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The Effect of Gender and Family Status on Downward  
Departures in Federal Criminal Sentences

A dissertation presented

by

Amy S. Farrell

To the  
Law, Policy and Society Program

In partial fulfillment of the requirements for the degree of

Doctor of Philosophy

In the field of Law, Policy and Society

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Boston, Massachusetts

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The Effect of Gender and Family Status on Downward  
Departures in Federal Criminal Sentences

by

Amy S. Farrell

FINAL REPORT

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**ABSTRACT OF DISSERTATION**

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## ABSTRACT OF DISSERTATION

Although, the Federal Sentencing Guidelines were designed to reduce disparities in sentencing between male and female offenders, important questions about the effectiveness of the Guidelines in reducing disparities remain unanswered. By conducting a statistical analysis of sentencing data from the United States Sentencing Commission (1996-1997), I have uncovered differences in the application of the Guidelines that result in continued sentencing disparities between men and women. Women are more likely than men to receive departures from the Guidelines, and these departures disproportionately decrease sentence lengths for women. Additionally, my analysis has shown that race affects both male and female defendants' ability to receive particular types of departures. White women and men are more likely to receive downward departures for providing "substantial assistance" to prosecutors than are non-white defendants, but non-white men and women are more likely to receive departures from the Guidelines based on traditional mitigating factors, such as family responsibilities. I have also used qualitative case analysis to examine how traditional gender norms influence departure decisions in cases involving extraordinary family circumstances (EFC). By conducting narrative analysis on 193 federal sentencing opinions involving EFC departures between 1989 and 1999, I have identified several themes illustrating how socially constructed norms about gender roles in the family shape judicial interpretations of "ordinary" and "extraordinary" family circumstances as they affect sentencing departures. This analysis draws attention to contradictions between the stated goals of gender-neutral sentencing and the application of such sentences for individuals whose lives are shaped by gender.

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## Chapter One

### Introduction and Theoretical Background

Since the mid-1900s, lawmakers and scholars have become concerned with the disparate treatment of offenders in the criminal justice system because it threatens an accepted principle of modern criminal justice--that defendants, regardless of their personal characteristics, should be treated equally under the law. Although race and class inequality have been at the forefront of our national dialogue about equal justice, gender disparity in sentencing remains the most consistent form of unequal treatment. This study explores whether or not women are being treated “equally” with men under the Federal Sentencing Guidelines and examines how cultural gender norms continue to influence federal sentencing decisions. Fundamentally, this study helps illuminate the conflicts faced by female defendants who are sentenced under a “gender-neutral” sentencing system that was designed primarily for male defendants.

In response to evidence of disparate sentencing practices, state and local legislatures have adopted determinate sentencing systems, such as sentencing guidelines, to limit judicial discretion and reduce bias in the sentencing process. The 1984 Federal Sentencing Guidelines are arguably the most prominent legislative effort to limit judicial discretion. The Guidelines prevent federal judges from using the sex of a defendant to determine a sentence length and discourage judges from considering a number of “gendered” characteristics, such as family responsibilities, during

sentencing. Although these decisions were made primarily to reduce the effect of racial bias in sentencing, they significantly affected the sentencing of women.

An unprecedented growth in women's incarceration in federal prison has followed the adoption of the Guidelines. In response, some feminist scholars have begun to question the "justness" of gender-equality in sentencing. Instead, they have argued that we should adopt "equitable" sentencing systems designed to recognize the cultural differences between men and women's experiences.

This study examines how a defendant's biological sex (male/female) and/or social gender roles (feminine/masculine) affect sentencing decisions under a "neutral" guideline system. There are two main objectives for this project. The first objective is to determine if women are treated differently than men under the Guidelines by virtue of their biology alone. That is, are women sentenced more leniently than men, even when other relevant legal factors such as offense severity and criminal history are held constant? The second objective is to understand how cultural norms about men and women's roles in the family affect judicial decisions to sentence defendants above or below the ranges specified in the Guidelines.

The first two chapters of this study provide background materials on the issue of gender disparity in sentencing and examine how the Federal Sentencing Guidelines were designed to solve the problem of "biased" sentencing. Research has shown that judges and other legal actors have historically relied on cultural norms about women's "place in society" as a justification for sentencing female defendants more leniently

than men. Chapter one ends with a review of the empirical research on gender disparity in criminal sentencing, examining the most prominent theoretical explanation for why women have historically been sentenced more leniently than men. The second chapter describes the origin, application, and evolving judicial interpretation of the Federal Sentencing Guidelines with specific attention to how judicial “departures” from a prescribed sentencing range circumvent the uniformity of the Guidelines. During the formation of the Guidelines, the Sentencing Commission outlined specific rules for departures, categorizing some circumstances as “prohibited” grounds for departures (race, class, gender), and other circumstances as “discouraged” grounds for departures (family responsibilities, rehabilitation). Departures from the Guidelines based on a defendant’s “extraordinary family circumstances” (EFC) serve as an important illustration of how judges can recognize gender roles at sentencing. I describe the evolving jurisprudence and application of EFC departures in the second chapter.

The third and fourth chapters address the central question: Are women treated more leniently under the Federal Sentencing Guidelines than men? For this analysis I have used data from the United States Sentencing Commission on criminal sentencing from 1996 to 1997. I focus on six key questions.

1. Are women more likely than men to receive departures from the Federal Sentencing Guidelines? (Chapter three)
2. Are women more likely to receive either judge-motivated or prosecutor-motivated departures? (Chapter three)

3. Are white women more likely than women of color to receive departures (either judge-motivated or prosecutor-motivated)? (Chapter three)
4. Are women less likely than men to receive prison sentences? (Chapter four)
5. Do incarcerated women receive more lenient sentences than incarcerated men? (Chapter four)
6. Do white women receive more lenient sentences than women of color? (Chapter four)

Statistical tests for differences in sentencing outcomes between men and women can tell us whether women are sentenced more leniently than men, but they are not particularly helpful for understanding why such differences exist. In the fifth chapter I take an in-depth examination of how cultural gender norms emerge in one type of departure from the Guidelines. Using case narratives from 207 EFC departure opinions, I develop a set of themes to illustrate how gender roles emerge in the legal construction of family circumstances that justify a departure from the Guidelines. The United States Sentencing Commission has limited EFC departures to circumstances that are extraordinary or not common among defendants. Thus, women's traditional role as caretakers makes it more difficult for female defendants to receive EFC departures than men because such responsibilities are quite common among women. Through an examination of EFC departures in federal courts, this study provides a unique opportunity to explore the interaction between social norms around gendered family roles and the application of "gender-neutral" law making policies.

The sixth chapter delves directly into the dilemma of how to apply gender-neutral policies to social problems, such as criminal sentencing, that are directly affected by gender norms. It is well recognized that law is an imperfect tool to address complex social and structural problems such as gender equality (Rhode, 1989; Williams, 1991). Formulaic and rigid legal rules must be applied to individual defendants with complex problems that often defy easy categorization. Although judges describe defendants in sex-neutral ways, they commonly make factual distinctions between the expected roles of men and women in families. Though policies such as the Federal Sentencing Guidelines can be written to require “gender-neutrality,” the laws’ interaction with a gendered social order makes the application of truly “neutral” principles unattainable. Feminist legal scholars argue that laws written from a supposedly neutral position are often implicitly informed by the normative standards based on the perception of the authors. Thus, a gender-neutral law runs the risk of creating male-centered standards under the guise of equality. Some have argued that the Federal Sentencing Guidelines, originally aimed at creating “certain and just” punishment through uniform sentencing, have instead created an irrational and at times unjust sentencing system for female offenders whose circumstances are often quite different than those of the typical male defendant (Raeder, 1993). Chapter six addresses the challenges that confront female offenders under gender-neutral sentencing policies.

## **Gender and Sentencing Prior to Structured Sentencing Reforms**

Gender differences in sentencing have not been static in the United States. Rather, paradigm shifts from rehabilitative to retributive penology have strongly influenced the relationship between gender and sentencing. Historically, female offenders were less likely to be arrested and often sentenced more leniently than similarly situated male offenders. However, such judicial discretion has often been a two-edged sword for women. Turn-of-the-century sentencing laws also allowed judges to send women to prison for minor public order offenses for which men were rarely even arrested (Temin, 1980; Rafter, 1990). Until the 1970s, state sentencing laws allowed judges to sentence women differently than men because female offenders were perceived to be more amenable to rehabilitation and would benefit from longer indeterminate sentences (Pollock-Byrne, 1990). Conducting an analysis of Pennsylvania's 1964 Muncy Act, Carolyn Temin (1980) found that judges prescribed longer prison sentences for women based on the belief that women were more likely to benefit from the rehabilitative nature of prison.

Historical examinations of women's imprisonment help illuminate the inconsistencies of women's treatment in the criminal justice system. Nicole Rafter (1990) describes the condition of women's imprisonment from 1800-1935 as "partial justice" because women both benefited from and suffered under the conditions of judicial paternalism. Rafter explains that early gender stereotyping resulted in women being sentenced to non-custodial institutions, as protection, while serving longer

sentences with much less adequate care and services than those available to their male counterparts. Discretionary sentencing allowed judges to take into consideration family obligations, pregnancy, motherhood, and a woman's standing in the community when determining sentences. Therefore, gender stereotypes of women could be either an advantage or a disadvantage to female defendants, depending on their social location. For female defendants, the difference between leniency and harshness was often based on a judge's determination that the defendant was a "good" or a "bad" woman.

In 1973 the New Jersey State Supreme Court became the first court to reverse statutes that openly discriminated against women by allowing judges to sentence women indeterminately and/or differently from male offenders. Justice Sullivan, speaking for the New Jersey Supreme Court in *State v. Chambers* (1973) argued that sentencing female offenders indeterminately, when a similarly-situated male would receive a fixed prison term, was unconstitutional because such practices violated the Equal Protection Clause of the Fourteenth Amendment (Moyer, 1985). However, it was not until the mid-1980s that the federal government and many states constructed legislation designed to reduce bias by limiting judicial discretion during sentencing.

Prior to the adoption of sentencing guidelines, a substantial body of empirical research has examined how personal characteristics of defendants, such as gender and race, affect sentencing outcomes. In 1995 Kathleen Daly and Rebecca Bordt conducted a meta-analysis of the existing body of empirical work on gender and

sentencing disparity. This review was intended to do for gender disparity what Kleck (1981) and Hagan and Bumiller's (1983) articles did for race disparity in sentencing. That is, Daly and Bordt intended to describe and summarize what the empirical literature to date revealed about gender disparity in sentencing. Daly and Bordt's analysis confirms that gender disparity in sentencing is strongly linked to the social contexts of a "gendered existence." Thus, while racial disparity in sentencing may be a direct result of minority group disadvantage or prejudice, gender disparities are "refracted through layers of cultural and social institutions" that must recognize and confront the reality of gender differences (Daly and Bordt, 1995:164). They conclude that an empirical and historical understanding of gender disparity must be informed by understanding how culturally imposed gender norms shape both individual behavior and institutional responses.

Most studies since the 1980s have shown that women are sentenced more leniently than men (Parisi, 1982; Curran, 1983; Nagel and Hagan, 1983; Zingraff and Thomas, 1984; Figueiria-McDonough, 1985; Wilbanks, 1986; Johnston, et. al. 1987). Although statistical research on gender disparity in sentencing universally has suffered from small sample sizes and insufficient control measures, researchers have compensated for these limitations through interviews, ethnographic observation, case-studies, and secondary document analysis. Past research on gender disparities in criminal sentences explains disparate treatment in three different ways: judicial paternalism, judicial concern for family unity, and judicial leniency for "good"

women. These three theories are described in more detail in the following subsections of the chapter.

### *Judicial Paternalism*

Early research on gender and sentencing used a theory of judicial paternalism to explain gender disparities in the criminal justice system. This theory is based on the belief that courts treat women more leniently than men out of a “duty” to protect women, as the weaker sex, from the harshness of prison. According to Parisi (1982) “male judges and prosecutors treat females more leniently because our society has taught them to approach females in a fatherly and protective manner and to assume that females have an inherently submissive, domestic nature” (Parisini, 1982: 207). Judicial paternalism can be observed in early (pre-1970) sentencing laws for women which provided the judiciary with the power to sentence women to reformatories instead of prison in order to protect the “welfare of women and mothers” (Moyer, 1985). By sentencing women to more lenient punishment, the court enforced traditional notions of women as “delicate” and “in need of protection.”

Darrell Steffensmeier (1980) identifies assumptions about the malleable nature of women as an additional justification for judicial paternalism. Under this assumption women are perceived to be more amenable to rehabilitation than men. Using aggregate state-level sentencing data in combination with interviews, Steffensmeier argues that judges believe women are less blameworthy than similarly situated males and have more potential for rehabilitation. Steffensmeier concludes

that judges used such traditional assumptions about women's nature to justify lenient sentencing for female offenders.

The theory of court paternalism has been challenged on a variety of fronts. First, the methodological limitations of early studies on gender disparity in sentencing often forced researchers to compare the crude sentencing outcomes for men and women without taking into consideration the effects of other variables, such as the severity of the offense, the existence of evidence, and a defendant's criminal history. Second, as women increasingly serve as judges and attorneys, a theory of judicial leniency based on paternalism loses some of its original explanatory power. Finally, theoretical questions about why judicial paternalism existed could not be answered from statistical sentencing comparisons alone. In response to this deficit, researchers such as Kathleen Daly (1987) have argued that the scholarly community became so entrenched in the belief that court paternalism explained sentencing disparity that it failed to step back and question whether court officials were actually concerned about protecting women. Instead, Daly suggested courts have used leniency toward women as a vehicle for protecting the stability of families.

#### *Judicial Concern for Family Unity*

The theory that differences in family responsibilities cause gender disparities in sentencing is founded on a belief that judges sentence women more leniently than men because they fear that family safety would be jeopardized if the courts took a mother out of the home for the purpose of incarceration. Research from many

disciplines suggests that modern gender roles within the family are no longer controlled by traditional stereotypes, such as the mother as ever ready caretaker and the father as absent provider (Stack, 1974; Chodorow, 1978; Skolnick, 1991; Coontz, 1992; Berry, 1993). However, family-based theories of justice argue that judges continue to sentence women more leniently in order to keep women with their families, rather than to protect women's "delicate" nature.

Mary Eaton's (1982) ethnographic study on the role of familial ideology in sentencing practices in London concluded that magistrates evaluate male and female defendants by their family situations. Eaton argues that female defendants used their family responsibilities during pleas for mitigation of their sentence to reflect their conformity to normative social standards for women, as mothers or wives. Thus, the criminal courts perpetuated the subordination of women by reducing sentences for women who presented themselves as "traditional" mothers. According to Eaton, being familial alone was insufficient for judicial leniency. Instead, courts used family circumstances as a justification for reducing sentences when the woman's role in the family met "traditional" standards.

Early work by Daly (1987, 1989) challenged the mother-centered model of disparate sentencing illustrated in Eaton's study. Daly criticizes the notion that only women receive leniency in sentencing due to their family responsibilities. In the place of the women/mother-centered sentencing approach, Daly constructed a model of family-based justice in which physical care, economic assistance, and emotional

support of families were the main factors in judicial leniency. Using interviews and court observations in a Massachusetts city, Daly found that judges considered protection of the family unit as a legitimate concern of the court. Therefore, men who are primary care-takers of families, or who contribute to the “wholeness” of a family, could receive the same leniency from the court as that afforded to women with children. As a corollary, Daly argued that non-familied defendants (either male or female) were treated differently from either familied men or familied women.

In addition to ethnographic observations, Daly conducted statistical comparisons of male and female sentencing outcomes in Springfield, Massachusetts; New York City; and Seattle, Washington. In these jurisdictions, family status had a greater effect on sentencing mitigation than gender alone. Daly argues that defendants with strong commitments to childcare and families are sentenced more leniently than defendants without family responsibilities, with familied women still afforded more judicial leniency than familied men due to the strong role of mothers in primary caretaking for children and families. Through interviewing judges, Daly discovered that court officials justify sentencing familied-women more leniently than familied-men because the state can more easily replace the economic support lost when a father is incarcerated than to provide the physical and emotional care lost when a mother is incarcerated. Daly’s model of family-based justice suggests that a strong judicial concern for the preservation of the family results in more lenient sentences for women.

Social control has also been used to explain why defendants with family responsibilities are sentenced more leniently than those without. Some judges assume that people with close ties to families will refrain from future deviance. Kruttschnitt and Green (1984) suggest that women are sentenced more leniently than men because judges think women's family responsibilities act as a type of informal social control which reduces the need for incarceration, a formal mechanism of social control. Therefore, family responsibilities can become an important consideration at sentencing based on the theory that they serve a deterrent function.

The effect of gender differences in family roles and responsibilities on sentencing is far from settled. The empirical research on family-based sentencing disparity is sparse. Most research on family and sentencing has been conducted using small populations for judicial interviews or ethnographic observations in the courtroom. Although these studies may not be generalizable to the entire population of sentenced defendants, their rich descriptions have helped to provide a foundation for understanding how women's roles and responsibilities within the family have affected sentencing outcomes. A small number of studies have called into question the idea that women benefit disproportionately from family responsibilities. For example, in a 1991 study Gayle Bickle and Ruth Peterson conducted a statistical test of gender, race, and family roles using data from federal defendants during the late 1970s. Using data that combined pre-sentence investigation information on offender backgrounds with sentencing outcome data, Bickle and Peterson found that male

defendants received a greater benefit from family responsibilities than female defendants. Although Bickle and Peterson agree with Daly that economic support is less important for mitigation than physical or emotional support, they point out that male involvement in parenting was rewarded to a greater degree than female involvement in parenting. Thus, judicial consideration of family responsibilities may disproportionately benefit male defendants more when they are involved with family caretaking because such duties are traditionally not expected of men.

*Judicial Leniency for "Good Women"*

A number of feminist scholars have been critical of the empirical research on gender disparity in sentencing because it has traditionally focused on differences in sentencing outcomes between men and women. Such critics suggest that it is equally important to understand why some women are treated differently than others. Past research confirms that cultural stereotypes about "appropriate" behavior for women affect how women have been treated in the criminal justice system (Chesney-Lind, 1973; Kruttschnitt, 1984; Rafter, 1990; Butler, 1997). Nicole Rafter (1982, 1990) documents a dual system of punishment for female offenders during the middle of the nineteenth century. Women whom the court deemed "feminine" or "trainable" were candidates for reformatories. Conversely, women whom the court judged "bad" or "masculine" were subject to incarceration in a penal institution. Similar research on western prisons in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries shows that female offenders who violated socially accepted gender norms were sentenced to male prisons.

Because relatively few women committed serious crimes during this period of history, there was little demand for separate female prisons. As a result, “fallen women,” the most unfeminine female offenders, were left to serve their sentences in male prisons (Butler, 1997).

Candice Kruttschnitt (1982, 1984) found that for women defendants, the distinction between law-abiding behavior and social respectability is blurred in the courtroom. Kruttschnitt concludes that “the degree of respectability that she [the defendant] achieves in other areas of her life appears to be, taken in total, as equally significant as her previous involvement with the law” (1984: 232). Thus, while male offenders are evaluated on prior criminal records and the seriousness of their offense, female offenders are additionally being judged by how well they meet cultural expectations of appropriate feminine behavior.

Some research shows that the sentencing of female offenders is influenced by the type of offense in which they were involved. Courts have historically perceived women who committed “masculine” offenses as “evil women,” and have sentenced them more harshly than their male counterparts. Such disparate sentencing was often justified on the grounds that the actions of “evil women” were both a legal and social transgression. In a study of female homicide across six major cities, Coramae Richey Mann (1996) found that women’s punishment for murder was gender-based. Women who killed men received more serious final charges and were sentenced to prison more frequently with longer sentences than women who killed other women. Mann

concludes that such disparities are based on gender role violations. The criminal justice system punishes women more harshly when they defended themselves against spousal violence or assaults by men -- a step outside their passive feminine role.

### **Lingering Questions About Gender Disparity in Sentencing**

The effect of a defendant's gender on sentencing outcomes is far from settled. New research has suggested that the more complex interaction of race and gender may disrupt the patterns of leniency toward women observed in previous studies. Studies on race and sentencing before and after the adoption of sentencing guidelines have dealt with the issue of race disparity in criminal sentencing (Kleck, 1981; Spohn, Gruhl and Welch, 1981; Albonetti, 1997; Alexander, 1997). However, reviews of the race and sentencing literature have told us little about race differences in the sentencing of women. Scholars have long recognized the influence of race and class on criminal sentencing, but the analysis of gender, race, and sentencing has historically been scarce. To understand the relationship between race, gender, and sentencing, feminist scholars have begun to explore the relationship among "racism, class bias, and patriarchy in the criminal law's subordination of women" (Roberts, 1997: 4). Black-feminist theorists have argued that race is a multiplicative, as opposed to additive, factor of disadvantage for black women (Hill-Collins, 1991). Thus, race is not a single factor among many for women of color, but rather, one that intensifies the significance of other disadvantages faced during sentencing. Without

examining the sentencing of women of color, we cannot understand the multiple influence of race and gender on sentencing outcomes.

Historically women of color have not benefited from judicial chivalry to the same degree as white women (Feinman, 1986; Rafter, 1990). Courts often sentenced white women to reformatories and black women to traditional penal institutions. Racial bias in court processing also resulted in more women of color being sentenced to prison for longer terms. Such racial disparities in the sentencing of women may explain the appearance of increased criminality among black women during the late 1800s and early 1900s (Sarri, 1986).

Studies comparing recent sentencing outcomes for white women and women of color have found that black women are overrepresented in the prison population and are serving longer prison terms than white women (Kruttschnitt, 1982; Chilton and Datesman, 1987). Data on the racial breakdown of female inmates in federal prison also suggested that race influences the sentencing of female offenders. In 1993, black women constituted 39 percent of the female inmates in federal prison, far greater than their representation in the overall population (Bureau of Justice Statistics, 1993). However, these studies are limited because they did not control for many important variables such as prior history or type of crime. Yet, more systematic studies of sentencing disparities have found that race alone fails to explain sentencing disparities between white and black female offenders (Gruhl, Welch and Spohn, 1984; Daly, 1989).

Feminist legal scholars have raised a serious concern about the possible influence of a social mythology of “unfit” black mothers on race and gender disparity in sentencing outcomes (Roberts, 1997; Gomez, 1998). The selective prosecution of black women aimed at preventing prenatal substance abuse is one example of how race and gender interact to influence sentencing outcomes. Local and national studies report little difference in the prevalence of drug abuse by pregnant women of color and pregnant white women, yet women of color have been disproportionately targeted for fetal substance abuse (Chasnoff et. al., 1988; Maternal, Infant, and Child Health Council, South Carolina, 1991; Dickerson and Leighton, 1994). Scholars suggest that both the greater government supervision of black women and social perceptions that they have failed to meet white middle-class ideals of motherhood may be responsible for the selective prosecution of black women for fetal substance abuse (Roberts, 1997, Gomez, 1998). The interaction of race and gender may be the most critical element for gaining a full understanding of how sex and cultural gender norms affect sentencing.

Within the large body of research focusing on sentencing disparity between men and women, there are researchers who suggest that the effect of gender on sentencing may not be as great as originally proposed. More advanced control mechanisms for quantitative analysis have challenged the conclusions about gender disparity that were found in older bivariate sentencing analysis. Research by Steffensmeir, Kramer and Streifel (1993) and Tjaden and Tjaden (1981) using control

variables such as past record and multiple offenses, found women were more likely to commit fewer serious crimes than men and had less serious criminal histories. Therefore, female defendants were sentenced more leniently than men because they were actually less serious offenders. Fenster and Mahoney's (1981) study of chivalry and paternalism illustrated the importance of statistical controls. By compiling a sample of male and female sentences for felony offenses. As they grouped the defendants by criminal histories, they found that sentencing levels between men and women with similar prior records began to converge. Fenster and Mahoney conclude that the perception that women receive lenient sentences was an artifact of fewer past offenses. Similarly, Daly and Bordt's meta-analysis of gender and sentencing research, found that controlling for prior record and offense severity often reduced the relationship between sex and judicial leniency.

Kathleen Daly's (1995) qualitative study of sentencing in New Haven, Connecticut also indicates that gender norms and family roles may play a lesser role in sentencing than previously believed. Daly used paired samples of male and female defendants to test whether gender or family responsibilities affected sentence outcomes. After comparing the crime and criminal history reports for both male and female offenders, she concludes that few differences actually existed in types of sentences.

While the literature on sentencing practices prior to the adoption of structured sentences guidelines identified gender as a factor in preferential sentencing, the

overall effect of being male or female remained unclear. However, much of this research is incomplete, in part, because scholars have been reluctant to question the gendered nature of both the sentencing process and the criminal justice system itself. Instead, research on gender and sentencing has traditionally treated a defendant's gender as one independent variable among many, comparing the experiences of female defendants against a benchmark of male sentencing. Such research methods fail to illuminate how gender roles influence the sentencing process or examine how male and female defendants "do gender" (Lorber, 1995). To more fully understand why gender differences exist in sentencing outcomes, it is increasingly important to examine how institutions themselves are shaped by gender, and how such institutional gender biases affect female defendants differently depending on their race or social class. Until we begin to place gender at the center of our analysis, women's experiences within the criminal justice system will continue to be marginalized by research.

Over the last decade the landscape for research on gender disparity in sentencing has changed dramatically. The widespread implementation of mandatory-minimum sentences and sentencing guidelines has weakened the discretionary powers of judges. Therefore, new research on the effect gender on sentencing outcomes must be understood within the context of sentencing guidelines. This project seeks to understand the sentencing decisions for male and female defendants under a

sentencing guidelines system while also identifying how the sentencing process under the federal guidelines is shaped by cultural gender norms.

## **Chapter Two**

### **The Origin of Gender-Neutral Sentencing Policies and the Adoption of the Federal Sentencing Guidelines**

Previous research, as discussed in chapter one, has confirmed that a defendant's biological sex and social gender roles often affect criminal sentencing decisions. Even though the effect of gender has not been static throughout history, women (particularly white middle-class women) have consistently received more lenient sentences than men. In response to these and other disparities in sentencing outcomes, Congress adopted a form of determinate sentencing, the Federal Sentencing Guidelines, to reduce the influence of a defendant's personal characteristics during the sentencing process. This chapter tracks the development and implementation of the Guidelines to provide a historical context for questions about how gender affects sentencing under a determinate sentencing model. The history of the "guidelines movement" and court interpretation of policy statements from Federal Sentencing Commission about when judges may depart from the Guidelines, affect how federal sentences are determined today. This chapter ends with an overview of the development and interpretation of the "extraordinary family circumstance" (EFC) departure, a departure strongly influenced by gender norms. By documenting how a specific departure has developed and been interpreted by the courts, I hope to illustrate how gender continues to influence sentencing outcomes under the Guidelines.

## **History of the Federal Sentencing Guidelines**

Until 1987, federal district court judges had relatively unrestricted power to sentence defendants. While these sentences could be reviewed by appellate courts, the appeals process showed great deference to the “fact sensitive” process of sentencing within the district courts. As long as sentences fell within proper statutory limits they were not reviewed. The discretionary latitude of judges to determine sentencing outcomes was perceived by many scholars, activists, and lawmakers as the cause of judicial leniency that resulted in discriminatory sentencing. Under public demand for harsher and more certain punishment, the United States Congress passed a landmark comprehensive structured sentencing system known as the 1984 Sentencing Reform Act.<sup>1</sup> Following a national trend of rejecting indeterminate, rehabilitation-based sentencing schemes, this new federal sentencing system was designed to meet three main objectives: 1) produce “just” and “uniform” punishment, 2) increase crime control, and 3) reduce the influence of extra-legal defendant characteristics on sentencing (Smith and Koh, 1993).

The federal sentencing reform movement of the late 1970s and early 1980s was part of a broader shift toward formalism and rationalization in American criminal law. Substantive criminal law and criminal procedure underwent major revisions

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<sup>1</sup> The Sentencing Reform Act was part of the Comprehensive Crime Control Act of 1984. The provisions of the Sentencing Reform Act can be found in 18 U.S.C. Section 3551-3673 or 28 U.S.C Section 991-998.

during the 1960s, setting the stage for broad-based sentencing reform. In 1965, the American Law Institute drafted the Model Penal Code (M.P.C.) as an attempt to standardize criminal law. The M.P.C. provided a template for the characteristics of different types of crimes for states to adopt. Simultaneously, the United States Supreme Court began placing stringent rules on criminal investigations and police practices in an attempt to formalize and standardize treatment of suspects, which had historically varied from state to state (Stith and Cabranes, 1998).

The federal sentencing reform movement developed out of the unlikely alliance between law makers concerned about equal rights and policy makers pushing for retributive and punitive justice. This movement was influenced, in part, by the race-centered civil rights struggle in the United States, which brought increased political and scholarly attention to racial disparities in criminal sentences. Although a substantive body of research demonstrated gender disparity in sentencing, the national dialogue on sentencing reform was framed around race and class disparity. Gender inequality in sentencing was a secondary concern to both social scientists and policy makers.

In reaction to perceived inequalities in the federal sentencing system, social and legal scholars pressed for federal legislation that would replace indeterminate sentencing with a system that offered greater predictability in determining proper sentence dispositions and lengths of imprisonment (Frankel, 1973; von Hirsch, 1976;

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Kennedy 1979). During the 1970s and early 1980s, a number of scholarly studies were published illustrating a lack of uniformity in judicial sentencing and parole practices in both federal and state courts. One of the most interesting and illuminating of these studies was conducted in the second circuit in the mid-1970s (Partridge and Eldridge, 1974). In this study, fifty district court judges from the second judicial circuit, which include the federal districts in New York and Connecticut, were given a set of identical criminal files and instructed to indicate a sentence for each case. The “hypothetical” sentences imposed by the fifty judges varied dramatically for each test case. For example, the “hypothetical” sentences for a bank robbery case ranged from five years imprisonment to eighteen years imprisonment.

In addition to exposing stark disparities in sentencing practices among individual judges, a number studies concluded that sentencing disparities were correlated with individual characteristics of defendants such as race, gender, education, and income (Hagan, 1974; Tiffany, 1975; Lortz and Hewitt, 1977; Farrell and Swigert, 1978; Sutton, 1978). These studies demonstrated that judicial discretion in sentencing led to wide variations in sentence outcomes among different judges, the effect of which often resulted in race, class, and gender disparity in sentencing.

Alongside the scholarly debate about sentencing disparities, policymakers in law enforcement agencies found themselves reacting to ideological shifts in the criminal justice community away from the goal of rehabilitation. During the late

1970s and early 1980s, a large and powerful segment of the criminal justice community adopted punitive, deterrent-based models of justice. In speeches and testimony before Congress and in the media, these groups recalled the image of the unrepentant young male predator in order to symbolize the failures of rehabilitation. The campaign for retributive sentencing ignored the experiences of female offenders and inmates.

In response to scholarly research and internal governmental pressure to develop standardized models of sentencing, the United States Board of Parole was the first agency to experiment with a guidelines model. The parole board guidelines, initially developed in the late 1960s, allowed parole hearing examiners to set the length of incarceration within a narrow range provided for by the guidelines. Deviations from the parole guideline ranges were granted only by written request (Bureau of Justice Assistance, 1996). This model was later applied to sentencing in experiments in four local jurisdictions (Essex County, New Jersey; Polk County, Iowa; Denver, Colorado; and the State of Vermont) from 1974 to 1976. By the late 1970s and early 1980s nearly all states were experimenting with or adopting variations of these standardized sentencing models.

The Sentencing Reform Act of 1984 was the first significant effort to reform and equalize sentencing in the federal courts, which have jurisdiction for all violations of federal law. There are ninety-four federal district courts, with at least one federal court located in each state. The Sentencing Reform Act created the United States

Sentencing Commission,<sup>2</sup> abolished federal parole, and narrowed judicial discretion at sentencing through the use of standardized sentencing ranges.

Organized in October 1985, the U.S. Sentencing Commission was granted authority by Congress to design and monitor the Federal Sentencing Guidelines (28 U.S.C. Section 991, b1B). The Sentencing Commission is an independent agency in the judicial branch of government and the United States President appoints its seven members. The Commission evaluates the effects of the Guidelines on the criminal justice system and recommends appropriate modifications of criminal law and sentencing procedures to Congress.<sup>3</sup> The Sentencing Commission submitted its original guidelines and policy statements to Congress on April 13, 1987. The Guidelines became effective on November 1, 1987, and have been applied to all federal offenses committed on or after that date (Sentencing Commission, 1991).

Shortly after implementation of the Guidelines, the constitutionality of the Sentencing Reform Act was challenged on a variety of fronts. Defendants sentenced under the Guidelines claimed that the Sentencing Commission and the Sentencing Reform Act were improperly usurped judicial authority and violated the separation of powers between Congress and the judiciary. The constitutionality of the Sentencing Commission's authority was upheld in the 1989 case of *Minstretta v. United States*.

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<sup>2</sup> The duties of the United States Sentencing Commission are set out in chapter 58 of title 28 of the United States Code.

<sup>3</sup> The Commission has the authority to submit each year to Congress guideline amendments which automatically take effect 180 days after submission unless a law is enacted to the contrary (United States Sentencing Commission, 1997).

In *Mistretta* the Supreme Court upheld the constitutionality of the Sentencing Reform Act and of the Commission as an independent judicial branch agency, arguing that achieving uniformity in sentencing was an appropriate congressional action.

### **Operation of the Guidelines and Use of Downward Departures**

The Federal Sentencing Guidelines were designed to take into account the nature of a defendant's criminal conduct and their criminal record. Sentences for each offender are calculated by assigning a primary offense level, a number that serves as a starting point in assessing the seriousness of an offense. The primary offense level can increase or decrease based on the particular circumstances of the defendant and his or her level of involvement in criminal activity. The calculation of an offender's primary offense level is outlined in the pre-sentence investigation report prepared by the Department of Probation.<sup>4</sup> The primary offense level forms one axis of the table used to determine sentencing ranges under the Guidelines. The primary offense axis extends from level one (least serious) to level forty-three (most serious). The second axis of the sentencing grid represents the defendant's criminal history, on a scale of one to six. Like the primary<sup>5</sup> offense level, the calculation for a defendant's

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<sup>4</sup> Probation officers calculate the offense level based on the seriousness of the offense, the number of counts, and any relevant adjustments, as specified in the Guidelines Manual, that could be made to the offense level. Adjustments can either increase or decrease the offense level depending on the particular adjustment and are outlined in Chapter Three of the United States Sentencing Commission, Guidelines Manual.

criminal history score is outlined in the pre-sentence investigation report. The defendant sentencing range is determined by the point where the offense level and criminal history category intersect on the Federal Sentencing Guidelines Grid, included in Appendix I.

Under the Guidelines, federal judges retain discretion for sentencing an individual within the range that has been prescribed by the Sentencing Commission. However, if judges choose to impose a sentence outside of the guideline range they must justify the departure by identifying the factors that distinguish a defendant's circumstances from other similarly situated defendants. The decision to sentence an individual below the range mandated by the Guidelines is commonly referred to as a "downward departure." Downward departures are important because they disrupt the uniformity of the Guidelines and re-introduce judicial discretion into the sentencing process.

When a judge determines that an individual defendant's circumstances warrant sentencing outside the guideline range, the judge may reduce the defendant's offense level by a certain number of points, decreasing the length of the sentence. In all cases the judge must provide reasons for any departure. The pre-sentence investigation report, prepared by representatives from the federal probation office, helps judges identify individual facts or circumstances about a defendant that might justify a departure from the Guidelines. The pre-sentence investigation report gives judges information about a defendant's criminal history, involvement in the crime in

question, seriousness of that offense, degree of injury to the victim, and background information about the defendant (their employment, educational background, economic status and family).<sup>6</sup>

Sentences outside the guideline range are subject to review by the courts of appeals for both "reasonableness" and potential violations of the Sentencing Commission's policies. In establishing the Federal Sentencing Guidelines, Congress acted on the belief that offender characteristics should not determine sentencing patterns, but rather, that sentences should be based on the type of crime and an offender's past criminal record. In the Guidelines the Commission instructs that sex, like race and class, was a factor that should never be relevant to sentencing (USSC Manual, 5H1.10). Consequently, federal courts are prohibited from departing from the Guidelines based on the race, gender, religion, or class of an individual defendant. However, the Commission recognized that judges might legitimately use some defendant characteristics as justifications for a departure. It has outlined certain factors that are not "ordinarily relevant" for the determination of whether a sentence should be outside the guideline range (18 USC Section 3553b). These offender

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<sup>6</sup> The pre-sentence investigation reports used in the post-guideline era contain substantially less personal information about a defendant's family and background than those used before the enactment of the guidelines. Under the Federal Sentencing Guidelines system the pre-sentence investigation reports are used to calculate a "tally" of criminal activity and relevant criminal conduct to construct the offense level at which the defendant should be sentenced. This mathematical model discourages probation officers from including information in the pre-sentence investigation report that cannot be assigned an appropriate "point-value." The pre-sentence investigation

characteristics are outlined in Part H of the Guideline Manual Policy Statement (see Appendix II). An offender's age, physical condition, mental or emotional condition, and family and community ties should "not ordinarily" be relevant in decisions to depart from Guidelines (United States Sentencing Commission Manual, 5H1.6, 1997). However, the Sentencing Commission has deferred to the courts to interpret how extensively judges may use offender characteristics to justify departures from the guideline range.

Since the adoption of the Guidelines, the courts have questioned how stringently they should interpret the "not ordinarily relevant" language in the Commission's policy statements. Were judges absolutely prohibited from departing from the Guidelines based on such characteristics? While the Sentencing Commission has offered little guidance on how federal judges should interpret the "not ordinarily relevant" language of their own policy statements, a number of federal appeals cases have directly addressed scope of judicial discretion that should be allowed for judges to grant departures based on defendant characteristics. In *United States v. Koon* (1996), the Supreme Court clarified the guideline departure process using the following list of analytical questions: 1) What features of this case, potentially, take it outside the Guidelines' "heartland" and make it a special or unusual case? 2) Has the Commission forbidden departures based on those features? 3) If not, has the Commission encouraged departures based on those features? 4) If

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report can also be critical on appeal when the appellate courts review the

not, has the Commission discouraged departures based on those features? This four-step model has become the guiding formula used by appellate courts for reviewing the departure decisions of lower courts since 1996.

In *Koon*, the Supreme Court acknowledged that determining when a defendant's circumstances are extraordinary is a difficult task for federal judges. The Court encouraged judges to use their day-to-day experiences as a guide for making such determinations, but it suggested that judges should depart from the Guidelines "only if the characteristics are present to an exceptional degree or in some other way make the case different from the ordinary case where the characteristics are present" (96). Though *Koon* provided a roadmap for federal courts to interpret the "not ordinarily relevant" language from the Sentencing Commission, judges across the federal judicial circuits continue to differ on whether particular offender characteristics, such as being a primary caretaker in a family, or individual circumstances, such as having a significant number of dependant children, qualify as extraordinary.

### **Extraordinary Family Circumstance Departures and the Emergence of Gender in the Departure Process**

Though the federal sentencing reform movement was born out of concern over racial injustice in sentencing, it has had profound influences on the sentencing of female offenders. The Guidelines were originally designed around a model of the

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"appropriateness" of a particular departure from the guidelines.

male offender. Testimony presented by the Justice Department and members of Congress about the effects of a Federal Sentencing Guidelines system largely overlooked the experiences of female offenders, both during sentencing and after incarceration. Not surprisingly, judges have struggled to apply “gender-neutral” sentencing policies to individual circumstances where the facts of criminal activity and the ramifications of sentencing on defendants and their families are affected by the gender of the defendant. Departures for extraordinary family circumstances (EFC) are one of the most prominent examples of the conflict between the goals of neutrality and the reality of gender in a defendant’s life.

Departures from the Guidelines represent one of the most important vestiges of judicial discretion under the Federal Sentencing Guidelines. Some legal scholars and practitioners have cautioned that judicial discretion to depart from the Guidelines, especially by lowering sentences, threatens to reintroduce gender bias into sentencing. Judicial discretion to depart from the Guidelines based on a defendant’s extraordinary family circumstances has raised even stronger concerns among feminist scholars in light of deeply entrenched social understandings about expected gender roles in families (Raeder, 1993; King, 1996).

Social science research and gender bias studies by the courts have shown that women offenders have unique needs because they are more likely to be single mothers or primary caretakers (Mumola, 2000; Ninth Circuit Gender Bias Task Force Report, 1992). Despite the difficult and marginalized circumstances of many female

offenders' lives, the Sentencing Commission determined that the family responsibilities of defendants should not "ordinarily" be a basis for reducing sentences. The framers of the Guidelines argued against recognition of family responsibilities during sentencing because it was believed that judicial consideration of family responsibilities could lead to race and class disparities (Breyer, 1988; Nagel and Johnson, 1994). Evidence presented at the Sentencing Commission hearings suggested that white men, with economic resources, were more likely to benefit from judicial consideration of family responsibility than non-white men, with fewer economic resources. During these hearings the Commission did not hear evidence on how judicial consideration of family responsibilities could positively or negatively affect female defendants or their families (Raeder, 1995). As a result of these hearings, the Commission created a policy that allowed sentencing departures only in the case of "extraordinary family circumstances." Again, the Commission failed to clarify or define what family circumstances would make a case "extraordinary."

Since the adoption of the Federal Sentencing Guidelines, federal judges, lawyers, and criminological scholars have struggled to define what circumstances make a family situation "extraordinary." Across the federal judicial circuits no magical formula exists for determining the number of dependants or degree of family destruction that rises to the Commission's standard of "extraordinary." Judges differ widely in their interpretation and application of the EFC departure. Thus, the possibility of obtaining a downward departure based on family responsibilities is

contingent upon both the facts of an individual defendant's life circumstances and the jurisdiction or courtroom in which the defendant is sentenced. Across the federal courts, three main definitions of an extraordinary family circumstance have emerged: 1) circumstances so rare or unusual that they would not have been considered by the Sentencing Commission; 2) family situations so compelling that they warrant a departure; and 3) multiple family troubles that, when taken as a "totality of the circumstances," justify the departure.

*Rare Family Circumstances Outside the Consideration of the Sentencing Commission*

In its most stringent application, the EFC departure has been limited to rare family circumstances where defendants must prove that their family responsibilities are sufficiently different from the "normal" family circumstances commonly faced by defendants. In a 1999 case, Judge Nancy Gertner of the District Court of Massachusetts summarized her understanding of a "rare family circumstances" by stating that "family obligations may be relevant if these obligations are present to an 'unusual degree,' if the facts differ 'significantly' from 'the norm,' taking the case out of the 'heartland,' suggesting that the case is 'exceptional' or 'atypical'" (U.S. v. Thompson, 1999). In other words, courts applying this standard have constructed a threshold for EFC departures where the effect of incarceration must fall outside the "normal disruption to the family and parental relationships" that would be found in a usual case (U.S. v. Canoy, 1994). For example, in U.S. v. Spedden (1996) the court

granted an EFC departure for a defendant whose wife and child were both suffering from potentially fatal illnesses, arguing that such circumstances are rarely found among defendants.

Courts that most stringently restrict departures from the Guidelines because of family responsibilities view parent-child separation due to incarceration as an “ordinary, if not self-evident, fact of life”(United States v. Chestna, First Circuit, 1992). Thus, single parenthood alone is normally an inappropriate justification for an extraordinary family circumstance departure (United States v. Brand, Fourth Circuit, 1990; United States v. Carr, First Circuit, 1991; United State v. Cacho, Eleventh Circuit, 1992; U.S. v. Leandre, District of Columbia, 1998). Some judges argue that single mothers or primary caretakers should reasonably foresee that their removal from the home could create disastrous consequences for the family unit. As women have increasingly shouldered the responsibilities of raising children on their own, their status as single parents has become more accepted as a normal family circumstance. Thus, the situations of single mothers are far too ordinary to be justified as “outside the heartland” of cases, and the harm of incarceration is considered by the courts as “foreseeable” for most defendants.

#### *Sufficiently Compelling Family Circumstances*

The second definition of an extraordinary family circumstance recognizes “compelling” family needs. Under this definition, a judge may depart from the Guidelines when the sentence creates a “destruction of the lives of dependants.”

(United States v. Duarte, Ninth Circuit, 1990; United States v. Thomas, Seventh Circuit, 1991; United States v. Gaskill, Third Circuit, 1993; United States v. Merritt, Second Circuit, 1993). The “compelling family need” definition for an extraordinary family circumstances allows judges to weigh the relative impact of a defendant’s incarceration on the family.

The second circuit appeals case of United States v. Johnson (1992) established the “compelling family need” standard for EFC departures. In *Johnson*, the court allowed a downward departure to stand because the family circumstances of the defendant were substantially more compelling than normal. The defendant in *Johnson* was convicted of bank fraud. She was a single mother of three children, one of whom was an institutionalized daughter. She was the primary caretaker of her daughter’s child as well as secondary caretaker of her son’s two children. According to the appellate court, Ms. Johnson faced “more responsibility than an ordinary parent, more even than those of an ordinary single parent”(United States v. Johnson, 1992:124).

The second circuit, which includes New York City and the surrounding metro area, is the only judicial circuit to embrace the “compelling family need” definition of and extraordinary family circumstance. This definition arose, in part, because of the particular challenges that families of incarcerated defendants often face in New York City. As one second circuit judge noted:

A parent’s role in supervising children and in providing support is particularly important in these times when uncontrolled children of broken families burden our courts and social institutions and add to the welfare rolls. Courts cannot ignore the fact that close to 50% of children in this

city [New York City] are born out of wedlock and most lack parental guidance. (U.S. v. Abbadessa, 1994:28).

While some federal judges outside of the second circuit have followed the lead of *Johnson* and adopted a “compelling family need” definition for EFC departures, few of these cases have been upheld upon appeal.<sup>7</sup>

#### *Totality of Family Circumstances*

In 1996 the Sentencing Commission added a paragraph to Sentencing Guidelines Manual (section 5K2.0) which allowed for downward departures based on a combination of factors that taken alone might be insufficient for justifying a departure. This expanded definition power is commonly referred to as a “totality of the circumstances” departure.<sup>8</sup> The case of U.S. v. Wehrbein (1999) illustrates how family circumstances that on their own do not rise to the level of “extraordinary” have been combined with other factors to justify a departure from the Guidelines. In 1999,

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<sup>7</sup> For example, in U.S. v. Pozzy (1990), the Massachusetts District Court recommended a departure for a pregnant mother, based on her compelling family circumstance, but the case was later reversed by the First Circuit Court. Similarly, in U.S. v. Goff (1990) the Fourth Circuit Court reversed a “compelling family circumstance” departure for a single mother granted by the Southern District of West Virginia.

<sup>8</sup> Although the amendment to the guidelines was not formalized until 1996, a number of circuits had adopted a modified “totality of the circumstances” justification through the appellate court review process. For example, the seventh circuit allowed district judges to consider the family circumstances of a defendant in combination with other individual factors that might distinguish a case from the “heartland” of similar cases, but it would not permit a downward departure based on extraordinary family circumstances if the results conflicted with a statutorily imposed minimum sentence (U.S. v. Thomas, 1993).

the state of Nebraska and the United States Attorney's office prosecuted Boyl Wehrbein twice for similar conduct in a marijuana transaction. Although this dual prosecution did not rise to a constitutional violation for double jeopardy, it arguably caused undue harm to Wehrbein and his family. Additionally, one of Wehrbein's sons suffered from a serious emotional disorder that was exacerbated by the threat of his father's incarceration. The court argued that Wehrbein's family circumstances, by themselves, were not extraordinary enough to justify a departure. However, the court concluded that the child's illness *in combination with* the dual prosecution justified a departure under the "totality of the circumstances" definition.

These three definitions illustrate the lack consensus within the courts about when family responsibilities become "extraordinary." The variation among circuits over the type and degree of hardship to a defendant's family that is necessary to justify an EFC departure threatens to erode the possibility for a unified EFC standard. The inter-circuit variation in both defining and granting EFC departures represents a larger struggle between the federal judges, interested in independence and the Sentencing Commission, interested in achieving uniformity in sentencing. Broader judicial interpretation of the EFC departure provision illustrates one way that federal judges have used the Commission's policy statements to enhance their own discretion. However, the Commission ultimately holds the power to clarify or to eliminate departures, further binding the hands of judges in sentencing federal

defendants.<sup>9</sup>

### **Policy Implications of Gender-Neutral Sentencing**

The Federal Sentencing Guidelines were created to reduce disparities in sentencing based on offender characteristics. As a result of the Guidelines and subsequent Commission policies, such as limiting judicial consideration of family responsibilities during sentencing, historically high numbers of women are facing incarceration in federal prisons--leading some to suggest the cure for unequal sentencing may actually be worse than the disease (Chesney-Lind, 1996; Raeder, 2000).

The Federal Sentencing Guidelines in combination with legislatively imposed federal mandatory-minimum sentences have increased the likelihood of long sentences for both men and women, particularly drug offenders. In the early 1980s, the Reagan administration launched a national effort to reduce drug abuse and protect communities most affected by drugs and violence. Drug use, particularly crack cocaine, was the target of two federal sentencing laws amending the penalties for dealing and possessing drugs. These laws in combination with the "real conduct" design of the Federal Sentencing Guidelines make drug conspirators eligible to be

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<sup>9</sup> In U.S.S.G. chapter 1, part. A, subsection 4b the Commission's oversight of judicial decision-making and departures in particular is articulated. "By monitoring when courts depart from the Guidelines and by analyzing their stated reasons for doing so and court decisions thereto, the Commission, over time, will be able to refine the

sentenced for all drugs associated with the transaction or conspiracy and for any additional drugs that could be attributed to “relevant conduct” of the defendant. Because mandatory drug sentences are based on the quantity and weight of the drugs, rather than some measure of culpability, female defendants who had traditionally played minimal roles in drug transactions, such as couriers, could be held responsible for all the drugs or activity associated with the criminal act. As part of this zero tolerance policy, more federal drug agents took part in state and local drug investigations making federal drug prosecutions, which carried stiffer penalties, much more frequent. Between 1992 and 1998 the number of federal drug prosecutions rose 16 percent (Transactional Records Access Clearinghouse, 2000).

In 1986, before the introduction of the Federal Sentencing Guidelines, only 77 percent of the people convicted for drug crimes were sentenced to prison, compared to 89 percent in 1991 (Gillard and Beck, 1998). The increase in prison sentences for drug convictions is compounded by a five-fold increase in the average amount of time a drug offender serves under the Guidelines, compared to the time a drug offender would serve if sentenced before the Guidelines were adopted (Gillard and Beck, 1998).

Stiff sentences for drug crimes have had a greater proportional impact on female offenders. In 1991, at the height of the war on drugs campaign, 12,600 women were serving sentences for drug offense in federal and state prisons, a 432

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Guidelines to specify more precisely when departures should and should not be

percent increase from the 2,400 female inmates serving time for drug offenses in 1986. During this same period, male drug offenders experienced a 281 percent increase in imprisonment (Bureau of Justice Statistics, 1993). In the federal system, women's arrests and incarceration for drug offenses now outnumber those offenses traditionally associated with women such as larceny and petty theft (Chesney-Lind, 1997; Mann, 1996, Uniform Crime Reports, 1999). Such changes reflect a shift in the objectives of police and prosecutors rather than any real change in female criminal behavior.

The increases in women's imprisonment have fallen disproportionately on African American women. In 1996, 42 percent of African American women who were incarcerated nationwide were serving time for a drug related sentence (compared to only 36 percent for white women) (Human Rights Watch, 2000). By the late 1990s, in the federal prison system alone, black women comprise 35 percent of the 9,200 female inmates, a much greater proportion than their overall representation in the population. Such racial disparities appear to be worsening as sentencing rates increase for women over time. In both state and federal correctional institutions, African American women experienced the greatest increases in criminal justice control of all demographic groups studied. Between 1989 and 1994 the incarceration rate for African American women increased 78 percent (Mauer and Huling, 1995). This is double the rate of increase for black men and white women and more than

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permitted.

nine times the increase for white men (Mauer and Huling, 1995).

But what explains such differential incarceration rates? Although virtually all scholars agree that sentences for women, particularly women of color, have dramatically increased since the adoption of the Federal Sentencing Guidelines, virtually no empirical research has focused on the causes of this increase. Do women receive dramatically higher sentences because of mandatory minimum penalties or are limitations on judicial discretion, particularly in the area of recognizing family responsibilities, the cause of such increases? Are some women disproportionately likely to receive prison sentences because they are more likely to be involved in “serious” or “dangerous” criminal activities that carry heavier sanctions? Exploring the use of departures in federal sentencing is a first step to answering these troubling questions about the causes of disparate treatment under the Guidelines.

Increasingly punitive sentencing outcomes for women and the rising racial disparities in women’s incarceration have real consequences for female offenders and their families. Undeniably, incarceration has destructive effects on the families of both incarcerated women and men. This harm is magnified when primary caretakers are incarcerated. Unfortunately, the structural arrangements of families in the United States today mean that incarceration of women, who are much more likely to be single parents or primary caretakers, creates a greater threat to families and children. These families often have access to fewer resources than two-parent families and were closer to the margin of economic viability before the primary caretakers’

incarceration.

A wealth of research has shown that incarcerated mothers, as opposed to incarcerated fathers, have much more limited options for familial childcare upon incarceration (Koban, 1983, Shupak, 1986; Seldin, 1995). For single mothers, this disparity is even greater. Imprisoned women are more likely to be responsible for the primary caretaking functions of their family than their convicted male counterparts. Nearly 80 percent of women in prison, compared to 50 percent of men in prison, lived with their minor children before conviction (Mumelo, 2000; Ninth Circuit Gender Bias Task Force, 1992). Additionally, female inmates face a greater struggle to find childcare once they are incarcerated, since the other biological parent is less likely to be available. In a 1991 survey of inmates in Federal prisons conducted by the Bureau of Prisons, 90 percent of incarcerated fathers' children lived with their biological mother during the father's incarceration while only 33 percent of incarcerated mothers' children lived with their biological father during the mother's incarceration (Bureau of Prisons, 1991). Therefore, it is more likely when a mother is incarcerated that her children will be forced to live with extended family members or that she may be forced to relinquish custody altogether.

There are serious consequences to state intervention in the care of children of incarcerated parents. Foster care is an alternative placement for ten to twenty percent of children with incarcerated mothers (Gaudin and Sutphen, 1993). When the state intervenes, female inmates risk losing custody beyond the period of their

incarceration. Once the state places a child in the legal custody of another caretaker it can be extremely difficult for a mother to regain custody of her biological children once she is released from prison. In many states incarceration alone constitutes a ground for termination of parental rights (Acoca and Raeder, 1999; Stanton, 1980).

Convicted pregnant female defendants further complicate the Federal Sentencing Commission's goals of gender-neutrality. Approximately 5 percent of female offenders are pregnant upon their entry into federal prison (Bureau of Prisons, 1993). Pre-natal care and treatment is virtually non-existent in most U.S. prisons, and very few federal facilities are equipped to house female inmates with newborns (Rafter, 1987). Only women risk being pregnant in prison, yet the Guidelines prohibit judges from taking a female defendant's pregnancy into account when making a sentencing determination because such a consideration violates the Federal Sentencing Commission's policy against using gender as a factor in departing from the Guidelines.

For female offenders with children the risk of incarceration has serious consequences on family stability and child welfare. Currently only fourteen of the sixty-eight federal facilities house female inmates. The lack of facilities for federal female inmates makes it more difficult for children and extended families to visit the mother because of the taxing distances of travel (Ninth Circuit Gender Bias Task Force Report, 1994). Children's lack of contact with incarcerated mothers can have serious consequences for children's stability in their everyday lives. Children whose

mothers are incarcerated are less stable than children whose mothers are on probation: they change schools more often, suffer a decline in academic performance, and have more serious behavioral problems in school (Stanton, 1980). Psychological and developmental studies have shown that the children of incarcerated mothers who endure long-term parental separation are likely to be delinquent and to engage in criminal behavior. (Acoca and Dedel, 2000; Baunach, 1982). Thus, the effects of a mother's or primary caretaker's incarceration on children in a family are staggering

The adoption of the Federal Sentencing Guidelines raises the stakes for incarcerated women and their families. Women sentenced in the federal system face an increased threat of incarceration. In the process of pursuing equality policy makers forgot to assess how "neutral" sentencing systems affected women. Subsequently, few empirical studies have tried to determine how the adoption of the Federal Sentencing Guidelines has affected female defendants. Although some legal scholars have written about the changing trends in judicial interpretation of departures, such as the EFC departure, no research has been conducted to assess if women are more likely to receive departure than men or under what conditions these departures are granted. This study is designed to provide the kind of information that is vital to understanding how the Guidelines have affected female defendants. In the next three chapters I will examine gender differences in the application of departures and test how gender differences in departures affect sentencing patterns among men and women. Finally, I will use a sample of sentencing opinions from extraordinary family circumstance

departure cases to determine how cultural gender roles have differentially affected men and women's abilities to receive an EFC departure.

Data from sentencing decisions represent only a fraction of the discretionary decision-making that occurs in the criminal justice system. It would be a tremendous oversight to believe that an examination of one part of the federal criminal justice system could provide a full insight into the intricacies of sentencing under the Guidelines. Police and prosecutors increasingly play important decision-making roles in the federal criminal justice system. Instead, this project will help shed light on the way that discretionary decisions about sentencing under the Guidelines are shaped by a defendant's biological sex and their cultural gender roles.

### Chapter III.

## Understanding Judicial Discretion in Federal Sentencing: A Statistical Analysis of Sex Differences in Departure Decisions

This chapter addresses three main questions about the relationship between a defendant's sex and downward departures.<sup>10</sup> First, are women more likely to receive downward departure from the Guidelines than men? Second, are women more likely to receive either judge-motivated or prosecutor-motivated departures compared to men? Finally, are white women more likely than women of color to receive departures (either judge-motivated or prosecutor-motivated)?

The chapter begins by outlining the characteristics of the sample that is used to address the three research questions outlined above. After conducting preliminary analysis on the full sample, I separate all possible departures into two departure categories, judge-motivated departures and prosecutor-motivated departures, and examine if men or women are more likely to receive either type of departure.<sup>11</sup>

Before the advent of the Federal Sentencing Guidelines, judges were held responsible

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<sup>10</sup> I have purposely chosen to use the word sex for the statistical analysis because the data set from the United States Sentencing Commission provides very limited information about the potential gender roles of defendants. The theoretical distinction between sex and gender separates biological characteristics from social characteristics.

<sup>11</sup> Originally I had intended to take the analysis one step further, to examine the application of the "extraordinary family circumstance" departure. Unfortunately, there are relatively few EFC departures granted each year, making statistical comparisons between those defendants who received the EFC departure and all other defendants problematic. Instead, I have chosen to conduct an in-depth analysis of

for gender differences in sentencing, under the Guidelines both judges and prosecutors play important roles in the decision to grant a departure. Understanding the differences between judicial and prosecutorial decisions to depart from the Guidelines is useful for determining the point at which, in the organizational structure of sentencing, disparities between men and women arise. Finally the chapter ends by examining how other variables, such as race affect male and female defendants' likelihood of receiving either a prosecutor-motivated or judge-motivated departure.

Since the adoption of sentencing guidelines, scholars have begun to investigate whether defendant characteristics or offense-related variables better explain the existence of sentencing disparity under various structured sentencing systems (Moore and Miethe, 1985; Dixon 1995; Albonetti, 1997; Ulmer, 1997; Albonetti, 1998, Steffensmeier and Demuth, 2000). This research has confirmed that women continue to receive more lenient sentences than men, in part because they have disproportionately benefited from the downward departure processes that were built into most guideline systems (Kramer and Ulmer, 1996; Albonetti, 1998). Although the Federal Sentencing Guidelines limit judicial discretion by providing a sentencing range for defendants based on their criminal history and offense level, departures from the Guidelines provide an opportunity for disparity to reemerge.

A 1991 study of federal mandatory-minimum penalties found that female defendants were less likely to be sentenced at or above the guideline range than males

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EFC departures using judicial narratives from sentencing opinions. This analysis is

(United States Sentencing Commission, 1991). Further research by Albonetti (1998) examined the direct and conditional effects of gender on sentencing severity for white collar offenders and found that women received more lenient sentences under the Guidelines than their male counterparts, even when controlling for legally relevant conduct. According to Albonetti, the effects of guideline departures were more significant for females than males, indicating that the use of departure may explain sex differences in sentence severity under the Guidelines. Previous work by Albonetti (1997) also identified departures as a primary variable for explaining racial differences in sentencing outcomes.<sup>12</sup> Albonetti's work is important because it suggests that understanding guideline departures may help us explain both sentencing differences between men and women and racial differences in sentencing outcomes for both male and female defendants.

### **Research Hypotheses**

In order to understand how departures affect sex differences in sentencing, it is first important to determine if defendants' sex changes their likelihood of receiving a departure. Previous research has shown that differences in defendants' abilities to receive departures affect the severity of their final sentences (Albonetti, 1998). But

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found in the fifth chapter.

<sup>12</sup> In this study Albonetti found that white drug defendants received greater advantages from guideline departures than either black or Hispanic drug offenders during the 1991-1992 sentencing years. For drug offenders, Albonetti found that guideline departures were more significantly related to race-based sentencing disparities than plea-bargaining.

currently we do not understand if there are differences in the abilities of male and female defendants to receive departures. **Hypothesis one** is: *women are more likely to receive departures from the Guidelines compared to men, even after controlling for other legally relevant variables and defendant characteristics.*

Next, I wanted to determine if defendants' sex affects their likelihood of receiving particular types of departures. To address this question I divided all downward departures into two groups: prosecutor-motivated departures and judge-motivated departures.<sup>13</sup> Prosecutor-motivated departures, commonly known as substantial assistance departures, are departures granted to defendants who have provided the government with information or assistance in a separate on-going investigation. Only prosecutors can raise a motion for a substantial assistance departure, although judges may review the merits of such motions. Judge-motivated departures make-up all the remaining types of factors (including family circumstances, rehabilitation, employment, and duress) which a judge may use to justify a departure from the Guidelines.<sup>14</sup>

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<sup>13</sup> Research by Steffensmeier and Demuth (2000) illustrates the usefulness of separating out prosecutor-controlled departures from judge-controlled departures. Steffensmeier and Demuth found that black and Hispanic male defendants who received prosecutor-controlled departures were sentenced much more severely than white males who also received substantial assistance departures. Racial differences in sentencing outcomes were less severe for defendants who received judge-controlled departures and virtually non-existent for defendants who did not receive any departures.

<sup>14</sup> The factors that judge may use to justify a departure from the sentencing guidelines are proscribed by the Sentencing Commission's policy statement, included in section

The literature on sentencing prior to the adoption of Guidelines suggests that judges were primarily responsible for sentencing disparities between men and women. However, pre-guideline sentencing research also indicated that white women were more likely to receive judicial leniency than women of color. Therefore, we should expect that under structured sentencing judges would continue to utilize their departure power to reduce sentences for white female defendants. **Hypothesis two** is: women are more likely than men to receive both judge-motivated or prosecutor-motivated departures; and **hypothesis three** is: *white women are more likely than non-white women to receive departures (either judge-motivated or prosecutor motivated)*. In the course of testing hypothesis two, I will examine whether racial differences in women's abilities to receive departures emerge more frequently in prosecutor-motivated or judge-motivated departures.

### **Methodology and Data**

In order to test the hypotheses outlined above, I used the Monitoring of Federal Criminal Sentencing data from 1996-1997. The Monitoring of Federal Criminal Sentencing data is provided annually by the United States Sentencing Commission and tracks the sentencing outcomes of for all criminal defendants sentenced under the Federal Sentencing Guidelines. This particular data set includes

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H of the United States Sentencing Commission Manual. A description of these factors can be found in Appendix II.

all cases received by the U.S. Sentencing Commission between October 1, 1996, and September 30, 1997.

For all of the analyses in this chapter, I have limited the sample to only those offenders who were charged with drug trafficking. I have used this single offense type to control for the variation in responses that prosecutors and judges have toward different offenses. Additionally, I have limited the sample to a single offense because later analyses in the fourth chapter test for sex differences in sentencing severity, which is sensitive to variation in offense types. Because I can not control for the internal variations in sentencing severity caused by combining multiple offenses, I have chosen to limit my analyses, throughout both chapters, to drug trafficking alone.

To test the research hypotheses outlined above I examined how different variables affected the likelihood of receiving a downward departure. These variables were selected for inclusion in the analysis because they expressed strong bivariate relationships with the dependant variables (receiving a departure of any kind, or receiving a particular type of departure). These variables are similar to those used in relevant previous studies of departures and federal sentencing (Albonetti, 1997, 1998; Steffensmier and Demuth, 2000). Finally, the independent variables represent three variations of the main factors that influence sentencing outcomes: legally relevant factors, different courtroom processes, and personal characteristics of defendants.

**Table 3.1: Descriptive Analysis of Independent Variables**

Variables	Coding	Pooled	Males	Females
		N=17,151 %	N=14,973 %	N=2,178 %
<b>Independent Variables</b>				
Race **	0= White	26	25	34
	1= Non-white	74	75	66
Gender	0= Male	87	-	-
	1= Female	13	-	-
Citizenship **	0= Citizen	73	72	79
	1= Non-citizen	27	28	21
Age	0=Below 30	44	44	39
	1=Above 30	56	56	61
Dependants	0=no dependants	35	35	35
	1= one or more dependants	65	65	65
Education **	0= Less than high school degree	49	50	55
	1= High school grad and above	51	50	45
Plea**	0= Not guilty	8	8	6
	1= Guilty	92	92	94
Guideline Offense Level**	0= low (less than 23)	48	45	63
	1=high (23 or higher)	52	55	37
Criminal History Points**	0=low (only one point)	57	54	76
	1=high (more than point)	43	46	24
Number of Counts	0= Single Count	80	79	85
	1= Multiple Counts	20	21	15
Safety Valve **	0= No Safety Valve	75	76	66
	1= Safety Valve Applied	25	24	34
Any Departure	0= No Departure	56	58	48
	1= Any Departure	44	42	52
Prosecutor-Motivated Departure	0= Other	68	69	63
	1= Substantial assistance departure	32	31	37
Judge-Motivated Departure	0= Other	88	89	86
	1= Traditional mitigating departure	12	11	14
Circuit 0	District of Columbia	1	1	1
Circuit 1	ME, MA, NH, RI, Puerto Rico	3	3	3
Circuit 2**	CT, NY, VT	9	9	10
Circuit 3	DE, NJ, PA, Virgin Islands	5	5	5
Circuit 4*	MD, SC, VA, WV	11	11	10
Circuit 5**	LA, MS, TX	19	20	16
Circuit 6	KY, MI, OH, TN	8	8	7
Circuit 7	IL, IN, WI	3	3	4
Circuit 8*	AR, IA, MN, MO, ND, NB, SD	7	7	8
Circuit 9	AK, AZ, CA, HI, ID, MT, NV	13	13	13
	OR, WA, Guam, N. Marina Is.			
Circuit 10**	CO, KS, NM, OK, UT, WY	6	5	7
Circuit 11	AL, FL, GA	15	15	16

Notes: \* Gender differences between variables significant at the  $p < .05$  level  
 \*\* Gender differences between variables significant at the  $p < .01$  level

The descriptive statistics for the independent variables are presented in Table 3.1. The descriptive statistics for the full sample are found on the left side of the table, with individual descriptive information for both male and female defendants listed on the right. There were 18,536 defendants convicted of federal drug trafficking offenses in 1996-1997, 17,151 of them are included in this analysis. The majority of defendants in the drug trafficking sample (87 percent) are male. Although there are more men than women included in the following analyses, the differences in the proportion of men and women convicted for drug offenses in the 1996-1997 data is fairly representative of the gender differences for convicted federal defendants overall.<sup>15</sup>

In Table 3.1 there are many noticeable differences in the “legally relevant” characteristics of male and female drug trafficking defendants.<sup>16</sup> Initially, there are significant differences in guideline offense levels for men and women. For the logistic regression analysis I have broken down the original guideline offense category into low and high offense levels, where an offense level less than 23 (on the forty three point scale) is a low offense level and offense levels of 23 and above are coded

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<sup>15</sup> Sample size is a common concern for researchers examining the experience of women. For this study, although women represent only 13 percent of the sentenced drug traffickers, there are a total number of 2,178 women in the sample, which is more than sufficient for statistical analyses.

<sup>16</sup> The federal sentencing guidelines specify that the offense level and criminal history scores should be used to determine the length of sentence a defendant will serve. The offense level is determined by the type of crime, the level of the defendant's of criminal involvement (in the case of drug cases, this includes the

as a high offense level. In this sample, 48 percent of defendants have a low offense level while 52 percent of defendants have high offense levels. Proportionally more male defendants fall in the high offense category than women (55 percent of men vs. 37 percent of women). Secondly, male defendants have, on average, more serious criminal histories than female defendants. I also recoded the criminal history points into dichotomous low and high categories. A point of one on the criminal history point scale (1-6) specified by the Guidelines was recoded as a low criminal history and two or more criminal history points from the original scale were coded as a high criminal history. For this sample, 46 percent of male defendants have high criminal history scores compared to 24 percent of female defendants.

The descriptive statistics in Table 3.1 also provide information about various “courtroom processes,” such as pleading guilty, receiving a safety-valve adjustment, receiving a departure, and being sentenced particular judicial circuit. The majority of male and female defendants in the sample plead guilty.<sup>17</sup> Female defendants disproportionately received a benefit from the “safety-valve” amendment, which allows a judge to sentence eligible low-level defendants below the requirements mandatory-minimum charges, dramatically reducing a defendant’s sentence length.<sup>18</sup>

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amount of drugs), and the number of offenses for which a defendant was charged. The criminal history score is a computation of the defendant’s past criminal activity.<sup>17</sup> In 1996-1997, 92 percent of men and 94 percent of women pleaded guilty to drug trafficking charges. Although this sex difference is not statistically significant, it is most likely an artifact of the large sample size.

<sup>18</sup> Adopted in 1995, the safety valve amendment specifies that for a defendant to become eligible for the safety valve, all of the following circumstances must exist: 1)

Therefore, disproportionate application of the safety-valve provision may explain why women receive more lenient sentences compared to men. The ability of a defendant to receive a downward departure<sup>19</sup> is the third courtroom process variable described in Table 3.1. The departure variable is broken down into three categories: 1) any type of downward departure; 2) substantial assistance departures (prosecutor motivated); and 3) traditional mitigating departures (judge motivated). In this sample, 42 percent of males and 52 percent of females received a departure of any kind. When broken down into the specific type of departure, 31 percent of males and 37 percent of females received a substantial assistance departure, but only 14 percent of females and 12 percent of males received a traditional mitigating departure. Finally, four federal circuits (fourth, fifth, ninth and eleventh) account for the largest percentages sentenced defendants.<sup>20</sup> However, male and female defendants appear before circuit courts in fairly equivalent percentages in most circuits, with the exception of the fifth

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The defendant is a non-violent/first offender with no more than one criminal history point; 2) The victim did not die or there were no serious bodily injuries; 3) The defendant was not an organizer or leader; 4) There is no engagement by the defendant in a continuing criminal enterprise; and 5) The defendant completely provided assistance to the government (Broderick, 1994; 18 U.S.C. Section 3553f).

<sup>19</sup> All the “departure” variables included in this analysis are downward departures, meaning that the judge reduces a defendant’s sentence range. The guidelines also permit judges to depart upward, thus enhancing a defendant’s potential guideline range; however, for these analyses the upward departures have been coded as “no downward departure” because I am attempting to capture information about how courtroom players reduce sentences.

<sup>20</sup> For the states and territories included in the various U.S. judicial circuits, see Appendix IV.

circuit, where male defendants are proportionally more likely to appear than female defendants.<sup>21</sup>

Table 3.1 also provides descriptive information about the personal characteristics of defendants in the sample. For the purposes of this analysis, racial categories were broken into white and non-white. Hispanic defendants were coded as non-white.<sup>22</sup> In this sample, 75 percent of the male defendants and 66 percent of the female defendants are non-white. Twenty-eight percent of males and 21 percent of females are non-citizens. Defendant age was recoded into two categories: below thirty years of age and a thirty years old and above. In the sample, 56 percent of the men and 61 percent of the women are thirty years of age or older.

Since this research is concerned with the continued influence of a defendant's family responsibilities on their ability to receive departures, I have selected a few variables to describe social differences between defendants. Unfortunately, the 1996-1997 Monitoring of Criminal Sentences data does not contain information on the marital status of defendants.<sup>23</sup> The 1996-1997 data set does contain information about the number of dependents for which the defendant is responsible. This variable

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<sup>21</sup> Although there are statistically significant gender differences in proportions of cases in four other circuits (second, fourth, eighth and tenth circuits) these significance levels should be interpreted cautiously due to the large sample size.

<sup>22</sup> The problem of coding different non-white racial groups into single category obscures the differences among these individuals groups, particularly the differences between black and Hispanic defendants. Future analysis may be necessary to discern if Hispanic defendants have different experiences in the federal sentencing system than, Black or other non-white defendants.

was recoded into two categories: no dependents and one or more dependents. In this sample, the percentage of male defendants with one or more dependent was identical to that of female defendants (65 percent).<sup>24</sup> The amount of education that a defendant received was recoded into two dichotomous categories: less than a high school graduation and high school graduate or above. Female defendants had less education than males (50 percent of men had a high school degree compared to only 45 percent of women).

### **Testing Hypothesis One: Women Are More Likely to Receive Departures Than Men**

Although there are a number of important differences between the experiences of men and women in the sample, I wanted to determine if these differences altered a defendant's ability to receive a downward departure. I have developed a set of logistic regression models to test the hypothesis that women are more likely to receive downward departures from the Guidelines. The logistic regression procedure is designed to predict the relationship among various factors that may be related to

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<sup>23</sup> While previous Monitoring of Federal Criminal Sentences data sets did contain information on defendants' marital status, the information was often missing.

<sup>24</sup> The "number of dependents" variable may not accurately represent a defendant's potential family responsibilities because the Sentencing Commission has not differentiated among types of dependents (e.g.: children, spouses, or elderly parents). The Commission also does not report the level of care that a dependent has been provided (e.g.: did they live with the defendant prior to arrest). The Bureau of Justice Statistics (1999) reports that although men in federal prison report having more minor

dichotomous variables. For this hypothesis, the dependant variable is receiving a downward departure. The variable is coded into two dichotomous elements: not receiving a departure, coded zero; and receiving a departure, coded one.

The descriptive statistics presented in Table 3.1 show that proportionally more women receive departures compared to men. In fact, 52 percent of women sentenced for drug trafficking in 1996-1997 received a downward departure from the sentencing Guidelines, compared to only 42 percent of men. However a number of other variables may explain these gender differences. For example, judges may grant departures in order to reduce the sentences of low-level offenders. Because women are more likely to be low-level offenders (based on their lower criminal history scores and offense levels), it may appear that women are disproportionately receiving departures. Logistic regression models are useful for testing the hypothesis that women are more likely to receive departure because they examine the influence of sex on departure outcomes, holding other relevant variables constant.

Table 3.2 provides the logistic regression estimates, standard errors, and odds ratios for twenty-two independent variables. The logistic regression model in Table 3.2 measures the effect of each variable on the outcome measure, receiving a departure. It is important to note that although a number of variables in this logistic regression model are significantly related to departure decisions, a significance level alone may be an artifact of the large sample size (N=17,151). A large sample is often

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children than females, female inmates were more likely than men to live with minor

overly sensitive, detecting artifactual relationships which appear due to bias in the sample and obscure true relationships among variables (Allison, 1999). Additionally, the data from the Sentencing Commission is not a true sample; the data set contains all reported drug sentences from 1996-1997. Therefore, the magnitude of the regression coefficients (found in the estimated B and odds ratio) is a more meaningful indicator of the effects of particular variables on departures than significance tests alone.

To determine whether women are more likely than men to receive a departure from the Guidelines I conducted logistic regression whether the dependant variable is departure outcome. The results from this logistic regression model are found in Table 3.2. The regression analysis shows that women are more likely than men to receive a departure from the Guidelines. While holding all other factors constant, sex (coded zero for men and one for women) has a positive B of .414 which yields an odds-ratio of 1.512 indicating that the odds of a defendant receiving a departure increase by 1.512 when the defendant is a women. Thus, the null hypothesis that women and men are equally likely to receive departures is rejected.

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children prior to incarceration (Greenfeld and Snell, 1999).

**Table 3.2: Logistic Regression Estimates for Variables in Departure Decisions (N=17,151)**

<b>Independent Variables</b>	<b>Estimate (B)</b>	<b>SE</b>	<b>Odds</b>
Race**	-0.411	0.042	0.663
Gender**	0.414	0.049	1.512
Citizen**	-0.140	0.043	0.869
Age**	-0.149	0.034	0.862
Education*	0.075	0.034	1.077
Dependants**	0.135	0.035	1.145
Number of Counts**	-0.154	0.044	0.857
Offense Level**	0.419	0.035	1.520
Criminal History**	0.180	0.040	1.197
Safety Valve**	0.366	0.044	1.443
Plea**	-1.951	0.097	0.142
Circuit 1a	-0.246	0.194	0.782
Circuit 2**	0.660	0.179	1.935
Circuit 3*	0.393	0.185	1.481
Circuit 4	-0.239	0.176	0.788
Circuit 5	-0.205	0.174	0.815
Circuit 6	0.236	0.179	1.267
Circuit 7	-0.235	0.191	0.791
Circuit 8	-0.068	0.180	0.934
Circuit 9**	0.596	0.176	1.816
Circuit 10	-0.186	0.183	0.830
Circuit 11	-0.132	0.175	0.876
Constant	-0.320	0.184	0.726

Notes: a District of Columbia is the reference  
 \* significant at the  $p < .05$  level  
 \*\* significant at the  $p < .01$  level

There are a few other noteworthy points in the logistic model, beyond our original hypothesis. Non-white defendants are significantly less likely to receive departures than their white counterparts, and relationship has a fairly strong odds-ratio. The negative B value of -.411 for race (coded zero for white and one for non-white) indicates that the odds of a defendant receiving a departure decrease by .663

for non-white defendants. Although a number of other individual defendant characteristics such as education, citizenship, and care for dependants are also statistically significant, they have relatively weak odds-ratios (closer to one), indicating that their influence on departure decisions is smaller than that of race or gender.

Higher offense levels and criminal history scores increase the chance that a defendant will receive a departure. A positive B value for offense level (.419) and criminal history (.180) indicate that the odds a defendant receiving a downward departure increase when defendants have both a high criminal history and a high offense level (each coded zero for low and one for high). This finding runs counter to the assumption that judges use departures to give low-level offenders more lenient sentences.<sup>25</sup> More research may be needed to help us understand why defendants with more serious criminal records and offenses are more likely to receive departures from the Guidelines.

The logistic regression model in Table 3.2 also indicates that courtroom process variables affect whether or not a defendant receives a departure. For

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<sup>25</sup> This finding led me to question the definitions I had used to recode offense level scores. It may have been possible that the distribution of departures between offense levels was dramatically skewed so that one high offense level was receiving a disproportionate number of departures. To test this question I ran a cross-tab of departures and original offense levels (prior to recoding into high and low offense levels). The cross-tab showed that the relationship between departures and offense levels did not vary depending on where one sets the cutoff point for high or low offenses. There was a consistent pattern: as offense levels rose, the percentages of defendants who received departures also rose.

example, the particular circuit in which defendants are sentenced influences whether they receive downward departures. Being sentenced in the second, sixth and ninth circuits significantly increase the likelihood of a departure. Moreover, defendants who plead guilty are more likely to receive a departure than defendants who go to trial.

Defendants who receive a break from mandatory-minimum sentencing under the safety valve provision are also more likely to receive a departure. This finding is particularly interesting because the safety valve provision is designed to assist low-level offenders. However, the analysis above indicates that in this sample, offenders with high criminal histories and high offense levels are more likely to receive downward departures from the Guidelines than offenders with low criminal histories or low offense levels. Together, these two findings raise a number of questions about the motivation for departures. Why do judges disproportionately grant departures to defendants with high offense levels, while at the same time give low-level defendants sentencing breaks by use of the safety valve provision? The contradiction between these two findings indicates a need for future research to separately examine the likelihood of receiving prosecutor-motivated or judge-motivated departures.

From this analysis I conclude that the likelihood of receiving a departure increases when the defendant is a female, even when holding other legal, process, and individual variables constant. This finding affirms my first research hypothesis. In the next section of the chapter I examine how a defendant's sex conditions the way

that other legal, process, and individual variables influence departure outcomes. Thus far, I have confirmed that women in this sample are more likely to receive departures than men, a finding consistent with previous research on federal sentencing, but this fact alone does not explain how other variables, such as race, interact with sex to change the outcomes of departure decisions. For example, it remains to be seen whether race influences the likelihood of a downward departure for female defendants in a way that is different than for male defendants. Because we know from previous research that the courts do not treat all women equally, it is important to examine the interactions between sex and other defendant characteristics (Temin, 1980; Kruttschnitt 1984; Wonders, 1996).

To examine how legal, courtroom process, and individual defendant characteristics influence the likelihood of departures for men and women, I have partitioned the logistic regression estimates by gender. Table 3.3 shows the logistic regression estimates for men and women separately.

Table 3.3 demonstrates that although some factors have a stronger effect for men than for women, and visa versa, for the most part, the effect of the independent variables are consistent for men and women. That is, for both men and women, being non-white significantly decreases the likelihood of receiving a departure, and the magnitude of the effect of race is roughly equivalent for men and women. The odds of non-whites receiving a departure decrease by .677 for men and by .611 for women. Additionally, both male and female defendants with a high offense level are more

likely to receive a departure (the odds of receiving a departure increase by 1.492 for men and 1.703 for women with high offense levels.)

**Table 3.3: Logistic Regression Estimates for Receiving a Departure for Men and Women**

Independent Variables	Model 1 <i>Men Only (N=14,973)</i>			Model 2 <i>Women Only (N=2,178)</i>		
	Estimate (B)	SE	Odds	Estimate (B)	SE	Odds
Race	-.390**	0.045	0.677	-.493**	0.111	0.611
Gender	-	-	-	-	-	-
Citizen	-.167**	0.046	0.846	0.042	0.132	1.043
Age	-.094**	0.037	0.910	-.380**	0.098	0.684
Education	.080*	0.036	1.083	0.057	0.097	1.059
Dependants	.130**	0.038	1.139	0.155	0.100	1.168
Number of Counts	-.149**	0.047	0.861	-0.221	0.142	0.802
Offense Level	.400**	0.037	1.492	.533**	0.103	1.703
Criminal History	.162**	0.042	1.176	.301*	0.122	1.351
Safety Valve	.313**	0.048	1.368	.714**	0.114	2.043
Plea	-1.997**	0.105	0.136	-1.745**	0.272	0.175
Circuit 1a	-0.303	0.208	0.739	-0.116	0.638	0.891
Circuit 2	.667**	0.191	1.948	0.285	0.598	1.330
Circuit 3	.456*	0.198	1.580	-0.365	0.615	0.694
Circuit 4	-0.097	0.188	0.907	-1.550*	0.593	0.212
Circuit 5	-0.138	0.186	0.871	-0.975	0.585	0.377
Circuit 6	.378*	0.191	1.459	-1.042	0.598	0.353
Circuit 7	-0.175	0.205	0.839	-0.906	0.617	0.404
Circuit 8	0.031	0.193	1.031	-1.066	0.597	0.345
Circuit 9	.666**	0.188	1.47	-0.192	0.589	0.825
Circuit 10	-.109	0.196	0.897	-1.106	0.598	0.331
Circuit 11	0.036	0.186	1.037	-1.581*	0.588	0.206
Constant	-0.395	0.197	0.674	0.876	0.609	2.402

Notes: a District of Columbia is the reference

\* significant at the  $p < .05$  level

\*\* significant at the  $p < .01$  level

In those instances where the estimate for men and women is different, it can be hard to interpret whether these differences are meaningful. To determine whether the differences between male and female regression estimates from the above logistic regression were significant, I used a z test for difference between the slopes in the two

estimates. To determine if  $b_1=b_2$  I used the formula developed by Patternoster, Brame, Mazerolle and Piquero (1998) where:

$$Z = \frac{B_1 - b_2}{\sqrt{Se_{b_1}^2 + Se_{b_2}^2}}$$

In this test, a z-score above the absolute value of 1.96 (either positive or negative) indicates a significant difference between the two estimates at the .05 significance level. The z-scores for differences in male and female estimates can be found in Appendix III.

Using the above test, gender differences emerge between the estimates for age, application of the safety valve provision, and being sentenced in a particular judicial circuit are statistically significant. The effect of age on downward departures is stronger for women than men (younger women are more likely to receive a departure than women who are thirty years of age or older.) Both men and women who benefit from the safety valve provision are more likely to receive a downward departure compared to those defendants who do not receive a safety valve sentence, but the effect is stronger for women. Additionally, the effect of being sentenced within the fourth, sixth, tenth, and eleventh circuits is stronger for men than women.<sup>26</sup>

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<sup>26</sup> For women, the second circuit is the only circuit where the likelihood of receiving a departure is greater than the reference category (D.C. Circuit), and the effect is not statistically significant. For all other circuits, women are more likely not to receive a departure, and in the fourth and eleventh circuits being female significantly decreases the likelihood of departure ( $B = -1.550$  for the fourth circuit and  $-1.581$  for the

The logistic regression equation in Table 3.2 and Table 3.3 confirms that women are more likely to receive downward departures than men. Additionally, these results suggest a continued effect of race on sentence outcomes. For both men and women, being non-white decreases the likelihood that a defendant will receive a departure.

### **Testing Hypothesis Two: Women Are More Likely than Men to Receive a Departure, Regardless of Departure Type (Prosecutor/Judge-Motivated)**

The analysis thus far has been restricted to an examination of all departures. In the next section, I examine the effect of sex on the application of two different types of departures, prosecutor-motivated (substantial assistance) and judge-motivated departures (traditional mitigating departures). Although most research on federal sentencing has grouped all departures into a single category, there are important theoretical reasons to separate out the types of departures. Prosecutor-motivated and judge motivated departures each originate from different sets of legal actors and the motivation for each type of departure is quite different.

The Federal Sentencing Guidelines outline the terms of for over three hundred types of downward departures, but many are rarely used. Table 3.4 illustrates the breakdown of major departure types for drug traffickers sentenced in 1996-1997.

Because the departures are not distributed evenly across all categories, it is not

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eleventh circuit). In this sample, particular circuits appear quite hostile to granting downward departures for female defendants.

practical to separately examine the influence of each departure type. Instead, I have grouped the departures into two separate categories, prosecutor-motivated and judge-motivated.

**Table 3.4: Departures for Drug Trafficking Defendants (1996-1997)**

	Male		Female	
	N	%	N	%
Substantial Assistance	4,637	73%	825	73%
Educational/Vocational Skills	2	0%	1	0%
Age	20	1%	6	0%
Mental/Emotional Conditions	8	0%	0	0%
Physical Condition	34	1%	11	1%
Drug Dependence	3	0%	1	0%
Family Ties/Responsibilities	48	1%	32	3%
Coercion or Duress	14	0%	8	0%
Diminished Capacity	41	1%	18	2%
Criminal History Over-Represents Defendant's Involvement	220	3%	17	2%
Pursuant to Plea Agreement	363	6%	55	5%
Mule/Role in Offense	41	1%	5	0%
Deportation	510	8%	44	4%
Lack of Culpability	7	0%	1	0%
Acceptance of Responsibility	14	0%	0	0%
Rehabilitation	17	0%	3	0%
Not "Representative of the Heartland"	11	0%	3	0%
General Mitigating Circumstances	131	2%	34	3%
Offense Was Isolated Incident	116	2%	40	4%
Other Downward Departures	114	2%	30	3%
	6,351	100%	1134	100%

Departures for substantial assistance, the prosecutor-motivated departure, made up the largest group type of departures granted to drug traffickers in 1996-1997. This departure was formally created in the 1986 Anti-Drug Abuse Act (P.L. 99-570), which directed Congress to create a sentence reduction mechanism for offenders who

assisted the prosecution in the investigation of another criminal act.<sup>27</sup> Substantial assistance departures are the “carrots” used by prosecutors to persuade defendants to testify against other individuals engaged in suspected criminal activity or to provide information for “building a case” against other suspects (this types of information can be particularly useful for obtaining warrants or wiretaps). Currently, only prosecutors can request a motion for substantial assistance. Judges are prevented from considering evidence of the defendant’s cooperation without a formal motion of substantial assistance from the prosecutor.<sup>28</sup>

In sentencing analyses, substantial assistance departures should be separated from other types of departures because the motivation for the departure comes from a prosecutor, not a judge. In all other departures, judges decide if the circumstances of a particular case warrant a departure without the requirement of action from other parties. Additionally, the substantial assistance departure is different because it rewards individuals for providing the government with information about criminal activity. All other departures grant defendants leniency based on their personal circumstances, such as supporting a family, the potential for rehabilitation, employment, or having engaged in single criminal act.

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<sup>27</sup> The Sentencing Commission responded to the legislative mandate by creating a policy statement (5K1.1) allowing departures for defendants who provide “substantial assistance” to prosecutors. According to the 5K1.1 policy statement (and subsequent case law) substantial assistance departures can only be granted when the government makes a motion requesting a departure for a defendant who has provided “substantial” assistance (Maxfield and Kramer, 1998).

I have separated the two categories of departures in order to determine how the sex of a defendant affects each of these two types of departures. During the process of this research I had the opportunity to conduct a number of informational interviews with practitioners in the federal criminal justice system about the application of departures. One striking comment from a defense attorney in the first circuit suggested that gender biases emerge in different ways depending on the departure type. When asked about the role that gender plays in decisions to seek downward departures he stated:

The 'girl' exception still exists. For nearly every woman we are defending, unless there is serious evidence of child abuse, we try to seek an extraordinary family responsibilities departure. You use what tools you have. But the most obvious cases of gender differences are with substantial assistance. The kind of information women provide in their testimony is often so small that it wouldn't justify the departure for men. But some women only have to provide a minimal amount of information. The prosecutors are willing to request the departure for stuff that they would never accept from men (Interview, 1/5/99, on file with author).

This comment was particularly noteworthy because it suggested that both defense attorneys and prosecutors consider a defendant's gender when requesting downward departures, but that such gender biases arise from different motivations. Defense attorneys used gender stereotypes of seek "breaks" for her client when possible. Such arguments are expected duties of defense attorneys. However, the expected role of prosecutors is quite different. Prosecutors are expected to vigorously prosecute each person, to the limit that best serves "justice," regardless of the defendants' personal

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<sup>28</sup> In the 5<sup>th</sup> Circuit case of Garcia-Bonilla (1993) the government's refusal to make a

characteristics. However, the defense attorney quoted here suggested that some prosecutors were willing to request substantial assistance departure for women who provided only minimal information, the kind of information that would not be rewarded if given by men. I was intrigued by this comment, but since it represented the opinion of only one defense attorney I decided to explore the relationship between gender and different types of departures using the 1996-1997 federal drug trafficking sample. The following table shows the differences in male and female departures for the two departure types.

**Table 3.5: Gender Differences in Departure Types--1996-1997 Drug Trafficking Convictions**

		<u>Pooled</u>	<u>Men</u>	<u>Women</u>
Prosecutor-Motivated	0= No Substantial Assistance Departure	68%	69%	63%
	1= Substantial Assistance Departure	32%	31%	37%
Judge-Motivated	0=No Traditional Mitigating Departure	88%	89%	86%
	1=Traditional Mitigating Departure	12%	11%	14%

As illustrated in Table 3.5, more defendants overall received substantial assistance departures (32 percent) compared to traditional mitigating departures (11 percent). Women were proportionally more likely to receive both types of departures than men. However, the results in Table 3.5 indicate that at a bivariate level, separating out the type of departure does little to explain the gender differences that were originally observed when departures were combined into a single category. To control for the effects of other variables, I conducted the regression analysis on likelihood of

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departure motion was held unreviewable absent an unconstitutional motive.

receiving a departure separately for each of the two departure types. Table 3.6 shows the regression estimates for the independent effect of sex on either departure outcome (controlling for the same set of independent variables in Table 3.2).

**Table 3.6: Logistic Regression Estimates for Receiving Either a Prosecutor-Motivated or Judge-Motivated Departure.**

	Model 1 Prosecutor-Motivated			Model 2 Judge-Motivated		
	B	SE	Odds	B	SE	Odds
<b>Sex</b>	.353**	.052	1.424	.298**	.076	1.347
<b>No. Case</b>	17,151					

Note: \*\* significant at the  $p < .01$  level

Table 3.6 confirms that women are more likely than men to receive both types of departures, even when controlling for other relevant variables. The effect of sex is slightly stronger for prosecutor-motivated departures, but it is strong enough for both types of departures to positively affirm the second research hypothesis.

**Testing Hypothesis Three: White Women Are More Likely Than Non-White Women to Receive Departures (Either Judge-Motivated or Prosecutor Motivated)**

From the analysis above it is clear that separating the type of departure does little to explain why women are more likely to receive departure than men. But we know from previous research on gender and sentencing that women of color have historically been less likely to benefit from judicial leniency than white women. To test the interactive effect of race and sex on departure outcomes, I conducted a three-way breakdown of gender, race, and departure type for the sample data.

The three-way analysis of sex, race, and departure types, in Table 3.7, confirms that white women and men both receive proportionally more departures (as a combined category) than non-white women and men. However, race and sex differences emerged as the two types of departures were broken apart. White women and men continue to receive proportionally more prosecutor-motivated departures than either women or men of color, but the race gap significantly widened for these departures. Forty-nine percent of white women receive a prosecutor-motivated departure compared to only 32 percent of non-white women.

**Table 3.7: Interaction of Gender and Race in Departure Types**

a. Any Departure				
	Men** (N=14,973)		Women** (N=2,178)	
	White	Non-White	White	Non White
No Departure	53%	59%	43%	50%
Received Any Departure	47%	41%	57%	50%
Total	100%	100%	100%	100%
b. Substantial Assistance Departure – Prosecutor Motivated				
	Men**		Women**	
	White	Non-White	White	Non White
No Substantial Assistance	58%	73%	51%	68%
Received Substantial Assistance	42%	27%	49%	32%
Total	100%	100%	100%	100%
c. Traditional Mitigating Departure – Judge Motivated				
	Men**		Women**	
	White	Non-White	White	Non White
No Mitigating Departure	94%	87%	92%	83%
Received Mitigating Departure	6%	13%	8%	17%
Total	100%	100%	100%	100%

Note: Race differences significant at the \*\*  $p < .01$  level

For men the gap is even greater, as 42 percent of white men receive a substantial assistance departure compared to only 27 percent of non-white men. Overall, prosecutor-motivated departures had the greatest benefit for white women.

One of the most striking features of the three-way analysis in Table 3.7 is that the sex and race differences in the prosecutor-motivated departure outcomes reverse for judge-motivated departures. While white women were proportionally more likely to receive substantial assistance departures, women of color are proportionally more likely to receive judge-motivated departures. Seventeen percent of non-white women received traditional mitigating departures compared to 8 percent of white women. Racial differences between prosecutor-motivated and judge-motivated departures also appeared for men. In this sample, 13 percent of non-white men received judge-motivated departures compared to 6 percent of white men. Though the absolute number of individuals who received judge-motivated departures is less than those who received prosecution-motivated departures, the differences in distributions for these two types of departures suggests that the departures were applied differently depending on the race of the defendant.

The race and sex differences in the application of these two types of departures raise a number of important theoretical questions about the influence of race and gender on departure outcomes. Do defendants of color disproportionately have personal circumstances that justify judicial departures? Do proportionally more white women provide the prosecution with substantial assistance, or does racial bias

influence prosecutors' decisions to request substantial assistance motions for women?

Although in-depth research utilizing interviewing and field work may best answer

these questions, I have begun to address the issue by examining how individual,

courtroom process, and legally relevant factors influence each of the types of

departures for both men and women.

**Table 3.8: Logistic Regression Estimates of the Effect of Independent Variables on Different Departure Types for Men and Women**

	Model 1: Prosecutor-Motivated Departures						Model 2: Judge-Motivated Departures					
	Men			Women			Men			Women		
	B	SE	Odds	B	SE	Odds	B	SE	Odds	B	SE	Odds
Race	-.631**	.048	0.532	-.663**	.111	0.515	.539**	.091	1.714	.449*	.183	1.57
Citizen	.530**	.052	1.698	.782**	.144	2.187	-1.083**	.068	0.339	-.892**	.162	0.41
Age	-0.067	.040	0.935	-.363**	.101	0.696	-0.055	.060	0.947	-0.038	.142	0.96
Education	.166**	.039	1.180	.216*	.099	1.242	-0.08	.061	0.923	-0.269	.142	0.76
Dependants	.221**	.041	1.247	0.035	.102	1.036	-0.164	.061	0.849	0.216	.152	1.24
Counts	-0.075	.051	0.928	-0.278	.150	0.757	-.249*	.082	0.779	0.018	.214	1.02
Crime History	.177**	.047	1.194	.271*	.125	1.312	0.018	.071	1.018	0.103	.193	1.11
Offense Level	.809**	.040	2.245	.678**	.103	1.969	-.622**	.061	0.537	-0.248	.153	0.78
Safety Valve	.224**	.053	1.251	.660**	.116	1.935	.353**	.071	1.423	0.225	.160	1.25
Plea	-3.439**	.214	0.032	-2.399**	.409	0.091	0.186	.130	1.195	-0.252	.352	0.78
Circuit 1 <sup>a</sup>	.095	.235	1.100	0.152	.596	1.164	-.896*	.305	0.408	-0.402	.734	0.67
Circuit 2	.527*	.215	1.694	-0.133	.553	0.875	0.275	.262	1.317	0.281	.668	1.32
Circuit 3	1.00**	.221	2.781	.408*	.574	1.504	-1.225**	.303	0.294	-1.370	.738	0.25
Circuit 4	0.41	.212	1.506	-0.835	.553	0.434	-1.544**	.286	0.213	-1.918*	.743	0.15
Circuit 5	0.33	.210	1.391	-0.29	.545	0.748	-1.057**	.261	0.348	-1.357*	.680	0.26
Circuit 6	.901*	.215	2.462	-0.208	.558	0.812	-1.364**	.296	0.256	-2.336*	.825	0.10
Circuit 7	0.318	.228	1.374	-0.346	.580	0.708	-1.610**	.364	0.20	-1.052	.761	0.35
Circuit 8	0.347	.217	1.415	-0.465	.557	0.628	-.772*	.283	0.462	-1.349	.730	0.26
Circuit 9	0.107	.214	1.113	-0.811	.551	0.445	.512*	.258	1.669	0.534	.664	1.71
Circuit 10	0.112	.224	1.118	-0.676	.561	0.509	-.628*	.275	0.534	-0.868	.697	0.42
Circuit 11	.655*	.211	1.925	-0.777	.547	0.46	-1.653**	.275	0.192	-1.721*	.692	0.18
Constant	-1.941	.223	0.144	-0.707	.574	0.493	-0.787	.284	0.455	-0.747	.712	0.47

Notes: a District of Columbia is the reference

\* significant at the  $p < .05$  level

\*\* significant at the  $p < .01$  level

Table 3.8 reports the results from two logistic regression analyses for each of the departure types. These two models are partitioned by sex to show how gender conditions the effect of each independent variable. This analysis presented in Table 3.8 confirm that race affects both men and women's abilities to receive prosecutor-motivated or judge-motivated departures, even when other important variables such as offense level and criminal history are held constant. Being non-white decreases the likelihood that a defendant will receive a prosecutor-motivated departure (coded zero for no substantial departure and one for receiving a substantial assistance departure) for both men and women. The odds of receiving a substantial assistance departure are reduced by .532 when the defendant is a non-white male and by .515 when the defendant is a non-white female. Conversely, non-white men and non-white women were more likely than whites to receive a judge-controlled departure. The odds of receiving a traditional mitigating departure increase 1.714 for non-white men and 1.566 for non-white women.

As we have seen, for both men and women, having high criminal history points and high offense levels increases the likelihood of receiving a prosecutor-motivated departure. Thus, for both men and women, being involved in more "serious" criminal activity may provide defendants with the ability to broker deals with prosecutors to exchange information for sentencing leniency. Some scholars have argued that women are unlikely to benefit from substantial assistance departures because they have less information to give prosecutors (Raeder, 1993). However, the

analyses in this study challenge such a prediction. White women in this sample are proportionally most likely to benefit from substantial assistance departures.<sup>29</sup> The interactive effect of sex and seriousness of criminal activity is quite different for traditional mitigating departures. Having a high offense level decreases the likelihood of receiving a traditional mitigating departure for men and women (although the effect is not statistically significant for women).

Though the effect of race on receiving either a prosecutor-motivated or a judge-motivated departure is consistent for both men and women, some independent variables affect men and women's ability to receive departures differently.

Responsibility for dependents has a different effect on male and female defendant ability to receive judge-motivated departures. Male defendants are more likely to receive traditional mitigating departures when they do not have any dependents (however the effect is not statistically significant), but for women having dependents

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<sup>29</sup> These analyses raise new questions about the interaction between race, gender, criminal activity, and departure types. Are white women more likely to receive substantial assistance departures because they are more involved in serious criminal activity? To test this assumption I examined the relationship between seriousness of criminal activity and race for women in the sample. In this sample, white women had proportionally higher criminal history scores than women of color (29 percent of white women had high criminal histories compared to 21 percent for women of color). However, women of color had proportionally higher offense levels than white women (52 percent of women of color had high offense levels compared to 47 percent of white women). The interaction among gender, race, and "seriousness" of criminal activity on substantial assistance departures requires more research.

significantly increase the odds of receiving a judge-motivated departure.<sup>30</sup> Thus, responsibility for children provides a greater benefit for women than men, in terms of receiving a judge-motivated departure.

Differences in circuits are the third, and possibly the most interesting, courtroom process variable for predicting the outcome of different types of departures for men and women. One of the main goals of the Federal Sentencing Guidelines has been consistency and uniformity in sentencing outcomes. However, differences in the application of departures across the judicial circuits threaten to erode such uniformity. The logistic regression analysis in Table 3.8 indicates that men and women are less likely to receive a judge-motivated departure in all circuits (as compared to those sentenced in the District of Columbia circuit, the reference category for this analysis), except the second and ninth circuits. However, there are stark sex differences in the likelihood of receiving a substantial assistance departure across the circuits. Men sentenced in the sixth and eleventh circuits are significantly more likely to receive prosecutor-motivated departures than those sentenced in the D.C. circuit while women sentenced in the same circuits are less likely to receive prosecutor-motivated departures than women sentenced in the D.C. circuit. Thus, similarly situated women do not share the benefits men receive in obtaining prosecutor-motivated departures in

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<sup>30</sup> A z-test for differences in regression estimates between men and women for receiving a traditional mitigating departure confirms that the effect of having dependents is not equal for men and women ( $z = 2.32$ ). For both men and women, having dependents has only a weak effect on receiving a substantial assistance departure.

the sixth and eleventh circuits.<sup>31</sup> The differences in departure outcomes across judicial circuits illustrate how shifting judicial attitudes toward granting departures threaten the Guideline framers' goal of uniformity in sentences for both male and female defendants.

This research confirms that for drug-trafficking defendants sentenced in federal court during 1996-1997, women were more likely to receive both prosecutor and judge-motivated departures than were similarly situated men. More specifically, white women were disproportionately likely to receive prosecutor-motivated departures, but women of color were more likely to receive judge-motivated departures. Thus, hypothesis three: *white women are more likely to receive either prosecutor-motivated or judge-motivated departures*, is rejected. White women in this sample are more likely to receive prosecutor-motivated departures than women of color, but women of color are more likely than white women to receive judge-motivated departures.

Two important conclusions can be drawn from this chapter's findings. First, in this sample, women receive "breaks" in sentencing disproportionately to men.

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<sup>31</sup> Tracing the changes in percentage of defendants who receive particular departures by gender and circuit is a better and more helpful illustration of the differential effects of judicial circuit. Proportionally more traditional mitigating departures are granted, for both men and women, in the second and ninth circuits. Therefore, a defendant is more likely to receive a traditional mitigating circumstance departure if they are

Both prosecutors and judges disproportionately grant departures to female defendants, a possible potential remnant of the “leniency toward women” attitude that existed prior to the adoption of the Guidelines. However, there are a number of factors that might explain sex disparities in departures that cannot be measured in this research. For example, female offenders may be more likely to provide prosecutors with information about on-going criminal activity which would make them more likely to receive prosecutor-motivated departures. Future research will be necessary to gain a better understanding of the conditions that make female defendants more likely to receive departures. In the next chapter I test whether female defendants’ disproportionate ability to receive departures results in more lenient sentence outcomes for women.

The second general conclusion that can be drawn from this chapter is that not all women are treated equally. The effect of race on a defendant’s ability to receive a departure changes depending on the legal actors (prosecutors/judges) making the departure decision. This finding affirms the contention that discretion does not disappear under sentencing Guidelines; rather it shifts around among legal actors. More research is needed to understand why prosecutor-motivated departures are more likely to be granted to white women and judge-motivated departures are more likely to be granted to women of color.

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sentenced in the second or ninth circuits. The breakdown of percentages of cases, and departures by circuit for both men and women is located in Appendix IV.

## **Chapter IV.**

### **Examining Individual and Structural Explanations for Sex and Race Differences in Sentencing Outcomes**

In chapter three I found that female defendants, in this sample, were more likely to receive departures than men. This finding affirmed my first hypothesis and shows continued leniency toward women under the Guidelines. In this chapter, I take the question of disparity in sentencing one step further and examine whether or not male and female defendants' differential ability to receive departures subsequently results in sex differences in sentence severity. Using the data for federal drug trafficking sentences in 1996-1997, I test whether female defendants receive more lenient sentences as a result of their increased likelihood to receive departures.

The analyses in chapter three also indicated that defendants' race affects their ability to receive particular types of departures. White women were less likely than women of color to receive judge-motivated departures, they were more likely to receive prosecutor-motivated departures for substantial assistance. I was surprised to find that the racial difference in defendants' abilities to receive departures shifted depending on the type of departure. But racial differences in defendants' abilities to receive particular types of departures do not inevitable lead to subsequent racial differences in sentence outcomes. The research to date on racial differences in sentencing outcomes under the Federal Sentencing Guidelines is mixed. Some studies show that black and Hispanic defendants are sentenced more severely than

whites (Steffensmeier and Demuth, 2000; Albonetti, 1997), yet other research has found that race has little influence on sentence outcomes under the Guidelines (McDonald and Carlson, 1993). In this chapter I will examine the relationship between race and sentence outcomes and test whether racial differences in defendants' abilities to receive departures lead to subsequent racial differences in sentence severity for male and female defendants.

### **Objectives and Hypotheses**

Because women are more likely than men to receive sentence departures, and because departures inherently reduce sentence severity, we should logically expect that women would receive more lenient sentences than men. To test this assumption I must determine if women receive more lenient sentences than men, while controlling for other relevant variables. To determine sentence severity I have divided sentence outcomes into two stages: receiving a prison sentence or receiving probation (the in/out decision) and the length of the sentence for incarcerated defendants. Following this two-stage model, **hypothesis four** is: *female defendants are less likely to receive prison sentences than male defendants* and **hypothesis five** is: *female defendants who are sentenced to prison receive more lenient sentences than male defendant*. In addition, I examine the effect of receiving a downward departure on sentence severity for men and women to see if women receive more lenient sentences compared to men,

regardless of the type of departure they receive (judge-motivated vs. prosecutor-motivated).

Finally, I will examine the interactive effects of sex, race, and departure status on sentencing severity. **Hypothesis six** is: *white women receive more lenient sentences than women of color, across all departure categories.*

### **Methods and Data**

A number of studies have tested the whether defendant characteristics, such as sex or race, affect sentences lengths imposed under the Federal Sentencing Guidelines. Barbara Meierhoefer (1992) published the first study to examine the effects of defendant sex and race on sentence lengths under the Guidelines using federal sentencing data for drug trafficking from 1984-1990. Meierhoefer found that the sentencing gap between white and non-white defendants was greater under the Federal Sentencing Guidelines than it had been in pre-guideline sentencing. Later research by McDonald and Carlson (1993) challenged the preliminary findings of Meierhoefer. McDondald and Carlson argued that to understand the relationship between defendant characteristics and sentence severity researchers should control for a number of legally relevant variables, particularly the application of mandatory-minimum penalties. Additionally, McDonald and Carlson suggested that research on sentencing outcomes should be conducted separately for the initial decision to imprison (in/out decisions) and for the secondary decision about the length of imprisonment given to defendants who were incarcerated.

Since the publication of these two early papers on sentencing severity under the Guidelines, a number of other studies have examined defendant characteristics and sentence outcomes using a variety of different models. Albonetti (1997, 1998) used a maximum-likelihood Tobit model to measure sentencing severity. The Tobit equation includes both offenders who received imprisonment and those who received probation in the model, but is designed to handle the censoring created by the non-imprisonment sentences.<sup>32</sup> To separately measure the probability of receiving a prison sentence from the probability of receiving increasingly severe lengths of imprisonment, Albonetti utilized a decomposition formula for the Tobit estimates. Albonetti found that non-white defendants were more likely to receive a prison sentence than whites and that when incarcerated, non-white defendants received longer sentences than white defendants. Additionally, Albonetti's research concluded that women were less likely to be incarcerated than men, and that when women were incarcerated, they received shorter sentences than men. More recent work from Steffensmier (1998) and Steffensmeier and Demuth (2000) measured sentencing severity by separating the decision to imprison (in/out decisions) and used an Ordinary Least Squares (OLS) regression model to measure the length of imprisonment for those offenders for received a prison sentence. Such differences in

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<sup>32</sup> Since some of the defendants in the database did not receive a prison sentence, but instead were sentenced to a term of probation, the dependant variable (months of prison time sentenced) includes a number of cases with zero months of imprisonment. The inclusion of the cases where a defendant receives zero months of imprisonment censors the data to the left (toward zero).

model specifications may explain why researchers have found differences in the effect of defendant characteristics on sentence severity.<sup>33</sup>

In this study I have used a split-outcome methodology to measure the decision to incarcerate separately from the length of imprisonment. I conducted logistic regression analysis on the incarceration decision and then utilized a separate OLS regression analysis for the sentence length. To address the concerns raised around differential specification of the models for sentence length, I have included the maximum likelihood Tobit regression models for the same variables in Appendix V.

For the analyses in this chapter I have chosen to use only sentencing data for drug traffickers. Because my hypotheses involve measurement of sentencing severity as a dependant variable, it is important to minimize the differences between crime types (as defined in the Guidelines). The Guidelines provide a base offense level for all types of crimes and specify how those offense levels should be modified depending on the particular circumstances of a crime. For example, aggravated assault (Section 2A2.2) has a base offense level of fifteen. However, the Guidelines call for changes in the offense level if specific offense characteristics are present. For aggravated assault, the Guidelines specify that the base level of fifteen should be increased by five levels if a firearm was discharged and increased four levels if there was serious bodily injury (United States Sentencing Commission, 1998). Therefore,

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<sup>33</sup> The questions about model specifications for tests of sentencing under the Federal Sentencing Guidelines are still unsettled. This issue is discussed in more detail in Hoefler (1999).

variation in guideline-specified adjustment to the base offense level can strongly influence the severity of sentencing outcomes. Because it is impossible to control for all the guideline-defined variation in offense levels for different types of criminal behavior, I have chosen to focus my analyses single type of crime, in this case, drug trafficking.

Table 4.1 provides descriptive analysis of the independent variables used in this chapter for analyses sentencing severity. This table is quite similar to the descriptive table (Table 3.1) presented in chapter three, but when appropriate (during OLS regression), categorical variables have been returned to their original continuous form. These adjustment were made because linear regression models are well suited to handle both continuous independent and dependent variables. The descriptive information has been separated for male and female defendants to show gender differences within the sample.

Guideline offense levels and criminal history categories are two important variables that have been returned to their original continuous form. The guideline offense level variable represents the level at which the defendant's offense and relevant behavior are placed on the guideline sentencing grid (measured from 1 to 43, see Appendix I).

**Table 4.1: Descriptive Analysis of Independent Variables**

Variables	Coding	Pooled	Males	Females
		N=17,151 %	N=14,973 %	N=2,178 %
<b>Independent Variables</b>				
Race**	1=Non-white	74	75	66
	0=White	26	25	34
Gender	1=Female	13		
	0=Male	87		
Citizenship**	1=Non-citizen	27	28	21
	0=Citizen	73	72	79
Age		x=32.97 s.d.=9.85	x=32.94 s.d.=9.90	x=33.22 s.d.=9.48
Dependants**		x=1.68 s.d.=1.74	x=1.70 s.d.=1.76	x=1.53 s.d.=1.61
Education**	1=high school grad and above	50.5	50.2	45.2
	0=less than high school degree	49.5	49.8	54.8
Plea**	1=Guilty	92	92	94
	0=Not guilty	8	8	6
Offense Level**		x=24.76 s.d.=8.17	x=25.16 s.d.=8.11	x=22.00 s.d.=8.10
Criminal History Point**		x=2.06 s.d.=1.52	x=2.14 s.d.=1.56	x=1.48 s.d.=1.03
Safety Valve**	1=Safety valve applied	25	24	34
	0=No safety valve applied	75	76	66
Any Departure	0=No Departure	56	58	48
	1= Any Departure	44	42	52
Prosecutor-Motivated Departure	1=Substantial assistance departure	32	31	37
	0=Other	68	69	62
Judge Motivated Departure	1=Traditional departure	12	11	14
	0=Other	88	89	86
Circuit 0b	District of Columbia	1	1	1
Circuit 1	ME, MA, NH, RI, Puerto Rico	3	3	3
Circuit 2 **	CT, NY, VT	9	9	10
Circuit 3	DE, NJ, PA, Virgin Islands	5	5	5
Circuit 4 *	MD, SC, VA, WV	11	11	10
Circuit 5 **	LA, MS, TX	19	20	16
Circuit 6	KY, MI, OH, TN	8	8	7
Circuit 7	IL, IN, WI	3	3	4
Circuit 8 *	AR, IA, MN, MO, ND, NB, SD	7	7	8
Circuit 9	AK, AZ, CA, HI, ID, MT, NV OR, WA, Guam, N. Marina Is.	13	13	13
Circuit 10 **	CO, KS, NM, OK, UT, WY	6	5	7
Circuit 11	AL, FL, GA	15	15	16

Notes: \* Gender Differences significant at the  $p < .05$  level\*\* Gender Differences significant at the  $p < .01$  level

Men in the sample had a mean guideline offense level of 25.16 (s.d.=8.11) compared to a mean guideline offense level for women of 22.00 (s.d.=8.10). The difference in guideline offense levels between men and women suggests that men are convicted of trafficking offenses that are considered more serious by prosecutors and judges. Such differences in “degree” of offense may be a legitimate explanation for gender disparities in sentencing severity.

On average, men had higher criminal history points ( $x=2.14$ ,  $s.d.=1.56$ ) compared to women ( $x=1.48$ ,  $s.d.=1.03$ ). Because the criminal history points represent one of the axis on the Guidelines grid, a higher criminal history score could mandate increased severity in sentencing outcomes. Thus, sex differences in criminal history points, like the differences in offense levels, can be important for understanding the existence of “legitimate sex differences” in sentencing severity.<sup>34</sup>

#### **Testing Hypothesis Four: Female Defendants Are Less Likely to Receive Prison Sentences Than Men**

To test hypothesis four, I use the same sample of federal drug offenders from 1996 to 1997 that has previously been described. For this hypothesis, the test or dependant variable measures if a defendant was sentenced to a term of incarceration or not (coded zero for no incarceration and one for incarceration). The original 1996 to 1997 data set included both incarceration and non-incarceration sentence outcomes.

There were 1,183 cases out of the original 17,151 cases in the data set that were non-incarceration sentences. The rest of the cases in this data set are incarceration sentences ranging from 1 month to 727 months.

To test hypothesis four, I employed logistic regression analysis to measure the likelihood of receiving a prison sentence. The results of this analysis are found in Table 4.2. In this sample, women are significantly less likely to receive a prison sentence than men. The odds of receiving a prison sentence decrease by .529 when the defendant is a female. Thus, hypothesis four, positing that female defendants are less likely to receive prison sentences than men, is affirmed.

A number of other interesting findings emerged from the regression analysis. First, non-white defendants are more likely to receive imprisonment than white defendants. Second, not surprisingly, defendants with higher criminal histories and offense levels are more likely to receive imprisonment. Thirds, receiving either a prosecutor-motivated departure or a judge-motivated departure also decreases a defendant's likelihood of receiving a prison sentence.

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<sup>34</sup> I use the term "legitimate gender differences" cautiously because prior decisions made in an inappropriate manner by the probation officer or the prosecutor about criminal history or offense levels can alter the sentence outcome.

**Table 4.2: Logistic Regression Model for Likelihood of Receiving a Prison Sentence**

Independent Variables	Estimate	SE	Odds
Race*	0.232	.087	1.261
Gender**	-0.637	.880	0.529
Citizen**	-1.901	.145	0.149
Age	0.076	.081	1.078
Education**	-0.374	.082	0.688
Dependants	-0.142	.081	0.868
Number of Counts	0.010	.124	1.010
Offense Level**	0.255	.008	1.290
Criminal History**	0.660	.047	1.934
Safety Valve	0.190	.108	1.209
Plea*	0.786	.395	2.195
Prosecutor-Motivated Departure <sup>a**</sup>	-2.431	.106	0.088
Judge-Motivated Departure**	-1.819	.140	0.162
Circuit 1 <sup>b**</sup>	2.144	.436	8.538
Circuit 2*	0.918	.385	2.505
Circuit 3**	1.448	.407	4.254
Circuit 4**	1.900	.391	6.686
Circuit 5**	2.297	.385	9.948
Circuit 6**	1.978	.391	7.228
Circuit 7**	2.747	.477	15.601
Circuit 8**	1.375	.392	3.955
Circuit 9**	1.885	.384	6.587
Circuit 10**	1.668	.397	5.304
Circuit 11**	1.963	.388	7.121
Constant**	-1.966	.434	0.140

Notes: a No departure is the reference  
b District of Columbia is the reference  
\* significant at the  $p < .05$  level  
\*\* significant at the  $p < .01$  level

Though the standard logistic regression analysis indicates racial differences in the likelihood of receiving a prison sentence, it is unclear whether or not racial differences in the likelihood of going to prison exist for both men and women. To test the interaction of sex and race on imprisonment decisions, I have partitioned the logistic regression model to test the conditioning effects of sex on racial disparities in

the likelihood of receiving a prison sentence. The results from this test are found in Table 4.3.

**Table 4.3: Male and Female Logistic Regression Estimates for Imprisonment**

	In/Out Decisions					
	Men			Women		
	B	SE	Odds	B	SE	Odds
Race	.334**	0.105	1.396	-0.046	0.163	0.955
Citizen	-1.753**	0.173	0.173	-2.087**	0.272	0.124
Age	-0.005	0.097	0.995	0.224	0.150	1.251
Education	-.385**	0.098	0.681	-.407*	0.153	0.666
Dependants	-0.089	0.096	0.915	-0.243	0.155	0.784
Number of Counts	-0.022	0.146	0.979	0.018	0.243	1.018
Criminal History	.651**	0.052	1.917	.752**	0.113	2.12
Offense Level	.267**	0.009	1.306	.218**	0.014	1.244
Safety Valve	0.116	0.132	1.123	.435*	0.194	1.545
Plea	0.926	0.490	2.525	0.732	0.676	2.079
Prosecutor-Motivated						
Departure	-2.420**	0.124	0.089	-2.495**	0.212	0.082
Judge-Motivated						
Departure <sup>a</sup>	-1.549**	0.173	0.212	-2.335**	0.257	0.097
Circuit 1 <sup>b</sup>	2.642**	0.529	14.038	1.205	0.795	3.337
Circuit 2	1.130*	0.445	3.095	0.520	0.738	1.681
Circuit 3	1.626**	0.471	5.083	1.113	0.78	3.044
Circuit 4	1.892**	0.450	6.636	2.125*	0.761	8.376
Circuit 5	2.480**	0.444	11.938	1.903*	0.738	6.705
Circuit 6	2.238**	0.452	9.370	1.355	0.747	3.875
Circuit 7	3.102**	0.604	22.251	2.221*	0.830	9.214
Circuit 8	1.485**	0.453	4.414	1.050	0.750	2.856
Circuit 9	2.050**	0.443	7.767	1.477*	0.734	4.38
Circuit 10	1.846**	0.462	6.333	1.264	0.751	3.541
Circuit 11	2.055**	0.447	7.81	1.892*	0.749	6.634
Constant	-2.486	0.504	0.083	-1.387	0.829	0.250

Notes: a No departure is the reference  
b District of Columbia is the reference  
\* significant at the  $p < .05$  level  
\*\* significant at the  $p < .01$  level

In this sample, gender conditions the effect of race on the likelihood of receiving a prison sentence. For men, being non-white increases the likelihood of receiving a prison sentence, while for women, being non-white does not significantly change a defendant's likelihood of receiving a prison sentence. Thus, the race of the defendant continues to affect the chances that they will receive a prison sentence under the Guidelines for men, but has little to no effect on prison sentences for women.

The above analyses confirm a continued leniency toward female defendants during the initial decision to grant probation or sentence a defendant to prison. However, this decision affects only a small number of the defendants in this sample (just 1,183 cases out of the original 17,151 received no prison time). Testing the relationship between gender and sentence lengths for those defendants who receive a term of imprisonment provides a much more accurate assessment of judicial leniency toward female defendants under the Guidelines.

### **Testing Hypothesis Five: Women Sentenced to Prison Receive Shorter Sentences Than Men**

The early analysis confirms that women are less likely to receive a prison sentence than men. Now it is important to determine if women receive shorter sentences than men do, when they are incarcerated. An initial bi-variate examination of sentence length shows that women receive fewer months of imprisonment than men and that white defendants, both male and female, receive fewer months of

imprisonment compared to non-white defendants. Table 4.4 illustrates the differences in mean months of incarceration for men and women and the differences in means months of incarceration for white and non-white defendants without controlling for any other relevant factors.

**Table 4.4: T-Test of Effect of Gender and Race on Months of Imprisonment**

<b>Gender</b>		<i>No. of Cases</i>	<i>Mean</i>	<i>SD</i>	<i>SE of Mean</i>	<i>Sig.</i>
	Male	14,973	76.10	76.67	0.63	.00
	Female	2,178	40.66	49.69	1.06	
<b>Race and Gender</b>		<i>No. Cases</i>	<i>Mean</i>	<i>SD</i>	<i>SE of Mean</i>	<i>Sig.</i>
<b>Male</b>	White	3,749	57.85	65.79	1.07	.00
	Non-White	11,224	82.20	79.05	0.75	
<b>Female</b>	<i>Variable</i>	<i>No. Cases</i>	<i>Mean</i>	<i>SD</i>	<i>SE of Mean</i>	<i>Sig.</i>
	White	731	36.51	49.05	1.81	.01
	Non-White	1,447	42.76	49.90	1.31	

Male defendants have a significantly higher mean length of imprisonment ( $x=76.10$  months) compared to female defendants (40.66 months). The stark differences in sentencing lengths for male and female defendants suggest females may be sentenced more leniently than males.

Table 4.4 also indicates that a defendant's race may influence the severity of the sentence for both men and women. The mean sentence length for white male defendants in this sample was 57.85 months (s.d.=65.69) while the mean sentence length for non-white male defendants was significantly higher at 82.20 months (s.d.=79.05). Though women receive significantly shorter sentences than men do overall, race differences in sentence lengths also exist for female defendants (36.51

months for white women compared to 42.76 months for non-white women). The differences in mean months of incarceration illustrated in Table 4.4 could be interpreted to suggest that women are sentenced more leniently than men and white defendants are sentenced more leniently than non-white defendants, but such conclusions cannot be made without controlling for other appropriate legally relevant variables.

The bi-variate relationships between sex, race, and sentence severity are extremely crude measures of sentencing disparity. Many other factors, such as defendants' criminal history or their offense level, may explain these differences in sentencing outcomes. To test the relationship between gender and sentencing severity I utilized OLS regression analysis for those cases where a defendant received a prison sentence longer than one month.

I have added two variables to the OLS regression model that were not included in the previous analysis. These two variables help control for other factors that might increase defendants' sentence length. I have added a variable for maximum-guideline sentence range that provides an additional control for the severity of the charges. The maximum-guideline range variable measures the potential severity of the sentence, as indicated in the pre-sentence investigation report, under the Guidelines. Additionally, I have added a variable for a sentencing enhancement based on the offender's use of a firearm during the crime. The firearm enhancement can result in a greater sentence length for defendants. The addition of these two

variables enhances the robustness of the model and control for factors beyond defendant characteristics that may explain disparities in sentence lengths.<sup>35</sup>

The bivariate correlation matrix for both the independent and dependent variables that will be used to test the relationship between gender and sentencing outcomes can be found in Appendix VI. Regression analysis is particularly sensitive to collinearity between variables because when two of the independent variables have high correlation it is difficult to separate out the estimates for each of the coefficients. The correlation matrix reveals no evidence of collinearity among the independent variables that could threaten a multivariate analysis.<sup>36</sup> However, it does show that the dependent variable, sentence length, is strongly correlated with three independent variables, defendant offense levels (.73), criminal history points (.37), and pleading guilty (.40). These results are not unexpected because under the Guidelines higher offense levels and more criminal history points automatically increase range of imprisonment that a judge is bound to sentence within.

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<sup>35</sup> Recent research on sentence guideline application has raised issues about the appropriate use of offense score and criminal history scores as indicators of offense severity. Recent debate between Ulmer (2000) and Engen and Gainey (2000) has suggested that better measures of legally-relevant variables should be developed, but no conclusions have yet been drawn about measuring sentencing outcomes under the Federal Sentencing Guidelines.

<sup>36</sup> There is potentially strong collinearity between the offense-level and the maximum-guideline range. This would be expected because the two variables measure similar effects (seriousness of the crime). I tested all of the following regression analysis both including and excluding maximum-guideline range to determine if the multicollinearity problem changed the estimates for other variables. Because these tests revealed no discernable effect having both offense-level and

Once I have determined that multicollinearity is not a problem with my model I will use an OLS regression model to examine the effects of gender on sentencing length (for defendants who receive a prison sentence) while controlling for a number of other important variables that might influence sentence outcomes. Table 4.5 illustrates that in federal drug trafficking cases from 1996 to 1997, women continue to receive more lenient sentences compared to men (approximately three months less), even after controlling for legally relevant and courtroom process variables.

In Table 4.5, I partitioned the sample by sex to help understand why women continue to receive more lenient sentences compared to men. Although we know from earlier analysis that women are more likely than men to receive departures, Table 4.5 shows that women receive less benefit from those departures than their male counterparts. Prosecutor-motivated departures for men yielded a sentence reduction of 48 months, compared to men who receive no departures. Women receiving the same departure only experienced a sentence reduction of 34 months, compared to women who did not receive a prosecutor-motivated departure.

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maximum-guideline range in the model together they have both been included in the following analysis.

**Table 4.5: OLS Regression for Sentence Length - Uncensored Cases**  
**N=15,968**

Independent Variables	All Cases		Men		Women	
	B	SE	B	SE	B	SE
Race	-0.74	0.72	-0.64	0.79	-1.72	1.41
Gender	-3.33**	0.86	-	-	-	-
Citizenship	-1.41*	0.71	-1.35	0.76	-1.9	1.59
Age (log)	-2.35*	0.98	-2.80*	1.07	3.82	2.12
Dependants	0.54	0.58	0.44	0.63	-0.2	1.24
Offense Level	4.53**	0.05	4.71**	0.06	2.89**	0.14
Criminal History	5.76**	0.21	5.87**	0.23	3.84**	0.61
Maximum Guideline Range	0.18**	0.01	0.18**	0.01	.251**	0.01
Number of Counts	0.92**	0.14	0.93**	0.15	0.47	0.56
Weapon Enhancement	0.24	0.92	0.29	0.98	0.25	2.46
Safety Valve	-8.41**	0.70	-8.81**	0.79	-4.66*	1.45
Plea	29.55**	1.08	30.79**	1.17	19.10**	2.55
Prosecutor-Motivated Departure <sup>a</sup>	-46.53**	0.63	-48.11**	0.69	-34.07**	1.37
Judge-Motivated Departure	-23.75**	0.92	-24.10**	1.01	-19.01**	1.95
Circuit D.C. <sup>b</sup>	-21.76**	2.91	-22.85**	3.13	-18.02*	8.33
Circuit 1	-7.58**	1.63	-8.55**	1.86	-2.09	3.95
Circuit 2	-17.31**	1.13	-17.43**	1.38	-17.18**	2.79
Circuit 3	-9.24**	1.41	-9.58**	1.64	-7.25*	3.30
Circuit 5	-6.75**	1.02	-6.58**	1.11	-6.60*	2.25
Circuit 6	-2.18	1.17	-1.95	1.38	-2.76	2.83
Circuit 7	-0.12	1.54	0.211	1.76	-1.83	3.34
Circuit 8	-4.92**	1.2	-4.78*	1.14	-5.70*	2.75
Circuit 9	-8.59**	0.98	-8.49**	1.25	-8.43*	2.52
Circuit 10	-7.03**	1.27	-7.23**	1.54	-5.57*	2.77
Circuit 11	-3.55*	0.92	-3.43*	1.16	-3.03	2.31
Constant	-46.54	3.84	-42.44	4.18	-34.01	8.39
	<i>R</i> <sup>2</sup> = <i>.80</i>		<i>R</i> <sup>2</sup> = <i>.80</i>		<i>R</i> <sup>2</sup> = <i>.77</i>	

Notes: a No departure is the reference  
b 4<sup>th</sup> Circuit is the reference  
\* significant at the  $p < .05$  level  
\*\* significant at the  $p < .01$  level

Similarly, the benefit that men receive for a judge-motivated departure is greater than the benefit received by women. Although women are more likely to receive departures than men, the reduction of their sentence is less than the reduction received

by men.<sup>37</sup> Therefore, departures, by themselves do not necessarily explain why women receive more lenient sentences than men. It is important to examine the effect of other variables on gender differences in sentencing outcomes.

In earlier analysis I found differences in the likelihood of receiving a departure across the judicial circuits. However, the results in Table 4.5 indicate that being sentenced in a particular judicial circuit does not explain why women receive more lenient sentences compared to men. In this analysis I used the fourth judicial circuit as the reference category because the highest average lengths of sentences came from the fourth circuit. Contrary to my expectation, circuit court treatment of male and female offenders was quite consistent. Circuit courts that sentenced men more leniently than those in the fourth circuit court also sentenced women more leniently. Similarly, circuit courts that sentenced males more harshly than those in the fourth circuit court also sentenced women more harshly. While the results from Chapter Three indicate that men are more likely to receive prosecutor-motivated departures than women in particular circuits, the results in Table 4.5 show that differences in judicial circuits do not explain the in subsequent sex differences in sentence outcomes. Therefore, the effects of other variables must be examined to understand why women continue to be sentenced more leniently than men.

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<sup>37</sup> The differences in magnitude of departures for male and female defendants may not accurately represent the relative value of these departures. Sex differences in the pre-departure sentencing range may cause gender disparities in the effect of departures on sentence outcomes. Future research is necessary to understand differences in the value of departures received by male and female defendants.

Increases in defendant offense levels and criminal history points disproportionately raise the sentence lengths of male defendants. For every one increase in offense levels, male defendants are sentenced to an additional 4.7 months of incarceration, compared to an additional 2.9 months for women. Similarly, for every one point increase in criminal histories men receive an additional 5.8 months of incarceration, compared to an additional 3.8 months for women. These differences could simply be a result of changes in sentencing ranges on the Federal Sentencing Guidelines grid. As offense levels increase, the range of sentence lengths also increases. More research is needed to help understanding why men receive longer sentence lengths than women for similar increases in offense levels or criminal history points. At the end of this analysis, whether or not you receive a departure, offense level and criminal history remain the three most important variables for explaining sex differences in sentence outcomes.<sup>38</sup>

After conducting the regression analysis I was surprised to find that once I controlled for the legally relevant variables, there were no statistical differences in sentence lengths for white defendants and non-white defendants. Contrary to early literature that discussed the interactive effects of sex and race on sentencing, a defendant's race did not significantly change sentence outcomes for either men or

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<sup>38</sup> The z score differences between male and female coefficients for substantial assistance, traditional mitigating departures, offense level and criminal history are statistically significant according to the Paternoster et. al. (1998) formula. Therefore sex differences in the effects of departures, offense level, and criminal history are statistically significant.

women in this sample. In the next section of the chapter I explore this finding further to see if there are any identifiable interactions between sex and race and which may explain differences in sentencing outcomes for defendants who receive different types of departures.

### **Testing Hypothesis Six: White Women Receive More Lenient Sentences Than Women of Color, Across all Departure Categories.**

The findings from chapter three indicate that there are significant race differences in defendants' abilities to receive either prosecutor-motivated or judge-motivated departures. In Chapter Three I found that white defendants (both men and women) were more likely than non-white defendants to receive prosecutor-motivated departures, and that non-white defendants (both men and women) were more likely to receive judge-motivated departures. Now I am interested in finding out if racial differences in departures lead to subsequent racial differences in sentence outcomes for men and women.

Previous research from Steffensmeier and Demuth (2000) on racial differences in sentencing outcomes for male defendants sentenced under the Federal Sentencing Guidelines shows that non-white defendants were sentenced more harshly than white defendants in both departure and non-departure cases. Steffensmeier and Demuth found that Hispanic defendants received the harshest treatment compared to both

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white and black defendants in departure cases.<sup>39</sup> I use a methodology similar to Steffensmeier and Demuth (2000) to see if there were race or gender differences in sentence outcomes for each of the three potential departure types: no departure, prosecutor-motivated departures, and judge-motivated departures.

I conducted OLS regression tests separately for each of the three possible departure statuses, with the results reported in Table 4.6. Women receive more lenient sentences compared to men under all three of the potential departure statuses. However, the sex disparity in sentence outcomes is greatest for prosecutor-motivated departure cases and lowest for cases where no departure was granted. Thus, leniency in sentencing for women is most visible for those defendants who receive prosecutor-motivated departures.

Once I determined that sex disparities in sentencing outcomes were greatest for defendants who received prosecutor-motivated departures the next step was to examine if racial disparities existed in sentence outcomes within any of the three departure statuses (no departure, judge-motivated departure, and prosecutor motivated departure). Table 4.6 shows no race differences in sentence severity for defendants who did not receive a departure or defendants who received a judge-motivated

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<sup>39</sup> It is important to note that the Steffensmeier and Demuth (2000) study separated non-white defendants into either black or Hispanic categories. Additionally, Steffensmeier and Demuth examined only the experiences of male defendants in federal criminal sentencing while my analysis includes both men and women. In my analysis both black and Hispanic defendants are combined into a non-white category.

departure. However, racial differences emerged for defendants who received prosecutor-motivated departures.

**Table 4.6: OLS Regression for Sentence Length - Comparing Three Models on Departure Effect**

	No Departure		Prosecutor-Motivated Departure		Judge-Motivated Departure	
	B	SE	B	SE	B	SE
Race	-0.51	0.86	2.17*	6.45	-0.88	2.14
Gender	-2.39*	1.07	-4.74**	1.03	-3.88*	1.83
Citizenship	-0.11	0.8	-0.52	1.29	-6.51**	1.65
Age (log)	-0.17	1.15	-3.43	1.23	-5.87*	2.17
Dependants	0.06	0.68	1.98*	1.62	-0.40	1.30
Offense Level	5.06**	0.06	3.29**	0.09	3.58**	0.13
Criminal History	7.10**	0.25	5.20**	0.36	3.90**	0.53
Maximum Guideline Range	0.25**	0.01	0.09	0.01	0.16**	0.01
Number of Counts	1.04**	0.15	2.17**	0.41	-0.32	0.25
Weapon Enhancement	1.84	1.08	-0.39	1.36	4.01	2.78
Safety Valve	-13.61**	0.87	-6.06**	1.11	-10.70**	1.48
Plea	18.61**	1.06	9.58	5.52	9.42*	2.98
Circuit D.C. <sup>a</sup>	-14.84**	3.30	-38.83**	5.51	-26.50**	6.76
Circuit 1	-6.85**	1.91	-4.60	2.95	-14.22*	5.26
Circuit 2	-10.45**	1.57	-24.54**	1.97	-16.60**	3.83
Circuit 3	-2.24	1.87	-12.45**	2.08	-12.08*	5.26
Circuit 5	-8.03**	1.14	0.31	1.62	-13.78**	3.89
Circuit 6	-2.82	1.53	-1.15	1.79	-9.73	5.20
Circuit 7	-4.69*	1.82	7.42*	2.45	-7.02	7.16
Circuit 8	-6.30**	1.50	-2.29	1.96	-5.65	4.58
Circuit 9	-6.67**	1.37	-8.98**	1.91	-19.55**	3.71
Circuit 10	-6.78**	1.57	-7.01*	2.38	-14.41*	4.34
Circuit 11	-2.27	1.23	1.18	1.57	-15.69**	4.28
Constant	-70.17	4.50	-42.95	6.48	-11.48	8.92
	<i>R</i> <sup>2</sup> = .87		<i>R</i> <sup>2</sup> = .64		<i>R</i> <sup>2</sup> = .79	

Notes: a 4<sup>th</sup> Circuit is the reference  
 \* significant at the  $p < .05$  level  
 \*\* significant at the  $p < .01$  level

Non-white defendants granted prosecutor-motivated departures received longer sentences than white defendants receiving the same departure.<sup>40</sup> This finding indicates that the discretionary power of prosecutors in the departure process may lead to racially disparate sentencing outcomes.

Although women received shorter sentences than men across all three of the sentence departure types, I wanted to find out if this pattern of leniency held for both white and non-white women. To understand the interactive effects of race and sex on sentence outcomes, I further partitioned the data into six categories: 1) men who receive no departure, 2) women who receive no departure, 3) men who receive a substantial assistance departure, 4) women who receive a substantial assistance departure, 5) men who receive a traditional mitigating departures, and 6) women who receive a traditional mitigating departure. Separate OLS regression analyses were conducted for each of the above gender-departure categories, and the estimates for race are included in Table 4.7.

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<sup>40</sup> The relationship between citizenship, departures, and sentence severity is also interesting. Non-citizens get more lenient sentences compared to citizens when they receive a traditional mitigating departure. Because the non-citizen category is predominately Hispanic, a group that is combined with black and other racial categories into the non-white category for my analysis, their experiences may not be fully captured here. This finding underscores the need for future research that separates out the different effects of race for Hispanic and Black defendants.

**Table 4.7: OLS Regression Coefficients for Sentence Length For Race by Departure Type and Gender**

	<i>No Departure</i>		<i>Substantial Assistance Departure</i>		<i>Traditional Mitigating Departure</i>	
	Men	Women	Men	Women	Men	Women
Race	-0.55	0.07	2.25*	-1.31	1.55	-8.93*
	-0.95	-1.5	-1.15	-1.94	-2.38	-4.85
R <sup>2</sup> <sup>41</sup>	0.87	0.9	0.64	0.61	0.8	0.69
Number of Cases	8,288	928	4,244	627	1,634	240

In Table 4.7 sentencing outcomes were similar for white and non-white men and women when they did not receive a downward departure. However, non-white men who received prosecutor-motivated departure were sentenced to longer lengths of incarceration compared to white men who received the same departure.<sup>42</sup> There were no significant racial differences in sentence lengths for women who received prosecutor-motivated departures. Racial differences emerged in sentencing outcomes for women who received judge-motivated departures, but the race effect switched for women. Non-white women who received judge-motivated departures got more lenient sentences compared to white women who received the same departure.

<sup>41</sup> I have included the R<sup>2</sup> calculation of variance that is explained for each of the three models to note that the variables included in the no departure model explained a high level of the variance (nearly 90%). The variables in the judge-motivated departure model also explained a high level of variance (80% for men and 69% for women). Yet, the variables in the prosecutor-motivated departure model explained a lower level of the variance than either the no departure or judge-motivated departure. This findings indicates that there may be other important factors that are influencing sentencing outcomes for defendants that receive prosecutor-motivated departures that are not captured in my model.

<sup>42</sup> The racial differences in sentence length for men who received judge-motivated departures were not significant.

Therefore, hypothesis six predicting that white women receive more lenient sentences than women of color across all departure categories, is rejected. In cases where judge-motivated departures were granted, women of color received more lenient sentences than white women. There are no significant race differences in the sentence lengths of female defendants who either did not receive any departure or who received prosecutor-motivated departures.

The findings from this chapter suggest that prosecutors and judges use their discretionary power to grant departures quite differently. Judges are more lenient to women of color and prosecutors are more lenient to white women. Although departures do not explain all of the differences in sentence outcomes for male and female defendants, they remain the central mode of Guideline circumvention. Understanding how courtroom actors make decisions during the sentencing process has always been a challenge for criminal justice research. But the Guidelines were designed to make the discretionary decision-making process of judges transparent. The decisions of judges about when to grant mitigating circumstance departures are made in public view. Judges must justify their departure decisions in writing, and the appellate courts often review judicial departure decisions. While the discretionary power of judges has been weakened by the Guidelines, the findings from this chapter confirm that judge-motivated departures continue to foster disparate sentencing outcomes for men and women. Future research may be able to use the wealth of

information about judicial departures that exist in sentencing opinions to better understand why sex differences persist in the judge-motivated departure process. In the next chapter I attempt just such a project, analyzing how a defendant's gender roles within the family affect judicial decisions to depart from the Guidelines.

Although we may be able to better understand how a defendant's sex affects judicial decisions to depart from the Guidelines, understanding the persistent sex disparities in prosecutor-motivated departure is more problematic. Unlike judges, the prosecutors continue to make discretionary decisions about departure behind closed doors. Although we know very little about how prosecutors make decisions, this research confirms that the decisions of prosecutors have become increasingly important under the Guidelines. Although scholars have hypothesized that prosecutors affect sentencing outcomes under the Guidelines because they make decisions about charging and plea bargaining (Salvelsberg, 1992), this research also shows that prosecutorial decisions about granting substantial assistance departures are a strong predictor of sentencing disparity. Thus, to fully understand why women continue to be sentenced more leniently than men under the Guidelines, we must gather information about how both judges and prosecutors use their discretionary power.

## Chapter V.

### Legal Constructions of Family Roles and the Application of 'Extraordinary Family Circumstances' Departures

In the previous two chapters I used a traditional disparity methodology to measure the effect of defendant sex on departure outcomes and sentence severity. I discovered that women sentenced at the federal level for drug-trafficking from 1996 to 1997 were more likely to receive both prosecutor and judge-motivated departures than men. I also confirmed that women were less likely than men to be sentenced to prison, and that women who were sentenced to prison received less lengthy terms of incarceration than men. This research showed that white women continue to be treated differently than women of color, both in departures and sentencing outcomes. However, while this research strategy has confirmed the continued existence of gender, and to a limited extent, race disparities in federal sentencing, it does not illuminate why such disparities exist.

In order to gain a deeper understanding of the interaction between gender and sentencing outcomes in federal courts, I used sentencing opinions to conduct a focused analysis of a particular judge-motivated type of departure—the extraordinary family circumstance departure. In this chapter, I examine how defendants' gender affects their ability to receive an EFC departure. While I discussed the effects of a defendant's *sex* on sentence outcomes in the last two chapters, in this chapter I shift

the focus to discuss the effects of *gender* on departure decisions. I have made this distinction between sex and gender in my analysis because the statistical data did not provide information about the social gender roles of defendants. Conversely, in the case analysis I have access to rich descriptions of defendants as both sexed and gendered subjects. Family responsibilities, as noted in Chapter One, were a well-recognized justification for judicial leniency toward female offenders in pre-guideline sentencing. Therefore, we should expect that judicial decisions to grant an EFC departures under the Guidelines should continue to be motivated by cultural norms about gender roles within the family.

### **Gender Differences in “Legal Responsibility” for the Family**

Feminist criminologists and legal scholars argue that cultural definitions of motherhood and family responsibilities affect how legal institutions treat women (Ashe, 1992; Fineman, 1995; Murphy, 1998). Those who interpret the law do so in the shadow of both personal and social assumptions about family structures, parenthood, and gender roles. Gender stereotypes about "appropriate" family roles have emerged in various legal contexts such as child custody (Chesler, 1986); civil abuse and neglect proceedings (Swift, 1995); criminalization of drug use during pregnancy (Humphries, 1995; Roberts, 1997); and criminal liability for "failure to protect" children (Erickson, 1991; Roberts, 1999).

American criminal law has historically imposed a greater affirmative duty on women for the caretaking responsibilities of children (Gomez, 1998; Roberts, 1999). According to the doctrine of omission liability, caretakers can be held accountable for harm inflicted on children in their care, whether or not they are directly responsible for causing the harm. While state laws for omission liability are gender-neutral in their references to which individuals face such affirmative duties (caregivers, parents), women in fact have disproportionately carried this burden (Martin, 1983). Under this legal construction, motherhood has been interpreted by the courts as an obligation, one carrying affirmative legal duties (Czapanskiy, 1991).

Although cultural expectations for women in families have varied over time, women in the United States have traditionally been held responsible for nearly all aspects of their children's lives, their education, their behavior, and their safety. These responsibilities grew out of a presumed "natural" relationship between women and children. Sociological research on families and gender has consistently shown that our cultural constructions of the "good" mother are of an "intensive" or "exclusive" mother (Berry, 1993; Hays, 1996; MacDonald, 1998). Such constructs of motherhood also imply that the "good" mother is middle class, white, married, and educated. Therefore, American courts have constructed strong affirmative legal duties for women in caretaking roles based on shared social expectations about what "good" mothers should do and who they should be.

Research on social expectations of fathers has shown that a "good" father is defined as one who successfully accomplishes discrete tasks (McAdoo and McAdoo, 1998). The "good" father is a provider (Pleck, 1987; Bernard, 1992), remains "committed" to his family and his marriage (Furstenberg, 1997), and is "present" to maintain emotional contact with children, even if he does not live with them (Tiedja and Darling-Fischer, 1996). Therefore, the affirmative legal duties that courts impose on fathers have been focused traditionally on the successful completion of specific tasks, unlike those imposed on mothers, where women have been held responsible for protecting the general welfare of children. As Judith Lorber suggested, "mothers are judged by who they are while fathers are judged by what they do" (Lorber, 1995: 167).

How legal institutions define family roles, and motherhood in particular, has dramatic consequences for both women who are charged with crimes and those outside the legal system who adopt institutionally sanctioned definitions about a mother's duties. The family is no longer solely a private enterprise. Instead, public institutions define and regulate many aspects of family life (Baca-Zinn, 1990; Skolnick, 1991; Coontz, 1992; Throne and Yalom, 1992; Berry, 1993). Law is one of the social structures that sanctions cultural norms about family roles, at times even creating these norms (Fineman, 1995). For example, emerging legal doctrine about the duties and responsibilities of gay and lesbian parents and their partners provides legitimacy to these family forms and to homosexual partnerships itself. As one legal

commentator observed, “by determining the legality of lesbian and gay families, the court is ruling on the legitimacy of these ‘alternative’ family structures, and implicitly conveys its approval or disapproval of these arrangements” (Lin, 1999: 767). The courts have served similar “legitimizing” functions for non-traditional family roles in legal battles over same sex adoption, custody for non-custodial parents, and surrogacy. Through these types of legal disputes the courts continually re-define what a family is.

Although courts have not always been in agreement on the definition of a family or of the responsibilities of individuals within families, they continue to serve a normative function that resonates through other social institutions. Therefore, when discrepancies arise between the standards for families demanded by legal institutions and the realities of everyday family life, social tension and instability can arise (Minow, 1998). Examining departures from the sentencing Guidelines made due to a defendant's extraordinary family circumstances provides a unique opportunity to illuminate how courts manage and interpret ever-changing social definitions about family roles through a specific legal claim.

Previous scholarship on gender and sentencing found that judges made sentencing decisions based on “traditional” assumptions about gender norms within families (Daly, 1987, 1989), but this research did not examine the effect of gender under structured sentencing systems, such as the Federal Sentencing Guidelines. In this chapter I examine how federal judges make decisions about sentence reductions

based on family circumstances within the confines of the Federal Sentencing Guidelines, which specify that a defendant's family circumstances and responsibilities should not ordinarily be relevant in judicial decisions to depart from the Guidelines. This chapter explores how particular family circumstances have been interpreted as "extraordinary," justifying a departure from the Guidelines, and how cultural assumptions about gender roles within the family have shaped such departure decisions. Sentencing departures for extraordinary family responsibilities occur for only a small percentage of the sentenced population, but they provide important insight into both judicial discretion in the federal courts, even limited as it now is, and institutionalized norms about gender roles in families.

### **Case Analysis Methodology and Assumptions**

Departures for extraordinary family circumstances are granted infrequently in most judicial circuits.<sup>43</sup> To systematically examine how judges use traditional family roles to determine whether a defendant's circumstances justify a departure for extraordinary family circumstances, I have compiled a database of 207 appellate and district court opinions on EFC departures from 1989 to 1999. The database of EFC departure cases was drawn from an extensive search for legal cases where EFC

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<sup>43</sup> In 1996-1997, EFC departures were granted in less than 1% of all the federal sentences. The characteristics of defendants who were granted EFC departures in 1996-1997 are described in Appendix VI.

departures were raised using the Lexis-Nexis legal database.<sup>44</sup> Between 1989 and 1999 there were approximately 1,500 EFC departures granted in the federal courts, but the total number of cases where the EFC departure issue was raised but a departure was not granted is unknown. Therefore, the sample of 207 sentencing opinions used in the chapter was drawn from a sub-sample of approximate 400 cases found through a Lexis-Nexis search for EFC departure cases from all federal court between 1989-1990. The 207 cases were chosen because they represented a cross-section of jurisdictions and contained enough descriptive information to be meaningfully analyzed. The cases were coded for common analytical themes using the qualitative software program NUD\*IST (QSR). The codes were subsequently organized to address theoretical questions about social norms in families. In addition, I conducted a series of informational interviews to gain additional information about interpreting EFC departure decisions for my narrative analysis. The informational

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<sup>44</sup> Lexis-Nexis is a legal data base that warehouses legal opinions for use by judges, lawyers and researchers. This sampling procedure is not truly random because judges in particular circuits are more likely to write full sentencing opinions in such cases. In other circuits, judges primarily issue "slip opinions," which are short descriptions of sentencing outcomes that are normally not included in the Lexis-Nexis database. Additionally, Lexis-Nexis is often more likely to include seminal opinions from each circuit which may not represent the cross-section of sentencing decisions in that circuit. However, this sample was important for understanding the application of EFC departures because the United States Sentencing Commission's data included in *The Monitoring of Federal Criminal Sentencing*, used in the previous chapter, does not indicate cases where an EFC departure issue was raised, rather it codes only cases where the EFC departure was successful. In addition, because this chapter is designed to examine cases as text, particularly the judges' reasoning about different defendants and their gendered locations in families, it is critical to use a narrative sentencing opinion as data.

interviews were conducted with ten different federal court officials in Massachusetts and New York.<sup>45</sup> The interviews were not used as a primary data sources, but rather served to clarify particular aspects of the EFC sentencing opinions and the departure decision-making process.<sup>46</sup>

Because the sample of 207 cases used for this analysis was drawn from an extensive Lexis-Nexis search of EFC departure opinions, the cases are not evenly distributed among the twelve federal judicial circuits. Thirty-two percent of the cases in the sample are from the second circuit. However, the uneven distribution of cases should be expected. Within the judicial circuits there are different legal precedents determining what standards judges should use to make EFC departure decisions. Therefore, judicial circuits differ widely in their interpretation of which family circumstances qualified as extraordinary.<sup>47</sup> The second circuit appellate has defined

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<sup>45</sup> The interviewees included four federal probation officers, two federal prosecutors, two federal defense attorneys and two federal judges and were conducted during winter and spring, 2000.

<sup>46</sup> While these interviews were helpful for understanding technical details, they were less effective for uncovering information about legal cultures and the ways that a defendant's gender influences decisions of courts, prosecutors, police, and probation officers in the sentencing process. Past research has indicated that in-depth and intensive qualitative research, beyond the scope of interviews, is necessary to understand how courtroom actors who work "behind the scenes", such as lawyers and probation officers, make decisions (Einstein and Jacob, 1977; Frohman, 1991). Additional qualitative research on the cultural norms in legal institutions about gender, family status, and downward departures from the Federal Sentencing Guidelines could be critical for answering questions about how legal institutions define and redefine family roles and how these processes influence procedural decisions such as downward departures

<sup>47</sup> Throughout the paper I refer to both circuit and district courts. The legal history of EFC departures shows clear patterns of district courts, which support of EFC

"extraordinary family circumstances" most broadly. In the second circuit, a family circumstance can be deemed "extraordinary" when it is compelling, as opposed to atypical, the standard used for most other circuits. Therefore, claims for EFC departures were raised and granted in the district courts of the second circuit (New York, Connecticut and Vermont) for family circumstances that would not have merited departures in other circuits.<sup>48</sup> The more expansive definition of "extraordinary" used in the second circuit has disproportionately provided a benefit for female defendants. The following table illustrates gender differences in EFC departure outcomes that emerged for the 207 cases in this sample.

Table 5.1 shows that women who raise issues about family suffering at sentencing are more likely to receive a departure in the second circuit than in all other circuits combined. In the second circuit, 81 percent of the women who raise EFC issues are granted a departure, but only 35 percent of the women who raise EFC issues in all the other circuits are granted a departure. Additionally, women in the second circuit are disproportionately more likely to be granted an EFC departure than men (81 percent of women and 47 percent of men granted an EFC departure).

However, the differences between men and women in their ability to receive EFC

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departures, facing censure from appellate circuit courts, which generally have tailored the range of EFC departures quite narrowly. Myrna Raeder (1993) suggests that if the circuit courts had been more hospitable to family circumstances departures then the EFC departure rate in district courts would be much higher.

<sup>48</sup> The 1997 Sourcebook of Federal Sentencing Statistics reveals that EFC departures constitute about 2% of departures nationwide, but constitute 22% of the departures in the 2nd circuit – four times the national average.

departures when the issue was raised was not statistically significant in all the other circuits (35 percent of women and 24 percent of men granted EFC departures in all other circuits combined).

**Table 5.1: Breakdown of Extraordinary Family Circumstance Departures Between 1989-1999 For All Cases Where This Legal Issue Was Raised (N=207)**

<b>All Circuits Except the Second Circuit</b>	<b>Women</b>	<b>Men</b>
Issue Raised- Departure Not Granted	35	64
	65%	74%
Issue Raised- Departure Granted	19	22
	35%	26%
<i>Issue Raised Total</i>	54	86
	100%	100%
<b>Second Circuit Only**</b>		
Issue Raised- Departure Not Granted	6	19
	19%	54%
Issue Raised – Departure Granted	26	16
	81%	46%
<i>Issue Raised Total</i>	32	35
	100%	100%

Note: \*\*  $p > .05$

The differences in departure standards across judicial circuits make it problematic to generalize about EFC departures. Instead, the case analysis methodology enables me to examine how shared cultural ideals about "appropriate" family roles arise in judicial opinions about EFC departures across judicial circuits.

After coding 207 cases, I began to identify common themes about gender norms within families that emerged in the sample. I was not trying to identify key legal precedents of the EFC departure caselaw for various judicial circuits, a number of legal scholars have already attempted that project (Ellingstad, 1992; Smith, 1993; Wayne, 1993; Raeder, 1993). Instead, I used the case analysis to illuminate how the identities of defendants were negotiated through cultural expectations of family roles that are shaped by gender. I used a methodology of narrative analysis to understand how judges use cultural norms based on gender stereotypes to define what family roles or responsibilities justified a departure from the Guidelines. Legal opinions are “carefully and often quite self-consciously constructed stories of a social conflict and its legal resolution” (Mertz, 1996: 135). Thus, the sentencing opinions were a useful source of data because they represented judicial ideologies about the normative value of particular family roles.

In the sample of sentencing opinions used in this analysis, judges did not express overt gender bias. Instead, the opinions made subtle assumptions about gender expectations for different family members, and judges used these assumptions to justify the appropriateness of an EFC departure. Through the analysis I found a pattern of gender specific judgments that were obscured by gender-neutral language within the texts of sentencing opinions. As a set of narratives, these opinions, from different circuits across a period of ten years, voiced common themes about what

family circumstances were ordinary, and how the definition of an ordinary family circumstance was shaped by cultural gender norms.

Through the case analysis process I developed three themes to describe reoccurring patterns in the sentencing opinions about what types of circumstances justified a judges decision to grant an EFC departure. These three themes, discussed in the body of this chapter, are: 1) the normality of family suffering, 2) the importance of atypical family forms, and 3) the meaning of gender in EFC departure decisions. For each of the themes I have chosen cases that represent theoretical concepts to discuss in some detail. These cases were chosen because they provided factual details that helped illuminate patterns, found across a number of cases, about when family responsibilities become extraordinary. Additionally, some of the cases that have been chosen are seminal cases that have provided guidance for future decisions.

Although these three themes are not universal in the sample of cases used in this analysis, they represent ideas consistently found across the circuits and over time. They illustrate that the court's interpretation of when judges may consider family circumstances during sentencing, as limited by the Guidelines, has been shaped by cultural assumptions about gender roles within the family and has had gender specific implications for defendants.

In order to apply an EFC departure from the Guidelines a judge must determine that an offender's family situation is sufficiently different from the "ordinary" family circumstances experienced by other defendants. As noted in

Chapter One, the United States Sentencing Commission has allowed federal courts to define the parameters of “usual” and “unusual” family circumstances. The introduction to the Federal Sentencing Guidelines states that “when a court finds an atypical case, one to which a particular guideline linguistically applies, but where conduct significantly differs from the norm, the court may consider whether a departure is warranted” (U.S.S.G. Chapter One, Part A). Not surprisingly, courts’ interpretations of when a case qualifies as sufficiently extraordinary to justify a departure have been widely inconsistent. Federal judges have described the task of interpreting the Sentencing Commission’s vague language about departures as: “mission impossible” (Weinstein, 1996), “more art than science” (US v. Alba, 1991), and “like the beauty of Botticelli’s ‘Venus Rising From the Sea,’ a subjective question because the overall thought is one resting in the eye of the beholder” (U.S. v. Galante, 1997).

To receive an EFC departure in most circuits, defendants must demonstrate that their family circumstances are sufficiently different from a “typical offender’s” family situation. Yet, defining what constitutes a “typical offender’s” family circumstance has been challenging. As one judge suggests, “the varieties of family forms, attachments, personalities, and track records in fulfilling responsibilities defies any such easy categorization” (U.S. v Dyce, 1996: 7). All families who appear before the court during criminal sentencing face the imminent loss and disruption that occurs when a primary caretaker is incarcerated. “As Tolstoy suggested, happy families are

all alike and every unhappy family is unhappy in its own way – but how to distinguish between unhappys? When is a case so unusual that it is a candidate for a departure?” (U.S. v. Gauvin, 1999:173)

### **Theme One: The Normality of Family Suffering**

There is strong disagreement among the courts on how to assess the family circumstances of a particular defendant. Should judges compare the circumstances of individual defendants with those of the population in general, those of the prison population, or those of other offenders who commit the same crime? Should judges compare a defendant’s family circumstances to those of families in their own jurisdiction or to those of families around the country? Identifying what types of family circumstances justify a departure from the sentencing guidelines is problematic because our social definition of “the family” is a constructed concept that changes over time. Judge Wald of the District of Columbia complained that the appellate courts have constructed “talmudic distinctions between ordinary and extraordinary family circumstances” that prevented district court judges from fairly considering the multitude of different family situations found in our “family-oriented” society (U.S. v. Dyce, 1996:14).

Although the appellate courts have been unwilling to create bright-line standards about what circumstances qualify a defendant for an EFC departure, most judges have concluded that suffering is a characteristic of “ordinary” families

defendants. The courts have recognized most sentences will affect children. These children are often at crucial stages of development where the presence of an adult nurturer is critical. Therefore, the suffering of children and extended family members is usually considered a normal feature of criminal sentencing. According to the courts, prison sentences for caregivers normally cause “disruption of the defendant’s life, and the concomitant difficulties for those who depend on the defendant” (US v. Johnson, 1992: 11), leading to a “normal disruption of parental relationships” (US v. Cacho, 1992: 311). Therefore, judges consider family suffering to be a normal component of sentencing because, “all families suffer when one of their members goes to prison” (US v. Shortt, 1990: 1328).

Judges acknowledge that a defendant’s children normally carry the burden of family suffering when a parent is incarcerated. One district court judge observed that “many, perhaps even most, criminal defendants have children who often bear the brunt of their parent’s wrongdoing” (U.S. v. Lopez, 1998: 953). However, courts are compelled by the Sentencing Commission to disregard such harms. As one district court noted “disruption of the parental relationship when a parent is imprisoned almost always exposes children to the risk of psychological harm; the Sentencing Commission considered this and nonetheless concluded that family responsibilities ordinarily ought not justify a departure” (US v. Miller, 1993: 553).

Many circuit courts have specified that in order for defendants to receive an EFC departure they must show that a sentence creates a “destruction of the lives of

dependents” beyond the suffering normally experienced upon imprisonment. The sentencing of Bobbi Brand illustrates why it is difficult for defendants to prove that their family circumstances are extraordinary, despite evidence of suffering. In 1990, Bobbi Brand pleaded guilty to distribution of two grams of cocaine. Ms. Brand had a minimal criminal history and faced a sentence of ten to sixteen months of incarceration. During the sentencing hearing Brand testified that her two children would be separated from each other and sent to live with different sets of distant relatives because none of her relatives could take both children. Upon concluding that incarcerating Ms. Brand would have “a devastating impact on the emotions, mind, and the physical well-being of two very innocent youngsters” (4) the district court departed from the Guidelines and sentenced Ms. Brand to five years of probation.

In Ms. Brand's case the prosecutors appealed the district court's departure and argued that Ms. Brand's position as a single parent with children who would be placed with distant relatives upon her incarceration was not unusual when compared with the suffering of most families when a caretaker is incarcerated. The Fourth Circuit appellate court reversed the district court's departure, stating:

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 (32).

The appellate court suggested that Ms. Brand's family circumstances might have been relevant to some judges before the adoption of the Guidelines, but concluded that under the Federal Sentencing Guidelines it was inappropriate to consider family circumstances, no matter how painful, unless they were unusual to a degree to distinguish the defendant from other individuals sentenced in the federal system.

Across judicial circuits, district court judges have openly expressed frustration or remorse about the serious consequences of incarcerating parents. The words of a district court judge in New Mexico illuminate the difficulty of applying rigid guideline principles to defendants with children. When sentencing a single mother with three minor children for crimes associated with a drug conspiracy run by members of her family, a district court judge argues that it is impossible for sentencing judges to both recognize family suffering and prevent their judgments from being reversed upon appeal.

I realize that the fact that somebody has three children, in and of itself, is no reason to depart downward. God only knows how many hundreds of parents it's been my misfortune to sentence. I realize every time I do it that that is breaking up a family, that it's going to work to a disadvantage to those children. And as the government points out, if I took that into consideration, I wouldn't sentence people, I'd retire right now so I wouldn't have to do this again, or I'd depart downward and get reversed every time, because I realize it [family suffering] is not a reason (U.S. v. Contreas, 1999: 1209).

This judicial view has prompted most judges to deny EFC departures based on evidence of family suffering alone. Family suffering has been rendered a normal byproduct of sentencing under the Guidelines.

Judicial interpretation that family suffering is normal and should not be considered during sentencing represents a shift from pre-guideline sentencing ideology. Kathleen Daly's (1987, 1989) research on judicial leniency suggests the pre-guideline judges were more likely to sentence women leniently as a way to protect families. Daly's interviews with judges confirmed that protecting families was a primary consideration of judges at sentencing, and women's disproportionate involvement in family responsibilities meant that they were more likely to receive lenient sentences. One of the judges in Daly's study explained why reducing family suffering was important in pre-guideline sentencing:

Family responsibility is something you have to recognize. It weighs against incarceration or makes the difference between a long versus a short incarceration. Women are more likely to have kids and dependents than men. It is more difficult to send a woman with a kid to prison than a man. But if the man was taking care of a child, it would be the same thing, but this has never happened to me in the court (1987: 281).

The idea that judges should prevent family suffering during sentencing was codified in the Model Penal Code (1965), a provision of which suggested that judges consider family circumstances as a mitigating factor in sentencing if "the imprisonment of the defendant would entail excessive hardship on his dependents" (M.P.C. Section 7.01, 1965). Federal judges in the post-guideline era have broken away from the pre-guideline ideology that judges should attempt to prevent family suffering when sentencing. This ideological change is part of a larger paradigm shift

within criminal justice, abandoning the goals of rehabilitation and individualized sentencing in favor of harsh punishment and uniformity.

Because family suffering has been interpreted by the federal courts to be a normal part of criminal sentencing, judges who decide to depart from the Guidelines because of a defendant's family circumstances must base their decisions on other "extraordinary" factors. But what are those factors? Circumstances that are deemed extraordinary in one courtroom may be considered ordinary in the other. As a judge in the first circuit argued, "Identifying extraordinary family circumstances ... reminds me of Justice Stewart's approach to obscenity: 'I know it when I see it'" (U.S. v. Thompson, 1999 citing *Jacobellis v. Ohio*, 1964). Instead of defining the parameters of extraordinary family circumstances in terms of suffering or harm to family members, some circuits have created a doctrine for departures that allows EFC departures when a family circumstance is atypical, and thus outside the consideration of the framers of the Federal Sentencing Guidelines. The interpretation that family circumstances can justify a departure from the Guidelines only when those circumstances are out-of-the-ordinary has disadvantaged defendants, particularly female defendants with children, whose family circumstances, though unfortunate, are quite common.

## **Theme Two: The Importance of Atypical Family Forms**

Because the courts have interpreted the Federal Sentencing Guidelines as prohibiting departures for “normal” family circumstances, the courts have had to define what types of family circumstances are sufficiently “unusual” that they justify a departure. The courts have commonly defined three “atypical” family forms as justifying an EFC departure: the disability of children or family members, non-traditional family roles, and uncommon family situations not originally considered by the Sentencing Commission.

Federal courts have shown great deference to families faced with disabilities or chronic illness. Some courts have described caregivers for children or extended families with disabilities as eligible for EFC departures because disabilities are rarely found in “typical” families. The case of *U.S. v. Joseph Sclamo* (1993) offers good example. Mr. Sclamo took an active part in the life of a child with a disability and provided a level of affection and support that exceeded that of a traditional male caretaker, particularly for a child that was not his own.

In 1990, Joseph Sclamo pled guilty to possession of cocaine with intent to distribute after he was arrested attempting to sell nine and a half ounces of cocaine to undercover DEA agents. Sclamo requested a downward departure because of his domestic situation. For approximately three years he had been living with his girlfriend and her two children. One of the children, James, suffered from severe attention deficit and hyperactivity disorder. Although Joseph Sclamo was not James’s

biological father, he argued that he had formed a very special connection with the young boy and that his removal from the home would threaten James's stability.

The prosecution challenged the departure on the grounds that Sclamo was not James' biological father and had only been involved with the child for a few years. However, the sentencing court found that the defendant's relationship with James was extraordinary both because of the child's illness and because of the special bond the defendant had developed with the boy, one that surpassed the bonds of other "surrogate" fathers or boyfriends.

While children with disabilities create additional burdens that may make a family circumstance seem more compelling, the language of the courts indicates that it is the aberrant nature of disabilities that creates the justification for the departure. In fact, the appellate courts have rejected many EFC departure claims for family disabilities or illness that were based only on the standard that "they strike judges as particularly compelling" (US v. Thomas, 1991: 526).

A number of legal scholars have raised concern about the fact that certain family responsibilities, particularly caretaking functions carried out by male defendants, are deemed extraordinary simply because they are "non-traditional" (Bush, 1990; Raeder, 1993; King, 1996). By creating a standard for EFC departures based on rare family forms judges have granted departures for men involved in caretaking roles simply because these roles are counter to stereotypes, and have

refused to grant departures for women involved in caretaking because such activities are "normal" for women.

Women, in particular, have not been able to justify EFC departures based on their position as single mothers. The courts have clearly stated that absent other factors, single parenthood alone should not be a justification for a departure. The language of EFC case law suggests that consideration of single parenthood is inappropriate because "the [Federal Sentencing] Commission was fully aware that some convicted felons are single parents of small children" (US v. Carr, 1991). The language in US v. Rivera (1993) demonstrates that courts have considered granting EFC departures when single mothers could prove additional hardships:

It may not be unusual, for example, to find that a convicted drug offender is a single mother with family responsibilities, but, at some point, the nature and magnitude of family responsibilities (many children? with handicaps? no money? no place for the children to go?) may transform the "ordinary" case of such circumstances into a case that is not at all ordinary (12).

Thus, women have only been able to justify a departure based on their single parent status by showing that they "faced more responsibilities than the ordinary single parent" (US v. Johnson, 1992).

Though the court's reluctance to grant departures based on single parenthood alone has generally not specified different standards for departures based on defendant characteristics such as race and gender, careful analysis of EFC departure opinions calls into question the neutrality of such decisions. While women have been unable to justify departures based on their status as single mothers because such family

circumstances are common, single fathers and husbands active in the care of family members have benefited from the rareness of their involvement in the nurturing functions of families. The case of *U.S. v. John Thompson* (First Circuit, 1999) illustrates how courts have used the “atypical” family standard to justify departures in cases where male defendants are involved in non-traditional family roles.

In *U.S. v. Thompson*, Judge Nancy Gertner compared the family responsibilities of an individual defendant with the family responsibilities of other defendants whose place, time, and type of crime were similar to the defendant. In 1998, John Thompson was convicted of distributing 51.8 grams of crack cocaine in the Bromley Heath housing development in Boston, Massachusetts. During the same year, twenty-six other individuals were charged with crack cocaine distribution in the Bromley Heath housing development. Using pre-sentence investigation reports from the twenty-six Bromley Heath defendants and forty other defendants convicted of crack cocaine distribution in Massachusetts during the same time period, Judge Gertner determined that John Thompson was one of very few crack cocaine defendants (almost all whom were male) to perform an active parental role.

John Thompson provided both emotional and financial support for his girlfriend and their two young daughters (ages four and one). Letters from Thompson’s girlfriend and her family members suggested that he had an “intense emotional involvement with his daughters”(9). In addition, Thompson was responsible for many of the daily household tasks such as providing transportation for

their eldest daughter to school, assisting with the care of Thompson's girlfriend's grandmother, and making financial contributions to support his girlfriend's extended family.

From the facts presented in Judge Gertner's sentencing opinion it is clear that John Thompson was truly a responsible father and family member. However, being a responsible parent does not automatically qualify a defendant for an EFC departure. To determine whether John Thompson was an appropriate candidate for an EFC departure, Judge Gertner compared the family responsibilities (as outlined in pre-sentence investigation reports) of sixty-six similarly situated defendants.<sup>49</sup> She found only three individuals with criminal histories and family responsibilities comparable to Thompson's, and even among those three individuals, Thompson's responsibilities were greater. Because of this difference, Judge Gertner departed seven criminal offense levels lower than the Guidelines specified, sentencing Thompson to just sixty months in prison.<sup>50</sup> In her sentencing opinion, Judge Gertner explained the rationale for Thompson's departure stating:

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<sup>49</sup> Although the Thompson opinion does not explicitly break out the gender of each of the sixty-six comparison defendants, all of the defendants discussed in the case narrative were male.

<sup>50</sup> Since the original analysis of this data the First Circuit Appellate Court has reversed the holding in *United States v. Thompson* stating that Judge Gertner inappropriately compared Thompson's family responsibilities with other defendants involved in the same type of offense. Instead the court argued that to determine if an EFC departure is appropriate the courts should compare the defendant's circumstances to the other cases where family responsibilities are present to determine if Thompson's parenting was actually unique. The appellate court does not address the issue of gender differences in family responsibilities or how district courts might

Not only did Thompson exhibit a sustained commitment to his family dating back to the instant he became a father, he consistently worked to provide for them. In short, Thompson has defied the odds. When compared with other defendants accused of like offenses, regardless of where they are from, he is extraordinary (33).

Judge Gertner's recognition that Thompson's strong parental role was unique when compared to other male defendant's is a creative use of the Guidelines and provides an interesting challenge to traditional norms about men's roles in caretaking. Arguably Judge Gertner's logic is informed by sociological debates about the construction of gendered family roles and serves a socially conscious interest of rewarding men for becoming caretakers in families. However, this decision illustrates the dilemma faced by female defendants who often have strong maternal roles and responsibilities within the family. What sacrifices by women would qualify as "extraordinary" under the standard enunciated in *U.S. v. Thompson*? According to Paula Cooley, a feminist scholar in theology, women--no matter how self-sacrificing they are in the care for their families--will always appear to be functioning as "normal" mothers. "Due to cultural romanticizing of both motherhood and childhood, U.S. society expects nothing less than extraordinary mothers as normative" (Cooley, 1999: 229). Thus, women engaged in traditional motherhood duties may be unable to qualify for an EFC departure under this atypical family forms standard

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compensate for such cultural differences when making determinations about when particular family responsibilities rise to the level of "extraordinary." See *United States v. Thompson*, 234 F.3d 74, December 8, 2000.

because extraordinary sacrifices and hardship are culturally defined as normal components of motherhood.

The federal courts have extended the logic that atypical family forms justify EFC departures to include some cases where the responsibilities of family members were so unfamiliar, even though deeply traditionally gendered, that they arguably were outside the consideration of the Sentencing Commission. The case of *U.S. v. Solomon Sprei* (Second Circuit, 1998) exemplifies the atypical family circumstance. Solomon Sprei pleaded guilty to conspiracy in a scheme to defraud several insurance companies. At sentencing Mr. Sprei received a departure from the Guidelines based on a motion made by his rabbi on behalf of the Orthodox Jewish sect of which Sprei and his family were members. Rabbi Halberstam argued that it was customary in Sprei's Jewish community for fathers to arrange marriages for their children and that a long period of incarceration would harm the marriage prospects of Sprei's three children.

At sentencing the district court considered a brief submitted by Rabbi Halberstam and the Bobov Community requesting a departure based on the importance of Sprei's responsibility in his children's arranged marriage. The brief provided the court with details of this highly unusual family situation. Rabbi Halberstam wrote:

I dread to predict the impact [of imprisonment] on the structure of this family. His [Sprei's] children of marriageable age will not be able to find spouses for themselves and in our community this is a devastating situation. Without their father to help them and seek out matches for them

and to guarantee financial arrangements they will be 'living as orphans.' (7)

The judge departed downward six offense levels, sentencing Sprei to eighteen months in prison with three years of supervised release. The sentencing judge indicated that the departure was based largely on the defendant's unusual family customs and the serious consequences to Sprei's children. The sentencing judge wrote:

To me the most significant factor relating to the family situation which quite clearly never was considered by the Sentencing Commission is the impact that a lengthy term of imprisonment would have on the children in consequences of the unusual customs of the community of which the Spreis' are a part, which, without in any way passing any judgment, simply are quite different from what people come to assume in twentieth century America in respect of the subject of marriage (8).

Although Sprei's departure was eventually overturned on appeal based on the district court's improper recognition of the religious affiliations of the defendant, this case illustrates the potential uses of a "rare family forms" doctrine in the judicial consideration of extraordinary family circumstances. This case illustrates the judiciary's willingness to recognize and reward some deeply gendered family roles. Solomon Sprei was the protector for his unmarried daughters and provided an arguably outdated role of the patriarchal matchmaker.

The cases of John Thompson and Solomon Sprei represent the dual roles that courts have carved out for male caretakers. Although Solomon Sprei's family responsibilities were quite traditional while John Thompson's responsibilities were equally untraditional, both represent the court's willingness to grant departures for circumstances that push the margins of "normal" family roles.

The court's definitions of "ordinary" family roles have largely overlooked questions about cultural differences in family responsibilities. Some legal scholars have argued that because a disproportionate number of low-level drug offenders (one of the fastest growing populations of federal offenders) are immigrants or ethnic minorities, the federal courts should recognize the non-traditional nature of many black and Latino families (Gomez, 1995). Judicial consideration of multicultural family forms has been limited because the Sentencing Commission has prohibited judges from explicitly using a defendant's race or ethnicity to justify a departure for family responsibilities.<sup>51</sup> But, it is naive to assume that cultural definitions of

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<sup>51</sup> Prohibitions against judicial recognition of a defendant's racial or ethnic background were designed to eliminate disparity in sentencing outcomes. However, it is these same prohibitions that prevent judges from recognizing important social and cultural differences in family roles. Some judges have creatively considered differences in racial and ethnic family forms to justify an EFC departure. Second Circuit District Court Judge Weinstein noted that "[i]f an ordinary family consists of two responsible adults caring for one or more minor children, then few defendants have ordinary families....[G]iven the multiplicity of family arrangements in New York, the use of the term 'ordinary' in the Guidelines gives the judge little guidance" (Weinstein, 1996, 169).

Two cases illustrate the courts' tentative recognition of cultural differences in family forms. In *U.S. v. Rose* (2nd Circuit, 1995), Jobim Rose pleaded guilty to interstate receipt of a firearm. According to the court records, Mr. Rose was raised by his maternal grandmother who, at the time of sentencing, was retired and raising other members of her extended family on her own without the benefit of a pension or social security. Therefore, Mr. Rose held two jobs while attending college in an attempt to contribute to his grandmother's household budget. The sentencing judge argued that if the court limited departures to "traditional families" the court would unfairly bias family structures, often found in racial and ethnic communities that do not fit traditional family patterns. The court granted Mr. Rose's departure arguing that ignoring differences in cultural traditions about family responsibilities threatened to undermine the duty of the law to protect all parts of society equally. In another line of cases the eighth circuit carved out an EFC doctrine recognizing the hardships of

“ordinary” family responsibilities are not, in part, shaped by cultural ideologies about parenthood that are strongly imbued with assumptions that “ordinary” families are white, heterosexual, and middle class (Baca-Zinn, 1992; Dill et. al., 1998).

Through the case analysis I found that some courts were sensitive to the potential for gender disparities in EFC departures. In *United States v. Bell* (Fourth Circuit, 1992) the appeals court reversed a downward departure for a father who claimed his family would suffer emotionally and financially from his imprisonment. The court specifically noted that “if we were to endorse the departure in this case while rejecting a departure in the case of a single mother we would risk the introduction of gender or class bias into the Guidelines and would undermine Congress’ primary purpose of achieving uniformity by resting sentences upon the offense committed, not upon the offender” (539). Similarly, in the District of Columbia, an appellate judge suggested that a male defendant’s role as a single father was no more compelling or unfortunate than that of a similarly situated single mother who did not receive a departure (*United States v. Leandre*, 1998). Therefore, in circuits where the EFC standard has been interpreted most narrowly single mothers and fathers both face great hurdles in securing departures. Ultimately, for both men

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family life on Native American Reservations (*U.S. v. Big Crow* 1990; *U.S. v. One Star*, 1993; *U.S. v. Decora*, 1999). Departures from the sentencing guidelines for were upheld for the male defendants in these cases because their support and care for their families and their steady employment records were unusual when compared with other individuals on reservations in South Dakota.

and women, the district courts of the Second Circuit remain the most open to consideration of single parenthood as an extraordinary circumstance, because the second circuit court has carved out a doctrine of “compellingness” as opposed to “unusualness” for EFC departures.

The cases of Joseph Sclamo, John Thompson and Solomon Sprei demonstrate three examples of how the courts have defined an atypical family circumstance. These three defendants were granted EFC departures because of the unusualness of their family circumstances within the context of culturally expected gender roles with the family. When culturally defined expectations about male and female duties within families influence judicial decisions about EFC departures, female defendants are at a disadvantage. The traditional role of women as caretakers makes it more difficult for female defendants to receive an EFC departure because responsibility for family members is a common trait among women. Thus, the fact that women normally shoulder heavier family responsibilities than men makes them less likely to qualify for a departure under the judicially imposed “extraordinary as atypical” standard for EFC departures. This finding raises several questions. Would judicial consideration of gender, in the context of family responsibilities, make sentencing more or less just? What would happen if judges began to consider women’s adherence to social norms about “appropriate” mothering when deciding whether or not to grant an EFC departure? The next section of the chapter addresses these issues by exploring how judges talk about women and their roles in families in EFC departure cases.

### **Theme Three: The Meaning of Gender in EFC Departure Decisions**

In sentencing opinions, defendants and their situations are normally discussed without reference to sex or gender. In keeping with the “offender-neutral” principles of the Guidelines, the courts have been careful to use language that would not distinguish defendants or their roles in the family according to sex. For example, judges rarely discuss the position of single mothers or single fathers but rather have used gender-neutral terms such as “single parent” or “sole custodial parent,” terms that obscure defendants’ gender and make them appear as neutral legal subjects. However, in my analysis EFC departure cases, I found that although judges describe defendants in gender-neutral ways, they often make factual distinctions between the expected roles of men and women in the family.

Judges have been unwilling to grant EFC departures for female functions with the family, such as pregnancy and breast-feeding, because only women could benefit from these circumstances, reintroducing gender disparity into sentencing. The case of Susan Pozzy (First Circuit, 1990) illustrates the court’s struggle to uphold gender-neutral principles when faced with the gendered realities of a pregnant defendant. Susan Pozzy and her husband pleaded guilty to possession of cocaine with intent to distribute. At the time of her arrest Ms. Pozzy was pregnant but suffered a miscarriage approximately a month later. By the time of sentencing, Susan Pozzy was pregnant again. At sentencing, the district court granted her a downward departure for family circumstances, arguing that the Sentencing Commission had not considered

pregnancy when it limited judicial considerations of family circumstances. The sentencing judge directly addressed the issue of Susan Pozzy's pregnancy, stating:

To confine her there [in prison] would require her to nurture this pregnancy and have this baby outside of her home, away from her family and in an environment that I think would be detrimental to her physically, psychologically, and that the same would impact, or could very well impact, on her child (137).

The government appealed Susan Pozzy's sentence, claiming that a family circumstance departure based on the defendant's pregnancy was inappropriate. Subsequently, the appeals court reversed the departure arguing that pregnancy of female felons was not atypical or unusual. The appellate court suggested that granting departures based on a defendant's pregnancy would open the door for female defendants to become pregnant in order to avoid prison.

It must be noted that the defendant became pregnant after she and her husband were arrested and charged with drug trafficking. We agree with the last paragraph with the pre-sentence investigation report, which stated: 'This office believes that to allow a departure downward for pregnancy could set a precedent that would have dangerous consequences in the future, sending an obvious message to all female defendant that pregnancy is a way out.' (Judge Bownes as quoted in U.S. v. Pozzy, 1990:139)

The appellate court conceded that delivering a child in prison would be stigmatizing and detrimental to the health and well being of both mother and child. Ultimately, however, the appellate court denied Ms. Pozzy's departure because "it has been recognized since time immemorial that the sins of parents are visited on their children" (U.S. v. Pozzy, 1990: 139).

In addition to pregnancy, many female inmates face the unique possibility of being denied the ability to breastfeed their newborns because they are separated from their children shortly after birth. The case of *U.S. v. Dyce* (District of Columbia, 1996) illustrates the court's struggle to apply gender-neutral sentencing principles in cases where the defendant's gender makes her uniquely suited to provide care to her newborn. In 1996 Amrhu Dyce plead guilty to conspiracy to distribute cocaine. At the original sentencing hearing a district court judge departed from the Guidelines based on Dyce's extraordinary family responsibilities as the mother of three children, one of whom was still breastfeeding at the time of sentencing. The district court judge ordered Ms. Dyce to serve her two-year sentence in a residential treatment facility that would allow her to care for her three month old infant.

At this point in time, the infant is totally dependent on the defendant for nourishment. While these family circumstances do not decrease the defendant's culpability for her crimes, these family circumstances nevertheless play a role in the court's consideration on sentencing. Causing the needless suffering of young, innocent children does not promote the ends of justice. (*U.S. v. Dyce*, 1996: 1471)

Ms. Dyce's departure was appealed by the state, and the appellate court reversed the departure, arguing that such family suffering is a normal consequence of incarcerating women. In reversing the departure the court wrote, "the unfortunate fact is that some mothers are criminals; and, like it or not, incarceration is our criminal justice system's principal method of punishment" (*U.S. v. Dyce*, 1996: 13). The appellate judges argued that the district court inappropriately based its conclusion about Ms. Dyce's departure on a belief that children should remain under the care of their mother.

Appellate Judge Patricia Wald disagreed with the decision to reverse the departure in Dyce's case. In a dissenting opinion she outlined the potential consequences of incarcerating Ms. Dyce when she carried such heavy family responsibilities:

The awful truth is that not only have two young children been denied any real opportunity to see their mother on a regular basis during their most formative years, but the baby may have fallen through the cracks all together. The panel's conclusion, even if factually correct, is based entirely on the notion that so long as the extended family can provide economic care and physical custody, no further inquiry is necessary as to the import of separating siblings from each other, as well as from their mother, without realistic possibility of even visitation. (U.S. v. Dyce, 1996: 14)

In his dissent, Judge Wald suggest that the Commission's fervor to eliminate gender bias in sentencing has blinded judges from recognizing the real gender differences that often exist in the care of newborn children.

Judges have been reluctant to grant EFC departures based on a female defendant's pregnancy, as evidenced in U.S. v. Pozzy, but judges have used their limited discretion during sentencing to protect unborn children from potentially "bad mothers." Although female defendants have been unable to use the normal conditions of pregnancy as a justification for a sentencing departure, the courts have suggested that protecting unborn children from the "hazardous" behavior of their criminal mothers may an appropriate consideration for the sentencing judge. For example, in 1990, Jacqueline Marie Denoncourt was ordered to serve the first six months of her sentence in a facility with twenty-four hour monitoring in order to protect her unborn

child from the potential danger of her continued prostitution and drug use. The court justified Ms. Denoncourt's sentence on the grounds that it was protecting her child. "In considering the interest of her unborn child, the court is particularly concerned that Miss Denoncourt may revert to abusing drugs or engaging in prostitution prior to giving birth to her child, with the resulting serious impact on her child" (170). The contradiction between the *Pozzy* and *Dennencourt* cases is that the court is willing to alter sentences in order to protect fetuses from harm, but is unwilling to alter sentences in order to protect children who are already born from the harms associated with incarcerating a primary caretaker. Such different uses of pregnancy in sentencing decisions may result from the state's historical control on women's bodies. Protecting fetuses enables the court to restrain the liberty of women, while protecting children does not.

The decisions in the cases of Susan Pozzy, Amrhu Dyce, and Marie Denoncourt illustrate the struggles judges face in enforcing the Guideline's goals of gender neutrality while recognizing that women often have unique experiences as mothers and caretakers. Departures for family responsibilities such as pregnancy and breast-feeding would disproportionately result in lenient sentences for female defendants. However, as the above cases illustrate, policies designed to equalize sentencing require judges to disregard any "real" differences in family responsibilities that are faced by men and women by virtue of their biology.

Should judges turn a blind eye to the cultural and biological differences between male and female roles within the family? What types of gender roles might be appropriate for judges to consider during sentencing? Some district and appellate judges have discussed EFC departure decisions within the context of defendants' cultural experiences as women. These cases provide an opportunity to see what happens when judges engage in gender-conscious sentencing.

Some sentencing judges have refused to divorce sentencing decisions from the gendered realities of criminal activity. In *U.S. v. Arize* (1992), the judge granted a departure to a pregnant female drug courier, recognizing in the sentencing opinion that pregnant females are routinely recruited to serve as drug couriers because their gender and pregnancy make interdiction less probable. Similarly, during sentencing for a drug trafficking case a Judge Leo Glaser spoke of the difficulty he faces sentencing women who are involved in crime, in part due to their association with more culpable male partners and husbands.

She has single-handedly and successfully guided three children through the socio-economic minefield of a not atypically treacherous urban environment. The explanation which is all but inescapable is that this single parent fell in love with the co-defendant, and despite her many other strengths did not have the strength to say 'no' to him. The story is as old as the story of civilization – he offered her an apple and she did eat (*U.S. v. Handy*, 1990: 561)

This decision recognized that female defendants face real gender differences in power and resources that can explain why they become involved in criminal activity.

However, when courts begin to recognize the “special” position of women in

families they risk punishing women who do not meet cultural definitions of a “good” mother. As research from pre-guideline sentencing has shown, judges have often made decisions about a female offenders’ sentence based on their adherence to socially acceptable gender roles. In her research on pre-guideline sentencing Kruttschnitt (1982) found that judges made decisions about which women to send to prison based on their social acceptability as “upstanding women” and “good mothers.” Judicial recognition of cultural norms about women’s roles within the family during the departure decision may result in the same kind of judicial bias against “non-traditional” women.<sup>52</sup>

Motherhood serves as a “cultural reference point” for a particular set of expectations, assumptions, and norms about female behavior (Ikemoto, 1999). As cultural sociologist Sharon Hays (1996) argues, the dominant “good mother” ideology in the United States today is that of the “intensive mother.” Under this ideology, the “good mother” focuses exclusively on parenting her children.<sup>53</sup> This standard assumes that the interests of a mother and her child will be the same and that mothers

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<sup>52</sup> On occasion federal judges have taken specific notice of female defendants who conformed to socially accepted gender roles. For example, Judge Weinstein, commended a group of Hispanic female defendants, charged with AFDC fraud, for being “housewives” who were not “currently promiscuous” (U.S. v. Concepcion, 1992: 1265). He further noted “their probable cellmates would likely surprise, dismay and terrorize them” (1265).

<sup>53</sup> The factors that cause some women to be labeled as “bad mothers ” result from both structural forces (being poor, a target of racism, or unmarried makes “intensive” mothering more difficult) and a social history of racism in our definition of “good” women.

are better suited than fathers to respond to the needs of their children (Berry, 1993; Arendell 1997).

The EFC departure cases provide an interesting example of how judges use sentencing as a mechanism to monitor “appropriate” mothering, and therefore regulate women’s behavior. The case of *U.S. v. JoAnn Sailes* (Sixth Circuit, 1989) illustrates how judges rely on cultural norms about motherhood to decide if a female defendant will be granted an EFC departure. In 1989, JoAnn Sailes was arrested after DEA agents found over 800 grams of cocaine belonging to her eighteen-year-old son in her home. Ms. Sailes knew her son was actively involved in drug trafficking, and at times took messages from his customers or delivered packages for him. However, court testimony confirmed that Ms. Sailes was completely unaware of the scope of her son’s drug operation. At the hearing Ms. Sailes’s son testified that he hid the drugs in a sandbox next to the house because if his mother knew how large his drug operation was, she would not allow him to live with her and her other children. Ms. Sailes pleaded guilty to possession of cocaine with intent to distribute and aiding and abetting another. She was sentenced at the highest end of the sentencing range for her particular criminal history and offense level.

Ms. Sailes requested a downward departure based on her significant family responsibilities, which included taking care of six other children. The district court denied her request for a downward departure arguing that she was unworthy of a

departure principally because she had violated the norms of motherhood. At sentencing, Judge Turner stated:

I think you have been extremely culpable in allowing your son to get to the position that he now finds himself today. The boy is only eighteen years old and he is off to jail now for a number of years. . . . I attribute his involvement in that, in some significant part, to your failure to raise him the way he should have been raised and to exercise the role that you should have exercised over him in your home (738).

Ms. Sailes appealed her sentence, arguing that the district court had improperly dismissed her request for a downward departure. The responsibilities faced by Ms. Sailes were certainly compelling, her six children lived at home, and the existence of alternative caregivers was unclear, but the appellate court refused to review the matter. Instead the appellate court deferred to the District Court's judgement, stating:

If family ties and responsibilities are relevant in this case, we have no basis for saying that Judge Turner was mistaken in his apparent belief that the proper development of Ms. Sailes younger children might be facilitated by the children's removal from her direct influence for a time (740).

The Sailes case provides an illuminating example of how cultural expectations about family roles and responsibilities are influenced by the defendant's position in the family structure. Ms Sailes was the mother of a drug dealer. She knew her son was dealing drugs and continued to let him live in her house, partially because his drug dealing provided extra income for the family. No one disputed the fact that Ms. Sailes's son entered the world of drug dealing on his own accord. No one disputed that Ms. Sailes's other children would be without a primary caretaker upon her incarceration. However, the court used Ms. Sailes's knowledge of her son's

dealing as a justification to refuse her request for a departure. In the Sailes case the court sends a clear cultural message: female defendants are worthy of departures for family responsibilities only when they can prove that they have been “good” mothers.

Judicial use of an “appropriate mothering” standard was not unique to the case of JoAnne Sailes.<sup>54</sup> The courts have repeatedly interpreted women’s criminal activity as violating both the law and the social norms of “good” mothering. Therefore, judges have denied women’s motions for EFC departures, even when their family responsibilities were exceptional, because women were considered to be “bad mothers.”

The case of *U.S. v. Monaco* (1994) represents a stark different from the logic of the court in *U.S. v Sailes*, and it provides an interesting illustrations of the court’s definition of “responsible fathering.” In *U.S. v. Monaco* a defendant was convicted of conspiracy and fraud in complying with a Department of Defense contract. In order

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<sup>54</sup> The issue of “inappropriate” behavior around children used use to deny other EFC departures for female defendants. Denying an EFC departure in *U.S. v. Goff* (1990), the court stated, “on at least one occasion Ms. Goff took one of her children with her on a cocaine buying trip to Philadelphia” (1441). Similarly in *US v. Guerrero* (1990) a mother was sentenced at the highest range in the guidelines for allowing drug distribution at home in front of her children. Some courts have actually extended the sentences of defendants who influenced their children’s entry into criminal activity. In *U.S. v. Ledesma* (1992) the appellate court upheld an upward departure from the sentencing guidelines, increasing the sentencing range for a mother who involved her daughter in drug transactions. Men and women have both been punished by courts for influencing children’s entry into crime as a “furtherance of criminal activity,” a very legalistic justification for the upward departure. However, women who were denied downward departures based on criminal activity in front of or around children were judged on subjective definitions of “bad mothers” or “irresponsible parents.”

to expedite payment on the contract the defendant asked his son to falsify some payroll records. As a consequence, both the defendant and his son were federally indicted and charged with fraud. The defendant requested and was granted an EFC departure for the moral anguish he suffered by involving his son a criminal conspiracy. In upholding the downward departure the appellate court wrote:

He [the son] was stigmatized, not for deliberately committing a criminal act, but for dutifully and unquestioningly honoring his father's request. This is not at all what the elder Monaco intended for his son. The pre-sentence investigation report records that Monaco stressed the values of family, education and a strong work ethic to his children and set an honest, law abiding example for them, with the sole exception of the offense conduct here. The district court believed that the distress and guilt that Monaco would feel as a conscientious father was punishment in itself, of a kind not adequately taken into account by the Sentencing Commission (800).

The Sailes and Monaco cases demonstrate how race, class, and gender intersect to create images of "dangerous" and "non-dangerous" criminals. JoAnne Sailes is dangerous because she is poor, Hispanic, and most of all a "bad" mother who raises children who threaten social order. Mr. Monaco, on the other hand, represents the sympathetic criminal. He is a middle-class white man who deeply regrets involving his son, a promising young man, in criminal activity. Ms. Sailes is punished for failing to telling her son to leave the drug trade, while Mr. Monaco is forgiven for asking his son to become involved in a crime. These two cases illustrate how gender roles become enmeshed with social stigmas attached to race and class to affect EFC departure decisions.

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Since the adoption of the Federal Sentencing Guidelines, cultural gender roles have strongly influenced judicial definitions of an “ordinary” and “extraordinary” family circumstance. Some judges have used EFC departures to impose shorter sentences for women defendants who have conformed to socially accepted gender roles. In other cases women who did not conform to cultural norms about the appropriate roles for women within the family were denied departures, even when their family circumstances were atypical. But most commonly, women’s responsibilities for children and family members did not rise to the level of “extraordinary” because women have traditionally shouldered the responsibilities for caretaking within a family as a “normal” function of motherhood. The EFC departure cases raise essential questions about how judges should sentencing individuals under Guidelines that require uniformity and neutrality. How can the court recognize the real influences of social or biological gender roles on the lives of women without reconstructing gender- biased stereotypes?

**Chapter VI.**  
**Paradoxes of Neutrality:**  
**Future Research and Policies for Equitable of Sentencing**  
**of Female Defendants under the Guidelines**

Women have historically presented the law with a challenging question: How do we rectify social differences in opportunity without codifying difference and dependence? Like other policies based on a model of equality (treat all people the same), as opposed to equity (treat people differently, but justly), mandatory sentencing guidelines cannot account for socially constructed inequalities, such as differences in family responsibilities, racial stereotyping of gender roles, and the varying roles of men and women in criminal activity. Sentencing guidelines prevent judges from considering the different social roles often assumed by women and men. Such limitations on judicial discretion raise serious policy questions concerning the costs and benefits of “equalizing” sentence outcomes. For example, if women are more likely to be the sole caretakers of children or families, should courts treat them differently? If cultural identities remain structured by gender and race, while sentencing guidelines remain neutral, how do we deal with disparate results? Using both statistical data and legal narratives from the EFC departure case law, this study has provided an opportunity to address these unresolved questions.

At the end of this project I am faced with two seemingly contradictory findings: 1) women continue to be sentenced more leniently under the Federal Sentencing Guidelines than men, and 2) women suffer more under the Guidelines

because judges are prohibited from considering defendants' family responsibilities in the sentencing calculation. In this final chapter I will try to resolve these contradictory conclusions and discuss a strategy for future research and policy-making for women sentenced under the Federal Sentencing Guidelines.

Although the Guidelines were designed to reduce disparities in sentencing outcomes based on the defendants' personal characteristics, my research has shown that female defendants continue to receive more lenient sentences under the Guidelines compared to male defendants, and that this leniency occurs at multiple stages of the sentencing process. Women are more likely to receive departures and are less likely to receive time in prison compared to men. Under the Guidelines, women who are sentenced to a term of incarceration receive fewer months of imprisonment than men, even after controlling for a number of recognized legally relevant variables. However, my research can not determine whether women are closer to achieving equality with men now than they were before the adoption of the Guidelines. In order to definitively suggest that the Guidelines have "failed" to move women closer towards equality with men, future research would need to compare the variance between male and female sentencing for specific offenses both before and after the adoption of the Guidelines. However, my research concludes that in sentencing decisions from 1996 to 1997, nearly a decade after the adoption of the Guidelines, women are still sentenced more leniently than men.

The evidence of continued leniency for women in federal sentencing presented in this study exists alongside dramatic increases in federal incarceration rates for both men and women. Under the Federal Sentencing Guidelines, designed to equalize sentencing for men and women, female defendants have disproportionately faced increased incarceration compared to men. In both state and federal courts between 1990 and 1996, the female rates of conviction for property, drug, and violent crimes outpaced the changes in the rates of convicted males (Greenfeld and Snell, 1999). Since the beginning of the Guidelines in 1987, the number of female inmates has increased by 182 percent, compared to a rate of growth of 158 percent for male inmates during the same period (Federal Bureau of Prisons, 1998).

The increased rate of female incarceration is due in part to the federal government's increased reliance on mandatory-minimum penalties for drug offense. Women are increasingly prosecuted under mandatory-minimum drug sentences that determine penalties based on the amounts of drugs seized, rather than the offenders "role" in the criminal enterprise. Therefore, women acting as low-level drug couriers increasingly receive prison sentences for criminal behavior that prior to mandatory-minimum sentencing would have resulted in a term of probation.

Federal reliance on mandatory-minimum penalties has emerged simultaneously with the adoption of Federal Sentencing Guidelines. Therefore, scholars have struggled to determine what portion of women's increased incarceration is due to mandatory-minimum sentences and what portion is due to the Guidelines

(Hoefer, 1999). However, it may not be possible to disentangle the independent effects of mandatory-minimum sentencing and the Federal Sentencing Guidelines. Although mandatory-minimum drug penalties have increased female incarceration rates, the Guidelines have exacerbated the situation faced by female offenders by limiting judicial consideration of factors that had previously been used by judges to justify sentence reductions. Previously, judicial discretion to reduce sentences for women, whether granted out of chivalry or to protect families, significantly decreased the chance that women would be imprisoned. Federal courts must now consider defendant characteristics, such as family responsibilities, as largely irrelevant to the sentencing process. Under the Sentencing Commission's policies, judges may now reduce defendants' sentences because of their family responsibilities only when those circumstances are deemed "extraordinary." Therefore, the Federal Sentencing Guidelines have failed to achieve equality between women and men, while at the same time they have exposed more women, particularly women of color, to a greater threat of lengthy imprisonment, in part because the Guidelines removed consideration of family responsibilities from the sentencing decision.

To evaluate how successful the Guidelines have been in achieving "just" sentencing outcomes for female offenders, it is first important to clarify what "justice for women" really means. Should women be treated equally to men under all circumstances? Or rather, should judges be allowed to consider the individual characteristics of defendants, even if doing so results in disproportionately more

lenient sentences for women? The answers to these theoretical questions may be useful for designing future policies for sentencing.

### **Theoretical Questions About Gender and Justice**

Examining the normative explanations that scholars, policymakers, and activists might use to measure justice in the context of equal or unequal sentencing outcomes is an important first step in assessing the “justness” of sentencing guidelines. Normative questions about how to measure justice are particularly important when we think about sentencing female offenders. With what do we compare the sentences of women? The sentencing experiences of men have traditionally been the benchmark against which we have compared female sentencing practices. However, it may now be time to abandon a “master” male standard of sentencing and begin to formulate new tools for evaluating sentencing practices for female offenders.

The Federal Sentencing Guidelines attempt to remedy past discrimination in sentencing by establishing rigid rules to prevent judicial bias. However, disparities in federal sentencing that remain after the adoption of the Guidelines are a reminder that law is an imperfect instrument to remedy social inequality. Legal rules are often inflexible and do not respond to the different and complex social realities faced by individuals. Additionally, law historically has been constructed in response to the experiences of dominant groups (white, upper-class males) (Fineman, 1999, West,

1989). Despite these flaws, groups and individuals seeking to remedy social inequalities have often sought assistance through legal institutions.

Feminist legal theorists who have struggled with the question of gender-neutrality in virtually all areas of law have constructed three main theoretical positions on gender equality. In the following section, I discuss these three competing legal schools of thought within feminist legal theory to provide a context for evaluating and understanding female sentencing under the Federal Sentencing Guidelines. The first normative position represents the present ideology of the Sentencing Commission – treat all people the same. The second normative position revisits and revises old sentencing models where women’s experiences were treated as “special.” The final normative position is that institutions should recognize and reward the different social roles that women often occupy, such as caretaking, without mandating that only women should fulfill these duties. This final theoretical position offers a potential structure for future sentencing policies.

#### *Legal Equality or “Gender-Neutral” Feminism*

Legal feminists calling for gender-neutrality argue that women and men should be treated equally, regardless of the short-term consequences. For example, legal equality theorist Wendy Williams (1991) has suggested that although stereotypes of male and female behavior are embedded in our legal system and statutes, feminists must decide that they want to achieve equality between the sexes,

even at the cost of losing the special nature of men's and women's experiences. Equality theorists argue that feminists cannot have it both ways; they conclude that gender-neutrality will benefit women in the long run.

The goal of gender-neutrality is to overcome difference between men and women. These differences may be real, or merely stereotypes. According to legal equality theorists, the challenge for the law is to work through the "glitches in equality" that currently differentiates the experiences of men and women in society. There are two basic approaches to legal-neutrality: assimilative, where women, given the chance, can become just like men, or androgynous, where a mean standard must be chosen between women and men upon which all humans should be judged.

The issue of gender disparity in sentencing does not fit easily within the assimilative understanding of gender-neutrality. It seems counter-intuitive to hope that female offenders would become as violent or prone to recidivism as their male counterparts. However, the Federal Sentencing Guidelines were designed, in part, around an androgynous approach to sentencing. For example, the framers of the Guidelines formulated the sentence lengths specified the Guidelines by combining the average sentence lengths for particular offenses for both male and female offenders. Since women represented a small percentage of the overall sentenced populations, their unique experiences were lost in this calculation. This example illustrates the problem with using equality theory to formulate criminal justice policy: It is impossible to define a "common" experience for women and men in the criminal

justice system when women represent such a small percentage of the overall population of offenders.

Gender-neutrality theorists recognize that equal treatment raises serious problems for women due to their marginalized status within most social structures. But they argue that through sustained periods of equal treatment, people will ultimately transcend the sex categories, that currently create social inequality between women and men.

#### *Special Treatment or Cultural Feminism*

According to cultural feminism, a second school of thought in legal feminist theory, equal treatment is doomed to fail because women cannot be judged fairly under gender-neutral legal codes where the definition of equality requires sameness (Wolgast, 1982). Cultural feminists warn that gender-neutral models of law harm women who perform traditionally feminine social roles. Additionally, this theoretical position assumes that the law will never be able to treat women and men equally because the law has historically failed to reflect women's lives and experiences (West, 1989). Therefore, imposing policies based on equality in existing social orders, where responsibilities and resources are unequally distributed, further disadvantages women. Cultural feminists instead have advocated for "special rights" for women based on women's unique positions within society.

Feminist legal scholar Christine Littleton (1987) offered an interesting twist to

the "special rights" model. She suggested that for all gendered activities and traits there should be both a male and a female complement so that the costs of engaging in traditionally female activities would be no greater than those of engaging in traditionally male activities. Such reforms allot equal merit to traditionally gendered tasks. For example, mothers returning to the job market would receive honor and job preferences comparable to those accorded to military veterans.

Cultural feminists advocate separate standards for sentencing men and women because women traditionally commit less violent crimes and are a lesser threat to the community. The cultural feminist position supports two sets of sentencing guidelines, one for men and women, to recognize uniquely male or female experiences and values. However, such simple dichotomous thinking about male and female roles is problematic because it assumes that social roles are "naturally" assumed by one sex and that all women are the same. Therefore, policies based on dichotomous gender identities break down when confronted by men and women behaving outside of their "traditionally expected" gender roles.

*Dominance Feminism and the Possibility of Sex-Neutral Policies with Gender-Specific Results*

The dominance approach to law defines the "natural differences" between men and women as social constructions that are reproduced in mainstream law to keep women subordinate to men. According to feminist legal scholar Catherine MacKinnon (1987), a chief exponent of this position, the goal of feminism should not

be to eliminate gender differences, but rather to reduce gender hierarchy. Dominance theory opens up an interesting avenue of exploration: Can the law address the differences that men and women face due to the unequal positions they hold in society without replicating and codifying these differences into law?

Joan Williams (1992) used the logic of dominance theory to formulate a model for “deinstitutionalizing” gender. Williams created a hypothetical legal standard aimed at avoiding the traditional correlations that are made between “gendered behavior” and biological sex. While cultural feminists offer legal protection to women who perform in traditionally “feminine” ways, Williams suggests that the law could protect anyone who performs certain functions that are often associated with feminine gender roles. Deinstitutionalized gender policies would be sex-neutral, but gender-role-specific. This standard is not blind to gender but rather “refuses to reinforce the traditional assumptions that adherence to gender roles flows naturally from biological sex” (Williams, 1992: 69). Under a rule of deinstitutionalized gender, women who perform traditionally female functions, such as childcare, would receive special legal protections. Men who perform similar roles would also be eligible for such legal protection. Williams’s conception of sex-neutrality might prevent women from being disproportionately harmed by gender-neutral laws, while not chaining them to gender stereotypes on the basis of their physiology.

The idea of deinstitutionalizing gender through legal policies provides a

hopeful perspective for solving the problems currently facing the gender-neutral Federal Sentencing Guidelines. This theory provides a an alternative course if we decide that the goal of equality with men is not really what is best for women because it comes at the high cost of increased imprisonment for women. Such a theory might lead us to adopt policies where women or men could receive downward departures or reduced sentences based on conditions that characterize many female offenders, such as family responsibilities. Under this model, policymakers protect women and families (when applicable) without codifying gender differences into law.

### **Bringing Women Back In: How to Consider Women's Experiences When Making Sentencing Policy?**

The Federal Sentencing Guidelines were designed to promote equality by making sentencing uniform across the country. Uniform policies, however, assume that people from diverse backgrounds, with vastly different experiences that explain their involvement in crime, can be treated "equally." Gender-neutrality in federal sentencing is one policy where the goals of equality have resulted in greater harm to female offenders and their families. Instead of focusing on equality, policy makers should begin to identify areas of women's experiences that were not considered in the formation of the original Federal Sentencing Guidelines, such as women's experience as primary caretakers. The Guidelines should be changed to recognize such factors, thus modifying the "formal equality" model of the Federal Sentencing Guidelines into a policy of "deinstitutionalized gender." By taking this step, policy makers would

allow the courts to consider factors that are traditionally associated with women, such as family responsibilities, when making decisions about departing from the Guidelines.

Through this project, I have discovered that judicial use of traditional mitigating departures benefits women of color, a group that has suffered a disproportionate harm from mandatory-minimum sentencing and the federal war on drugs. In addition, the second circuit's broad interpretation of the extraordinary family circumstances (EFC) departure disproportionately benefits women, particularly helping women of color receive reduced sentences. The second circuit has interpreted the Sentencing Commission's policy that "family circumstances are not ordinarily relevant to departure decisions" to mean that family circumstances are relevant when they are "compelling" as opposed to being relevant only when they are "atypical." In Chapter Five, I analyzed the distribution of EFC departures for men and women who raise "family responsibility" issues in different judicial circuits. That analysis showed that the "compelling" standard for granting EFC departures utilized by the second circuit had the greatest benefit for female offenders. In all other judicial circuits, a roughly equal proportion of men and women who raise the legal argument that their family responsibilities justified a departure actually received the EFC departure (35 percent of women and 24 percent of men, a difference that was not statistically significant). However, in the second circuit disproportionately more women who brought such claims received the EFC departure (81 percent of women compared to

47 percent of men, a difference that was statistically significant). The “compelling” standard for EFC departures in the second circuit does not prohibit men from receiving the departure; in fact, nearly half of male defendants who raised “family responsibility” issues in the second circuit were granted the departure. This finding makes intuitive sense. Women are more likely to have family circumstances that could be defined as “compelling” due to the fact that they are more likely to be primary caretakers, but men become eligible to receive the departure when they are active primary caretakers.

Judge Weinstein, a District Court Judge in the second circuit, explained why he thought the second circuit’s broad interpretation of family circumstances was reasonable for considering departures from the Guidelines:

Visit my courtroom sometime when tearful young children watch their mother being sentenced. Jail would mean destruction of the only loving relationship they have. It may mean institutionalization for these children, or worse. The lack of parental supervision resulting from incarceration of heads of households can lead into a vicious downward spiral of criminal activity, jail sentences, and possible death for such children at a young age. (Weinstein, 1996: 179)

According to Judge Weinstein, the long-term consequences of prison sentences on defendants and their family members is more harmful than that borne by a defendant without primary caretaking responsibilities. Judges in the second circuit may have recognized that children whose primary caretakers are incarcerated disproportionately suffer a decline in academic performance and have more behavioral problems in school, as the research by Stanton (1980) shows. The Sentencing Commission’s

gender-neutral provision limiting judicial consideration of family responsibilities did not lead to gender-neutral results. Women, children, and communities paid a higher price for a primary caretaker's imprisonment.

The quotation from Judge Weinstein raises an important question about what we, as a society, want from punishment. If we make a normative decision that current sentencing policies disadvantage too many individuals through unnecessarily long prison sentences, then we need to look for ways to remedy this situation. Kathleen Daly (1987) suggested that making women's experiences the norm for future sentencing policies would be potential solution to current harsh sentencing policies. "By disrupting the image of men as presumptive sentencing subjects, we may see some men's law breaking in a different, perhaps more sympathetic light, and we can revisit the question of what is just and humane punishment" (1987: 242). From this research it may be appropriate for the United States Sentencing Commission to add a section to the current pre-sentence investigation report that outlines the impact of a defendant's incarceration on his or her family.<sup>55</sup> Judges would use the information about family impact to make more informed decisions about when family ties departures are justified or warranted.

But, while judicial recognition of family responsibilities as a justification for a departure from the Guidelines may help address some of the "equity" problems of

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<sup>55</sup> Currently the pre-sentence investigation reports contain information about the offender's characteristics, such as personal and family data (Part C of the Pre-

structured sentencing, such a departure is not a perfect solution to the disparate harms faced by women, particularly primary caretakers, when they are incarcerated. The case analysis of family responsibilities departures presented in Chapter Five raises important questions about racial bias in judicial interpretation of family roles. Judges may have different social expectations of the potential maternal and paternal duties of white defendants compared to defendants of color. Future research would be necessary to monitor any expanded use of downward departures for family responsibilities to guard against such bias.

### **The Future of Sentencing Guideline Policies and Research**

In addition to raising theoretical issues about policy choices for future sentencing guidelines, this study highlights the need for additional empirical research on the application of the Guidelines. Examining sentencing opinions can provide rich information about how judges justify varying decisions in sentencing, such as granting departures. However, it cannot definitively answer questions about how organizational processes affect sentencing outcomes for either women or men. Macro (quantitative analysis of aggregate data) and micro (content analysis of legal cases) research on sentencing outcomes are limited because they only tap one avenue of discretion – the ability of judges to grant departures from the Guidelines. Future

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Sentence Investigation Report). However, such information does not assess the impact of the defendant's incarceration on the family unit.

research on sentencing guidelines must examine how other internal (less visible) processes shape sentencing outcomes.

First, new research is needed to determine why particular defendants are granted departures and how judges decide the level of departure to grant. Does one group of defendants receive a greater benefit from the same type of departure than others? Secondly, we must strive to understand how prosecutors set offense levels, when they decide to drop charges, and how they determine the terms of a plea agreement. Because charging decisions determine sentencing options under the Federal Sentencing Guidelines, vast control over sentencing outcomes has shifted from the sentencing stage (judges) to the charging stage (prosecutors and probation officers) (Meithe, 1987; Salvensburg, 1992). Finally, future research is needed to understand the role of probation officers in writing pre-sentence investigation reports. Do probation officers recommend sentence adjustments for particular types of defendants? How do probation officers and prosecutors determine what "other conduct" by the defendant should be relevant to the sentence outcome? Such questions must be addressed by future empirical research if we are to understand if bias exists at in various levels of the criminal justice process.

Although answers to these questions may help us to better understand how gender or racial bias emerge in different phases of the criminal justice system, the above research questions are limited to understanding specific decision points taken out of context from the criminal justice process as a whole. Research on sentencing

has struggled unsuccessfully to find new methodologies to illuminate the interactive nature of decision-making through various stages of the courtroom workgroup (Wonders, 1996; Eisenstein and Jacob, 1978). By combining statistics on guideline departures and sentence outcomes with judicial narratives from sentencing opinions, my research advances our understanding of how judicial interpretation of sentencing policies under the Federal Sentencing Guidelines shape departure decisions which subsequently affect sentencing outcomes. New research is needed on how other decisions at early stages of the criminal justice system, such as arrest or pre-trial detainment, affects later decisions about prosecution, plea bargaining and sentencing.

The statistical analysis of downward departure decisions and sentencing outcomes presented in chapters three and four illustrate the need for future research focused on exposing the interaction between decisions in multiple phases of the criminal justice system. Research in criminal justice has traditionally considered the sentencing decision as a solitary event. However, it can be argued that the decisions made before the determination of the sentence can significantly affect the outcome. A feminist approach to sentencing research could help researchers conceptualize sentencing as a stage in a lifecourse of decision making in the criminal justice system that is interactive, fluid, and reflexive.

The analysis in chapters three and four confirm the need for a more fluid understanding of how sentencing decisions are affected by other actors in the criminal justice process. In these chapters it is clear that women of color were

disproportionately less likely to receive departures from the Guidelines for providing assistance to prosecutors than white women. Yet, women of color were disproportionately more likely to receive traditional mitigating departures compared to white women. These findings raise important “flags” for future researchers and policymakers. Are prosecutors granting white women leniency by offering them substantial assistance departures, or do white women really have more useful information to offer prosecutors that would justify such disparate results? On the other hand, research is needed to understand why judges disproportionately grant downward departures to women and men of color. Do judges use downward departures to remedy severe charging by prosecutors, or do men and women of color have more “mitigating factors” in their lives that would justify the disproportionate departures?

To answer these questions scholars must begin to use new methodologies and data sources. The scholarly community has been successfully developed innovative procedures for analyzing quantitative data provided by the United States Sentencing Commission. But there is a limit to the productivity of this data. To understand fully the emergence of bias in the application of the Guidelines, future researchers must spend more time interviewing stakeholders, such as probation officers, defense attorneys and prosecutors; analyzing information from the pre-sentence investigation reports; examining the texts of sentencing opinions; and conducting fieldwork in the courts.

Finally, if stakeholders in the criminal justice system begin to embrace expanded judicial consideration of family responsibilities as a basis for departing from the Guidelines, future research will be needed to better understand the long-term consequences of sentencing on families. What types of parental relationships are most beneficial for reducing future crime? Does separating a primary care taker from children due to incarceration increase delinquency? New research may be needed to assess the effects of incarcerating primary caretakers on community structure and stability. At what point does the increased incarceration of community members make families and neighborhoods destabilize communities and threaten the effectiveness of general deterrence strategies, such as mandatory minimums? Additionally, new research may be needed to understand the relationship between having strong family relationships and successful reintegration of offenders back into society after serving prison sentence.

The existence of the Federal Sentencing Guidelines raises the stakes for incarcerated women and their families. The present study raises new questions about the existence of both disparities in the application of the Guidelines and disparities that may be built into the structure of the Guidelines themselves. If more states begin to adopt structured sentencing systems such as the Guidelines, it is important to develop new tools for evaluating such policies. Neutrality is the easy road; it is simple to implement and creates bright line rules. However, the wide variety of lived experiences of individual defendants may require a more nuanced sentencing system.

The goal for future sentencing policies is designing systems of sentencing that are equitable for male and female defendants, as opposed to simply being equal.

## Appendix I.: Federal Guidelines Sentencing Grid

		Criminal History Category (Criminal History Points)					
		I	II	III	IV	V	VI
<b>Zone A</b>	<b>Offense Level</b>						
	<b>1</b>	0-6	0-6	0-6	0-6	0-6	0-6
	<b>2</b>	0-6	0-6	0-6	0-6	0-6	1-7
	<b>3</b>	0-6	0-6	0-6	0-6	2-8	3-9
	<b>4</b>	0-6	0-6	0-6	2-8	4-10	6-12
	<b>5</b>	0-6	0-6	1-7	4-10	6-12	9-15
	<b>6</b>	0-6	1-7	2-8	6-12	9-15	12-18
	<b>7</b>	0-6	2-8	4-10	8-14	12-18	15-21
<b>Zone B</b>	<b>8</b>	0-6	4-10	6-12	10-16	15-21	18-24
	<b>9</b>	4-10	6-12	8-14	12-18	18-24	21-27
	<b>10</b>	6-12	8-14	10-16	15-21	21-27	24-30
<b>Zone C</b>	<b>11</b>	8-14	10-16	12-18	18-24	24-30	27-33
	<b>12</b>	10-16	12-18	15-21	21-27	27-33	30-37
<b>Zone D</b>	<b>13</b>	12-18	15-21	18-24	24-30	30-37	33-41
	<b>14</b>	15-21	18-24	21-27	27-33	33-41	37-46
	<b>15</b>	18-24	21-27	24-30	30-37	37-46	41-51
	<b>16</b>	21-27	24-30	27-33	33-41	41-51	46-57
	<b>17</b>	24-30	27-33	30-37	37-46	46-57	51-63
	<b>18</b>	27-33	30-37	33-41	41-51	51-63	57-71
	<b>19</b>	30-37	33-41	37-46	46-57	57-71	63-78
	<b>20</b>	33-41	37-46	41-51	51-63	63-78	70-87
	<b>21</b>	37-46	41-51	46-57	57-71	70-87	77-96
	<b>22</b>	41-51	46-57	51-63	63-78	77-96	84-105
	<b>23</b>	46-57	51-63	57-71	70-87	84-105	92-115
	<b>24</b>	51-63	57-71	63-78	77-96	92-115	100-125
	<b>25</b>	57-71	63-78	70-87	84-105	100-125	110-137
	<b>26</b>	63-78	70-87	78-97	92-115	110-137	120-150
	<b>27</b>	70-87	78-97	87-108	100-125	120-150	130-162
	<b>28</b>	78-97	87-108	97-121	110-137	130-162	140-175
	<b>29</b>	87-108	97-121	108-135	121-151	140-175	151-188
	<b>30</b>	97-121	108-135	121-151	135-168	151-188	168-210
	<b>31</b>	108-135	121-151	135-168	151-188	168-210	188-235
	<b>32</b>	121-151	135-168	151-188	168-210	188-235	210-262
	<b>33</b>	135-168	151-188	168-210	188-235	210-262	235-293
	<b>34</b>	151-188	168-210	188-235	210-262	235-293	262-327
	<b>35</b>	168-210	188-235	210-262	235-293	262-327	292-365
	<b>36</b>	188-235	210-262	235-293	262-327	292-365	324-405
	<b>37</b>	210-262	235-293	262-327	292-365	324-405	360-life
	<b>38</b>	235-293	262-327	292-365	324-405	360-life	360-life
	<b>39</b>	262-327	292-365	324-405	360-life	360-life	360-life
	<b>40</b>	292-365	324-405	360-life	360-life	360-life	360-life
	<b>41</b>	324-405	360-life	360-life	360-life	360-life	360-life
	<b>42</b>	360-life	360-life	360-life	360-life	360-life	360-life
	<b>43</b>	Life	Life	Life	life	Life	life

### **Description of the Federal Sentencing Guideline Table**

*(modified from the Federal Sentencing Guidelines Manual, 2000, Section 5C1.1)*

The offense levels (1-43) form the vertical axis of the Federal Sentencing Table. The criminal history category (I-VI) forms the horizontal axis of the table. The sentence range (in months of imprisonment) is determined at the point of intersection between the offense level and the criminal history category. A sentence range of "life" means life imprisonment.

The sentencing zones that are indicated on the vertical axis represent the types of sentencing options that fall within each zone.

- If the applicable guideline range is within *zone A* of the sentencing table, a sentence of imprisonment is not required.
- If the applicable guideline range is within *zone B*, the minimum sentence may be satisfied by a sentence of imprisonment; a sentence of imprisonment that includes a term of supervised release; or a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment.
- If the applicable guideline range is within *zone C*, the minimum term of the sentence must be imprisonment or a sentence of imprisonment that includes a term of supervised release.
- If the applicable range is within *zone D*, the sentence may only be satisfied by a term of imprisonment.

## Appendix II: Defendant Characteristics and Guideline Departures United States Sentencing Commission Manual Part H

### **§5H1.1. Age (Policy Statement)**

Age (including youth) is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse).

### **§5H1.2. Education and Vocational Skills (Policy Statement)**

Education and vocational skills are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor. See §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Education and vocational skills may be relevant in determining the conditions of probation or supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service.

### **§5H1.3. Mental and Emotional Conditions (Policy Statement)**

Mental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range, except as provided in Chapter Five, Part K, Subpart 2 (Other Grounds for Departure). Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; e.g., participation in a mental health program ( see §§5B1.3(d)(5) and 5D1.3(d)(5)).

### **§5H1.4. Physical Condition, Including Drug or Alcohol Dependence or Abuse (Policy Statement)**

Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Drug or alcohol dependence or abuse is not a reason for imposing a sentence below the Guidelines. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (see §5D1.3(d)(4)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the supervisory body to judge the success of the program.

Similarly, where a defendant who is a substance abuser is sentenced to probation, it is strongly recommended that the conditions of probation contain a requirement that the defendant participate in an appropriate substance abuse program (see §5B1.3(d)(4)).

**§5H1.5. Employment Record (Policy Statement)**

Employment record is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Employment record may be relevant in determining the conditions of probation or supervised release ( e.g., the appropriate hours of home detention).

**§5H1.6. Family Ties and Responsibilities, and Community Ties (Policy Statement)**

Family 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.

**§5H1.7. Role in the Offense (Policy Statement)**

A defendant's role in the offense is relevant in determining the appropriate sentence. See Chapter Three, Part B (Role in the Offense).

**§5H1.8. Criminal History (Policy Statement)**

A defendant's criminal history is relevant in determining the appropriate sentence. See Chapter Four (Criminal History and Criminal Livelihood).

**§5H1.9. Dependence upon Criminal Activity for a Livelihood (Policy Statement)**

The degree to which a defendant depends upon criminal activity for a livelihood is relevant in determining the appropriate sentence. See Chapter Four, Part B (Career Offenders and Criminal Livelihood).

**§5H1.10. Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement)**

These factors are not relevant in the determination of a sentence.

**§5H1.11. Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)**

Military, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

**§5H1.12. Lack of Guidance as a Youth and Similar Circumstances (Policy Statement)**

Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds for imposing a sentence outside the applicable guideline range.

### Appendix III

#### Z-Score Tests for Logistic Regression Estimates

**Table A: Z-Score of Difference Between Regression Estimates for Receiving a Departure for Men and Women**

Variable	Z-Value of Difference Between Estimates
Race	.85
Citizen	-1.49
Age**	2.73
Education	.22
Dependants	-.23
Number of Counts	.48
Offense Level	-1.21
Criminal History	-1.07
Safety Valve**	-3.24
Plea	-.86
Circuit 1	-.26
Circuit 2	.61
Circuit 3	1.27
Circuit 4**	2.33
Circuit 5	1.36
Circuit 6**	2.26
Circuit 7	1.12
Circuit 8	1.74
Circuit 9	1.38
Circuit 10**	1.58
Circuit 11**	2.62

\*\*  $p < .05$

**Table B: Z-Score of Difference Between Regression Estimates for Receiving a Substantial Assistance Departure or Traditional Mitigating Departure for Men and Women**

Variable	Z-Value of Difference Between Estimates	
	Men	Women
Race**	-11.37	Race** -5.19
Citizen**	18.84	Citizen** 7.72
Age	-.166	Age -1.86
Education	1.26	Education .38
Dependants	.97	Dependants -.25
Number of Counts	-.48	Number of Counts** -1.99
Offense Level**	19.62	Offense Level** 5.02
Criminal History	1.77	Criminal History .67
Safety Valve	.47	Safety Valve** 2.20
Plea**	-14.47	Plea** -3.97
Circuit 1**	2.57	Circuit 1 .58
Circuit 2	.743	Circuit 2 -.47
Circuit 3**	5.91	Circuit 3 1.90
Circuit 4**	5.47	Circuit 4 1.17
Circuit 5**	4.14	Circuit 5 1.22
Circuit 6**	6.19	Circuit 6** 2.14
Circuit 7**	4.48	Circuit 7 .74
Circuit 8**	3.137	Circuit 8 .96
Circuit 9	-1.20	Circuit 9 -1.56
Circuit 10**	2.08	Circuit 10 .214
Circuit 11**	6.65	Circuit 11 1.07
** $p < .05$		** $p < .05$

**Appendix IV.**  
**Percent Distribution of Cases by**  
**Types of Departures for Men and Women**

Judicial Circuit	<b>Men</b>			
	<i>Cases</i>	<i>Any</i>	<i>Substantial</i>	<i>Mitigating</i>
	<i>%</i>	<i>Departure</i>	<i>Assistance</i>	<i>Departure</i>
0 District of Columbia	1	1	1	1
1 ME, MA, NH, RI, Puerto Rico	3	2	2	2
2 CT, NY, VT	9	11	9	18
3 DE, NJ, PA, Virgin Islands	5	5	6	2
4 MD, SC, VA, WV	11	10	12	3
5 LA, MS, TX	20	16	17	15
6 KY, MI, OH, TN	8	8	11	3
7 IL, IN, WI	3	3	3	1
8 AR, IA, MN, MO, ND, NB, SD	7	7	8	4
9 AK, AZ, CA, HI, ID, MT, NV OR, WA, Guam, N. Marina Is.	13	17	9	39
10 CO, KS, NM, OK, UT, WY	5	5	4	6
11 AL, FL, GA	15	15	18	5

Judicial Circuit	<b>Women</b>			
	<i>Cases</i>	<i>Any</i>	<i>Substantial</i>	<i>Mitigating</i>
	<i>%</i>	<i>Departure</i>	<i>Assistance</i>	<i>Departure</i>
0 District of Columbia	1	1	1	1
1 ME, MA, NH, RI, Puerto Rico	3	4	4	4
2 CT, NY, VT	10	15	11	25
3 DE, NJ, PA, Virgin Islands	5	6	7	3
4 MD, SC, VA, WV	10	7	9	3
5 LA, MS, TX	16	14	16	10
6 KY, MI, OH, TN	7	6	9	1
7 IL, IN, WI	4	4	4	2
8 AR, IA, MN, MO, ND, NB, SD	8	8	10	3
9 AK, AZ, CA, HI, ID, MT, NV OR, WA, Guam, N. Marina Is.	13	16	9	35
10 CO, KS, NM, OK, UT, WY	7	7	7	6
11 AL, FL, GA	16	12	14	7

## Appendix V: Maximum Likelihood Tobit Regression

The sentencing data from the Monitoring of Criminal Sentences is left-censored due to a large number of sentences that resulted in no imprisonment (1,183). The left-censoring for no incarceration causes the distribution of sentence lengths (measured in months) to be skewed. Therefore, I have used maximum likelihood tobit equations to as a second model to compare my results from the ordinary least square regression models in the text of Chapter Four. The maximum likelihood tobit equation is designed to handle censored data (Tobin, 1958; McDonald and Moffitt, 1980; Roncek, 1992).<sup>56</sup> The tobit model is:

$$Y_t = X_t B + u_t \text{ if } X_t B + u_t > 0$$

$$Y_t = 0 \text{ if } X_t B + u_t \leq 0 \text{ and } t = 1, 2, \dots, N$$

Where  $N$  is the number of observations,  $Y_t$  is the dependant variables (length of imprisonment)  $X_t$  is a vector of independent variables,  $B$  is a vector of tobit

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<sup>56</sup> There is some disagreement within the sentencing literature on the appropriate use of tobit regression in place of OLS regression. McDonald and Carlson (1993) argue that tobit regression is inappropriate for federal sentencing outcomes because the decision to imprison a defendant is a sequential process, where judge determine if a defendant will be incarcerated then determine the length of a sentence. Some scholars have utilized a combination of Probit or Logit estimates for incarceration/no incarceration and in combination with OLS regression models for the remaining uncensored data. I chose to continue using the tobit regression model since the distribution of sentence lengths remains abnormal even after removing the censored/no imprisonment cases. The tobit estimates can be decomposed to estimate the length of imprisonment for those defendants receiving imprisonment and the

coefficients and  $u_t$  is an error term that is assumed to be normally distributed with zero mean and constant variance.

I have replicated the two OLS models from Chapter Four (Tables 4.5 and 4.6) using the maximum likelihood tobit equation. The first table in this appendix (Table VA) includes three tobit models, the first with all cases pooled together and the second and third separating out sentence outcomes for women and men. In model one we see that a defendant's gender significantly influences sentence outcomes. Being female significantly decreases sentence lengths ( $B=-4.49$ ), a finding consistent with the OLS regression model. As with the OLS regression model, using the tobit equation I found that race had a non-significant influence on sentence length for the pooled group, though being a citizen decreased sentence lengths in the tobit model, while showing only a minimal effect in the OLS model.<sup>57</sup>

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probability of imprisonment for defendants receiving a non-prison sentence, however the estimates included in this appendix have not been decomposed.

<sup>57</sup> The differential effects of race and citizenship are an indication that future research should separate the white/nonwhite categories into black, white and Hispanic. Most of the non-citizens in the sample are Hispanic indicating that being Hispanic, may increase sentence lengths to a degree not seen for black defendants.

**Table Appendix V-A: Tobit Regression Coefficients for Sentence Lengths in All Cases, Women's Cases, and Men's Cases**

Model 1: All Cases (N=16,300)		Model 2: Men (N=14,973)		Model 3: Women (N=2,178)	
	Coef.		Coef.		Coef.
Race	.63	Race	.06	Race*	-2.93
Gender**	-5.16				
Citizen**	-2.40	Citizen**	-3.13	Citizen**	-7.71
Age	-.03	Age**	-.10	Age	.03
Dependants	.04	Dependants	-.11	Dependants	-.69
Offense Level**	5.15	Offense Level**	5.28	Offense Level**	4.01
Criminal History**	6.83	Criminal History**	7.30	Criminal History**	6.94
Guideline Maximum**	.05	Guideline Maximum**	.14	Guideline Maximum**	.15
Number of Counts**	2.66	Number of Count**	.88	Number of Counts	.60
Weapon	.26	Weapon*	2.15	Weapon	3.35
Safety**	-8.53	Safety**	-7.56	Safety*	-3.62
Plea**	15.40	Plea**	31.37	Plea**	17.73
Substantial Assistance**	-40.04	Substantial Assistance**	-50.11	Substantial Assistance**	-39.40
Traditional Mitigating**	-20.30	Traditional Mitigating**	-25.22	Traditional Mitigating**	-25.32
Circuit 0**	-20.77	Circuit 0**	-25.41	Circuit 0**	-34.02
Circuit 1**	-6.56	Circuit 1**	-7.70	Circuit 1	-7.39
Circuit 2**	-14.91	Circuit 2**	-18.35	Circuit 2**	-20.56
Circuit 3**	-8.31	Circuit 3**	-10.28	Circuit 3*	-10.76
Circuit 5**	-4.51	Circuit 5**	-6.07	Circuit 5*	-5.84
Circuit 6	-1.02	Circuit 6	-1.76	Circuit 6*	-6.06
Circuit 7*	2.53	Circuit 7	.66	Circuit 7	-2.34
Circuit 8**	-3.94	Circuit 8**	-5.44	Circuit 8*	-9.08
Circuit 9**	-7.47	Circuit 9**	-8.13	Circuit 9**	-9.59
Circuit 10**	-6.68	Circuit 10**	-6.53	Circuit 10*	-9.03
Circuit 11	-1.06	Circuit 11*	-3.58	Circuit 11*	-6.41
Intercept**	-60.85	Intercept**	-62.48	Intercept**	-39.01
Log Likelihood = - 71707.43		Log Likelihood = -71169.81		Log Likelihood = - 8667.48	
Model Chi-Square = 23702.68		Model Chi-Square = 23734.68		Model Chi-Square = 3044.73	
Pseudo R2 = 0.14		Pseudo R2 = 0.14		Pseudo R2 = 0.15	
**estimate significant at p>.001		**estimate significant at p>.001		**estimate significant at p>.001	
* estimate significant at p>.05		* estimate significant at p>.05		* estimate significant at p>.05	

I also conducted tobit analysis to replicate the findings in Table 4.6 on sentence lengths for each of the guideline departure types. Again the findings are quite consistent with the original OLS findings. The race of the defendant is only significant for prosecutor-motivated departure cases both in the OLS and in the tobit

models. Similarly, citizenship is only significantly related to sentence outcomes for judge-motivated departures in both models. One slight difference between the two models is the effect of gender on sentence outcomes for judge-motivated departure cases. In the OLS model, being female was significantly related to decreased months of imprisonment, though the effect was small. In the tobit model, gender is not significantly related to sentence outcomes. Future work to decompose the tobit coefficient for gender in the judge-motivated departure cases may help explain the differences between the two models. The effects of the remaining independent variables are quite consistent between the two models.

Because there was such consistency between the original OLS models in Chapter Four and the subsequent maximum likelihood tobit model tests, I am confident that the findings from Chapter Four are not a result of censoring or model specification problems.

**Table Appendix V-B: Tobit Regression Coefficients for Sentence Lengths No Departure Cases, Prosecutor-Motivated Departure Cases, and Judge-Motivated Departure Cases.**

Model 1: No Departure (N=9,218)	Coef.	Model 2: Prosecutor Motivated Departure (N=4,873)	Coef.	Model 3: Judge-Motivated Departure (N=1,877)	Coef.
Race	-1.46	Race*	2.34	Race	-.14
Gender*	-3.02	Gender**	-4.75	Gender	-3.45
Citizen	-.40	Citizen	-.77	Citizen**	-6.86
Age	-.25	Age*	-3.56	Age	-.03
Dependants	.30	Dependants*	1.88	Dependants	-.57
Offense Level**	5.49	Offense Level**	3.59	Offense Level**	3.67
Criminal History**	8.60	Criminal History**	5.86	Criminal History**	4.05
Guideline Maximum**	.19	Guideline Maximum**	.07	Guideline Maximum**	.14
Number of Counts**	1.03	Number of Count**	2.05	Number of Counts	-.26
Weapon**	4.70	Weapon	.49	Weapon*	5.48
Safety**	-11.66	Safety**	-4.90	Safety**	-10.15
Plea**	20.21	Plea	7.55	Plea*	6.03
Circuit 0**	-16.76	Circuit 0**	-39.15	Circuit 0**	-28.42
Circuit 1**	-7.74	Circuit 1	-4.63	Circuit 1*	-15.12
Circuit 2**	-12.08	Circuit 2**	-24.13	Circuit 2**	-19.93
Circuit 3	-3.31	Circuit 3**	-12.94	Circuit 3*	-15.59
Circuit 5**	-9.59	Circuit 5	.11	Circuit 5**	-16.27
Circuit 6*	-4.91	Circuit 6	-1.37	Circuit 6*	-13.80
Circuit 7**	-7.48	Circuit 7*	7.35	Circuit 7	-6.47
Circuit 8**	-7.63	Circuit 8	-2.59	Circuit 8	-5.41
Circuit 9**	-7.50	Circuit 9**	-10.06	Circuit 9**	-21.34
Circuit 10**	-7.68	Circuit 10*	-7.17	Circuit 10**	-15.86
Circuit 11*	-4.28	Circuit 11	.23	Circuit 11**	-18.89
Intercept**	-78.37	Intercept**	-49.39	Intercept**	-30.94
Log Likelihood = - 44923.43		Log Likelihood = -23319.86		Log Likelihood = - 8750.21	
Model Chi-Square = 18102.19		Model Chi-Square = 4900.57		Model Chi-Square = 2896.53	
Pseudo R2 = 0.17		Pseudo R2 = 0.10		Pseudo R2 = 0.15	
**estimate significant at p>.001		**estimate significant at p>.001		**estimate significant at p>.001	
* estimate significant at p>.05		* estimate significant at p>.05		* estimate significant at p>.05	

## Appendix VI. Correlation Matrix

	X <sub>1</sub>	X <sub>2</sub>	X <sub>3</sub>	X <sub>4</sub>	X <sub>5</sub>	X <sub>6</sub>	X <sub>7</sub>	X <sub>8</sub>	X <sub>9</sub>	X <sub>10</sub>	X <sub>11</sub>	X <sub>12</sub>	X <sub>13</sub>	X <sub>14</sub>	X <sub>15</sub>	X <sub>16</sub>	X <sub>17</sub>	X <sub>18</sub>	X <sub>19</sub>	X <sub>20</sub>	X <sub>21</sub>	X <sub>22</sub>	X <sub>23</sub>	X <sub>24</sub>	X <sub>25</sub>	X <sub>26</sub>	
race	X <sub>1</sub>																										
gender	X <sub>2</sub>	X <sub>2</sub>																									
citizen	X <sub>3</sub>	-0.06	X <sub>3</sub>																								
age	X <sub>4</sub>	0	-0.22	X <sub>4</sub>																							
dependent	X <sub>5</sub>	0.02	-0.03	0.08	X <sub>5</sub>																						
plea	X <sub>6</sub>	-0.01	0.04	0.08	0.02	X <sub>6</sub>																					
safety	X <sub>7</sub>	0.03	0.04	0.02	0.14	0.01	X <sub>7</sub>																				
no.counts	X <sub>8</sub>	0.09	-0.20	0.01	-0.14	0.31	0.13	X <sub>8</sub>																			
off level	X <sub>9</sub>	0.05	0.11	0.10	0.26	0.06	0.21	0.19	X <sub>9</sub>																		
history	X <sub>10</sub>	0.10	0.11	0.03	0.28	0.19	0.07	0.70	0.38	X <sub>10</sub>																	
max. range	X <sub>11</sub>	0.07	0.12	0.03	0.07	0.28	0.19	0.70	0.38	0.07	X <sub>11</sub>																
weapon	X <sub>12</sub>	-0.04	0.12	-0.03	0.01	0.05	0.07	0.27	0.07	0.27	0.07	X <sub>12</sub>															
pros.dep	X <sub>13</sub>	0.03	0.15	0.01	0.02	0.18	0.03	0.07	0.18	0.07	0.08	0.05	X <sub>13</sub>														
judge.dep	X <sub>14</sub>	0.02	0.02	-0.01	-0.04	0.08	0.08	0.06	-0.11	-0.07	-0.06	-0.06	-0.24	X <sub>14</sub>													
circuit 0	X <sub>15</sub>	0.04	0.04	-0.02	0.01	-0.02	0.01	0.03	0.02	0.02	0.01	0.02	-0.02	0.01	X <sub>15</sub>												
circuit 1	X <sub>16</sub>	0.01	-0.01	-0.01	-0.01	0.02	0.08	-0.03	-0.03	-0.03	-0.01	-0.01	-0.02	-0.02	-0.02	X <sub>16</sub>											
circuit 2	X <sub>17</sub>	0.04	0.01	0.04	0.03	0.08	0.04	0.01	0.04	0.02	0.03	0.01	0.01	0.15	-0.03	-0.05	X <sub>17</sub>										
circuit 3	X <sub>18</sub>	0.01	0.01	0.01	0.05	0.05	0.05	0.02	0.05	0.02	0.01	0.01	0.01	0.04	-0.02	-0.06	-0.06	X <sub>18</sub>									
circuit 4	X <sub>19</sub>	0.01	0.01	0.16	0.05	0.09	0.02	0.10	0.13	0.12	0.04	0.01	0.01	0.10	-0.03	-0.06	-0.10	-0.07	X <sub>19</sub>								
circuit 5	X <sub>20</sub>	0.01	-0.02	-0.08	-0.01	0.04	-0.05	-0.10	-0.07	-0.07	0.01	-0.05	-0.05	-0.05	-0.09	-0.15	-0.11	-0.18	-0.18	X <sub>20</sub>							
circuit 6	X <sub>21</sub>	-0.08	-0.01	0.12	0.03	-0.01	0.01	-0.01	0.04	0.01	0.01	0.08	-0.03	-0.07	-0.05	-0.08	-0.10	-0.10	-0.14	-0.14	X <sub>21</sub>						
circuit 7	X <sub>22</sub>	0.01	0.01	0.08	0.01	-0.01	0.02	0.03	0.02	0.03	0.03	0.01	0.03	0.01	-0.04	-0.06	-0.04	-0.07	-0.10	-0.05	-0.05	X <sub>22</sub>					
circuit 8	X <sub>23</sub>	-0.15	0.01	0.11	0.03	-0.01	-0.01	-0.05	0.03	0.03	0.03	0.02	0.03	0.02	-0.05	-0.08	-0.06	-0.04	-0.07	-0.10	-0.09	-0.07	-0.05	X <sub>23</sub>			
	X <sub>24</sub>																									X <sub>24</sub>	
	X <sub>25</sub>																									X <sub>25</sub>	
	X <sub>26</sub>																									X <sub>26</sub>	



Appendix VII.  
Comparison of EFC and Non-EFC Departure Characteristics

Variables	Coding	Pooled Group N=45,991	EFC Departure N=346	No EFC Departure 45,645
		%	%	%
Race **	White	35	44	35
	Black	27	22	27
	Hispanic	33	31	33
	Other	5	3	5
Gender**	Female	15	39	15
	Male	85	61	85
Citizenship	Non-Citizen	71	70	71
	Citizen	29	30	29
Age**		X= 34.60 s.d.=10.96	X= 39.02 s.d.= 11.46	x= 34.57 s.d.= 10.95
Dependants**		X= 1.51 s.d.=1.68	X= 2.26 s.d.=1.76	x= 1.51 s.d.=1.68
Education **	1=high school graduation + 0=less than high school degree	42 58	33 67	42 59
Plea	1=Guilty 0=Not guilty	93 7	95 5	93 7
Guideline Offense Level (PSR)		x= 18.80 s.d. =9.83	x = 18.23 s.d. =6.94	x= 18.81 s.d.= 9.85
Criminal History Point (PSR)**		x= 2.23 s.d.= 1.69	x= 1.37 s.d.= .96	X= 2.24 s.d.= 1.69
Number of Counts		x= 1.60 s.d.= 2.84	x= 1.46 s.d.= 1.81	x= 1.60 s.d.= 2.85
Safety Valve**	1=Safety valve applied 0=No safety valve applied	10 90	21 79	10 90
Circuit 0	District of Columbia	1	0	1
Circuit 1	ME, MA, NH, RI, Puerto Rico	3	2	3
Circuit 2**	CT, NY, VT	8	48	9
Circuit 3	DE, NJ, PA, Virgin Islands	5	6	5
Circuit 4**	MD, SC, VA, WV	10	1	10
Circuit 5**	LA, MS, TX	17	3	17
Circuit 6	KY, MI, OH, TN	8	5	8
Circuit 7*	IL, IN, WI	4	6	4
Circuit 8**	AR, IA, MN, MO, ND, NB, SD	6	2	6
Circuit 9 **	AK, AZ, CA, HI, ID, MT, NV OR, WA, Guam, N. Marina Is.	21	13	21
Circuit 10	CO, KS, NM, OK, UT, WY	6	6	6
Circuit 11**	AL, FL, GA	13	6	13
Total Months Imprisoned**		x=56.03	X=25.23	x=56.03
* $p < .05$	** $p < .001$			

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