. Moulds, *Chivalry and Paternalism: Disparities of Treatment in the Criminal Justice System*, in WOMEN, CRIME AND JUSTICE 277, 283 (Susan Datesman & Frank Scarpitti eds., 1980).

save women from the harsh reality of prison and who assume that women are weaker, less responsible for their crimes, and more easily rehabilitated than men.⁵⁴ The concept of paternalism is less precise,⁵⁵ but views the motivation for preferential female sentencing by male judges with a more skeptical eye.⁵⁶ Such theories gained credibility because penal policy for females was originally focused on treatment rather than punishment, based on differing views of male and female criminality.⁵⁷ In a slight twist, male protectiveness was also considered to be responsible for harsher punishment of women whose crimes violate traditional gender expectations because such females defy the judges' beliefs about femininity.⁵⁸

Other explanations for differential sentencing of men and women have been formulated⁵⁹ reflecting assumptions about roles played by social control⁶⁰ and familial responsibility⁶¹ in sentencing. Practicality

54. See Odubekun, *supra* 45, at 9 (containing extensive citations).

55. *Id.*

56. Paternalism may not be solely a male reaction. One study found evidence of "paternalistic response towards women offenders" by both male and female probation officers in their sentencing recommendations. See Candace Kruttschnitt, *Legal Outcomes and Legal Agents, Adding Another Dimension to the Sex-Sentencing Controversy*, 9 LAW & HUM. BEHAV. 287, 301 (1985). In fact, a study based on felony sentencing in Georgia between 1976 and 1985 concluded that courts composed exclusively of males punish females more harshly than those consisting in part of female judges. MARTHA A. MYERS & SUSETTE M. TALARICO, *THE SOCIAL CONTEXTS OF CRIMINAL SENTENCING* 18, 107 (1987).

57. Vernetta D. Young, *Gender Expectations and Their Impact on Black Female Offenders and Victims*, 3 JUST. Q. 305, 306 (1986). See generally POLLOCK-BYRNE, *supra* note 5, at chs. 2 & 3; NICOLE HAHN RAFTER, *PARTIAL JUSTICE: WOMEN, PRISONS AND SOCIAL CONTROL* chs. 2 & 3 (1990).

58. Some empirical support exists for this proposition. In one study, Ilene H. Nagel, John Cardascia and Catherine Ross found that when sentences for women were compared, those whose offenses most departed from sexual stereotypes fared least well in sentencing. *Offense Patterns*, *supra* note 45, at 133-34. See also Mathew Zingraff & Randall Thomson, *Differential Sentencing of Women and Men in the U.S.A.*, 12 INT'L J. SOC. OF LAW 401, 410 (1984), which found women being sentenced to longer terms than men for child abandonment and assaults.

59. See generally Odubekun, *supra* note 45, at 11. Kathleen Daly and Meda Chesney-Lind, *supra* note 5, at 504, view gender as "a complex social, historical, and cultural product . . . related to, but not simply derived from, biological sex differences and reproductive capacities."

60. See generally Candace Kruttschnitt, *Social Status and Sentences of Female Offenders*, 15 LAW & SOC'Y REV. 247 (1981); Candace Kruttschnitt, *Women, Crime and Dependency*, 19 CRIMINOLOGY 495 (1982). She finds an inverse relationship between the amount of formal social control, such as incarceration, which is imposed by the court and the amount of informal social control to which the offender is subject. In other words, sentencing disparity is explained because women's lives have a high degree of informal social control in family settings which lessens the need for more formal punishment. The status of female offenders is also deemed significant in

rather than chivalry now explains any preferential treatment, with the focus shifting from the female offender to the children in her care and the likely disruption of the family unit caused by her incarceration.⁶² Racial disparities in sentencing are also beginning to receive attention.⁶³ For example, it is questionable whether Black women ever bene-

determining the extent of their punishment.

Some of the social control literature incorporates the work of Carol Gilligan, whose classic book, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 73 (1982), posited a female "ethic of care." In a criminal context, caring is translated into deterrence because women are subject to tremendous guilt when they engage in criminal activity that negatively affects their families. See Simpson, *supra* note 45. However, since Gilligan's findings have been questioned as reflecting mainly White middle class female values, it is unclear how much they apply to poor or minority female offenders. *Id.* at 621. See also Kathleen Daly, *Criminal Justice Ideologies and Practices in Different Voices: Some Feminist Questions About Justice*, 17 INT'L J. OF SOC. OF LAW 1 (1989), which critiques the applicability of Gilligan's thesis in the penal context.

61. See Kathleen Daly, *Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing*, 3 GENDER & SOC'Y 9 (1989) (hereinafter *Rethinking Judicial Paternalism*). Professor Daly draws the distinction between judicial concern for protecting women and concern for protecting children and families. *Id.* at 10-11. Judges who were interviewed believed the care of children was more important than their financial support, since entitlement programs could provide for basic needs. *Id.* at 19-21. Professor Daly's study found no evidence that men and women without families were sentenced differently. *Id.* at 18. See also Kathleen Daly, *Discrimination in the Criminal Courts: Family, Gender and the Problems of Equal Treatment*, 66 SOCIAL FORCES 153 (1987); Kathleen Daly, *Structure and Practice of Familial-Based Justice in a Criminal Court*, 212 L. & SOCIETY REV. 267 (1987). Similarly, commentators have recognized that single fathers receive a significant sentencing advantage. See Candace Kruttschnitt, *Sex and Criminal Court Dispositions: The Unresolved Controversy*, 21 RES. IN CRIME & DELINQ. 213, 227 (1984).

62. See Nicolette Parisi, *Are Females Treated Differently?* in JUDGE, LAWYER, VICTIM, THIEF 205, 207 (Nicole Hahn Rafter & Elizabeth Anne Stanko eds., 1982); Darrell Steffensmeier & John H. Kramer, *Sex-Based Differences in the Sentencing of Adult Criminal Defendants, An Empirical Test and Theoretical Overview*, 66 SOC. & SOC. RES. 289, 298 (1982). See also Candace Kruttschnitt, *Sex and Criminal Court Dispositions: The Unresolved Controversy*, 21 RES. IN CRIME AND DELINQ. 213, 227 (1984), for an early mention of the single parenting problem.

63. For example, Vernatta D. Young, in *Gender Expectations and Their Impact on Black Female Offenders and Their Victims*, 3 JUST. Q. 305, 323 (1986), argues that negative racial stereotypes convey either that Black women deserve harsher punishments or "can endure incarceration, so there is no need to focus on alternatives."

Another study found that while Black women were less likely than Black men to be incarcerated or sentenced harshly, the sentences of Black women were comparable to those of White men. The effect of family considerations was not analyzed. The authors concluded that rather than evidence of paternalism in favor of Black females,

fitted from judicial chivalry.⁶⁴ On the other hand, one study theorized that the interrelationship of race and sex may result in Black women being subjected to more paternalism than White women, because they are more likely to be heads of households that include young children.⁶⁵ While criminologists have recognized the need to focus on ethnicity, such research is still in its infancy.

In light of the numerous factors which affect sentencing decisions, gender alone may no longer be the key to explaining sentencing disparity between males and females, regardless of the Guidelines. To the ex-

they had uncovered evidence of racial discrimination against Black males. 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).

Similarly, concern over disparity that results in longer sentencing of Black males has emerged. For example, in a recent Federal Judicial Center Study, Barbara S. Meierhoefer noted that the tendency for the sentences of Whites to be lower than the sentences of non-Whites has become larger over time, particularly in the application of mandatory minimum drug laws. BARBARA S. MEIERHOEFER, FEDERAL JUDICIAL CENTER, *THE GENERAL EFFECT OF MANDATORY MINIMUM PRISON TERMS* 20 (1992). The United States Sentencing Commission has also decried racial disparity in sentencing caused by mandatory minimum penalties. See UNITED STATES SENTENCING COMMISSION SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM ii, 82 (August 1991) [hereinafter MANDATORY MINIMUM PENALTIES].

64. See, e.g., NICOLE HAHN RAFTER, *supra* note 57, 150-51 (discussing Black women being put in chain gangs while White females were placed in reformatories); POLLOCK-BYRNE, *supra* note 5, at 47 (noting that Blacks were almost entirely excluded from reformatories).

Clarice Feinman, *supra* note 13, at 32, concludes that if chivalry exists in the criminal justice system, it is reserved for White and conforming women. The disproportionate number of Black females in the federal female inmate population may support this thesis. For example, in January 1993 not only did Black women constitute 39% of federal female inmates, which was large in comparison with their number in the general population, but their percentage of the female inmate population was 6% greater than the percentage of male Black inmates (33%) in the male inmate population. See 1993 INMATE CHARACTERISTICS, *supra* note 23. In contrast, the percentage of White women incarcerated was 6% less than that of White males. *Id.*

Similarly, only White women appear to have had an advantage concerning the decision to arrest, because they were more deferential to officers than Black women or White men. Christy Visher, *Gender, Police Arrest Decisions, and Notions of Chivalry*, 21 CRIMINOLOGY 5, 22-23 (1983).

65. John Gruel et al., *Women As Criminal Defendants: A Test For Paternalism*, 37 W. POL. Q. 456, 464-65 (1984). The study involved analysis of more than 10,000 felony cases from 1977 to 1980 in Los Angeles, California. See also Kathleen Daly, *Neither Conflict Nor Labeling Nor Paternalism Will Suffice: Intersections of Race, Ethnicity, Gender, and Family in Criminal Court Decisions*, 35 CRIME & DELINQ. 136, 159 (1989). Professor Daly determined that the effects of family ties in preferential sentencing was the strongest and most consistent for Black women although her study did not find that Black women are less likely than White women to be imprisoned. In addition, single individuals with ties were less likely to receive an incarcerative sentence than singles without ties. *Id.* at 152.

tent sentencing preference exists, feminists view it as a two-edged sword, since any leniency in sentencing female offenders may be intertwined with the exclusion of women from the economic process.⁶⁶ In other words, as two male commentators have observed, "[t]he prime structural mainstay of male dominance lies in the continued assignment of females [to] the home and to the nurturant homemaker role . . . [which] helps eliminate labor competition."⁶⁷ However, sole and primary caretaking responsibilities by females are the norm in our society and sentencing practices which further familial stability have great benefit to mothers and children as well as to the community at large. As has been suggested in another context, feminists must devise a reliable approach to reckon with generalizations which are largely true either because of biology or highly successful socialization.⁶⁸ In the sentencing arena, such methodology must integrate gender assumptions concerning the predominantly nonviolent nature of female crime and parenting roles of female offenders. Merely denouncing sexism in sentencing without examining the effects of so called gender-neutral sentencing ultimately operates to the detriment of women whose lives are shaped by the existing gender social structure.

The goal of eliminating gender bias in sentencing cannot be attained simply by legislating gender neutrality in sentencing. Just as no one would deny that differences in male and female physiology have consequences in such contexts as pregnancy, health, strength, and longevity, so too the gendered nature of crime and familial relationships should be considered as legitimate factors in sentencing. In fact, Professor Kathleen Daly, a well-known feminist criminologist, criticizes most disparity studies as adopting an "add-women-and-stir" posture that treats gender like variables such as race or age without recognizing that many influences on sentencing are themselves deeply gendered.⁶⁹ In other words, the severity and type of offense charged, the defendant's previous record, and indicators of stability such as family and employment

66. Darrell Steffensmeier & John H. Kramer, *Sex-Based Differences in the Sentencing of Adult Criminal Defendants, An Empirical Test and Theoretical Overview*, 66 Soc. & Soc. Res. 289, 301 (1982).

67. *Id.*

68. See Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1394-95 (1986) (discussing the inequality approach to analyzing gender questions).

69. See KATHLEEN DALY, GENDER, CRIME, AND PUNISHMENT: PROBLEMS OF EQUALITY AND JUSTICE 10-11 (forthcoming 1994) (ms. on file with author).

reflect established gender patterns.⁷⁰ Merely equalizing punishment may produce longer sentences for females that are not necessarily just sentences.⁷¹ Professor Daly suggests that comparable worth analyses that have corrected for gender differences in the economic realm need to be translated into penal policy in order to create a just approach to punishing females.⁷² She also posits that a sentencing scheme that focuses on women's lives, rather than men's lives, as the norm might be better for all defendants.⁷³

IV. THE GROWTH OF THE FEMALE PRISONER POPULATION

While criminologists continue to debate the causes of female crime and the existence of sentencing disparity, it became evident that both the number and percentage of sentenced women offenders was growing at a faster rate than that of male offenders. Some commentators attribute the rise in female offenders and female imprisonment to increasing arrests of women.⁷⁴ In their view the percentage of convictions to arrests has not changed, but police were simply arresting more women who are being convicted and incarcerated. For example, a Bureau of Justice Statistics Special Report found that over the 1980s the number of arrests of women for drug violations increased at about twice the rate of men.⁷⁵ The mere increase in arrests, however, does not explain such variations as why the percentage of women in prison for drug offenses exceeds that of men.⁷⁶

Professor Meda Chesney-Lind, a noted criminologist, refutes the assumption that spiralling arrests are the primary cause of growing female incarceration. She contrasted the total arrests of women to the historical data concerning female incarceration and concluded that the growth in women's imprisonment cannot be explained by increases in women's crime, as measured by arrests.⁷⁷ Instead, she posits that the war on

70. *Id.* at 11.

71. *Id.* at 13-14.

72. *Id.* at 14, 18.

73. *Id.* at 15.

74. *See, e.g.*, SUSAN K. DATESMAN AND FRANK R. SCARPITTI, *WOMEN, CRIME AND JUSTICE* 35-36 (1980); SIMON & LANDIS, *supra* note 16, at 78.

75. LAWRENCE A. GREENFELD & STEPHANIE MINOR-HARPER, *BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, WOMEN IN PRISON 4* (1991) [hereinafter *BJIS, WOMEN*]. This report is based primarily on a 1986 Survey of Inmates in State Correctional Facilities.

76. *See id.* at 5.

77. *Trends in Women's Incarceration*, *supra* note 39, at 55. Professor Chesney-Lind reviewed statistics which showed women comprising 4% of the total prison population around 1900, 3% in 1970 and almost 6% by 1989. She compared a 230% jump in female incarceration from 1980 to 1989 to a 121% increase for males, and contrasted this to the total arrests of women which increased only 66% in the same timeframe.

drugs, shifts in law enforcement practices, and judicial decision-making are responsible for increasing female incarceration rather than any change in the nature of female criminality.⁷⁸ She suggests that mandatory minimums, sentencing reforms employing guidelines based on male models, and "get-tough" attitudes toward crime are the primary causes of the increase.⁷⁹ "Simply put, it appears that the criminal justice system now seems more willing to incarcerate women."⁸⁰ Another criminologist has argued that the "increase in female imprisonment may be a result of a general increase in severity of sentencing, an effect of determinate sentencing, or an effect of faulty perception that female criminality and especially violent crime has tremendously increased, which may influence judicial sentencing."⁸¹ Ironically, gender-neutral sentencing has undoubtedly disadvantaged women, since the current sentencing model, which focuses on punishing violent male offenders and major drug dealers, defies any attempt to develop a rational sentencing policy for nonviolent female offenders, many of whom are caught up in drug offenses because of familial relationships, and most of whom have sole or primary parenting responsibilities.

The war on drugs is largely responsible for women no longer being an imperceptible segment of the population sentenced to federal prison. In the twenty-one months after full implementation of the Sentencing Guidelines, females accounted for 15.9 percent of the 41,849 people sentenced whose gender could be determined.⁸² More recent Sentencing Commission data confirms this trend. Women constituted 16.7 percent and 16.4 percent of those sentenced in fiscal years 1991 and 1992.⁸³ Absolute numbers of women being sentenced are also becoming noticeable. From January 19, 1989 through September, 1992, more than 18,000

Id. See also FEINMAN, *supra* note 13, at 20-32 (seeking to dispel the myth that there was any extraordinary change in the extent and nature of women's criminality from 1960-1983). POLLOCK-BYRNE, *supra* note 5, at 31, also questions whether the relatively small increases in the percentage of total female arrests is responsible for the growing rate of imprisonment.

78. *Trends in Women's Incarceration*, *supra* note 39, at 57-58. While her analysis includes all female sentencing, her conclusions are applicable in the federal as well as state context. *Id.* at 58.

79. *Id.* at 57-58.

80. *Id.* at 57.

81. POLLOCK-BYRNE, *supra* note 5, at 31.

82. See I DECEMBER 1991 SENTENCING COMMISSION REPORT, *supra* note 22, Table 7 at 58.

83. UNITED STATES SENTENCING COMMISSION 1991 ANNUAL REPORT Table 17 and UNITED STATES SENTENCING COMMISSION 1992 ANNUAL REPORT Table 13.

women were sentenced pursuant to the Guidelines.⁸⁴

As more women are being sentenced, more women are being incarcerated.⁸⁵ Punitive federal sentencing caused by harsh mandatory minimums⁸⁶ and restrictive Sentencing Guidelines cannot be ignored. What was once a relative handful of females in federal facilities is now a growing minority of prisoners, with drug offenses fueling much of the increase. Drug crimes comprised 44.5 percent of all offenses for which women were admitted to federal prison in 1989,⁸⁷ and 64.3 percent of offenses for which women were sentenced to more than twelve months.⁸⁸ These percentages were greater than the comparative statistics for men, which were respectively 39.6 percent⁸⁹ and 58.7 percent.⁹⁰ In August, 1991, sixty-two percent of female inmates in the Federal Bureau of Prisons were incarcerated for drug offenses, compared with fifty-five percent of males.⁹¹ By January, 1993, the respective statistics had swelled to sixty-eight percent and fifty-eight percent.⁹² It is not accidental that the percentage of females incarcerated for drug offenses continues to outpace that of males. This result is highly predictable, given that the earlier preference for a noninstitutional model of

84. From January 19, 1989 through September 30, 1990, 6633 women were sentenced pursuant to the Guidelines (DECEMBER 1991 SENTENCING COMMISSION Report, *supra* note 22, Table 7), compared with 5447 sentenced from October 1, 1990 through September 30, 1991, and 6225 sentenced in fiscal year 1992. UNITED STATES SENTENCING COMMISSION 1991 ANNUAL REPORT Table 17 and UNITED STATES SENTENCING COMMISSION 1992 ANNUAL REPORT Table 13. While the number of women being sentenced pursuant to the Guidelines is increasing, it is unclear how much of the difference is caused by the fact that in the earlier timeframe a number of women were subject to non-guidelines sentencing.

85. Obviously this trend affects men as well as women. The ABA recently published a report that highlighted the fact that "[t]he number of persons imprisoned is increasing three times faster than adult arrests, and the number imprisoned for drug offenses is increasing thirteen times faster than adult drug arrests." AMERICAN BAR ASSOCIATION, THE STATE OF CRIMINAL JUSTICE, AN ANNUAL REPORT 4 (1993).

86. See generally MANDATORY MINIMUM PENALTIES, *supra* note 63. The report notes that approximately 60 criminal statutes contain mandatory minimum penalty provisions and summarizes a number of ways in which their application interferes with and distorts the goals of the sentencing guidelines. *Id.* at i-iii. The Judicial Conference and the Twelve Circuit Courts of Appeals have adopted resolutions opposing mandatory minimum statutes. *Id.* at App. G-1 to G-24.

87. BJS, 1989, *supra* note 11, Table 5-2 at 53.

88. *Id.*, Table 5-3 at 54.

89. *Id.*, Table 5-2 at 53.

90. *Id.*, Table 5-3 at 54.

91. OFFICE OF RESEARCH AND EVALUATION, FEDERAL BUREAU OF PRISONS, AUGUST 1991 CHARACTERISTICS OF INMATES IN THE FEDERAL BUREAU OF PRISONS, Source Sentry Extract File (August 1991) [hereinafter 1991 INMATE CHARACTERISTICS] (on file with author). This figure includes women not sentenced under the Guidelines.

92. 1993 INMATE CHARACTERISTICS, *supra* note 23.

female sentencing has been abrogated by mandatory drug minimums and the operation of the Guidelines.

The brutal effects of federal criminal sentencing practices on women becomes evident when viewed against state sentencing policy. Differences have begun to emerge when the overall percentage of female prisoners is compared to the total federal and state inmate populations. In 1990, women prisoners accounted for 7.6 percent of federal prisoners, compared to 5.5 percent of state prisoners.⁹³ Moreover, from year-end 1984 to 1990, the number of female federal inmates more than doubled, increasing from 1996 to 5011.⁹⁴ In that timeframe, the total percentage of female federal inmates increased from 5.8 percent to 7.6 percent.⁹⁵ Thus, women currently constitute more of the inmate population in federal institutions than in state institutions, and have increased their percentage relative to all federal prisoners. Instead of women's deincarceration becoming a model for male sentencing, the reverse has occurred.⁹⁶ In other words, "the dark side of the equity or parity model of justice" has produced "equality with a vengeance."⁹⁷

Obviously, the punitive trend in female sentencing predates the Sentencing Guidelines. In particular, mandatory minimums in drug cases play a significant role in the length of sentences for drug offenders. For example, the number of federal drug offenders sentenced to prison rose forty-eight percent from 1986 to 1990, at which time drug offenders accounted for nearly half of all federal sentencings.⁹⁸ However, the restrictions imposed by the Guidelines exacerbate the effect of the mandatory minimums. For example, the increase in female inmate population from year-end 1988 to year-end 1989 was 36.8 percent for federal prisoners compared to 23.1 percent for state prisoners.⁹⁹ This likely reflects the impact of *Mistretta v. United States*,¹⁰⁰ which signaled the

93. ROBYN L. COHEN, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONERS IN 1990 Table 6 at 4 (1991) [hereinafter BJS, 1990].

94. *Id.*; BUREAU OF JUSTICE STATISTICS NATIONAL PRISONER STATISTICS REPORT, PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DECEMBER 31, 1984 Table 4 at 3 (1987) [hereinafter BJS, 1984].

95. See BJS, 1990, *supra* note 93; BJS, 1984, *supra* note 94.

96. See *Trends in Women's Incarceration*, *supra* note 39, at 52.

97. *Id.*

98. DOUGLAS C. McDONALD & KENNETH E. CARLSON, FEDERAL SENTENCING IN TRANSITION, 1986-90, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 2 (1992) [hereinafter BJS, 1986-90].

99. BJS, 1990, *supra* note 93, at 5.

100. 488 U.S. 361 (1989).

start of guideline implementation in all judicial districts on January 18, 1989.¹⁰¹ Females comprised 10.6 percent of all federal prison admissions in 1989.¹⁰² While both federal and state percentage increases in female inmate population for 1990 were less than for 1989, the federal growth rate of thirteen percent still outpaced the state increase of 7.2 percent.¹⁰³ In 1991, the number of female inmates again increased at a faster rate than male inmates.¹⁰⁴

If women received better treatment prior to the implementation of the Guidelines, and now receive sentences approximately the same as men, it can be argued that the Guidelines have had a disproportionately harsher effect on women than on men.¹⁰⁵ In other words, while all defendants receive longer sentences under the Guidelines than previously, women's sentences have increased more than those of men because before the Guidelines they received probation and shorter sentences more often than men. For example, it appears that the sentence ranges established by the Guidelines were created in part by determining average sentences for defendants committing selected crimes.¹⁰⁶ However, blending male and female statistics benefitted men and disadvantaged women, because men previously received longer sentences than those given to women.¹⁰⁷ While it could be argued that the shorter female sentences were due to bias favoring women, it is obvious that the Commission did not think about gender issues in formulating the guideline ranges.

Comparative statistics of sentence length for prisoners under federal jurisdiction at year-end 1988 and 1989 support the hypothesis that women were more dramatically affected by the Guidelines than men. The number of female prisoners with sentences of more than one year rose dramatically in that timeframe, with a 19.3 percent change in sentences of more than one year and a 311 percent change in sentences of less

101. See I DECEMBER 1991 SENTENCING COMMISSION REPORT, *supra* note 22, at 2.

102. BJS, 1989, *supra* note 11, Table 5-1 at 52.

103. BJS, 1990, *supra* note 93, Table 6 at 4.

104. TRACY L. SNELL & DANIELLE C. MORTON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1991 Table 5 at 4 (1992) [hereinafter BJS, 1991]. The change in female population from 1990 to 1991 was 8.4%.

105. Cf. MEIERHOEFER, *supra* note 63, at 19 (noting that mandatory minimums have had a greater effect on females than males, probably due to their lower starting point).

106. See, e.g., I DECEMBER 1991 SENTENCING COMMISSION REPORT, *supra* note 22, at 21; MANDATORY MINIMUM PENALTIES, *supra* note 63, at 18; Nagel, *supra* note 3.

107. TASK FORCE REPORT, *supra* note 4, at 161 n. 91. Averaging markedly increased the sentences of women when it was used in California's Uniform Determinate Sentencing Law. 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 114, 213-14 (Alfred Blumstein et al. eds., 1983).

than one year.¹⁰⁸ In contrast, federal statistics for males showed a 9.7 percent increase for sentences of more than one year and a sixty-three percent increase for sentences of less than one year.¹⁰⁹ Some of the variation between male and female percentages can be discounted as a distortion due to the lower absolute number of females, which can result in a large percentage change with the addition of a relatively small number of females. However, it is apparent that women who would have received straight probation were being sentenced to serve some time, and those who would otherwise have been incarcerated faced longer sentences.

The above statistics also confirm that probation was used less for all offenders. In 1989 there was a 3.1 percent drop in federal probation compared to a 5.8 percent state increase.¹¹⁰ Similarly, during 1990, the federal probation population continued to decrease while state probationers increased.¹¹¹ Indeed, offenders sentenced under the Guidelines were generally more likely to be incarcerated than those sentenced pre-Guidelines, with seventy-four percent being imprisoned in 1990 compared to fifty-two percent in 1986.¹¹² The use of pure probation sentences decreased from sixty-three percent in 1986 to forty-four percent in the first half of 1990.¹¹³ Although women who are eligible for straight probation still do better in sentencing than men for reasons probably tied to different offense patterns,¹¹⁴ the shift away from probation falls disproportionately on women who previously would not have served any time. Twenty years ago nearly two thirds of females convicted of federal felonies were granted probation, compared to slightly more than one third of men.¹¹⁵ In 1991, straight probation was granted to twenty-eight percent of the women.¹¹⁶ Although men are

108. BJS, 1989, *supra* note 11, Table 5.3 at 66 & Table 5.20 at 86.

109. *Id.*, Table 5.2 at 65. Statistics compiled on males in federal custody by length of sentence reveal a 15.7% increase for sentences above one year and a 19.6% increase for lesser sentences. *Id.*

110. *Id.*, Table 3.2, at 25.

111. LOUIS JANKOWSKI, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE 1990 Table 1, at 2 (1991). Federal probation dipped 1.5%, while state use of probation increased 6.1%.

112. BJS, 1986-90, *supra* note 98, at 1. The percentage of convicted federal offenders receiving some prison sentence, which could include probation, also rose from 52% in 1986 to 60% in the first half of 1990, with most of the increase occurring after 1988. *Id.*

113. *Id.*

114. See UNITED STATES SENTENCING COMMISSION 1991 ANNUAL REPORT 71-72.

115. Moulds, *supra* note 53, at 286-87.

116. May 26, 1992 SC Responses, *supra* note 3, Tables 4B, 4D, 4F & 4H. These

still incarcerated more than women,¹¹⁷ some form of institutionalization has become the norm for female as well as male sentencing. As a result, the percentage of short-term, low-risk female commitments to federal Community Correction Centers has increased.¹¹⁸

Even more distressing, Black and Hispanic women are being sentenced to federal prison more than White women. In 1991, forty-eight percent of White females received a prison sentence, compared to fifty-six percent of Black females and sixty-nine percent of Hispanic females.¹¹⁹ This pattern repeated in 1992.¹²⁰ This apparently skewed effect may simply be a function of offense characteristics. It is likely that minority women are overly represented in drug offenses subject to severe mandatory minimum sentences. However, it raises the specter of a criminal justice system which penalizes the illegal activities of its minorities more severely than those of its White population.¹²¹ Similarly, different racial and gender patterns are emerging for downward departures.¹²² In fiscal years 1991 and 1992, Black men and women received a lower percentage of downward departures for reasons other than substantial assistance¹²³ than did any other grouping of sentenced individ-

tables show that 1448 females were given probation, 956 were given probation plus some prison time, and 2785 were sent to prison.

117. *Id.* at Tables 4A, 4C, 4E, & 4G. These tables report that 2932 males received probation, 1867 received probation plus some prison time, and 21,431 were sent to prison.

118. See Rita D. Hardy-Thompson, *Community Corrections and Female Offenders*, 3 FED. PRISONS J. 6 (1992).

119. See May 26, 1992 SC Responses, *supra* note 3, Tables 4B, 4D, 4F & 4H.

120. Forty-eight percent of White women, 54% of Black women and 68% of Hispanic women were sentenced to prison. See March 17, 1993 SC Responses *supra* note 3, Tables 4B, 4D, & 4F.

121. For example, penalties for crack cocaine are more severe than those for other forms of cocaine. However, crack cocaine is more prevalent in minority communities. See MANDATORY MINIMUM PENALTIES, *supra* note 63, at H-17 to H-19 (summarizing case law challenging mandatory minimums for crack cocaine on equal protection grounds). See also UNITED STATES SENTENCING COMMISSION 1992 ANNUAL REPORT Table 31 (indicating that 91.5% of defendants sentenced for crack are Black).

122. See May 26, 1992 SC Responses, *supra* note 3, Tables 2A-2H, and March 17, 1993 SC Responses, *supra* note 3, Tables 2A-2H. Certain caveats in interpreting this information must be noted. First, it has not been subjected to analysis for statistical significance because the actual number of departures in some categories is quite small. Second, relying on percentages may be misleading since they can vary widely with the addition of even a few departures given the small numbers involved. Third, the Commission's data relies on information provided in individual cases; thus, missing or incomplete data may skew the accuracy of any statistical interpretation.

123. Substantial assistance departures are authorized by § 5K1.1 of the Guidelines and permit the government to request a downward departure below any mandatory minimum penalty. While such departures are supposed to be based on the usefulness of the defendant's information to the government, they can also be a plea bargaining

uals.¹²⁴ Again, there is no obvious reason for the discrepancy, yet it is troubling that unless prosecutors request a substantial assistance departure, Black offenders are less likely than others to receive downward departures.

Not only do the Guidelines help ensure that more women are incarcerated, but also that the women who are incarcerated spend more time in prison. First, the Guidelines have resulted in higher rates of imprisonment for economic crimes,¹²⁵ where women have always been more highly represented. Second, although average sentences for property crimes have decreased since 1986, the average percent of sentence served to first release has increased.¹²⁶ Thus, a pre-Guidelines sentence may have been longer, but the availability of parole resulted in less time being served. For example, the Bureau of Prisons notes that an average of one third of the sentence is served by pre-Guidelines offenders, compared with eighty-five percent of the sentence served by offenders pursuant to the Guidelines.¹²⁷ Third, mean time served for drug offenders increased from twenty-seven months in July 1984 to sixty-seven months in June 1990.¹²⁸

The question of whether the guideline sentencing serves the public by isolating dangerous criminals for a longer period of time is beyond the scope of this Article. However, as one criminologist inquired more than

tool or method of lowering a sentence that the prosecutor believes is unjustly high. See, e.g., Ilene H. Nagel and 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, 531-32, 556-57 (1992).

124. See May 26, 1992 SC Responses, *supra* note 3, Tables 1-A & 1-B, and March 17, 1993 SC Responses, *supra* note 3, Tables 2A-2H.

125. I DECEMBER 1991 SENTENCING COMMISSION REPORT, *supra* note 22, Table 7 at 58 & vol. II at 384; UNITED STATES SENTENCING COMMISSION 1991 ANNUAL REPORT 149. See also Theresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 416 (1991) (finding a substantial reduction in the percentage of cases receiving probation or a no-prison sentence for bank embezzlement, credit card fraud, and postal fraud).

126. BJS, 1986-90, *supra* note 98, at 1, 8. For fraudulent property crimes, the percent of time served rose from 67.7% in 1988, to 69.8% in 1989, to 76.7% in 1990.

127. 1993 INMATE CHARACTERISTICS, *supra* note 23 (examining expected length of stay).

128. UNITED STATES SENTENCING COMMISSION 1991 ANNUAL REPORT 148. Drug sentences ranged from forty-eight percent to eighty-seven percent higher than pre-guidelines sentences and a larger proportion were sentenced to prison rather than probation. See Karle & Sager, *supra* note 125, at 416. See also *supra* notes 87-92 and accompanying text.

ten years ago:

Why has it been possible to control criminal behavior on the part of one-half of the adult population with one-twentieth the amount of incarceration? Why are women granted probation almost twice as often as men? . . . In a period of increasing pressure for forceful law and order, it is important to ask the question whether we are headed in precisely the wrong direction in our approach to criminality. Addressing ourselves more to the human needs of the people who become involved in criminal activity might evolve more productive policies than those policies which emphasize police hardware and tougher prison security.¹²⁹

These questions remain relevant. Moreover, women offenders are not identical to men and equating them needlessly swells the ranks of women in prison. Women appear to have much lower recidivism rates than men.¹³⁰ Moreover, the average incarcerated female is not a dangerous offender. "[F]emale offenders overwhelmingly commit crimes that, while unacceptable, pose little threat to the physical safety of the community at large."¹³¹ The Federal Bureau of Prisons currently classifies fifty percent of female inmates at the minimum security level and thirty-three percent at the low security level.¹³² Only a punitive justice system can rationalize the imprisonment of such women who formerly would not have been confined. Additionally, as will later be argued, imprisoning women for larceny and drug offenses without considering the societal effect of putting their children at risk scarcely accords with rational sentencing or public policy.

V. DOES SENTENCING DISPARITY CURRENTLY EXIST?

Even in the legislatively mandated gender-free world of the Sentencing Guidelines, questions about sentencing disparity of female offenders persist. The United States Sentencing Commission found that women were statistically more likely to receive sentences at the bottom of the range.¹³³ Sentence position relative to guideline range was analyzed by the gender of defendant in approximately 18,000 cases. The Commission concluded that women appeared to fare better in the system overall and within the various guideline intervals than men.¹³⁴ However, these findings must be viewed with caution since they did not control for other variables that result in more favorable sentencing, such as employment,

129. See Moulds, *supra* note 53, at 295.

130. RUSS IMMARIGEON & MEDA CHESNEY-LIND, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, WOMEN'S PRISONS, OVERCROWDED AND OVERUSED 9, 12 (1992) (citing several state empirical surveys).

131. *Id.* at 9.

132. 1993 INMATE CHARACTERISTICS, *supra* note 23.

133. See II DECEMBER 1991 SENTENCING COMMISSION REPORT, *supra* note 22, Tables 132 & 133 at 359-60.

134. *Id.* at 352.

first offender status, and the effect of sole or primary parenting.

Similarly, fiscal year 1991 data appears to confirm that women fare better than men in sentencing decisions.¹³⁵ For example, when reviewing the sentence type imposed for those eligible for probation with conditions of confinement, it appears that men receive prison terms with much greater frequency than women.¹³⁶ Sentences imposed in cases eligible for straight probation without any incarceration result in 26.8 percent of men being sentenced to prison compared to 9.4 percent of females.¹³⁷ Indeed, women received many more sentences that included both probation and confinement in both tables. Again, none of this information was analyzed through multivariate analysis. Thus, it is still unclear whether sentencing is affected solely by gender, or whether offense characteristics provide the key reason explaining the seemingly large differences. Moreover, whether any impact is caused by parenting responsibilities has not been analyzed.

The only Sentencing Commission Report to control for offense characteristics is the Mandatory Minimum Penalties Study published in 1991, which found that females were less likely to be sentenced at or above minimums than men and that females received high downward departures for substantial assistance.¹³⁸ Remarkably, the statistically significant relationship between sentence and gender disappeared when considered in conjunction with offense characteristics.¹³⁹ When such matters as presence of weapon, amount of drugs, role in the conspiracy, and substantial assistance to the government were factored into the analysis, gender did not play a role in sentencing. This also demonstrates that sole or primary parenting responsibility was not a factor in sentencing women when the statute requires imposition of a mandatory minimum.

As with pre-Guidelines sentencing, the empirical data may be interpreted in a number of ways. A recent Federal Judicial Center study concluded that females remain more likely to receive lower sentences than men, although such disparity is shrinking.¹⁴⁰ For example, in 1984 women were sixty-nine percent less likely to receive the prescribed minimum sentence, while in 1990 they were only twenty percent less likely to be

135. UNITED STATES SENTENCING COMMISSION 1991 ANNUAL REPORT Tables 28 & 30 at 71.

136. See May 26, 1992 SC Responses, *supra* note 3, Tables 8-A and 8-B.

137. *Id.*, Tables 7-A and 7-B.

138. MANDATORY MINIMUM PENALTIES, *supra* note 63, at 76.

139. *Id.*

140. MEIERHOEFER, *supra* note 63, at 19.

sentenced below the minimum. However, because the 1990 statistics also included cases in which sentences were not rendered pursuant to the Guidelines,¹⁴¹ it is possible that much if not all of the apparent disparity favoring women exists because of pre-Guidelines cases.¹⁴² The study concludes that "the mandatory minimums have had a somewhat greater influence on the sentencing of females than of males, most probably due to their lower starting point."¹⁴³ Thus, it implicitly supports the proposition that before implementation of the Guidelines women received significantly more favorable treatment than after its implementation. At a minimum, one can surmise that the Guidelines have played a key role in lessening any perceived preferential treatment of females based solely on gender. Unfortunately, family responsibility and gender have intertwined in the case law, with the deplorable result that children have become the unintended victims of so-called gender-neutral sentencing.

VI. LIMITATIONS ON USING OFFENDER CHARACTERISTICS IN GUIDELINES SENTENCING

As previously mentioned, because the Guidelines emphasize elimination of disparity, short shrift has been given to offender characteristics other than the defendant's prior criminal history and role in the offense. Even the absence of prior criminality no longer ensures leniency in sentencing. Congress originally directed that "the Guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."¹⁴⁴ If this admonition had been followed, it likely would have encompassed much female crime. However, the Guidelines' structure and practice has belied this nonpunitive approach. The following language, reversing a departure based in part on a female's lack of criminal record, is typical of the restrictive view taken in interpreting downward departures:

It is simply not the sentencing judge's prerogative if he disagrees with the guideline concepts to determine whether incarceration would serve a useful purpose when the guidelines expressly provide for a minimum jail term. Because the guidelines were promulgated to reduce a judge's complete discretion in those matters of principle, we believe that the district court judge improperly departed from the guidelines based on this factor.¹⁴⁵

141. *Id.* at 1-2 & n.4.

142. *See id.* at 19. Meierhoefer also recognizes that the gender differences may actually reflect other factors related to gender such as child care responsibilities. *Id.* at 19 n.10.

143. *Id.*

144. 28 U.S.C. § 994(j) (1992).

145. *United States v. Brewer*, 899 F.2d 503, 509-10 (6th Cir. 1990), *cert. denied*, 498 U.S. 844 (1991).

The policy statements in Section 5H1 describe such factors as the defendant's age, education, vocational skills, mental and emotional condition, physical condition, previous employment record, and family and community ties or responsibilities, as not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Similarly, current sentencing practice downplays the congressional intent that courts impose a sentence sufficient, but not greater than necessary, to comply with objectives such as reflecting the seriousness of the offense, deterrence, protection of the public, and needed educational or vocational training or medical care of the offender.¹⁴⁶ Instead, the statutory caveat that courts should avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,¹⁴⁷ has trumped attempts to generously permit departures in order to mitigate the harshness of the Guidelines.

Unfortunately, courts have focused too narrowly on disparity itself, without recognizing that disparity should be forbidden only if it is unwarranted. Thus, while factors such as sole or primary parenting responsibility might cause disparity, this result is warranted because of societal concerns about the well-being of children. Indeed, even the Sentencing Commission recognized that "a court's departure authority is a critical component in the successful implementation of the Guidelines system. Departures are sometimes appropriate and necessary to achieve a just sentence in a particular case where an important factor is not reflected in the guidelines"¹⁴⁸

Moreover, courts have unduly limited their sentencing discretion despite the congressional mandate that no limitation should be placed on the information received and considered by the court in imposing sentence concerning the background, character, and conduct of a person convicted of an offense.¹⁴⁹ The Guidelines further provide that in determining the sentence to impose within the guideline range, or whether a departure from the Guidelines is warranted, the court may consider without limitation any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law.¹⁵⁰ At a minimum, courts appear to agree that these provisions permit consideration of offender characteristics, including family ties, in calculating a

146. See 18 U.S.C. § 3553(a) (1992).

147. *Id.*

148. I DECEMBER 1991 SENTENCING COMMISSION REPORT, *supra* note 22, at 241.

149. 18 U.S.C. § 3661 (1982).

150. U.S.S.G., *supra* note 2, § 1B1.4 (Supp. 1992).

suitable sentence within the applicable guideline range.¹⁵¹ As a result, no justification is necessary to sentence a single parent or a pregnant offender at the bottom of the guideline range.¹⁵²

In contrast, departures are allowed only in limited circumstances. First, the Policy Statements in Section 5H1 do not permit factors such as health, mental outlook and family circumstances to "ordinarily" justify downward departures. Second, departures are also permitted when the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines.¹⁵³ To determine whether a circumstance was adequately taken into consideration, the court considers only the Sentencing Guidelines, policy statements, and official commentary.¹⁵⁴

In evaluating whether to grant a departure, some circuits have regularly examined the totality of circumstances.¹⁵⁵ The Sentencing Commission recently proposed an amendment to the Commentary of Section 5H1, which would have permitted offender characteristics to be combined to determine the applicability of a departure.¹⁵⁶ However, this proposal was not adopted. To the extent that this methodology is available,

151. See, e.g., *United States v. Mondello*, 927 F.2d 1463, 1468-70 (9th Cir. 1991) (interpreting 18 U.S.C. § 3553(a)(1) and § 3661); *United States v. Lara-Velasquez*, 919 F.2d 946, 953-56 (5th Cir. 1990) (rehabilitative potential); *United States v. Duarte*, 901 F.2d 1498, 1500-01 (9th Cir. 1990) (character references). Similarly, in *United States v. Fiterman*, 732 F. Supp. 878, 885 (N.D. Ill. 1989), the court denied a departure based on family responsibilities concerning the defendant's disabled adult sons, but did use this factor to assign the minimum sentence permitted within the guideline range. *Id.*

152. See, e.g., *United States v. Denoncourt*, 751 F. Supp. 168, 171 (D. Haw. 1990) (sentencing a pregnant woman at low end of guideline range).

153. 18 U.S.C. § 3553(b) (Supp. 1992). See also U.S.S.G., *supra* note 2, § 5K2.0 (concerning grounds for departure).

154. 18 U.S.C. § 3553(b) (Supp. 1992).

155. For instance, *United States v. Takai*, 930 F.2d 1427 (9th Cir. 1991), noted:

[i]n making a decision in any particular case, good judgment will often require the evaluation of a complex of factors. No single factor may be enough to point to the wise course of action. But a wise person will not look on each particular factor abstractly and alone. Rather, it will be how the particular pieces fit together, converge, and influence each other that will lead to the correct decision.

Id. at 1434. Similarly, *United States v. Floyd*, 945 F.2d 1096, 1099 (9th Cir. 1991), recognized that a judge need not specify the weight given to each element and decide whether each would independently qualify as a mitigating circumstance. *Floyd* quoted the language in *United States v. Cook*, 938 F.2d 149, 153 (9th Cir. 1991), that "[t]here is no reason to be so literal-minded as to hold that a combination of factors cannot together constitute a 'mitigating circumstance.'"

156. See 57 Fed. Reg. 112, ch. 5, pts. A & H (1992) (discussing specific offender characteristics and departures).

it is helpful in evaluating departures of female offenders because their lives may demonstrate a number of disparate themes which can be woven into a narrative which justifies a departure. Even in using the totality standard, the complex of factors considered must be at least authorized and certainly not expressly prohibited by the Sentencing Guidelines.¹⁵⁷ In addition, the factual predicate of the relevant findings are subject to the clearly erroneous standard of review.¹⁵⁸

The totality approach can result in a departure where a single factor alone might not be sufficient justification. It enables judges to provide more individualized sentencing for all offenders, and is particularly useful in sentencing females who are first offenders because it permits the use of aberrant behavior as a possible justification for a downward departures.¹⁵⁹ Therefore, a court need not rely solely on a crime being considered a single act of aberrant behavior, or on one of the offender characteristics found in Section 5H1 being considered extraordinary in isolation from other factors. For example, the case *United States v. Takai*¹⁶⁰ explored the kinds of conduct that represent single acts of aberrant behavior sufficient to permit a downward departure. The defendants were convicted of bribing an official to obtain green cards for some relatives and friends. One of the offenders, a 42-year-old housewife with no criminal history, "stumbled into something, awkwardly, naively, and with insufficient reflection on the seriousness of the crime she was proposing."¹⁶¹ The bribery did not involve any individual gain for the defendants and occurred by happenstance. Thus, while not every first offense is synonymous with aberrant behavior, these factors were sufficient to support a downward departure.

However, some courts do not view the lack of criminal record as supporting a downward departure based on aberrant conduct.¹⁶² Frequent-

157. *United States v. Anders*, 956 F.2d 907, 914 (9th Cir. 1992).

158. *Id.*

159. *See, e.g., United States v. Pena*, 930 F.2d 1486, 1495-56 (10th Cir. 1991) (finding that the behavior of a first offender who was a single mother was aberrational).

160. 930 F.2d 1427, 1434 (9th Cir. 1991).

161. *Id.* at 1432. While it is legitimate to ask whether such a characterization of a female is patronizing, the flavor of the opinion is that the defendant's culpability in committing the crime was less than in usual offenses of this sort because no financial gain was involved. Thus, regardless of whether the defendant's naivety was due in part to her gendered socialization, it was relevant in determining the appropriateness of a departure.

162. *See, e.g., United States v. Brewer*, 899 F.2d 503, 509 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 127 (1990); *United States v. Carey*, 895 F.2d 318, 324-25 (7th Cir.

ly, the property and drug offenses for which women are most often sentenced are crimes that extend over time. Therefore, they do not fit within the single spontaneous act framework required by some circuits for aberrant behavior.¹⁶³ For example, the Seventh Circuit reversed a downward departure given to a woman convicted of concealing a felon, in part because of her continued involvement with the felon after learning of his fugitive status.¹⁶⁴ Reference to tragic personal background as justifying departure has similarly met with limited success,¹⁶⁵ but may be combined with other reasons for departure.¹⁶⁶ Generally, offender characteristics which accounted for much of the earlier preferential sentencing of female offenders rarely are a factor in Guidelines sentencing.

VII. CARING FOR CHILDREN: FACTORING THE GENDERED NATURE OF CHILD CARE INTO GUIDELINES SENTENCING

A. *Should Single Moms and Pregnant Offenders Be Eligible for Downward Departures?*

Application of the Policy Statements found in Section 5H1 raise the most difficult fairness issues concerning the effects of sex-neutral sentencing of females under the Guidelines.¹⁶⁷ The dilemma that confronts judges most frequently is the extent to which they can grant departures based on concerns about children or pregnancy. Congress directed the Commission to reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendants in the Guidelines and poli-

1990). *Brewer* appears to completely reject a departure for aberrational conduct, while *Carey* simply refuses one based on lack of criminal history.

163. *See, e.g.*, *United States v. Sheffer*, 896 F.2d 842, 847-48 (4th Cir. 1990), *cert. denied*, 496 U.S. 968 (1990) (affirming refusal to depart for aberrant behavior where female first-time offender was involved in family conspiracy that had multiple transactions).

164. *United States v. Andruska*, 964 F.2d 640, 646 (7th Cir. 1992).

165. *See, e.g.*, *United States v. Lopez* 938 F.2d 1293, 1296 (D.C. Cir. 1991); *United States v. Deigert*, 916 F.2d 916, 918-19 (4th Cir. 1990) (refusing departure).

166. For example, during the time frame that departures for lack of youthful guidance were granted pursuant to *United States v. Floyd*, 945 F.2d 1096, 1099 (9th Cir. 1991), the Ninth Circuit remanded a case to determine if the court knew it could depart when a female defendant argued psychological impairment arising from her chaotic and abusive childhood. *United States v. Kiba*, 951 F.2d 364 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1986 (1992), an unpublished decision available on Westlaw.

167. The Commission is studying the impact of gender on sentencing in its current research on pre-guideline and post-guideline sentencing, but no time frame has been indicated for the completion of that research. *See* Letter from Phyllis Newton, Staff Director of the United States Sentencing Commission, May 26, 1992 SC Responses, *supra* note 3.

cy statements.¹⁶⁸ In response, Policy Statement 5H1.6 provides that

[f]amily ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.

As a result, relatively few departures are granted for these reasons. For example, family-based departures have declined in percentage as a reason for downward departures every year since 1989 and have fallen from the third to the fifth-most cited reason for downward departures.¹⁶⁹ Thus, in 1989, they constituted five percent of total departures,¹⁷⁰ and in 1992 less than two percent of all departures were for this reason.¹⁷¹ The absolute number of such departures is also quite small. In light of the widespread appellate hostility towards departures for family ties, it is remarkable that even 141 departures were granted for this reason in 1992. Trial judges appear more sympathetic than appellate courts to departures based on family ties, although the published cases are centered in the Second Circuit, which has authored most of the few appellate decisions supporting generous use of family ties departures.¹⁷² It is likely that considerably more women would be granted such departures if the appellate climate were more hospitable, since many women inmates are single mothers.

Undoubtedly, family ties departures are requested more often by females than males. In 1992, women received fifty-six percent of all family ties departures,¹⁷³ and in 1991, forty-five percent of such departures,¹⁷⁴ despite the fact that women were being less than seventeen percent of the sentenced population in both years. Excluding departures for substantial assistance, in 1991, sixteen percent of female departures and

168. 28 U.S.C. § 994(e) (Supp. 1992).

169. Compare UNITED STATES SENTENCING COMMISSION ANNUAL REPORTS for 1989 and 1991, respectively at Table IX at 50, and Table 54 at 137.

170. UNITED STATES SENTENCING COMMISSION 1989 ANNUAL REPORT Table IX at 50.

171. UNITED STATES SENTENCING COMMISSION 1992 ANNUAL REPORT Table 49. In 1990 family departures were nearly four percent. UNITED STATES SENTENCING COMMISSION 1990 ANNUAL REPORT Table R at 72. In 1991, they accounted for only two percent of all departures. UNITED STATES SENTENCING COMMISSION 1991 ANNUAL REPORT Table 54 at 137.

172. See *United States v. Johnson*, 964 F.2d 124, 126 (2d Cir. 1992) (single mother); *United States v. Alba*, 933 F.2d 1117, 1122 (2d Cir. 1991) (male supporting wife, children, parent and grandparent).

173. See March 17, 1993 SC Responses, *supra* note 3, Tables 2A-2H.

174. See May 26, 1992 SC Responses, *supra* note 3, Tables 2A-2H.

three percent of male departures were granted for family ties.¹⁷⁵ In 1991, Black women received almost ten percent fewer family departures than their percentage of the sentenced female population, while in 1992, they were only one percent lower. In both years, Hispanic women received significantly more than their relative share of family departures.¹⁷⁶ It is unclear why this lopsided result occurred. Given the general population data concerning single mothers,¹⁷⁷ one might assume that Black and Hispanic women would be requesting more single parent departures than White women. However, there is no easy reason that explains why Hispanic women would fare so much better in obtaining them. One possibility is that stereotypes about Hispanic and Black families are predisposing judges to look favorably when Hispanic women request family departures and negatively when they are requested by Black women who have previously made use of female kinship networks to care for their children. Whatever the reason, any underrepresentation of Black women in obtaining family ties departures is disturbing.

While the Sentencing Commission also provided data concerning dependents for whom the defendant provides financial support, it could not differentiate spouses from children, or identify single parents.¹⁷⁸ Even given this weakness, several generalizations may be warranted. First, the likelihood of a woman with a dependent being given a prison term is much greater if the female is Black or Hispanic than if she is categorized as White or Other. This racial and ethnic disparity is also true for men. Second, every category of females with dependents was incarcerated less often than any category of males with dependents.¹⁷⁹ This may reflect offense characteristics and prior criminal history. However, to the extent that judges can grant probation and family-based departures it may indi-

175. Fiscal year 1991 departure data, which includes race and gender information, reveals that 61 females were given departure for family ties out of 378 departures given women for reasons other than substantial assistance. This compares with 49 male family ties departures out of 1443 total male departures other than for substantial assistance. *Id.* The respective statistics for 1992 were 18% of female departures and 4% of male departures. See March 17, 1993 SC Responses, *supra* note 3, Tables 2A-2H.

176. In 1991, Black females received 24% of family departures and constituted 34% of the sentenced female population, while in 1992 they received 33% of family departures and were 34% of the female population. Hispanic women received 26% of family departures and were 17% of the sentenced female population in 1991. In 1992, they obtained 20% of the family departures and were 15% of the female population.

177. See *infra* notes 248-55 and accompanying text.

178. May 26, 1992 SC Responses, *supra* note 3, Letter from Phyllis J. Newton, Staff Director, United States Sentencing Commission. The fact that the categories for collecting data do not reflect information of significance to women is not surprising given that women appear to be an afterthought in sentencing guidelines policy.

179. See May 26, 1992 SC Responses *supra* note 3, Tables 4A-4H, and March 17, 1993 SC Responses, *supra* note 3, Tables 4A-4H.

cate that they believe that incarcerating mothers, many of whom have sole or primary parenting responsibilities, has a substantial detrimental impact on minor children.

B. The Conflicting Case Law Concerning Single Parenting

The relatively small number of family-based departures reflects perceived appellate hostility found in case law interpreting Policy Statement 5H1.6. For example, in *United States v. Thomas*,¹⁸⁰ the Seventh Circuit held that no departure is allowed for family ties for sentences other than probation.¹⁸¹ Not surprisingly, Ms. Thomas was a single mother caring for her two mentally disabled adult children and a young grandchild. *Thomas* found that Section 5H1.6 contained no suggestion that departure may be based on family considerations if they strike judges as particularly compelling.¹⁸² It viewed the reference to fines and restitution in the Section 5H1.6 commentary as exhaustive, rather than illustrative of circumstances in which family-based departures could be granted. The policy statement declaring that family responsibilities are relevant when probation is an option was interpreted as suggesting that the Commission did not intend them to be relevant when probation is *not* a sentencing option.¹⁸³

A number of other circuits seem to recognize the discretion of judges to depart based on family ties in all cases,¹⁸⁴ but have held that downward departures cannot be given to single parents because the effect of the mother's incarceration on a young child is not extraordinary.¹⁸⁵ In

180. 930 F.2d 526 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 171 (1991).

181. *Id.* at 530.

182. *Id.*

183. *Id.*

184. For a thorough review of the general family ties departure case law, see Susan E. Ellingstad, Note, *The Sentencing Guidelines: Downward Departures Based on a Defendant's Extraordinary Family Ties and Responsibilities*, 76 MINN. L. REV. 957, 966-70 (1992).

185. *United States v. Chestna*, 962 F.2d 103, 106-07 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 334 (1992); *United States v. Mogel*, 956 F.2d 1555, 1565 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 167 (1992); *United States v. Cacho*, 951 F.2d 308, 311 (11th Cir. 1992); *United States v. Headley*, 923 F.2d 1079, 1082 (3d Cir. 1991); *United States v. Brand*, 907 F.2d 31, 33 (4th Cir.), *cert. denied*, 111 S. Ct. 585 (1990); *United States v. Brewer*, 899 F.2d 503, 509-11 (6th Cir. 1990), *cert. denied*, 498 U.S. 844 (1990). *Cf. United States v. Carr*, 932 F.2d 67, 72 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 112 (1991) (reversing departures of couple with four-year-old son, noting that the sentence of one parent could have been stayed to the end of the other's sentence). However,

United States v. Brand,¹⁸⁶ the Fourth Circuit asserted the classic justification for refusing departures to single mothers whose children will be placed with strangers:

[S]uch a situation is not extraordinary. 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.¹⁸⁷

Brand concluded that "[the defendant's] situation, though unfortunate, is simply not out of the ordinary,"¹⁸⁸ despite the District Judge's conclusion that "[t]he carrying forward of the guideline range of imprisonment . . . would have a devastating impact upon the emotions, minds and the physical well being, just every aspect, of two very innocent youngsters . . ." ¹⁸⁹ However, the Fourth Circuit has recognized that in combination, family circumstances may justify a departure.¹⁹⁰ Indeed, in *United States v. Calle*,¹⁹¹ Judge Ramsey recently granted a family based departure in a case where the fact that both parents faced certain incarceration required the relocation of their three-year-old child to family care outside the United States.¹⁹² *Calle* relied on favorable out-of-circuit precedent, studiously avoiding any reference to potentially unfavorably Fourth Circuit family ties case law.¹⁹³ In contrast, the Sixth Circuit specifically relied on the fact that sex is irrelevant to guideline sentencing in disregarding the effects of incarceration on children.¹⁹⁴

Sometimes, refusal to grant a departure to a single mother is affirmed simply because it is considered an unreviewable discretionary decision by a judge that the particular circumstances are not extraordinary

this result appears impractical in most drug cases involving long mandatory minimums.

186. 907 F.2d 31 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 585 (1990).

187. *Id.* at 33.

188. *Id.* The *Brand* court compared the case to *United States v. Daly*, 883 F.2d 313 (4th Cir. 1989), *cert. denied*, 496 U.S. 927 (1990). Ironically, *Daly* involved a male and there is no indication that he personally was a single parent. The oft-cited language from *Daly* is that he "has shown nothing more than that which innumerable defendants could no doubt establish: namely, that the imposition of prison sentences normally disrupts spousal and parental relationships . . ." *Id.* at 319.

189. *Brand*, 907 F.2d at 33.

190. See *United States v. Deigert*, 916 F.2d 916, 919 (4th Cir. 1990) (remanding the case to see if judge exercised his discretion or thought he had no discretion in refusing a departure of a pregnant offender who had several other children).

191. 796 F. Supp. 853 (D. Md. 1992).

192. *Id.* at 857.

193. Given the well-researched nature of the opinion, it is unlikely that the judge was ignorant of the potentially conflicting precedent.

194. *United States v. Brewer*, 899 F.2d 503, 508-09 (6th Cir. 1989), *cert. denied*, 111 S. Ct. 127 (1990).

enough to require a downward departure.¹⁹⁶ For example, in *United States v. Johnson*,¹⁹⁶ the trial judge indicated the only reason he would issue a sentence below the Guidelines was for the welfare of the defendant's infant which was "not a reasonable basis for a departure; as tough as it is for you and more importantly for your child."¹⁹⁷ The Eighth Circuit assumed that this language demonstrated that the court had exercised its discretion not to depart, rather than its belief that it could not depart. Thus, a defendant can obtain appellate review only if the trial court clearly asserts that it has no discretion to depart. Ironically, the prosecution can more easily obtain reviews of family-based downward departures by arguing that single parenting is not an appropriate reason for departure.¹⁹⁸ Indeed, Judge Edwards has generally complained of the "disparity between the relative ease of upward departure and the niggardly application of downward adjustments" by appellate courts which "seem quick enough to warrant upward departure, while mitigating factors are often rejected as 'adequately considered' by the Sentencing Commission."¹⁹⁹

The apparent appellate distaste for single parent departures led the Third Circuit to overstate their inappropriateness in *United States v. Headley*.²⁰⁰ While affirming the unavailability of a departure based on a female's status as a single mother of five young children, *Headley* claimed that every court to consider the issue of departure based on the effect that sentencing a single parent to prison will have on minor children has found the circumstances not to be extraordinary,²⁰¹ despite the existence of a number of district court decisions that had permitted such

195. See, e.g., *United States v. Carr*, 979 F.2d 51, 53-54 (5th Cir. 1992). The Fifth Circuit, among others, follows the policy that it "will not review a district court's refusal to depart from the Guidelines, unless the refusal was in violation of law." *Id.* at 54 (quoting *United States v. Mitchell*, 964 F.2d 454, 462 (5th Cir. 1992) (internal quotations omitted)). As a result, most family issues cannot be raised on appeal by the defendant because the circuits will not review judges' discretionary refusals to depart from the Guidelines.

196. 908 F.2d 396, 399 (8th Cir. 1990).

197. *Id.*

198. See, e.g., *United States v. Mogel*, 956 F.2d 1555, 1564 (11th Cir. 1992); *United States v. Brand*, 907 F.2d 31, 32 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 585 (1990); *United States v. Brewer*, 899 F.2d 503, 506 (6th Cir. 1989), *cert. denied*, 111 S. Ct. 127 (1990).

199. *United States v. Harrington*, 947 F.2d 956, 968 (D.C. Cir. 1991) (Edwards, J., concurring).

200. 923 F.2d 1079, 1082 (3d Cir. 1991)

201. *Id.*

departures.²⁰² Moreover, none of the decisions cited by *Headley* involved as many children or discussed special problems associated with the likely separation of siblings during their mother's incarceration. Thus, deciding in the abstract that single parenting was not extraordinary ignored the extraordinary single parenting situation present in *Headley*.

More recently, in *United States v. Gaskill*,²⁰³ the Third Circuit narrowed its view of *Headley*, by noting that the children would have inevitably been in foster care even if the sentence had been substantially reduced because the lower end of the applicable Guideline range for the drug charges was seventeen and a half years. Therefore, in that case, family ties were not an appropriate basis for a downward departure given the length of imprisonment and nature of the offense.²⁰⁴ *Gaskill* affirmatively cited several decisions in which departures were granted to single mothers whose circumstances were considered extraordinary.

The Second Circuit has been favorably inclined towards family based departures. In *United States v. Johnson*,²⁰⁵ it approved a thirteen-level downward departure²⁰⁶ to a single mother who was raising four children, including an infant and the child of her institutionalized daughter.²⁰⁷ *Johnson* cautioned against blind reliance on sentencing policy statements such as Section 5H1.6, noting that the central question remains whether an aggravating or mitigating circumstance has not adequately been taken into consideration by the Sentencing Commission.²⁰⁸ As the court noted, Ms. Johnson "faced more than the responsibilities of an ordinary parent, more even than those of an ordinary single parent The number, age and circumstances of these children all support the finding that Johnson faced extraordinary parental responsibili-

202. See *infra* notes 211 and 221. *Headley* also did not cite *United States v. Deigert*, 916 F.2d 916, 919 (4th Cir. 1990), which implied that some parenting circumstances could be extraordinary.

203. 991 F.2d 82 (3d Cir. 1993).

204. While the Court did not expressly state that the charges were subject to a mandatory minimum penalty, it is likely that the Court could not depart below a five- or ten-year mandatory sentence without a U.S.S.G. Section 5K1.1 motion. However, this Article will later suggest that family ties departures should also be considered in determining the length of any prison sentence to the extent that it exceeds the mandatory minimum. See *infra* notes 348-51 and accompanying text.

205. 964 F.2d 124 (2d Cir. 1992).

206. The departure for family ties accounted for a ten-level downward adjustment. *Id.* at 126.

207. This decision was presaged by *United States v. Alba*, 933 F.2d 1117, 1122 (2d Cir. 1991), which justified a downward departure of a male supporting his wife, two children, a disabled father, and a grandmother, based on family responsibilities. As *Johnson* noted, the single mother's situation was "substantially more compelling than that of the defendant in *Alba*," whose wife could take care of his two children and elderly dependents. *Johnson*, 964 F.2d at 129.

208. *Johnson*, 964 F.2d at 128.

ties.²⁰⁹ *Johnson* explicitly recognized that the rationale for the downward departure was not that it decreased the defendant's culpability, "but that we are reluctant to wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing."²¹⁰ In other words, the departure was not on behalf of the defendant herself, but on behalf of her family. Numerous district court cases within the Second Circuit have granted departures for single mothers both before and since *Johnson*,²¹¹ and the Second Circuit has virtually invited family ties departures for males and females.²¹²

Other circuits have also factored single parenthood into the departure matrix. In *United States v. Pena*,²¹³ the Tenth Circuit upheld a departure for a single mother of a two-month-old child, a sixteen-year-old daughter and an infant grandchild. The defendant had no other felony convictions and had been employed long term. The trial judge also noted that the defendant was no threat to the public and would be justly punished by a sentence of probation with community confinement. The appellate court viewed this as an implicit finding that *Pena's* behavior was an aberration from her usual conduct. The aberrational character of her conduct, combined with her responsibility to support two infants, justified a departure.²¹⁴

While the Ninth Circuit has repeatedly recognized that the policy statements prohibiting the ordinary usage of Section 5H1 factors permit their use in an extraordinary case,²¹⁵ it has not clearly grappled with the defini-

209. *Id.* at 129.

210. *Id.*

211. *See, e.g.*, *United States v. Gerard*, 782 F. Supp. 913, 914-15 (S.D.N.Y. 1992); *United States v. Pokuaa*, 782 F. Supp. 747, 747-48 (E.D.N.Y. 1992); *United States v. Handy*, 752 F. Supp. 561, 564 (E.D.N.Y. 1990); *United States v. Mills*, Nos. 88 CR 956 (CSH) & 89 CR 256 (CSH), 1990 WL 8081 (S.D.N.Y. Jan. 17, 1990). *United States v. Gonzalez*, No. S 88 CR 559 (CSH), 1989 WL 86021 (S.D.N.Y. Jul. 27, 1989); *United States v. Hon*, No. 89 CR 0052 (RWS), 1989 WL 59613 (S.D.N.Y. May 31, 1989); *United States v. Williams*, 88 CR 144 (E.D.N.Y. 1988).

212. *See, e.g.*, *United States v. Califano*, 978 F.2d 65, 65-66 (2d Cir. 1992) and *United States v. Sharpsteen*, 913 F.2d 59, 63-64 (2d Cir. 1990) (remanding cases in which males requested family ties departures, suggesting that the trial courts might not have recognized the scope of their authority to depart for this reason).

213. 930 F.2d 1486 (10th Cir. 1991).

214. *Id.* at 1494-95.

215. *See, e.g.*, *United States v. Boshell*, 952 F.2d 1101, 1106-07 (9th Cir. 1991); *United States v. Floyd*, 945 F.2d 1096, 1100 n.3 (9th Cir. 1991); *United States v. Mondello*, 927 F.2d 1463, 1470 (9th Cir. 1991); *United States v. Brady*, 895 F.2d 538, 543 (9th Cir. 1990).

tion of "extraordinary" in the family context. For example, in *United States v. Bertier*,²¹⁶ efforts to keep the family together did not justify a downward departure. However, in that case, the wife of the male being sentenced continued to care for the children alone. Similarly, *United States v. Miller*²¹⁷ cited *Bertier* in reversing a family departure granted to a married mother of two children. In *United States v. Floyd*,²¹⁸ upholding a downward departure based on the defendant's youthful lack of guidance, the Court favorably cited decisions permitting family-based parenting departures as examples of extraordinary circumstances. At least one district court in the Ninth Circuit permitted a family ties departure to a single mother of six children.²¹⁹ Similarly, a district court in the District of Columbia Circuit permitted a departure for a homeless single mother of two young children.²²⁰

The Eighth Circuit at first appeared sympathetic to downward departure for family reasons.²²¹ However, *United States v. Harrison*,²²² held that a district court lacked authority to depart where the adopted minor child of a single grandparent would be cared for during her incarceration by the child's mother. The natural mother allegedly abused chemical substances or alcohol and went out frequently. *Harrison* seems to take a case by case approach to departures for single parents, noting that a number of district courts permit such departures where other mitigating factors are involved. Its holding appears based on the fact that there was

216. 948 F.2d 1093, 1096 (9th Cir. 1991).

217. 991 F.2d 552 (9th Cir. 1993). See also *United States v. Shrewsbury*, 980 F.2d 1296 (9th Cir. 1992), in which the court noted that the trial judge's decision that the female's family circumstances were not sufficiently unusual to justify departure was consistent with "Guidelines policy to downplay the relevance of family ties." *Id.* at 1298. No details were given about her family situation.

218. 945 F.2d 1096, 1101 n.4 (9th Cir. 1991). The holding in *Floyd* has been overruled by the Commission's later policy statement in Section 5H1.12.

219. See, e.g., *United States v. Newell*, 790 F. Supp. 1063 (E.D. Wash. 1992) (finding that when six children face likely separation and placement in foster care, such circumstances are relevant to the sentencing process).

220. *United States v. Jackson*, 756 F. Supp. 23, 27 (D.D.C. 1991).

221. *United States v. Big Crow*, 898 F.2d 1326, 1331-32 (8th Cir. 1990), upheld a downward departure of a male who supported his family despite the economic hardship of living on an Indian reservation.

District courts in that circuit permitted such departures to single mothers. See *United States v. Floyd*, 738 F. Supp. 1256, 1261 (D. Minn. 1990) (granting a departure to a single mom of four young children whose imprisonment would place these minor children at risk). In *United States v. Rodriguez*, 691 F. Supp. 1252, 1253 (W.D. Mo. 1988), the judge noted that he departed in another case because both parents of a small child were being imprisoned for serious crimes, but not so grave as to make it unreasonable to consider the effect of imprisonment on the defendants' small children.

222. 970 F.2d 444 (8th Cir. 1992).

no evidence concerning the unfitness of the child's natural mother, other than the brief remarks by counsel. The First Circuit recently appeared to soften its disapproval of single parent departures in *United States v. Rivera*.²²³ In *Rivera*, a woman with three small children who lived on welfare because her former husband gave her no financial aid, transported cocaine in order to buy Christmas presents for her children.²²⁴ She had never engaged in any other criminal activity. The trial judge commented that he would grant her a departure, but had no discretion to do so.²²⁵ The appellate court noted that family departures were discouraged but not forbidden. Therefore, it reviewed the conflicting case law to determine if Rivera's circumstances would support a lawful departure. The court concluded that the district judge had discretion to grant the departure, citing its two previous refusals to approve such a departure as cases in which the circumstances were less compelling.²²⁶ *Rivera* did not clarify why the two female defendants who did not fare well with the First Circuit provided less sympathetic family departure candidates. Such an explanation would have been difficult since one was a single mother of four children who assisted the prosecution,²²⁷ and the other was a pregnant defendant with no prior record whose involvement in her husband's drug trafficking was limited to enjoying its financial benefits.²²⁸ Undoubtedly, the compelling difference in *Rivera* related to the aberrational reason for her drug dealing. As a result, *Rivera's* analysis also appears to have undermined the First Circuit's earlier rejection of the totality approach to determining departures.²²⁹ Thus, the case law concerning single mothers is in disarray, but it appears that a number of circuits are still fairly hostile to child-based departures.

C. *The Scant Case Law Concerning Pregnant Offenders*

Currently, relatively few pregnant offenders are incarcerated in federal facilities before they give birth. Preliminary data from a 1991 federal inmate survey found that about five percent of the female inmates were

223. 1993 WL 181368 (1st Cir. June 4, 1993).

224. *Id.* at *9.

225. *Id.* at *9-10.

226. *Id.* at *10.

227. *United States v. Chestna*, 962 F.2d 103, 107 (1st Cir.), *cert. denied*, 113 S. Ct. 334 (1992).

228. *United States v. Pozzy*, 902 F.2d 133, 135 (1st Cir.), *cert. denied*, 498 U.S. 943 (1990).

229. *Pozzy*, 902 F.2d at 138.

pregnant at the time of their admission to a federal facility.²³⁰ Similarly, federal institutions reported a total of 149 births in 1991 and 71 births in the first six months of 1992.²³¹ No data exists concerning the number of sentenced women who are pregnant. As a practical matter, most pregnancy departures will revolve around child care and maternal bonding issues since judges have within their discretion the ability to stay sentences until the child is born.²³²

While many pregnant offenders will shortly become single mothers, their sentencing raises issues in addition to child rearing. For example, pregnancy may fall within policy statement Section 5H1.4 concerning physical condition, which like Section 5H1.6 states that departures should not ordinarily be granted. Further, since it has been recognized that a majority of pregnant federal prisoners meet some criteria of having high-risk pregnancies,²³³ is it appropriate for the judge to consider the adequacy of prenatal care in prison facilities? If so, should sentencing be delayed until after the child is born? How long should the new mother be permitted to bond with or care for her infant before her imprisonment? Conversely, considering the high miscarriage rate in prison, is it ever appropriate to incarcerate a pregnant woman who uses drugs in order to prevent her from a course of conduct harmful to the fetus? It is understandable that judges would consider the timing of the pregnancy in determining whether to grant a departure. However, an offender who pleads her stomach is not likely to be favorably sentenced if it appears that she became pregnant post-arrest in order to obtain a lighter sentence. Nevertheless, if she or her spouse is likely to be sentenced to a lengthy prison term, is it fair to also sentence them to childlessness? Regardless of particular policy determinations, pregnancy, like single motherhood, is a factor which should be evaluated in the departure matrix.

Few sentencing guideline cases focus on pregnant offenders. Although the First Circuit rejected a downward departure for a pregnant woman in *United States v. Pozzy*,²³⁴ this decision should be viewed with great caution. First, it rejects the totality of circumstances approach which

230. April 27, 1993 BOP Responses, *supra* note 34, at 1.

231. Bureau of Prisons, Health Services Division, Document prepared December 7, 1992 and Memorandum dated August 20, 1992 (on file with author).

232. Occasionally a judge will sentence pregnant offenders to time served instead of staying a sentence. In *United States v. Pokuaa*, 782 F. Supp. 747, 748 (E.D.N.Y. 1992), this was done to ensure that the offender could return to her home in Ghana before her child was born. *Id.* Similarly, when a pregnant offender has been incarcerated prior to the trial, the judge may be able to justify sentencing her to time served.

233. See Anita G. Huft et al., *Care of the Pregnant Offender*, 3 FED. PRISONS J. 49, 51 (1992).

234. 902 F.2d 133, 138-39 (1st Cir.), *cert. denied*, 498 U.S. 943 (1990).

may be available in a given circuit.²³⁵ Second, *Pozzy* considered the absence of any mention of pregnancy in Sections 5H1.6 and 5H1.4 as an affirmative representation that the Commission had considered pregnancy and purposely discounted it.²³⁶ However, it is questionable whether an omission should ever be equated with consideration, if there was no reference to the particular factor in the legislative history. Third, the First Circuit's conclusion that pregnancy is neither atypical nor unusual²³⁷ is suspect. It is equally reasonable to argue that "not ordinarily" should be read in relation to the total population being sentenced, not simply women, in light of the gender-neutral admonition in Section 5H1.10. In fact, any other reading appears to violate Section 5H1.10's ban on consideration based on sex, since only women can become pregnant. Fourth, the decision does not give appropriate deference to the trial judge's findings of fact.

In *Pozzy*, the trial judge had permitted the departure on several grounds, including the psychological standpoint of the defendant's health and that of the child not to be born in prison, as well as the lack of any halfway house to which the defendant could be sentenced which would permit her to care for the child. The appellate court's pontification that "it has been recognized since time immemorial that the sins of parents are visited upon their children"²³⁸ was scarcely a justification for its utter disregard of the judge's factual findings. The First Circuit observed that the judge could have stayed the defendant's commitment until after her child was born, and questioned the motivation for the pregnancy which occurred after arrest.²³⁹ However, such factual issues should have resulted in a reversal only if the trial judge's ruling was clearly erroneous.²⁴⁰ Decisions like *Pozzy* also completely ignore the "systematic failure of correctional systems to respond to the critical medical needs of pregnant prisoners."²⁴¹

235. See, e.g., *United States v. Takai*, 930 F.2d 1427, 1434 (9th Cir. 1991). In addition, *United States v. Rivera*, 1993 WL 181368 (1st Cir. June 4, 1993), may have revived the totality approach in the First Circuit.

236. 902 F.2d at 139.

237. *Id.*

238. *Id.*

239. *Id.*

240. 18 U.S.C. § 3742(e) (Supp. 1992). Cf: *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-76 (1985). In *United States v. Rivera*, 1993 WL 181368 (1st Cir. June 4, 1993), the First Circuit recently decided that deference should be accorded to factual decisions that circumstances are not ordinary. *Id.* at *8.

241. Ellen M. Barry, *Pregnant Prisoners*, 12 HARV. WOMEN'S L.J. 189 (1989). While

In contrast, in *United States v. Williams*,²⁴² Judge Sweet granted a departure to a pregnant defendant, citing the risk of death or injury to the mother or fetus if she had a complicated pregnancy. Judge Weinstein alluded to the policy of the Federal Bureau of Prisons of prohibiting children in prison, when he granted a downward departure to a pregnant offender who would almost certainly have lost permanent custody of her child due to her incarceration for more than one year.²⁴³ In *United States v. Denoncourt*,²⁴⁴ although departure was not at issue since the offender could avoid prison by being sentenced at the low end of the guideline range, the judge observed that the defendant's prior history of drug abuse and prostitution constituted an extraordinary physical impairment which might endanger her unborn child.²⁴⁵ The judge also rejected the prosecutor's request for an upward departure to incarcerate the defendant, who was in her third trimester, in order to protect her unborn baby from any further cocaine use.²⁴⁶ Instead, the judge placed her in a halfway house to ensure proper medical and drug treatment, as well as to provide supervision.²⁴⁷ While in *United States v. Arize*²⁴⁸ Judge Weinstein granted a departure to a female drug courier who did not know she was pregnant at the time of the offense, he commented that routine lenient sentencing of such "mules" might have a negative general deterrence effect since drug dealers often recruit pregnant carriers.²⁴⁹ This review of the caselaw reveals that pregnancy, like single parenting, is not treated consistently in the departure matrix.

some state systems have more problems than the federal system in providing medical assistance, federal facilities clearly are not set up to provide routine prenatal care as would be available in a nonprison setting. *See id.* at 190. For example, the Ninth Circuit Gender Bias Task Force found anecdotal evidence of pregnant women receiving no medical checkups and erratic medical care. TASK FORCE REPORT, *supra* note 4, at 154. One male federal public defender reported knowledge "of 'incredibly high' rates of spontaneous miscarriage while women were detained." *Id.* at 159. The report also noted that a pregnant inmate can generally obtain an abortion only if she can afford it, and with no provision for post-abortion counseling. *Id.* at 154.

242. No. 88 CR 144 (E.D.N.Y. 1988).

243. *See United States v. Pokuaa*, 782 F. Supp. 747, 748 (E.D.N.Y. 1992) (*citing* N.Y. SOC. SERV. LAW, §§ 384-b3, 384-b4(d) & 387-b7(a) (McKinney 1989)). The defendant was sentenced to time served to facilitate her return to Ghana before the child was born. *Id.* at 748-49.

244. 751 F. Supp. 168 (D. Haw. 1990).

245. *Id.* at 170.

246. *Id.* at 169.

247. *Id.* at 171-72.

248. 792 F. Supp. 920, 921 (E.D.N.Y. 1992).

249. *Id.*

D. Are Single Mothers and Mothers-to-be Ordinary or Their Children Contemplated by the Guidelines?

Unquestionably, pregnant women and single mothers should be eligible for downward departures in the current Guidelines regime. Such departures are warranted because neither single mothers nor mothers-to-be are ordinary when viewed in the framework of the total sentenced population. Alternatively, such departures are authorized because the Guidelines did not contemplate the effect of incarceration on the children of single mothers. Even though the Guidelines are written in gender-neutral language, some of the policy, commentary, and application notes were drafted using solely male pronouns. In fact, a recent Westlaw search revealed thirty-one references to "he" in the Sentencing Guidelines database. Thus, it is legitimate to question whether the Commission, when interpreting policy statements, has adequately considered any potentially disparate consequences to women.

There is absolutely no indication that the Commission ever considered pregnancy and single parenting, let alone the lopsided gender effect that imprisoning single mothers has on their children. Yet the empirical data points to the gendered nature of single parenthood. A recent census report recognized that the vast majority of all single parents—eighty-eight percent—are female.²⁵⁰ Another census report acknowledged that "the tremendous increase in the number of single parents has been one of the most profound changes in family composition to have occurred during the past quarter century."²⁵¹ In 1991, 10.1 million single parents were reported, compared to 3.8 million in 1970.²⁵² Equally striking, in twenty years, single parents grew dramatically from thirteen to twenty-nine percent of family groups with children.²⁵³ As earlier discussed, most female inmates have children, and the majority are single mothers.²⁵⁴

250. BUREAU OF THE CENSUS, UNITED STATES DEPARTMENT OF COMMERCE, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1992 XI.

251. BUREAU OF THE CENSUS, UNITED STATES DEPARTMENT OF COMMERCE, POPULATION CHARACTERISTICS SERIES P-20, No. 458, HOUSEHOLD AND FAMILY CHARACTERISTICS: MARCH 1991 8.

252. *Id.*

253. *Id.* at 9.

254. *See supra* notes 30-32 and accompanying text. Unfortunately, the 1991 federal survey of inmates did not specifically ask how many of the female inmates with children were single mothers. The survey confirmed that 80% of female inmates were mothers, although only 45% of all female inmates had minor children. April 27, 1993

The single parenting problem falls disproportionately upon women offenders than on male offenders, but may affect minority women offenders more severely than White female offenders. While currently almost two-thirds of single parents are White,²⁵⁵ single parenting is much more prevalent among Blacks than Whites.²⁵⁶ In fact, almost sixty-three percent of Black family groups with children are single-parent, as compared with twenty-three percent of White family groups.²⁵⁷ Single parenting among Hispanics has also increased, now comprising about one-third of Hispanic family groups with children.²⁵⁸ Presently, 92.6 percent of Black single parents are female, compared to 86.7 percent who are Hispanic and 83.7 percent who are White.²⁵⁹ It is almost a certainty that a majority of female federal prisoners are minority women.²⁶⁰ This is consistent with Sentencing Commission data which shows that minority women are now the majority of sentenced female offenders.²⁶¹ Moreover, Black females consistently have comprised a higher percentage of the federal female inmate population than the comparable percentage of

BOP Responses, *supra* note 34, Table 1.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*, Table F at 9.

260. While White females compose the largest category of female federal inmates, Hispanic women were not categorized by race in data available from the Bureau of Justice Statistics. The identification of Hispanic prisoners solely as an ethnic variable confounds any attempt to determine how many Hispanics were classified as Black or White. The comparative statistics for year end 1984 and 1989 did reveal that female Hispanic prisoners increased 178% while the overall increase in female prisoners was 122%. See BJS, 1984, *supra* note 94, Tables 8 & 9 at 19, 21; BJS, 1989, *supra* note 11, Tables 5.8 & 5.9 at 71-72. Since 24% of female federal prisoners are currently identified as Hispanic, it is probable that minority women are actually a majority of females incarcerated by the Bureau of Prisons given that the Bureau of Prisons identifies 59% as White, 39% as Black, 1% as Indian, and 1% as Asian. See 1993 INMATE CHARACTERISTICS, *supra* note 23. A telephone conversation with Christopher A. Innes, Research Analyst, Bureau of Prisons, confirmed that the great majority of Hispanics identify themselves as White when self-reporting race (May 4, 1993).

261. UNITED STATES SENTENCING COMMISSION 1991 ANNUAL REPORT Table C-1. Recent federal sentencing data which separates Hispanics from the Black and White populations shows that White females comprised 45% of those sentenced in fiscal year 1991 compared to 34% Black and 17% Hispanic females sentenced. *Id.* In comparison, the respective statistics for sentenced men were 45%, 26%, and 26%. *Id.* The 1992 data showed 48% of the females as White, 34% as Black and 15% as Hispanic, compared to the male population, which was 45% White, 27% Black, and 24% Hispanic. See UNITED STATES SENTENCING COMMISSION 1992 ANNUAL REPORT Table 15. Thus, Black women constituted a greater proportion of the sentenced female population than the respective statistic for Black men in both years. Minorities accounted for 56% of male and 55% of female federal offenders in 1991. The respective statistics for 1992 were 55% and 52%. This data reflects only sentenced rather than imprisoned offenders. *Id.*

Black males.²⁶² Therefore, Black and Hispanic female offenders are more likely to be disadvantaged by the inability to obtain departures based on their status as single mothers than are White women.

The deletion of gender from alimony decisions had the unforeseen result of plunging children of divorced mothers into poverty.²⁶³ Likewise, the deletion of gender from sentencing decisions often causes the complete disruption of the lives of children of female offenders who are single mothers. In divorce, the deletion of gender assumes the existence of equal economic opportunities, contrary to the actual lower earnings of most females. In sentencing, the deletion of gender assumes a world in which men and women have equal custody of their children. It also envisions that the noncustodial parent is willing and able to take responsibility for the care of the children. The reality is that single parents are disproportionately mothers. When fathers are incarcerated, their wives or former wives overwhelmingly assume the responsibility of caring for their children. In contrast, when mothers are incarcerated, their former husbands or lovers rarely have custody of the children and their current male intimates often face imprisonment for the same criminal activity involving the female.²⁶⁴

This asymmetry in child care arrangements has been documented.²⁶⁵ The results of two surveys of women prisoners are critical in assessing why a single mother is not "ordinary" for Section 5H1.6 purposes or alternatively to demonstrate that the effect of her incarceration was not contemplated by the Guidelines.²⁶⁶ Preliminary data from a 1991 federal

262. See BJS, 1984, *supra* note 94, Tables 7 & 8 at 18-19 (showing Black women as 43% of the female inmate population, and Black men as 31% of male inmate population). See also BJS, 1989, *supra* note 11, Tables 5.7 & 5.8 at 70-71, showing Black women as 38% of the female population and Black men as 30% of the male population. Similarly, in 1993, Black women were 39% of the female population, while Black men were 33% of the male population. 1993 INMATE CHARACTERISTICS, *supra* note 23. As already noted, the White population may be overstated as compared to the total minority population because Hispanics were not separately identified.

263. See, e.g., Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 60-65 (1987); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 337-56 (1985); Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 U.C.L.A. L. REV. 1181, 1241-54 (1981).

264. See discussion of conspiracy cases, *infra* notes 450-517 and accompanying text.

265. See BJS, *WOMEN*, *supra* note 75.

266. No data isolating children from other dependents was available from the Sentencing Commission. Since any data concerning a defendant's number of children comes from presentence reports, it is unclear whether placement of children will nec-

inmate survey indicates that forty-five percent of female inmates have minor children²⁶⁷ and that more than eighty-six percent of mothers, compared to sixty-eight percent of fathers with minor children, lived with those children prior to being incarcerated.²⁶⁸ Ninety-one percent of men and only thirty-three percent of women reported that their children now live with the child's other parent.²⁶⁹ While these figures may be overstated since both men and women could report more than one location, the alternate places designated by men totaled 119 percent, compared to a total of 152 percent for females. Therefore, it is likely that percentage of children living with their fathers is more exaggerated than the percentage living with their mothers.²⁷⁰ These results also suggest that women offenders who have more than one child may have difficulty finding placements that keep the children together. In other words, more than one location is reported because children are separated. Similarly, the number of varied locations for children of female offenders may also signify the instability of caretaking arrangements. For example, the children may be moved between relatives, friends or foster care. The survey also revealed racial differences in terms of placement of children. Approximately ten percent more White women²⁷¹ had children living with the child's other parent than did Black women.²⁷²

The federal results parallel the information obtained in a nationwide state prison survey, which found that nearly eighty percent of mothers,²⁷³ compared to fifty percent of fathers, lived with minor children before entering prison.²⁷⁴ More telling, nearly ninety percent of males reported that their wives were caring for their children during the man's incarceration.²⁷⁵ In contrast, twenty-two percent of women reported that their children lived with their husbands during the woman's im-

essarily be reported unless probation officers are instructed to routinely ask for this information.

267. April 27, 1993 BOP Responses, *supra* note 34, Table 1.

268. *Id.*

269. *Id.*, Table 2.

270. *See id.* The sample was designed to be representative of the entire prison population.

271. As previously discussed in *supra* note 261, this also includes most Hispanic Women.

272. *Id.* Nearly 38% of White women and 28% of Black women identified this response.

273. BJS, WOMEN, *supra* note 75, at 6. This is consistent with other estimates at individual women's prisons. *See supra* notes 29-33 and accompanying text. *See also* George C. Kiser, *Female Inmates and Their Families*, 55 FED. PROBATION 56, 58 (1991) (noting that the number of mothers at the Dwight Correctional Center outside Chicago Illinois was estimated at 65% to 88%).

274. BJS, WOMEN, *supra* note 75, at 6.

275. *Id.* at 7.

prisonment.²⁷⁶ Other recent surveys found even fewer children being cared for by their fathers, ranging from seventeen percent²⁷⁷ to less than eleven percent.²⁷⁸

When a single mother is sentenced, it is not merely her status as a female which is relevant, but rather the gendered effect of child rearing which causes her children to be severely disadvantaged compared to those of male offenders. Unlike a male parent whose children will continue to live with their mother, a single mother's imprisonment is more likely to lead to the total disruption of her children's lives. As Judge Weinstein has recognized "[r]emoving the mother in such a matriarchal setting destroys the children's main source of stability and guidance and enhances the possibility of their engaging in destructive behavior."²⁷⁹ Such children will be placed with relatives, neighbors, foster care or in an institutional setting. One study found that living arrangements for nearly forty percent of the children whose mothers were imprisoned changed from the initial placement and that separation from siblings occurred in nearly one third of the families studied.²⁸⁰ On occasion, such child placements can have disastrous consequences.²⁸¹

Children of incarcerated mothers have also been found to change schools more often than children of mothers given probation, suffer a decline in academic performance and have more behavioral problems than the children of mothers on probation.²⁸² The negative effects of parental separation, which can include potential delinquency and criminal behavior by children, have long been recognized.²⁸³ The practical conse-

276. BJS, WOMEN, *supra* note 75, at 6. See also PATRICIA J. BAUNACH, MOTHERS IN PRISON 29 (1985) (study reporting that only 20% of children of incarcerated females were living with their natural fathers).

277. BARBARA BLOOM & DAVID STEINHART, *supra* note 33, at 24.

278. See POLLOCK-BYRNE, *supra* note 5, at 65.

279. *United States v. Concepcion*, 795 F. Supp. 1262, 1282 (E.D.N.Y. 1992).

280. STANTON, *supra* note 32, at 39-40.

281. See, e.g., *United States v. Perez*, 756 F. Supp. 698 (E.D.N.Y. 1991) (permitting a downward departure because of the sudden, unexpected and inexplicable death of the defendant's only child who was born during the mother's incarceration and later given to her relatives).

282. STANTON, *supra* note 32, at 93-94. Other factors as well as incarceration combined to create these problems. *Id.* at 94. The mother's socioeconomic status and prior criminal record are also related to her child's development. *Id.*

283. See, e.g., Phyllis J. Baunach, *You Can't Be a Mother and Be in Prison . . . Can You? Impacts of the Mother-Child Separation*, in THE CRIMINAL JUSTICE SYSTEMS AND WOMEN 155 (Barbara Raffle Price & Natalie J. Sokoloff eds., 1982); JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTEREST OF THE CHILD, 32-35 (1979); POLLOCK-

quence of ignoring children at sentencing is not only that the children become victims of their parent's crimes, but they also are more likely to become victimizers of others. As Judge Weinstein has commented, "[e]xperience in this district has demonstrated that imprisonment of a parent tends to result in the child ending up in prison as well."²⁸⁴ It makes sense to consider such children at sentencing to avoid their becoming the next generation of criminal defendants. How ironic it would be if a mother's incarceration initiated her child's cycle of criminality where the judge does not believe that incarceration of the single mother is otherwise required to meet the goals of sentencing.²⁸⁵ Moreover, from a sentencing policy perspective, there is considerable evidence that family relationships also affect the mother's rehabilitation.²⁸⁶

Another reality which haunts single mothers is whether their parental rights will ultimately be terminated because of their incarceration.²⁸⁷ Again, children of male prisoners usually remain with their mother, which makes it unlikely that official termination proceedings will be initiated. On the other hand, some twenty-eight percent of state female prisoners who had been living with their minor children prior to incarceration reported that a court had placed their children in the legal custody of others since their admission to prison.²⁸⁸ Although most mothers hoped they would be able to regain custody on their release, one study found that some mothers voluntarily relinquished custody of their children so that outside caretakers could act as their legal guardians and better obtain medical and other services for the children.²⁸⁹ Once the state placed the child, it becomes difficult for women to retrieve them despite their desire to regain custody.²⁹⁰

One commentator observed that incarcerated mothers receive a double punishment for their crimes: a prison sentence and the threat of termination of parental rights.²⁹¹ Research has also shown that enforced separa-

BYRNE, *supra* note 5, at 65-66.

284. *United States v. Concepcion*, 795 F. Supp. 1262, 1283 (E.D.N.Y. 1992).

285. See 18 U.S.C. § 3553(a) (1982).

286. George C. Kiser, *Female Inmates and Their Families*, 55 FED. PROBATION 56, 63 (1991); see C.F. Hairston, *Family Ties During Imprisonment: Do they Influence Future Criminal Activity?* 52 FED. PROBATION 48 (1988).

287. See, e.g., *Concepcion*, 795 F. Supp. at 1290 (noting that a female defendant may lose custody if she serves more than two years, in a case where the seriousness of the offense warranted incarceration for three years). See generally Kathleen Haley, *Mothers Behind Bars: A Look at the Parental Rights of Incarcerated Women* 338, 341-46 in *WOMEN, CRIME & JUSTICE* (Susan K. Datesman & Frank R. Scarpitti eds., 1980); POLLOCK-BYRNE, *supra* note 5, at 177; STANTON, *supra* note 32, at 3.

288. BJS, *WOMEN*, *supra* note 75, at 7. No similar question was asked in the federal survey.

289. BAUNACH, *supra* note 284, at 164.

290. POLLOCK-BYRNE, *supra* note 5, at 177.

291. Adela Beckerman, *Women in Prison: The Conflict Between Confinement and*

tion from their children has detrimental psychological consequences to mothers, similar to those suffered in connection with a traumatic loss.²⁹² Moreover, given the few federal facilities which house women, a prison sentence may be served in a far flung location where family visitation is almost impossible.²⁹³ Interviews with incarcerated mothers found fewer than half reported visits from children.²⁹⁴ This was consistent with federal inmate survey data, which disclosed that ten percent more women than men never received visits from children, although the percentage of women never receiving calls or mail was six percent lower than that of males.²⁹⁵ No federal prison currently permits children to reside with their mothers.²⁹⁶ Relatively few community placements are available for those women who are pregnant or have children.²⁹⁷ Thus, while the consequences of incarceration to pregnant women and single mothers may be foreseeable, they are not typical of the larger population of prisoners who are parents. Nor is there the slightest evidence that the Commission ever considered any of the types of data discussed in this Article.

The present quandary over the feasibility of granting departures to

Parental Rights, 18 SOC. JUST. 171, 180 (1991).

292. See, e.g., RONALD B. FLOWERS, *WOMEN AND CRIMINALITY* 159 (1987).

293. See *United States v. Concepcion*, 795 F. Supp. 1262, 1285 (E.D.N.Y. 1992); see also STEVEN MCPEEK & SHAU-FAI TSE, *BUREAU OF PRISONS OFFICE OF RESEARCH AND EVALUATION, BUREAU OF PRISONS PARENTING PROGRAMS: USE, COST, AND BENEFITS* (1988). The report comments that the data showing that women's families lived further away from their facilities than men's families "is not surprising since there are fewer institutions that house women in the Federal Prison System, and, thus, women cannot always be placed as near to their homes as male inmates." *Id.* at 2. At Lexington, only 11% of females had family within 200 miles compared to 32% of males using the center. *Id.* at 12. Women also were found to use such visiting centers more than men. *Id.* at 5. This is consistent with information developed for the Ninth Circuit Gender Bias Task Force which found that nearly two-thirds of the women interviewed were located more than 500 miles from their homes. TASK FORCE REPORT, *supra* note 4, at 145.

294. TASK FORCE REPORT, *supra* note 4, at 160.

295. April 27, 1993 BOP Responses, *supra* note 34, Table 3.

296. *United States v. Pokuaa*, 782 F. Supp. 747, 748 (E.D.N.Y. 1992).

297. See, e.g., TASK FORCE REPORT, *supra* note 4, at 158 & n.81 (indicating that in the Ninth Circuit, none of the community placements permitted children); see also Rita D. Hardy-Thompson, *Community Corrections and Female Offenders*, 3 FED. PRISONS J. 6, 7 (1992) (discussing federal halfway house placements). See generally POLLOCK-BYRNE, *supra* note 5, at 188 (arguing that the greatest need of women offenders is for correctional alternatives that recognize the presence of children in their lives).

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." This language conjures up an image of unique circumstances, rather than of circumstances infrequent in the larger offender population, albeit typical within a given population such as single mothers. In commentary concerning departures, the Commission uses terms such as "atypical" and "unusual" as antonyms for ordinary.²⁹⁸ 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. Stated in gender-neutral terminology, single parents who at the time of their arrest have custody of children who cannot be cared for by the other parent are not typical of the overall federal offender population. Given their few numbers, pregnant offenders are even less typical of the federal offender population. The reality is that single mothers and mothers-to-be are not the average offenders. Women remain less than twenty percent of federal offenders and less than eight percent of the federal inmate population.²⁹⁹ The percentage of single mothers or pregnant offenders is even smaller, as is the number of such females whose family units would be destroyed by their incarceration. Thus, in the broad sense, such females are not ordinary.

In a decision construing the word exceptional, one judge noted that to "every criminal defendant, his own case is exceptional."³⁰⁰ This example is equally apt when applied to single parenting; the relationship of each single mother to her children is exceptional. The disruption of a family unit is an extraordinary event in the lives of those affected, despite the fact that a growing number of single mothers are being incarcerated. It is particularly disturbing that some appellate courts have taken the position that single parenting cannot support a departure because it is not extraordinary. By so doing, the courts fail to recognize that departures are not determined in the abstract. In an individual case, the seamless web of interrelated facts that define the life of the single mother may well render her not ordinary. Claiming that single parenthood is always ordinary is both unrealistic and unnecessary because such a claim ignores differences in family situations. Moreover, the claim conflicts with the totality approach towards sentencing departures, which allows courts to evaluate factors in combination in order to determine their "extraordinary" nature.

In determining the appropriateness of a family-based departure, Judge

298. See, e.g., U.S.S.G., *supra* note 2, § 4b.

299. 1993 INMATE CHARACTERISTICS, *supra* note 23. The data shows that 5463 women and 66,217 men were incarcerated as of January 1993. *Id.*

300. *United States v. American Cyanamid Co.*, 427 F. Supp. 859, 866 (S.D.N.Y. 1977).

Weinstein has recognized that the policy statement of Section 5H1.6 is not useful because

[i]t tells us that a defendant-mother is not generally entitled to credit for her motherhood. It does not address the more critical problem of whether the court can consider the welfare of her child or children in determining the sentence Insofar as the absence of the mother may have profoundly deleterious effects on her child or children, their care must be relevant in considering whether there should be incarceration or other forms of punishment.³⁰¹

Similarly, Judge Merritt's dissent in *United States v. Brewer*,³⁰² concluded that nothing in the Guidelines or its commentary suggested that the sentencing facts were taken into account in devising the Guidelines.³⁰³ In his view, the Guidelines fail to consider a judge's sentencing determination that may take into account the defendant's responsibility to raise her young children.³⁰⁴ Judge Merritt decried the result in *Brewer* which reversed a downward departure for a single mother as turning the "guidelines" into mechanistic 'rules' which will create serious injustice in many cases in the future.³⁰⁵ These judges clearly contemplate the alternative departure route by which you need not show that parenting is extraordinary. They illustrate that the Commission did not ever consider a departure on behalf of children.

The appropriateness of single parent departures is evident when proper attention is focused on the Commission's pronouncement that it "does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the Guidelines, that could constitute grounds for departure in an unusual case."³⁰⁶ Admittedly, courts are required to consider any pertinent policy statements in determining an appropriate sentence,³⁰⁷ and the Supreme Court has accorded significant weight to policy statements and commentary.³⁰⁸ However, the absence of any mention in Section 5H1.6 of single parenting should not be construed as a sign that the Commission either considered this issue or did so adequately.³⁰⁹ In oth-

301. *United States v. Concepcion*, 795 F. Supp. 1262, 1282 (E.D.N.Y. 1992).

302. 899 F.2d 503, 511-15 (6th Cir. 1990) (Merritt, J., dissenting), *cert. denied*, 498 U.S. 844 (1990).

303. *Id.* at 514 (Merritt, J., dissenting).

304. *Id.* at 513-14 (Merritt, J., dissenting).

305. *Id.* at 513 (Merritt, J., dissenting).

306. U.S.S.G., *supra* note 2, Part A § 4b.

307. 18 U.S.C. § 3553(a)(5) (1988).

308. *See, e.g.*, *Williams v. United States*, 112 S. Ct. 1112, 1119 (1992) (Policy Statements); *Stinson v. United States*, 113 S. Ct. 1913 (1993) (Commentary).

309. *See* Marc Miller and Daniel J. Freed, *Offender Characteristics and Victim*

er words, to the extent that a policy statement does not prohibit a specified action, the court is still free to interpret that statement with the recognition that it is not subject to formal legislative review and does not have the same degree of authority as the Guidelines.³¹⁰ Moreover, since Congress directed the courts to consider offender characteristics in determining sentences,³¹¹ this arguably gives judges authority to independently evaluate the role of such characteristics regardless of the existence of any Commission policy.³¹²

The congressional admonition that the Guidelines should reflect the general impropriety of ordinarily considering offender characteristics was directed "to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties."³¹³ However, "each of these factors may . . . in an appropriate case, call for the use of a term of probation instead of imprisonment, if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community."³¹⁴ This language is ideally suited to permit parenting departures for nonviolent women offenders. As the legislative history further notes, such factors should be subjected to "intelligent and dispassionate professional analysis; and on this basis to recommend, with supporting reasons, the fairest and most effective guidelines [the Commission] can devise."³¹⁵ In essence, fairness can best be achieved by considering the effects of incarceration upon the children of offenders who are single parents. In addition, it should be remembered that the Sentencing Reform Act directed the Commission "to reflect to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."³¹⁶ Ignoring the wealth of information concerning single parenting, the disruption caused to children by incarcerating a single parent, and the rehabilitative effects of parenting violates the letter as well as the

Vulnerability: The Differences Between Policy Statements and Guidelines, 3 FED. SENT. REP. 3, 5 (1990).

310. *United States v. Gaskill*, 991 F.2d 82 (3d Cir. 1993). See also *United States v. Merritt*, 988 F.2d 1298, 1308 (2d Cir. 1993). Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1695 (1992).

311. 18 U.S.C. §§ 3553(a)(1) & (a)(5) (Supp. 1992).

312. David F. Shapiro, Note, *Sentencing the Reformed Addict: Departure Under The Federal Sentencing Guidelines and the Problem of Drug Rehabilitation*, 91 COLUM. L. REV. 2051, 2058 (1991).

313. S. Rep. No. 225, 98th Cong., 2d Sess. 175 (1984), reprinted in 1984 U.S.C.A.N. 3182, 3358 (discussing Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473).

314. *Id.* at 3357-58.

315. *Id.* at 3358.

316. 28 U.S.C. § 991(b)(1)(C) (Supp. 1992).

spirit of the law.

Children are not new to sentencing policy. The Model Penal Code provides that consequences to children can weigh against incarceration when "the imprisonment of the defendant would entail excessive hardship to himself or his dependents."³¹⁷ Any cost benefit analysis would seem to dictate that children be considered in the sentencing decision,³¹⁸ particularly when societal costs regarding any future criminality of the children are weighed.³¹⁹ Even without factoring children into the analysis, the current average cost of \$56.84 per day³²⁰ or nearly \$21,000 per year for incarcerating females for crimes that society did not formerly view as requiring imprisonment appears unnecessary. However, the addition of the disruption to childrens' lives to the cost-benefit analysis should favor downward departures, even if any future criminality of the children is regarded as purely speculative. 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.³²¹ Indeed, the economic cost of foster care ranges between \$200 and \$600 for basic monthly maintenance, which does not include other monetary assistance provided to foster children in many states.³²²

There is no policy reason to prohibit downward departures to pregnant women and single mothers. Absolutely no evidence exists that pregnant women or single parents received any attention when the Guidelines were formulated. Thus it seems equally implausible that the effect of incarceration on children of single mothers in general or minority women in particular was considered. The only reference to family ties in the legislative history is in a traditionally male context. Congress recognized that the Commission could conclude that

a person whose offense was not extremely serious but who should be sentenced to prison should be allowed to work during the day, while spending evenings and

317. MODEL PENAL CODE § 7.01(2)(K) (1962). Ten states have enacted this provision. See Eleanor Bush, *Considering the Defendant's Children at Sentencing*, 2 FED. SENT. REP. 194 n.12 (1989).

318. See, e.g., Karle & Sager, *supra* note 125, at 437-38.

319. *Id.*

320. BUDGET EXECUTION OFFICE, FEDERAL BUREAU OF PRISONS, 1992 AVERAGE PER CAPITA COST FIGURES.

321. Karle & Sager, *supra* note 125, at 437-38.

322. See AMERICAN PUBLIC WELFARE ASSOCIATION, W-MEMO, FOSTER CARE RATES, APRIL 1, 1993 Table 1, Foster Care Basic Monthly Maintenance Rates (in dollars).

weekends in prison, in order to be able to continue to support *his* family. Even more frequently, perhaps, family ties might play a role in such matters as the location of the prison facility in which a prisoner is to be housed, the use of furlough, and the location of pre-release custody.³²³

While this statement would appear to permit the consideration of positive family ties in sentencing decisions, it is directed solely at male offenders. The legislative history does not contemplate the single parenting problem of women, which involves disruption to children's lives. In reality, even the statement about prisoner placement is only significant to males since relatively few federal facilities exist that house women. This results in women being incarcerated and furloughed to locations far from home. Indeed, the trial judge in *Pozzy*³²⁴ based his downward departure in part on the absence of any nearby community-based facility that would house a mother and her newborn child.

A specific parenting departure also does not violate the Commission's ban on considering the offender's sex in sentencing; male single parents, as well as male and females who have primary parenting responsibilities, would be eligible. Moreover, the Senate Report concerning this provision acknowledged that sex neutrality did not mandate "blindness" to this factor.³²⁵ Sex and race neutrality were mandated to ensure that the Guidelines would not harm traditionally disadvantaged groups. Interpreting gender neutrality in a way that harms the very group the rule was meant to aid is a perversion of just sentencing. The cruelty imposed on families by the failure of the sentencing matrix to weigh the effect of incarceration on children is contrary to the spirit of Section 5H1.10. Population data relating to single parenting demonstrates that the practical result of the current policy falls disproportionately on women.

As a practical matter, before the Guidelines were promulgated, judges did consider children at sentencing.³²⁶ For example, Judge Merritt has questioned why we should now consider irrelevant the fact that the defendant is a young mother who must raise several small children, when such facts, alone and in combination, have heretofore been considered highly relevant by sentencing judges and jurors.³²⁷ Professor Daly has noted that this type of favoritism may pose a dilemma for feminists.³²⁸

323. S. REP. NO. 225, 98th Cong., 2d Sess. 175 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3357.

324. *United States v. Pozzy*, 902 F.2d 133, 138-39 (1st Cir. 1990), *cert. denied*, 498 S. Ct. 943 (1990).

325. S. REP. NO. 225, 98th Cong., 2d Sess. 171 n.409 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235.

326. *See supra* notes 61-62 and accompanying text.

327. *United States v. Brewer*, 899 F.2d 503, 512 (6th Cir. 1990) (Merritt, C.J., dissenting), *cert. denied*, 498 U.S. 844 (1990).

328. *Rethinking Judicial Paternalism*, *supra* note 61, at 12-13.

While such sentencing can reinforce traditional family roles, jettisoning any consideration of children puts the family units of single mothers at risk. As Professor Daly has aptly recognized, "[E]qual treatment of defendants whose responsibilities for others vary and differ by gender may not be justice."³²⁹ Child rearing is primarily allocated to the mother in today's society.³³⁰ Therefore, why should the judiciary blindly impose equal treatment on parents, when the rest of society does not?³³¹ The disadvantage to children who may have less supervision and care has societal costs which can outweigh any sentencing advantage.³³²

The total disruption to the lives of children of single mothers makes a mockery of so-called gender neutrality in sentencing. What we have instead is a facially sex-neutral departure rule that ignores children and fails to operate equally in the way it affects male and female offenders. In discussing feminist jurisprudence, Professor Littleton has asserted that the question is not whether women are different, but rather how "the social fact of gender asymmetry can be dealt with so as to create some symmetry in the lived-out experience of all members of the community."³³³ In a sentencing context, this inquiry requires an investigation of methods for neutralizing negative effects of incarceration on the children of single mothers in order to ensure that all offenders' children will be impacted in an approximately equal manner.

True gender neutrality in this matter requires the availability of departures for single parents whose children cannot be cared for by their other parent. Otherwise, the gendered nature of parenting roles will dictate that such children are punished as severely as their mothers. Similarly, many of the observations about the effect of incarceration on children of single parents equally apply to parents with primary caretaking responsibilities. In other words, in a two-household family, maintaining the presence of the primary caretaker, usually a mother, is significant in avoiding disruption to the child's life, even if the other spouse is not incarcerated.³³⁴ Therefore, departures should be available to parents who are primary caretakers because their children are also disadvan-

329. *Id.*

330. Parisi, *supra* note 62, at 216.

331. *Id.*

332. *Id.* at 216-17.

333. Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1297 (1987).

334. As previously mentioned, the parent who is the primary or sole caretaker is typically, but not always, the female.

taged in a way that is atypical of the overall offender population.

Some will argue that the availability of such departures simply gives a break to mothers. However, since the Guidelines have virtually ignored women, attention to this issue is actually an attempt to devise a rational sentencing policy for females that recognizes their separate pattern of criminality³³⁵ and family responsibilities. Termination of parental rights, concern about disruption to their children's lives, and inferior access to child visitation have never been viewed as criminal penalties. However, it is unrealistic to claim that women who face such issues are being punished in a manner equal to male offenders whose children remain with their mothers and who can more easily visit their male parent because he is incarcerated closer to home.

While a consequence-based standard for decision-making regarding family departures may not be an ideal approach to female sentencing in the abstract, given the restrictions imposed by the Guidelines it is a significant improvement over current practice. In 1992, J. Michael Quinlan, then the Director of the Federal Bureau of Prisons, asked, "[D]oes equal treatment really mean treating all inmates the same? Or, rather does it mean that their needs should be met at the same level as those of the male offender—even if through "different" programs and services?"³³⁶ This author suggests that Sentencing Guidelines should address these same questions.

E. How Should Children Be Factored into Sentencing Decisions?

The Sentencing Act, congressional history, and policy statements permit pregnancy as well as single parenting as reasons for departure. Since a significant number of circuits have ruled otherwise, the policy statement and/or commentary concerning family responsibilities should be modified. Moreover, any amendment to the Policy Statement Section 5H1.6 should specify both that a downward departure *shall* be granted to single parents unless good cause exists for denying it and that primary parenting responsibilities and pregnancy can be considered in granting a family ties departure. In other words, single parenting departures would become the norm rather than the exception, with pregnancy and primary parenting responsibilities also capable of justifying a departure.

The reason that primary parenting responsibilities would not be accorded the same weight as single parenting is obvious. In a two-parent

335. A number of factors are subsumed under this general description including different entry points into crime, more victimization of females at home, different social organization of lawbreaking, and less perceived seriousness of female offenses.

336. J. Michael Quinlan, *The Female Offender: A Prologue*, 3 FED. PRISONS J. 3 (Spring 1992).

household, while the presence of both spouses is advantageous, if the spouse who has primary parenting responsibilities is incarcerated, the other spouse is available to keep disruption of the child's life to a minimum.³³⁷ However, since the spouse with primary parenting responsibilities may significantly impact the child's quality of life, such departures should regularly be available. For example, the other spouse might not be the child's natural parent, which may affect their relationship, or the other parent's employment may require long or irregular hours or frequent travel. Similarly, if both parents are facing incarceration, the judge should have flexibility to determine whether a departure for one or both parents is appropriate. Since judges have discretion to stay sentences until after birth, most pregnancy departures will actually be for parenting reasons. However, if a pregnant woman is incarcerated pretrial, she should be able to receive a discretionary departure at the time of her sentencing.

An amendment to Guidelines policy and commentary is also beneficial because of the peculiarity that a district court's discretionary refusal to depart downward cannot be reviewed.³³⁸ If the Guidelines were modified, a denial of a single parenting departure would become appealable on the grounds that good cause to deny the departure was lacking as a matter of law. However, under circuit courts' current guideline interpretation, the extent of the departure would still be discretionary, and therefore not appealable.³³⁹ Similarly, a discretionary denial of a departure for pregnancy or primary parenting would also not be appealable.

If the effect of imprisonment on children is considered, this does not mean that single mothers would automatically be given probation or substantial departures. A variety of factors, including the seriousness of the crime and the defendant's culpability, must be considered. In some cases, the gravity of the offense and the need to protect the public will outweigh the social costs of imprisoning a defendant.³⁴⁰ Similarly, in

337. Two-parent households need not be traditional, given that single-sex couples may have stable relationships in which they are raising children. None of the federal offender case law concerning family ties departures has raised any sexual orientation issues.

338. See JEFRI WOOD, FEDERAL JUDICIAL CENTER, GUIDELINE SENTENCING: AN OUTLINE OF APPELLATE CASE LAW ON SELECTED ISSUES 31 (1991). While Judge Becker eloquently argued in his concurring and dissenting opinion in *United States v. Denardi*, 892 F.2d 269, 272-85 (3d Cir. 1989), that appellate review should be available for plainly unreasonable refusals to depart, this position has not garnered appellate support.

339. See WOOD, *supra* note 338, at 31.

340. Karle & Sager, *supra* note 125, at 437-38.

considering a departure for a single parent of either sex, the judge should weigh the desirability as well as the feasibility of having the child reside with the other parent.³⁴¹ In addition, such departures do not permit judges to depart below any applicable mandatory minimum sentence unless the government requests a departure based on substantial assistance.³⁴² However, given the usual property crimes committed by females and their generally minor roles in drug conspiracies, family departures should be favored for women, many of whom would not have received any incarceration prior to the Guidelines.

Eleanor Bush has proposed a detailed structure for child based sentencing decisions. She recommends that judges (1) choose the least punitive sanction to achieve their sentencing purpose; (2) avoid harm to innocent parties; and (3) avoid the breakup of families.³⁴³ She suggests that the parent-child relationship be assessed to determine the nature of the relationship and the mother's parenting skills. She cautions, however, that a judge should not question such skills unless contrary evidence exists.³⁴⁴ To be eligible for such a departure, a parent would have to be living with the child at the time of arrest.³⁴⁵ It should be remembered that being convicted of a crime does not mean that a woman is a 'bad' mother.³⁴⁶

The in/out or imprisonment versus non-imprisonment decision is clearly the most important issue, although children should also be considered when selecting the form and length of an incarcerative sentence.³⁴⁷ Ms. Bush cautions judges about feeling reassured that family or friends will take the children, since the stability of many such relationships is questionable.³⁴⁸ Alternative types of sentences such as intermittent sentencing or time in halfway houses should be considered as well as a delay of the single parent's sentence until the child is in school.³⁴⁹ Since place-

341. *Id.*

342. See U.S.S.G., *supra* note 2, § 5K1.1; MANDATORY MINIMUM PENALTIES, *supra* note 63, at 53.

343. See Eleanor L. Bush, *Not Ordinarily Relevant? Considering the Defendants' Children at Sentencing*, 54 FED. PROBATION 15, 17-21 (1990) [hereinafter *Children*].

344. *Id.* at 19-20.

345. Arrest, rather than sentencing, is key because children should not be further disadvantaged if their lives have already been disrupted during the parent's pretrial incarceration.

346. Louise Rosenkrantz & Virdia Joshua, *Children of Incarcerated Parents: A Hidden Population*, CHILDREN TODAY, Jan.-Feb. 1982, at 2. At the time the article was written, Ms. Rosenkrantz was the Director of the Children's Center at the Federal Correctional Institution at Pleasanton, California. The article discusses many of the difficulties mothers face in making arrangements for children and having them visit.

347. *Children*, *supra* note 343, at 17.

348. *Id.* at 19.

349. *Id.* at 20.

ment of the children in foster care may lead to termination of parental rights, it militates against incarceration.³⁵⁰

While Bush views any prior prison record as weighing against consideration of children,³⁵¹ Phyllis Baunach has observed that some women may revert to crime "more out of sheer frustration or an inability to cope with the situation than out of lack of concern for their children."³⁵² Racial stereotyping must also be avoided in considering family obligations. For example, sentencing judges should not regard Black women as more easily replaced than White women by female kin because of more extended women-centered domestic networks in urban poor Black families.³⁵³ The 1991 federal inmate survey disclosed that fifteen percent more Black inmate mothers responded that their children were residing with grandparents than did White inmate mothers.³⁵⁴ While it is unclear if any of these grandparents lived in the home prior to the mother's incarceration, the presence of a grandparent in the home should not by itself defeat a single parenting departure unless the circumstances indicate the mother is not the primary parent. Motivation for the criminal act should also be evaluated. In other words, if money obtained from the crime was spent on personal necessities or for the children, this would be more significant than if such money was spent on personal luxuries.

Even with compassionate sentencing, given the economic distress of many single mothers, probation without drug rehabilitation,³⁵⁵ job train-

350. *Id.* at 18-19.

351. *Id.* at 18.

352. See Baunach, *supra* note 284, at 166. She notes that inmate-mothers who must find stable employment and housing often lack skills or education and must cope with resuming the sole care for their children after an extended absence. *Id.*

353. See *Rethinking Judicial Paternalism*, *supra* note 61, at 28-29.

354. April 27, 1993 BOP Responses, *supra* note 34, Table 2.

355. Only a few circuits permit any downward departure for a defendant's drug rehabilitation efforts because U.S.S.G., *supra* note 2, § 5H1.4 provides that drug dependence is not a reason for imposing a sentence below the Guidelines. See *United States v. Maier*, 975 F.2d 944, 946-48 (2d Cir. 1992) (reviewing the case law). Interestingly, in *Maier* the court affirmed a departure for a female defendant with a 14-year history of addiction. *Id.* at 944-45. In the year her sentencing was deferred, she had made progress ridding herself of addiction, had returned to school, and had obtained employment. *Id.* at 946. The typical approach is found in *United States v. Wall*, No. 91-CR677, 1992 WL 33882 (N.D. Ill. 1992), which denied a departure commenting that while remission of addiction was commendable, it was neither extraordinary or unusual. *Id.* at *2. In that case, the female defendant had alcoholic parents, three biracial children, and strained family ties. *Id.* at *1. She had stopped using drugs two years earlier when she realized during pregnancy the potential damage to

ing,³⁵⁶ or childcare remains an empty promise. When little is done to alleviate the social and economic conditions which contribute to criminal behavior, it is foolhardy to assume that none of these women will be re-committed or that their children will not face continued disruption.³⁵⁷ Only when courts and prisons provide innovative programs to break the criminal cycle will female offenders truly be responsible for their own destinies and those of their children.³⁵⁸ The virtual lack of community-based federal facilities that accept women and their children provide judges with little alternative but to incarcerate women or grant them departures.

Yet even in the present sentencing regime, judges can make a difference. For example, Judge Weinstein's novel sentencing in *United States v. Concepcion*,³⁵⁹ in which he sentenced twenty women convicted of fraudulently obtaining assistance from the Aid to Families with Dependent Children, Food Stamp and Medicaid Programs,³⁶⁰ is an archetype of how to provide incentives to female offenders while providing for the stability and viability of their families. Judge Weinstein realized that while he would have ordered incarceration of some defendants in a community treatment program with their children, he could not because no such facilities existed in the area.³⁶¹ Among other sentencing alternatives, he required a confession of judgment up to the amount of restitution ordered by the court as a condition of probation.³⁶² He tied credits for restitution to paying jobs to encourage rehabilitation as well as to potentially free the women from welfare dependency.³⁶³ He also worked closely with the probation department to ensure the availability of bed space at a community treatment center, help for the women in job placement, and childcare.³⁶⁴ He offered to stay the sentence of some women who were illegal aliens so they could voluntarily depart the country with

her unborn child. *Id.* She also continued her drug-free behavior after childbirth. *Id.*

356. For example, in 1989, 27% of the Federal Bureau of Prisons female population, compared with 18% of the male population, functioned at less than an eighth-grade level. Federal Bureau of Prisons Educational Division, Adult Basic Education Needs and Enrollment (August 10, 1989) (on file with author). Thus, any job training for females is hindered by their education level.

357. STANTON, *supra* note 32, at 123.

358. For a review of programs that reduce women's imprisonment see IMMARIGION & CHESNEY-LIND, *supra* note 130, at 14-16. See generally 3 FED. PRISONS J. (Spring 1992), which is devoted to the female offender.

359. 795 F. Supp. 1262 (E.D.N.Y. 1992).

360. *Id.* at 1263.

361. *Id.* at 1283.

362. *Id.* at 1284.

363. *Id.* at 1285.

364. *Id.* at 1306-07.

their children.³⁶⁵ Obviously, the availability of greater community-based resources and placements for the families would have been desirable. Their unavailability, however, was not treated as an excuse to forego all sentencing ingenuity. In contrast, too often federal judges decry the inflexibility of the Sentencing Guidelines without first testing their limits.³⁶⁶

Similarly, the Department of Justice should develop policy identifying criteria for determining whether to appeal from a trial court's decision to grant a family-based departure. Appeals by federal prosecutors protesting downward departures have in large measure triggered the bad case law on single parenting. Questions of fairness should dictate limiting such appeals to cases in which the female offender's criminal activity demands a harsh sentence.

F. Should Bad Moms Get Upward Departures?

If good mothers get downward departures, should bad moms be given upward departures or sentenced at the high end of the range? The few cases that raise this question involved drug trafficking at home in the presence of children. For example, *United States v. Guerrero*³⁶⁷ affirmed a sentence at the high end of the range where drug trafficking was based at home, even though the young children were typically not present during the transactions. *United States v. Shuman*³⁶⁸ held that the defendant's wilful inclusion of her adult son in the drug business and permitting his easy access to drugs justified an increased sentence because she abused her custodial relationship. Similarly, *United States v. Ledesma*³⁶⁹ affirmed an upward adjustment where the district judge found that "as a mother, [Ledesma] aided, abetted, facilitated, and procured her daughter into the drug world." The mother was penalized because she held a position of trust in influencing her daughter who had recently reached the age of majority.³⁷⁰

365. *Id.* at 1303.

366. Not all judges believe that the Guidelines are as restrictive as currently perceived. See, e.g., Edward R. Becker, *Flexibility and Discretion Available to the Sentencing Judge Under the Guidelines Regime*, 55 FED. PROBATION 10 (1991); Jack B. Weinstein, *Prison Need Not Be Mandatory*, 28 JUDGES' J. 16 (1989).

367. 894 F.2d 261, 269-70 (7th Cir. 1990).

368. 902 F.2d 873, 875-76 (11th Cir. 1990).

369. 979 F.2d 816, 822 (11th Cir. 1992).

370. *Id.* at 819.

In *United States v. Thorton*,³⁷¹ distributing drugs to a minor daughter was approved as a basis for upward departure of the defendant's criminal history category, but not for her base level offense. However, *Thorton* recognized that it was improper to sentence a female because of her lifestyle choice to continue living with her male co-conspirator.³⁷² Similarly, an upward departure of twenty-five percent was based in part on the use of drugs at home in front of children in *United States v. Wylie*.³⁷³ The clearest statement of gender expectation of mothers is found in *United States v. Sailes*,³⁷⁴ in which the trial judge refused to grant a family ties downward departure to a female defendant, stating that her son's involvement in drugs was due to her failure to raise him as she should have. The judge also indicated that it was good for the children to be separated from their mother.³⁷⁵

Only one case, *United States v. Christopher*,³⁷⁶ was found in which a male was granted an upward departure based in part on being a bad father.³⁷⁷ *Christopher*, similar to *Shuman* and *Ledesma*, arose in the Eleventh Circuit and involved adult children dealing drugs.³⁷⁸ To date, any gender effect of such sentencing has not been recognized. In other words, behavior that exposes children to the drug trade may support an argument for increased sentencing. However, the relevant cases mainly concern women, even though men are responsible for most drug offenses. Moreover, as will later be discussed, women whose mates are involved in drug offenses, including selling from the home, have only one real option if they wish to remain crime-free: breaking up their family.

It is troubling that judges often assume that the mother maintains sole responsibility to raise her children correctly and therefore punish her for lax parenting, while not identifying fathers or substitute fathers for the same increased punishment, particularly when young children are involved. It is hardly surprising that the only upward departure cases concerning minor children were directed at mothers. Moreover, this type of sentencing may also have a disparate effect on single mothers who live

371. 922 F.2d 1490, 1492 (10th Cir. 1991).

372. *Id.* at 1494 n.5.

373. 919 F.2d 969, 980 (5th Cir. 1990).

374. 872 F.2d 735 (6th Cir. 1989).

375. *Id.* at 737.

376. 923 F.2d 1545 (11th Cir. 1991).

377. A second case, *United States v. Porter*, 924 F.2d 395, 399 (1st Cir. 1991), was located in which a father was sentenced to an upward adjustment of two months for urging his adult son to rob another bank to obtain bail for the father. However, no mention was made of any family justification for the departure which would have been appropriate regardless of the identity of the person who the defendant asked to commit the other crime.

378. 923 F.2d at 1548, 1556.

with their children to a larger extent than do male defendants.³⁷⁹

VIII. BATTERING, COERCION, DOMINANCE, AND ABUSE:
FACTORING THE VICTIMIZATION OF WOMEN OFFENDERS
INTO GUIDELINES SENTENCING

A. *Departures Based on the Battered Woman Syndrome*

A number of gender issues have emerged in the departure matrix which involve questions of battering, coercion, dominance and abuse. The extent to which the socialization and victimization of women can be integrated into Guidelines sentencing is currently unclear, although it appears that defendants who can demonstrate they suffer from the Battered Woman Syndrome³⁸⁰ are more likely to fit into the departure methodology. For example, some females may be eligible for downward departures pursuant to Section 5K2.12 of the Guidelines. This section provides that coercion or duress, though not amounting to a complete defense, may justify the court's granting a downward departure.³⁸¹ The built-in limitation to this departure is that "ordinarily" coercion is sufficiently serious to warrant departure only when it involves a threat of physical injury. In practice, departures for coercion are more significant for females than for males, and are used more frequently by White wom-

379. BJS, *WOMEN*, *supra* note 75, at 6.

380. See generally, ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* (1987); CHARLES PATRICK EWING, *BATTERED WOMEN WHO KILL* (1987); CYNTHIA K. GILLESPIE, *JUSTIFIABLE HOMICIDE* (1989); LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* (1984).

381. Coercion may also be a factor when evaluating upward adjustments. For example, *United States v. Sabatino*, 943 F.2d 94 (1st Cir. 1991), reversed upward adjustments for vulnerable victim (2 points) and coercion (4 points) based on the rationale that prostitutes hired in a Mann Act conspiracy case were single teenage mothers in need of a job. *Id.* at 102-04. *Sabatino* found that given the Mann Act's paternalistic attitude towards protecting vulnerable women and girls, that any upward adjustment for vulnerability would have to be justified by evidence that the prostitutes were unusually vulnerable. *Id.* at 104. Similarly, coercion was questionable since the prostitutes could and did quit. *Id.*

The court recognized that if economic coercion justified this departure, economic advantage from crime would increase the punishment for every financially motivated crime. *Id.* The court did not deem coercive the defendants' indifference to instances of customers raping the prostitutes, nor did it find coercive the defendants' practice of sending "problem" prostitutes to a violent customer. In fact, the court found that such conduct should have persuaded the prostitutes to abandon this line of work. *Id.* A disconcerting gender reference in this case described the prostitutes as "girls," even though not all of them were teenagers. *Id.*

en than minority women.³⁸²

The Ninth Circuit recently dealt with several issues concerning coercion of female defendants in *United States v. Johnson*.³⁸³ *Johnson* recognized that "there are sets of circumstances in which gender is also a factor to be considered" in determining coercion.³⁸⁴ *Johnson* considered the defendant's vulnerability to fear, not produced by the people causing the defendant's criminal action, as a factor to consider at the sentencing stage.³⁸⁵ Therefore, the fact that a defendant met the Battered Woman Syndrome could be considered: (1) as an affirmative defense of duress for acts of distribution included as relevant conduct under Section 1B1.3; and (2) as evidence of incomplete duress for which the court could grant a discretionary downward departure.³⁸⁶

Johnson also recognized that a downward departure for coercion could be granted in cases where the female defendant, with effort, could have escaped.³⁸⁷ Similarly, downward departure based on incomplete duress was also discretionary if a defendant had "frozen fright," a syndrome that made her an easy victim of powerful, manipulative, and violent men, since the court could consider her subjective vulnerability.³⁸⁸ Such coercion related not merely to entering a conspiracy, but also to failing to leave it.³⁸⁹ Coercion could also be considered in determining whether to grant a downward departure for acceptance of responsibility after the trial, so long as the defendant admitted guilt.³⁹⁰

Of course, since such departures are discretionary, a judge is not required to grant them. For example, in *United States v. Henderson-Durand*,³⁹¹ a downward departure was denied despite the defendant's claim that the informant threatened to kill her and her children.³⁹² Moreover, as the Eighth Circuit noted, it could only review the ruling to determine that the court understood its power to depart. Therefore, be-

382. In 1992, White women received 67% of the departures granted to females for coercion. See May 26, 1992 SC Responses, *supra* note 3, Tables 2A-2H. The data only describes the number of departures granted and does not include the number of departures requested. Therefore, one can only speculate whether White women are asking for such departures in higher numbers or are more successful than minority women in having them granted. At a minimum, this is a type of departure that defense counsel should consider in appropriate cases.

383. 956 F.2d 894 (9th Cir. 1992).

384. *Id.* at 898.

385. *Id.*

386. *Id.* at 900-01.

387. *Id.* at 902.

388. *Id.* at 903.

389. *Id.* at 902-03.

390. *Id.* at 903.

391. 985 F.2d 970 (8th Cir. 1993).

392. *Id.* at 976.

cause the trial judge's comment that the defendant had not shown that the crime was motivated by any coercion demonstrated that the ruling was discretionary, the failure to depart could not be appealed.³⁹³

Moreover, the relevant facts must be argued in a readily identifiable departure context. For example, in *United States v. Santos*,³⁹⁴ the court showed little compassion for a woman with few options in her life, in part due to the failure of counsel and the court to recognize how her tragic life history related to the Guidelines structure.³⁹⁵ The defendant was indicted for conspiracy with her common law husband, with whom she had two children.³⁹⁶ She originally agreed to cooperate and was promised leniency. However, after she became despondent and attempted to take her own life, the government found her unfit to cooperate and asked to have her bail revoked.³⁹⁷ She did provide information, but no plea bargain was reached and she eventually was tried. Santos claimed duress by her common law husband, who engaged in a pattern of violent and abusive behavior towards her and her children.³⁹⁸ A forensic psychiatrist testified concerning the Battered Woman Syndrome. The Judge commented that "an abusive husband is no license to break the law."³⁹⁹ She was sentenced without any benefit of a government motion for substantial departure.⁴⁰⁰ Although the appellate decision concerned the trial, rather than the sentencing, it is troubling that *Santos* did not discuss the ability to depart at sentencing on the basis of duress, particularly since the defendant was sentenced for a non-violent crime. Also, an earlier Third Circuit decision had viewed the failure of counsel to argue an appropriate departure as incompetence that justified a remand for resentencing.⁴⁰¹

Battering can also provide a justification for a downward departure based on Section 5K2.10, which provides that if "the victim's wrongful conduct contributed significantly to provoking the offense behavior," the

393. *Id.*

394. 932 F.2d 244 (3d Cir. 1991).

395. Santos was sentenced to 210 months. *Id.* at 247. It is not clear from the decision what portion of her sentence was required because of a statutory minimum penalty.

396. *Id.* at 245-46.

397. *Id.* at 246.

398. *Id.*

399. *Id.* at 254.

400. *Id.* at 247.

401. See *United States v. Headley*, 923 F.2d 1079, 1084 (3d Cir. 1991).

court may reduce the sentence.⁴⁰² For example, in *United States v. Whitetail*,⁴⁰³ the Eight Circuit held that the fact that a jury rejected a defense based on the Battered Woman Syndrome did not foreclose a judge from considering a downward departure based upon the same evidence; the departure is broader than the elements necessary to prove self-defense.⁴⁰⁴ In *Whitetail*, the defendant was charged with the second-degree murder of her abusive live-in boyfriend. A downward departure was also affirmed in *United States v. Yellow Earrings*.⁴⁰⁵ *Yellow Earrings* involved a female defendant who was charged with assault resulting in serious bodily injury. The victim had tried to force himself on the defendant and was rebuffed. When he then verbally abused and humiliated her, she knifed him.⁴⁰⁶ In contrast, the Eighth circuit has been unwilling to permit downward departures based on the victim's conduct in cases in which causal relationship to the crime is more remote. For example, *United States v. Desormeaux*⁴⁰⁷ vacated the downward departure of a female defendant who assaulted a woman her boyfriend was dating.⁴⁰⁸ The appellate court disregarded the defendant's low self-esteem, which was a product of abusive relationships with males. The court reasoned that while her mental condition could be a factor in sentencing within the Guidelines, it was not relevant in determining whether a sentence should be outside the range.⁴⁰⁹

B. Departures Based on Dominance and Psychological Abuse

While battered women have fought their way into the case law,⁴¹⁰ many of the relationships that ensnare female offenders in criminal behavior do not present as compelling stories. While it may be stereotypical to assume that men lead women astray, and therefore women are not fully responsible for their criminal offenses, one federal prison warden

402. U.S.S.G., *supra* note 2, § 5K2.10.

403. 956 F.2d 857 (8th Cir. 1992).

404. *Id.* at 863-64.

405. 891 F.2d 650, 652 (8th Cir. 1989).

406. *Id.* at 651.

407. 952 F.2d 182 (8th Cir. 1991).

408. *Id.* at 183-84.

409. *Id.* at 185. This is consistent with the Eighth Circuit's holding in *United States v. Shortt*, 919 F.2d 1325 (8th Cir. 1990), which presented this issue in the opposite gender order. In *Shortt*, a male constructed a bomb to kill his wife's lover. The court found that neither the defendant's family circumstances nor the victim's adultery warranted departure. Weighing "proportionality," the court stated that adultery did not justify "blowing up the adulterers or building a bomb capable of doing so." *Id.* at 1328.

410. See also *United States v. Mickens*, 977 F.2d 69, 72 (2d Cir. 1992) (recognizing that departure could be granted to a battered wife).

has observed, "Females who make their way to prison have been socialized more toward dependent relationships, as opposed to life activities that promote independence."⁴¹¹ Thus, a number of women offenders whose circumstances do not fit the classic definition of physical coercion appear to be dominated by a male with whom they have a relationship.⁴¹² In one case the judge described a woman as being under the "Svengali" spell of her boyfriend.⁴¹³ Only if judges can move beyond coercion to dominance in considering departures will culpability questions be dealt with in a way that recognizes the gendered nature of some female crime.

In *United States v. Gaviria*,⁴¹⁴ Judge Weinstein recently ordered a downward departure for a woman whose history established a pattern of dependence due to male control from a combination of physical and psychological abuse, cultural norms, economic dependence and other factors. He observed, "Nowhere in the Guidelines' formulaic mechanism is there room to consider how the facts of the life of a woman abused in this fashion should bear upon her sentence."⁴¹⁵ Justification for the departure was alternatively based upon the authority of Section 5K2.12⁴¹⁶ or independently upon Congress's directives in 18 U.S.C. § 3553,⁴¹⁷ or

411. David W. Helman, "Constants" and "Contrasts," *Managing Female Inmates*, 3 FED. PRISONS J. 55, 57 (1992).

412. These cases clearly pose theoretical difficulties for feminists who do not want to encourage the use of stereotypical thinking about male/female relationships. However, given the reality facing many women offenders, it would be a hollow victory to deny them appropriate downward adjustments based on an idealized view of sexual equality that is nonexistent in their lives.

413. Henry Weinstein, *Judge Sticks to His Guns, Gives Robber Same Term as Before*, L.A. TIMES, Feb. 4, 1992, at B3. The article reported that the judge's remarks, in which he declared that women are soft touches for clever men if sex is involved, caused a storm of protests. The sweeping nature of the judge's comments no doubt were responsible for the criticism. Actually, the particular facts did support a departure with no need for stereotyping. A psychiatrist who interviewed the defendant reported that she told him her boyfriend beat her and threatened her into committing the robberies with him. Thus, this departure should have easily fit into a classic coercion framework if the judge had not focused on dominance.

414. 804 F. Supp. 476, 479-80 (E.D.N.Y. 1992).

415. *Id.* at 479.

416. Section 5K2.12 refers to coercion or duress not amounting to a complete defense. U.S.S.G., *supra* note 2, § 5K2.12.

417. Section 3553(a)(2) states in part that the sentence should "provide just punishment for the offense" and "afford adequate deterrence to criminal conduct." U.S.S.G., *supra* note 2, § 3553(a)(2).

upon both.⁴¹⁸ *Gaviria* also recognized that women in traditional cultures are particularly susceptible to patterns of dependence, domination, and victimization.⁴¹⁹ Thus, the court noted that the Commission's statement on bias found in Section 5H1.10 should not be interpreted expansively to deny the effects of gender on relevant and appropriate sentencing criteria.⁴²⁰

Coercion not reaching the level of battering was also recognized as a legitimate departure factor in *United States v. Cheape*.⁴²¹ In *Cheape*, a female defendant argued her male co-defendants coerced her to engage in a robbery.⁴²² The female offender had a three-year relationship with one of her co-defendants and claimed that another co-defendant had held a gun to her head. Although the trial judge indicated that the woman had been unfairly used by her co-defendants, he did not grant a downward departure.⁴²³ Since it was unclear whether the judge understood it was within his discretion to depart, the case was remanded. Similarly, in *United States v. Naylor*,⁴²⁴ the late Judge Devitt departed downward by ten years in sentencing a young woman who had a clean record except for a minor shoplifting incident, was a good student, was active in the community, and was gainfully employed until she became romantically involved with her older male co-defendant who used his romantic relationship and age to manipulate her.⁴²⁵

Obviously, not every argument of dominance or battered woman status will result in a departure. First, the decision to depart is discretionary. Second, a factual predicate will have to be established before the court exercises its discretion.⁴²⁶ Third, such departures will often need expert testimony in order to demonstrate that the female offender suffered from

418. *Gaviria*, 804 F. Supp. at 480.

419. *Id.* at 479-80.

420. *Id.* at 479-80 (citing, among others, Isabelle R. Gunning, *Arrogant Perception, World Travelling and Multicultural Feminism*, 23 COLUM. HUM. RTS. L. REV. 189 (1992); Eugene Robinson, *Women in Latin America Advance Amid Stereotypes*, WASH. POST, Mar. 29, 1992, at A26; and Evelyn P. Stevens, *Marianismo: The Other Face of Machismo in Latin America*, in FEMALE AND MALE IN LATIN AMERICA 95 (Ann Pescatello ed., 1973)).

421. 889 F.2d 477, 478-80 (3d Cir. 1989).

422. *Id.* at 478. She was in the back seat of the intended getaway car in the parking lot during the robbery.

423. *Id.* at 479.

424. 735 F. Supp. 928 (D. Minn. 1990).

425. *Id.* at 929.

426. See *United States v. Homick*, 964 F.2d 899 (9th Cir. 1992) (holding that a duress defense based on the battered woman syndrome was unavailable to a divorced woman whose monitored telephone conversations with her ex-husband were not threatening and who indicated no concern over his reaction to her lack of cooperation with him).

the particular condition used to justify the departure. Finally, courts are not always receptive to reducing sentences based on coercion or dominance. In *United States v. Nelson*,⁴²⁷ a husband's threats of physical violence led the judge to give a two-level rather than three-level enhancement to the female defendant for being a manager or supervisor of a drug conspiracy and "only" a two-credit enhancement for obstruction of justice.⁴²⁸ One might ask why coercion did not defeat any enhancement or justify a downward departure. Clearly, many judges have little sympathy for females in relationships with bad men.

Sometimes mental and emotional conditions having gender overtones are considered in relation to Guidelines Section 5H1.3, which provides that such conditions are not ordinarily relevant in determining whether a sentence should be outside the Guidelines. Several circuits have recognized that psychological abuse falls within Section 5H1.3.⁴²⁹ For example, *United States v. Roe*⁴³⁰ held that female's extraordinary history of childhood physical, sexual, and mental abuse and neglect could justify a downward departure from the Sentencing Guidelines.⁴³¹ *Roe* observed that the psychological effects of child abuse manifest themselves in a variety of ways, which may include the victim experiencing profound feelings of inadequacy and low self-esteem.⁴³² Therefore, where the medical experts agreed that the defendant's abuse was exceptional, turning her into "virtually a mindless puppet," it was error for the trial court to find her abuse was not extraordinary.⁴³³ The case was remanded for the trial court to determine whether to exercise its discretion by granting a departure.⁴³⁴ Similarly, *United States v. M.B.*⁴³⁵ granted a downward departure based on the female's motives, lifelong victimization, and her reality as an abused woman. The interaction of her childhood sexual victimization and her organic personality disorder were a contributory

427. 740 F. Supp. 1502 (D. Kan. 1990).

428. *Id.* at 1513-17, 1514 n.20.

429. *See, e.g., United States v. Roe*, 976 F.2d 1216, 1217-18 (9th Cir. 1992); *United States v. Vela*, 927 F.2d 197, 199 (5th Cir.), *cert. denied*, 112 S. Ct. 214 (1991); *United States v. Desormeaux*, 952 F.2d 182, 185 (8th Cir. 1991).

430. 976 F.2d 1216 (9th Cir. 1992).

431. *Id.* at 1218.

432. *Id.*

433. *Id.*

434. *Id.* The court also suggested that her unstable childhood could justify a departure on the basis of lack of youthful guidance. *Id.* However, this departure is no longer available. U.S.S.G., *supra* note 2, § 5H1.12.

435. 809 F. Supp. 319, 320 (D.N.J. 1993).

cause of her embezzling money to avoid her husband's potential abuse when she did not obtain a bank loan.

Not every circuit is eager to accept such departures even in the face of expert testimony indicating that the female offender suffers from the mental or emotional condition being cited as the reason for departure. For example, *United States v. Perkins*⁴³⁶ remanded a case in which the trial judge had ordered a departure for a female suffering from dependent personality disorder. *Perkins* noted that a causal element must be shown between the illness and the offense to justify a departure.⁴³⁷ In *United States v. Vela*,⁴³⁸ childhood sexual abuse and a shocking family life did not constitute an extraordinary mental and emotional condition. While the court agreed that the offender's family life was abusive, it did not cause her to participate in the heroin conspiracy. Thus, this background did not support a downward departure in sentencing.⁴³⁹ Similarly, the Eighth Circuit reversed a downward departure based on spousal abuse, where the abuse occurred several years before the offense and was not caused by the victim.⁴⁴⁰ The Seventh Circuit has also reversed a departure where there was no indication that the female's condition resulted in a significantly reduced mental capacity at the time of the offense.⁴⁴¹

Moreover, Section 5K2.13 restricts the ability to depart based on diminished capacity unless the defendant committed a non-violent offense while suffering from significantly reduced mental capacity, not resulting from voluntary use of drugs or other intoxicants.⁴⁴² Thus in *United States v. Poff*,⁴⁴³ a woman who wrote threatening letters to the President was denied a departure because that crime was considered violent. Her problem arose because her father had sexually abused her over a long period. This resulted in her intermittent commitment to psychiatric institutions.⁴⁴⁴ One symptom of her mental illness was to threaten public officials, thinking her father wanted her to do so. The repercussion of this unfortunate habit was her classification as a career offender.⁴⁴⁵ While the dissent observed that she was still a victim of her father's

436. 963 F.2d 1523, 1528 (D.C. Cir. 1992).

437. *Id.* at 1526-27.

438. 927 F.2d 197, 199 (5th Cir. 1991).

439. *Id.*

440. *United States v. Desormeaux*, 952 F.2d 182, 185 (8th Cir. 1991).

441. *United States v. Frazier*, 979 F.2d 1227, 1230 (7th Cir. 1992). In addition, the trial court's finding that incarcerating the female offender would be useless could not justify a departure because it was not linked to the Guidelines structure. *Id.* at 1231.

442. *Id.* at 1230, citing U.S.S.G., *supra* note 2, § 5K2.13.

443. 926 F.2d 588 (7th Cir.) (*en banc*), *cert. denied*, 112 S. Ct. 96 (1991).

444. *Id.* at 590.

445. *Id.* at 595 (Easterbrook, J., dissenting).

abuse,⁴⁴⁶ one could equally assert that she was also a victim of a restrictive reading of the Sentencing Guidelines.⁴⁴⁷

The Guidelines give relatively little recognition to the victimization of females that fosters their entry into criminality. To the extent that departures for mental and emotional conditions or diminished capacity are being granted to females, they are primarily received by White women.⁴⁴⁸

IX. WOMEN AS CO-CONSPIRATORS: FACTORING THE SOCIALIZATION OF WOMEN OFFENDERS INTO GUIDELINES SENTENCING

A. *The Gendered Role of Women in Conspiracies*

The most troubling gender questions concerning female offenders are raised by simply reading the published facts of many drug cases, including those mentioned throughout this Article, which identify women by their relationships with men.⁴⁴⁹ Such females are typically married to, living with, or intimately involved with males who are described as being central to the conspiracies in question. In contrast, the women often have relatively minor roles in the conspiracies: facilitating drug deals by

446. *Id.* (Easterbrook, J., dissenting).

447. *United States v. Chatman*, 986 F.2d 1446, 1453 (D.C. Cir. 1993), rejected the *Poff* analysis, concluding that since the defendant neither intended nor was able to carry out her threats, her crime was in fact a "non-violent offense."

448. See March 17, 1993 SC Responses, *supra* note 3, Tables 2A-2H. White women received 75% of the female § 5H1.3 departures and 71% of the diminished capacity departures.

449. See, e.g., *United States v. Goff*, 907 F.2d 1441, 1443 (4th Cir. 1990) (convicting female defendant for conspiracy to distribute cocaine on the basis of her traveling with her boyfriend, an alleged drug dealer); *United States v. Wylie*, 919 F.2d 969, 972 (9th Cir. 1990) (noting that although the male conspirator had agreed to plead guilty only if the female's name was omitted from each count, such omission did not prevent female's conviction).

Not all such cases raise sentencing guidelines issues. For example, in *Zafiro v. United States*, 113 S. Ct. 933 (1993), a decision rejecting the proposition that severance is required as a matter of law when codefendants present mutually exclusive defenses, the Supreme Court noted that *Zafiro's* unsuccessful defense was that she was merely the girlfriend of one of the defendants and had no idea that the suitcase he stored in her apartment contained drugs. *Id.* at 936. See also *United States v. Branch*, 989 F.2d 752, 754-56 (5th Cir. 1993) (crack cocaine found in diaper bag in a room the defendant shared with her "husband" (quotes in original) and child. Defendant claimed she had no knowledge of the other defendants' activities or that cocaine was in her diaper bag, but evidence suggested that she and her family were used as a cover for drug distribution).

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

Given the nature of such women's relationships, unless a female leaves her mate who is dealing drugs, it may be difficult for her to totally disassociate herself from the conspiracy. In other words, she is likely to be aware of his criminal endeavors and familial actions on her part often promote his criminal activities. Undoubtedly, such females do receive the benefit of drug money, and have enough involvement with illicit activity to be charged and convicted of crime. However, while the mates of drug dealers and mates of men accused of white-collar crime equally receive the benefits of tainted money, mates of drug dealers usually live at the scene of criminal activity. Therefore, some women who are poor may be sucked into crime, whereas richer women who associate with white-collar felons do not face sacrificing their relationships in order to remain crime-free.

The interaction between class and gender can be observed in *United States v. Pozzy*,⁴⁵⁰ in which the wife appeared to have little to do with her husband's drug business beyond enjoying its financial benefits. The trial court granted a departure based on Section 5K2.12, which permits coercion to justify a lesser sentence.⁴⁵¹ The court found that the wife became an abettor by default, having no alternative but to stay or leave when her husband dealt drugs.⁴⁵² In contrast, the First Circuit reversed the departure on the grounds that coercion does not exist merely because of the marital relationship.⁴⁵³ However, *Pozzy* did recognize that a departure might still be available on the grounds the wife was a minor participant.⁴⁵⁴

The interrelationship of gender to crime and sentencing is fairly complex in such situations and raises a number of policy questions. When charging conspiracies, how do prosecutors determine which women to arrest? Are some women really arrested to provide leverage for plea bargaining with the more culpable male, either to provide information

450. 902 F.2d 133, 135 (1st Cir.), *cert. denied*, 111 S. Ct. 353 (1990).

451. *Id.* at 137.

452. *Id.* at 136-37.

453. *Id.* at 138-39.

454. *See* U.S.S.G., *supra* note 2, § 3B1.2(b).

and testimony in exchange for immunity, or to be dismissed in exchange for the male's plea?⁴⁵⁵ Since decisions concerning the nature of the charge and plea bargaining rest with the prosecutor, gender questions concerning a woman's culpability are often not raised at the appellate level because evidence supporting the verdict will always exist. For example, one female defendant who moved to Minneapolis to marry her male codefendant claimed she had no criminal intent to join the conspiracy, but found herself counting money and writing messages for him.⁴⁵⁶ Large quantities of drugs and money were found in their residence and she admitted to maintaining ledgers.⁴⁵⁷ Needless to say, the jury convicted her. Similarly, another woman who pleaded guilty to a drug conspiracy agreed to accompany her boyfriend of five years on a drug buy and carry the purchase money.⁴⁵⁸ While she claimed it was the first time she had actively participated in his drug dealing, she admitted that for two years she suspected his illegal earnings were drug-related.⁴⁵⁹

It is obvious that such women are not really innocent. However, unless the prosecutor permits them to plead to lesser offenses, they become subject to long mandatory minimums which are disproportionate to their culpability as a member of the conspiracy. Men can similarly show circumstances in which they are given sentences that have no relationship to their activities in a conspiracy, but such arguments will depend on the facts in a given case rather than on gender-based role patterns. Thus, the prosecutors' control of substantial assistance departures is key, since they provide the only escape below the statutory requirement. Therefore, it is important to ask whether it is easier or more difficult for a female to be granted a departure for substantial assistance than her male co-conspirator. Does a male have to provide names of other individuals, while a female must be cooperative to obtain such a departure, or is the woman who has little information because of her peripheral role not likely to

455. In *United States v. Seligsohn*, 981 F.2d 1418 (3d Cir. 1992), a family business white collar crime case, the wife claimed the government coerced her into pleading guilty by threatening that if she did not agree to a bargain, her husband would not be allowed to enter a plea. The court noted that the government could appropriately bargain for a package deal as part of the plea, provided that the defendant's decision to forego a trial was otherwise voluntary. *Id.* at 1426. However, it did not assess the implied coercion of a package deal in a husband-wife context, particularly in light of traditional gender roles.

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

457. *Id.*

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

459. *Id.*

receive a departure and escape the applicable mandatory minimum?

B. Plea Bargaining and Substantial Assistance Departures

The statistical information regarding plea bargains and substantial assistance departures provides no clear answers about how well women actually fare in obtaining reduced sentences in their gendered roles as co-conspirators. While Sentencing Guidelines statistics reveal the likelihood of significant charge bargaining by female drug offenders,⁴⁶⁰ they do not reveal whether a number of such women were overcharged when they were originally arrested. Some defense counsel perceive that in prior years a number of women living with male co-conspirators would not even have been arrested, let alone sentenced to prison. Undoubtedly, the government generally realizes the peripheral roles of many females in conspiracies. For example, in 1989 and 1990 women were sentenced for nearly fifteen percent of all drug offenses, but comprised nearly twenty-five percent of the people who were sentenced for the lesser drug crimes of simple possession and communication facilitation.⁴⁶¹ This result reoccurred in both 1991 and 1992, with women forming thirteen percent of drug offenders, but twenty-one to twenty-two percent of those pleading to lesser crimes.⁴⁶²

Viewing substantial assistance departures produces equally murky results. While substantial assistance is the primary reason for all downward departures, such departures form a larger percentage of all departures given to males than to females.⁴⁶³ For example, in 1991 and 1992 substantial assistance respectively accounted for sixty-eight and seventy-three percent of male departures and only sixty-two and sixty-five percent of female departures.⁴⁶⁴ These percentages vary more dramatically when race is factored into the equation. For example, in 1991 seventy-two percent of White males versus sixty-two percent of White females receive substantial assistance departures,⁴⁶⁵ while in 1992, sixty-eight percent of White males versus fifty-five percent of White females received such departures. Similarly, in 1991 seventy-seven percent of departures for Black males were for substantial assistance compared with sixty-seven percent of Black females, while in 1992 these figures were re-

460. See DECEMBER 1991 SENTENCING COMMISSION REPORT, *supra* note 22, Table 7.

461. *Id.*

462. See UNITED STATES SENTENCING COMMISSION 1991 ANNUAL REPORT Table 17 and UNITED STATES SENTENCING COMMISSION 1992 ANNUAL REPORT Table 13.

463. See May 26, 1992 and March 17, 1993 SC Responses, *supra* note 3, Tables 2A-2H. Conversely, women appear to do better than men in receiving other departures.

464. *See id.*

465. *See id.*, Tables 2-A & 2-B.

spectively seventy-five percent and sixty-six percent.⁴⁶⁶ In 1992, the percentage of female substantial assistance departures was slightly less than their proportion of the sentenced population.⁴⁶⁷ Hispanic women receive more than their share of substantial assistance departures, while Black women receive slightly fewer departures.⁴⁶⁸ The gender information for White women shows varying results, with their receiving more departures in 1991 and fewer in 1992 than their proportionate share of female departures.⁴⁶⁹ The problem in interpreting this data is that we know nothing about the individual cases to conclude whether women in similar circumstances are being treated equally, both in relation to the total female population and the total male population.

It is evident that substantial assistance departures are being used as a significant plea bargaining tool, since they have swelled from approximately 1200 departures in 1989 to 5442 in 1992 or more than a fourfold increase in four years.⁴⁷⁰ Even the 1991 to 1992 jump of more than 3000, or a forty-five percent increase,⁴⁷¹ cannot be dismissed as simply reflecting an enlarged sentenced population since the influx of an additional 4839 prisoners increased the entire population by only fifteen percent.⁴⁷² The likely explanation for their burgeoning growth is that they function as the mechanism by which prosecutors are keeping the federal criminal justice system afloat. In other words, the predicted flood of trials logjamming the system has not occurred because prosecutors are able to avoid restrictions imposed by mandatory minimum statutes and the Sentencing Guidelines via substantial assistance departures.⁴⁷³ Yet if women are minor players in conspiracies, one might expect to see that females would account for more than fifteen percent of such departures. Instead, the peripherality of women based on their gender roles may actually

466. *See id.*, Tables 2-C & 2-D.

467. *See id.*, Tables 1-B, 2-A & 2-H. In 1992, women received 15% of the substantial assistance departures and were just over 16% of the sentenced population.

468. *Id.*, Tables 1-B. Black women receive approximately three percent less, while White and Hispanic women each receive approximately two percent more than their proportion in the sentenced population. *Id.*

469. *Id.*, Tables 2A.

470. Compare UNITED STATES SENTENCING COMMISSION ANNUAL REPORTS for 1989 (Table IX), 1990 (Table R), 1991 (Table 54) and 1992 (Table 49).

471. *See* UNITED STATES SENTENCING COMMISSION 1991 ANNUAL REPORT Table 54 and UNITED STATES SENTENCING COMMISSION 1992 ANNUAL REPORT Table 49.

472. *See* UNITED STATES SENTENCING COMMISSION 1991 ANNUAL REPORT Table C-1 and UNITED STATES SENTENCING COMMISSION 1992 ANNUAL REPORT Table 15.

473. *See also* Nagel and Schulhofer, *supra* note 123.

place them at a disadvantage in obtaining the only departure permitting a judge to impose a sentence below the mandatory minimum.

The ability to depart below the mandatory minimum also arises in cases where young females, often pregnant or with small children, are recruited as drug couriers, or mules, often for a single transaction. Such women are recruited primarily because of gender reasons. In other words, they are viewed as less readily identifiable as potential drug runners and not likely to obtain information central to the conspiracy. This issue arose in *United States v. Delgado-Cardenas*,⁴⁷⁴ in which the trial judge raised due process and equal protection concerns when he granted a female a downward departure below the statutory minimum for substantial assistance in the absence of any motion from the government.⁴⁷⁵ He was troubled by the ability of the woman to provide successful information for the government.⁴⁷⁶ The appellate court remanded for the trial judge to clarify the legal basis of its sentencing decision,⁴⁷⁷ noting that *Wade v. United States*⁴⁷⁸ permitted the review of a prosecutor's refusal to file a substantial assistance motion if based upon an unconstitutional motive.

In *United States v. Floyd*,⁴⁷⁹ in assessing the contribution of a female offender, the trial judge was also concerned that the "remorseful, but marginally culpable" defendant may not know enough to be able to assist the prosecution.⁴⁸⁰ Similarly, in *United States v. Tannis*,⁴⁸¹ Judge Higginbotham questioned the unnecessary harshness of a mandatory minimum sentence of ten years for a twenty-one-year-old first offender with a one-year-old child. Her role in the drug conspiracy was as a courier, unlinked to the main drug organization.⁴⁸² However, since the government did not file a departure motion for substantial assistance, he might well have asked how such a young female could provide information entitling her to a sentence below the mandatory minimum. While the Sentencing Commission has recently proposed a departure for defendants whose offense level overrepresents their culpability, such a departure is both discretionary and does not permit the court to depart below any applicable mandatory minimum.⁴⁸³ At least one United States Attorney's

474. 974 F.2d 123, 125 (9th Cir. 1992).

475. *Id.* at 124-25.

476. *Id.* at 125.

477. *Id.* at 126. The *Wade* decision was not available to the judge at the time of sentencing.

478. 112 S. Ct. 1840, 1843-44 (1992).

479. 738 F. Supp. 1256, 1259 (D. Minn. 1990).

480. *Id.*

481. 942 F.2d 193 (3d Cir. 1991) (Higginbotham, J., concurring).

482. *Id.* at 198 (Higginbotham, J., concurring).

483. 58 Fed. Reg. 27154-55 (proposed May 6, 1993) (Proposed Application Note 16

office appears to be deliberately undercharging mules in order to avoid harsh mandatory minimums.⁴⁸⁴

*United States v. Calle*⁴⁸⁵ is a decision that exemplifies many of the issues being discussed. Two females escorted the male conspirator on drug delivery trips to translate, register at the hotel and provide companionship. One, Mrs. Grisales, the wife of the male and the mother of their three-year-old child, had previously left him because of his criminal lifestyle. She returned when he assured her he would forsake illegal activity. Instead, her continued involvement in his drug trafficking operations was motivated by the fact that he took their child, and threatened that she would not see the child again unless she participated. Since the government moved to permit Mrs. Grisales a departure based upon her substantial assistance, the court sentenced her well below the statutory minimum, also departing downward based on her family circumstances, duress, and minimal role in the conspiracy. Similarly, the male who was the primary defendant was the beneficiary of a Section 5K1.1 departure.

In contrast, since the government did not request any substantial assistance departure for the other female, whose role was equally minimal, the court was required to apply the mandatory minimum of ten years, which was described by the court as "so completely disproportionate to the realities of the proceeding as to shock the conscience of the Court."⁴⁸⁶ Yet it is unlikely that the government offered the other female an equally favorable plea bargain since unlike the others she was convicted by a jury, rather than pleading guilty. Certainly, the other female who had no criminal record, a stable employment history, and family ties and who is described as having an equally minimal role as Mrs. Grisales would appear as appealing a candidate for a sentencing reduction.

While the effect of gender on the use of the Section 5K1.1 departure in this case is unclear, the fortuity of the departure is evident. We will never know whether the wife was really granted the departure as a way of ensuring the husband's participation in identifying other members of the conspiracy, whether she had enough information to justify a departure, or whether she simply appeared deserving enough to warrant a sentence below the mandatory minimum. The government simply represented that

to Commentary of Section 2D1.1).

484. Daniel Wise, *Prosecutors End-Run Guidelines*, NAT'L L.J.; June 21, 1993, at 3, 18.

485. 796 F. Supp. 853, 861 (D. Md. 1992).

486. *Id.* at 861 n.7.

she "endeavored to provide such assistance as she could."⁴⁸⁷ This hardly appears as a ringing endorsement of her usefulness to the prosecution. At present, a number of Circuits recognize that judges are not bound by the government's wishes as to the extent of the substantial assistance departure.⁴⁸⁸ However, few sentencing judges appear to request detailed factors that would permit them to evaluate the basis of the government's motion. Ironically, several Circuits have refused to permit judges to consider family ties in relation to the substantial assistance departure.⁴⁸⁹

C. Minimal and Minor Role Departures

Determining the extent of a female's criminal culpability also comes directly into play in assigning minimal or minor role status for purposes of downward departures in drug conspiracies pursuant to Section 3B1.2 of the Guidelines.⁴⁹⁰ It is hardly accidental that the Bureau of Justice Statistics defines persons having a "peripheral" role in the offense to include a "girlfriend, spouse, or courier with little knowledge of the drug activity."⁴⁹¹ Indeed, it is well recognized that women are "bit players in the male world of crime," in part due to the sexism of the male criminal underworld.⁴⁹² However, the commentary to Section 3B1.2 implies that minimal participant departures should be used infrequently and in situations involving only a single transaction. Since most drug conspiracies are ongoing by their very nature, women who are associated with male conspirators appear excluded from this definition. For example, *U.S. v. Madera-Gallegos*⁴⁹³ held that a wife who retrieved a heroin sample for her husband was properly denied a four-level minimal role departure, even though the government had recommended that reduction by stipulation.⁴⁹⁴ The trial judge's two-level departure was upheld based on the husband's stating that his wife was his partner, that they kept the gram

487. *Id.* at 862.

488. *United States v. Mariano*, 983 F.2d 1150, 1155 (1st Cir. 1993) (and cases cited therein).

489. *See United States v. Chestna*, 962 F.2d 103, 106-07 (1st Cir.) (per curiam), *cert. denied*, 113 S. Ct. 334 (1992); *United States v. Thomas*, 930 F.2d 526, 528-29 (7th Cir.), *cert. denied*, 112 S. Ct. 171 (1991).

490. Not all cases are drug conspiracies. For example, *United States v. Wilson*, 955 F.2d 547 (8th Cir. 1992), involved a conspiracy concerning stolen property. A female defendant involved with male conspirators was refused a minor participant role because she stored stolen property at her house for the main conspirator. *Id.* at 551. The government opposed the departure because of the defendant's long-term relationship with the main male co-conspirator. *Id.*

491. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS Table 5.43, n. 1 at 542 (1991).

492. ANNE CAMPBELL, *THE GIRLS IN THE GANG* 280 (2d ed. 1991).

493. 945 F.2d 264 (9th Cir. 1991).

494. *Id.* at 268-69.

scale in the cupboard by the Mazola, and that his wife retrieved the drugs in question and came back with the sample.⁴⁹⁵ *United States v. Hall*⁴⁹⁶ is another example of a drug dealer's live-in mate who handled money to obtain items for which identification was needed. While she requested a three-level reduction falling between a minor and minimal participant, her two-level reduction was found not to be clear error.⁴⁹⁷

A minor rather than minimal participant departure was also affirmed in *United States v. Tabares*,⁴⁹⁸ where a couple was selling cocaine from home.⁴⁹⁹ The woman leased the apartment and both made rent payments.⁵⁰⁰ Since the drugs were in plain view and cash was readily accessible, she was not considered a minimal participant.⁵⁰¹ One poignant note about the case that is not developed is that the woman repeatedly told police to get out of her baby's room.⁵⁰² There is no way of knowing whether she would have been able to argue dominance. As with other cases, she clearly knew of the drug dealing.

Sometimes, lawyers even fail to request such departures. In *United States v. Headley*,⁵⁰³ in which a wife's role in the conspiracy was limited to delivering drugs on several occasions, and whose five children had been fathered by the leader of the drug organization,⁵⁰⁴ the court remanded the case based on incompetence of counsel because no argument as to her minor role had been raised before the trial judge.⁵⁰⁵ On the other hand, in *United States v. Sailes*,⁵⁰⁶ the wife's sentence was almost as harsh as that of her husband, who played a much greater role in the drug activity. In some cases, police investigative methods can result in much longer sentences than would otherwise be available. For example, in *United States v. Floyd*,⁵⁰⁷ in order to identify a woman's supplier,

495. *Id.* at 269.

496. 949 F.2d 247 (8th Cir. 1991).

497. *Id.* at 248-49.

498. 951 F.2d 405 (1st Cir. 1991).

499. *Id.* at 407.

500. *Id.* at 408.

501. *Id.* at 410.

502. *Id.* at 409.

503. 923 F.2d 1079 (3d Cir. 1991).

504. This description of the wife's relationship was employed in *United States v. Gaskill*, 991 F.2d 82, 85 (3d Cir. 1993).

505. *Headley*, 923 F.2d at 1082.

506. 872 F.2d 735, 739 (6th Cir. 1989).

507. 738 F. Supp. 1256 (D. Minn. 1990). *Floyd* approved a downward departure for substantial assistance, defendant's "extraordinary turnaround," and defendant's need to care for and supervise her young children. *Id.* at 1261.

the officials kept making transactions with her which then added to cumulative weight of drugs for which she was sentenced.⁵⁰⁸

*United States v. DiIorio*⁵⁰⁹ is a particularly troubling case that demonstrates how gender factors are ignored by the current departure matrix. The trial judge granted a three-level departure for being in between a minimal and minor participant; however, he refused to grant her a further departure based on her personal circumstances.⁵¹⁰ The defendant claimed that her early severe disfigurement left her scarred mentally and physically.⁵¹¹ When she became romantically involved with her codefendant, her love for him blinded her to his conduct.⁵¹² She had long reconstructive surgery and was employed for the previous four years.⁵¹³ The trial judge remarked that applying guidelines gave him great personal anguish, saying, "If I came on this bench as a free agent today, this lady would not go to jail because I believe her story."⁵¹⁴ However, he denied any departure because her condition was not extraordinary.⁵¹⁵ Similarly, she was not a minimal participant because she was aware of her codefendant's continuing activities and counted money for him.⁵¹⁶ While the defendant appealed, claiming that the trial judge believed he could not depart, the First Circuit considered that the judge had exercised his discretion and simply concluded her case was not extraordinary.⁵¹⁷ In other words, breast beating by the trial judge about the effects of the Guidelines was considered an exercise of discretion, not a clear statement that the judge had no discretion to depart.⁵¹⁸ It is unfortunate that the defendant did not also rely on imperfect coercion and dominance in addition to extraordinary circumstances to justify any additional departure. Cases such as these must be argued by relying on a combination of factors. Undoubtedly, when defending women who are bound to one of their male conspirators, lawyers must consider how to weave the varying departure rationales into a theme which supports the greatest permissible departure.

508. *Id.* at 1260-61.

509. 948 F.2d 1 (1st Cir. 1991).

510. *Id.* at 3.

511. *Id.* at 4.

512. *Id.*

513. *Id.*

514. *Id.* at 8.

515. *Id.* at 9.

516. *Id.* at 5.

517. *Id.* at 9.

518. *Id.* at 5.

D. Other Sentencing Issues Concerning Drug Couriers

To the extent that women are simply mules or couriers in drug conspiracies, should they be considered minimal participants? In *United States v. Cacho*,⁵¹⁹ the fact that a mother of four small children was a mule did not entitle her to a departure as either a minimal or minor participant in the conspiracy.⁵²⁰ Similarly, in *United States v. Martinez*,⁵²¹ the denial of a minimal role adjustment was affirmed where the female passenger in a car containing twenty kilograms of cocaine claimed that she was a courier in a transaction necessarily involving numerous other individuals. The court reasoned that the amount of narcotics runs counter to the commentary accompanying Section 3B1.2, which states that a downward adjustment should be used infrequently.⁵²²

At the other end of the spectrum, the Ninth Circuit recently considered the question of discriminatory charging of male drug couriers who alleged they were not treated as favorably by the United States Attorney as were similarly situated females. In *United States v. Redondo Lemos*,⁵²³ the court held that once a prima facie showing of prosecutorial gender-based discrimination is shown in the plea bargaining process, the district court has the authority to determine whether a discriminating purpose motivated the prosecutor in charging the defendant before the court.⁵²⁴ If unconstitutional selective prosecution had occurred, a defendant could appropriately be given the plea bargain he would have received but for the discrimination.⁵²⁵ The case was remanded to determine if an intent to discriminate existed on the part of the prosecutor.⁵²⁶

E. Upward Departures for Female Co-Conspirators

A final issue in conspiracy cases relates to granting upward departures to women. Given the cultural and social factors that face women who become involved in drug cases, courts should be cautious in upholding upward departures in cases in which a wife, originally charged with con-

519. 951 F.2d 308 (11th Cir. 1992).

520. *Id.* at 311.

521. 983 F.2d 968 (10th Cir. 1992).

522. *Id.* at 977.

523. 955 F.2d 1296 (9th Cir. 1992).

524. *Id.* at 1301.

525. *Id.* at 1302-03.

526. *Id.* at 1303.

spiracy, pleads guilty to a lesser drug crime. Thus, cases such as *United States v. Crawford*⁵²⁷ should be read with care. *Crawford* affirmed the trial court's inclusion of the total amount of drugs relevant to the conspiracy as justifying a wife's upward departure for simple possession.⁵²⁸

Of course, in a particular case the wife's extensive role in a conspiracy may justify an upward adjustment.⁵²⁹ While most of the female offenders discussed in this Article exhibit behavior patterns that are characterized by their gender, it would be unrealistic to suggest that all women offenders are so defined. Although gender roles should be considered in determining the extent of a female's culpability, they should not be followed blindly when they are contradicted by facts demonstrating that the particular female offender's criminality was not affected by gender considerations. However, the effects of socialization should not easily be disregarded, unless clearly warranted by the evidence.

Generally, it is difficult to draw a principled line defining how women should be sentenced in drug conspiracies when their role is really one of facilitation based on their socialization. Such women do not exhibit duress in the classic sense, but in many cases little doubt exists that their involvement in crime revolves around their efforts to accommodate their male intimates. Should these women be the beneficiaries of a modern-day paternalism, or does factoring their socialization and/or victimization into the departure mix merely acknowledge the reality of many female offender's lives? Professor Scales has identified domination, disadvantage, and disempowerment as the real issues generally facing women.⁵³⁰ Translating this to a sentencing context, it becomes evident that any attempt to gender neutralize the Guidelines, without recognizing the shared background and experiences of many women offenders in our society, is destined to foster inequity.

X. CONCLUSION

The Sentencing Guidelines claim to be gender-neutral, but in reality they work great harm to women whose lives reflect typical gender roles and expectations. Gender bias cannot be eliminated as a factor in sentencing merely by legislating gender neutrality. This approach overlooks

527. 883 F.2d 963 (11th Cir. 1989).

528. *Id.* at 966.

529. *Cf. United States v. Sabatino*, 943 F.2d 94 (1st Cir. 1991). In *Sabatino*, the wife received a four-level enhancement for having a leading role in her husband's conspiracy to violate the Mann Act. *Id.* at 101. As a former prostitute, she had an active role interviewing new prostitutes, calling American Express to complete credit card transactions, and discussing problems with hired prostitutes. *Id.* at 97-98.

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

the ways in which gender impacts criminality and sentencing. At a minimum, gender effects must be evaluated rather than simply ignored. In particular, the treatment of family responsibilities by the Guidelines is highly detrimental to children of single mothers. To the extent that Circuits are not permitting departures to single mothers, the Guidelines should be modified to require departures for single parents unless good cause exists for denial. Primary parenting responsibilities and pregnancy should also be grounds for a discretionary departure.

More attention should be paid in the Guidelines' structure to physical and mental abuse of female offenders who engage in crime. In addition, questions concerning women's roles as facilitators of criminal activity needs further study. In other words, issues of victimization and socialization of women need to be addressed in Guidelines sentencing. Merely equating males and females in the Guidelines structure frustrates any attempt to create a rational sentencing policy for women.

Further, it is incorrect to assume that policy enacted to eliminate racial or class bias in sentencing will help women. The relationships discounted by the Guidelines to avoid disparity in sentencing males who are poor, unemployed, or members of a minority group are the very relationships that are key in defining traditional female gender roles and expectations. As a practical matter, women have been disadvantaged by being blended into the Guidelines equation without paying any attention to gender effects. Ultimately, the gender neutrality of the Guidelines has worked to produce gender bias in sentencing females.

Ideally, a federal task force is needed to provide a rational sentencing policy for female offenders. This should include representation from the Justice Department, Defense Bar, Judiciary, Sentencing Commission, Bureau of Prisons, Probation Office and social service agencies as well as criminologists and those who have studied family based prisoner issues. Such a task force would focus on all of the gender issues that affect the sentencing and imprisonment of women. Canada established a Task Force on Federally Sentenced Women which issued a report in 1990 focusing on incarceration.⁵³¹ Given the Guidelines' regime, which limits judicial discretion to sentence women to nonincarcerative alternatives, in the United States a broader task force framework is necessary to include sentencing issues. For too long women have been boxed in by a Guidelines structure dominated by visions of male criminality. It is time that

531. See Jane Miller-Ashton, *Canada's Female Offenders*, 3 *FED. PRISONS J.* 63, 63-68 (1992).

the gender realities that define the lives of many female offenders are integrated into the assumptions underlying the Guidelines. In addition, a uniform approach should be developed for establishing alternatives to imprisonment and programs within prisons that foster family ties. Finally, it is clear that mandatory minimum penalties frustrate any attempt to create a truly rational sentencing policy for females and give prosecutors almost unreviewable power to plea bargain in a manner that can disadvantage women because of their gender roles. Substantial assistance should not depend on fortuity when women's roles in conspiracies operate in a gendered way to prevent them from obtaining the only departure that offers a sentence below the mandatory minimum. Unfair gender effects can now be added to the long list of reasons to abolish mandatory minimums.