Benevolent Sexism in Judges

JEFFREY J. RACHLINSKI*
ANDREW J. WISTRICH**

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I. INTRODUCTION

Previous research suggests that judges make more favorable rulings for female litigants in family court cases and in criminal sentencing. Although

* © 2021 Jeffrey J. Rachlinski. Henry Allen Mark Professor of Law, Cornell Law School.
** © 2021 Andrew J. Wistrich. Magistrate Judge, U.S. District Court, Central District of California, retired; Adjunct Professor of Law, Cornell Law School.

such trends might arise from real differences between men and women, they might also arise from stereotypes that cause judges to favor mothers over fathers and to show leniency towards female defendants. We tested for benevolent sexism among 714 sitting trial judges with two experiments in which we presented judges with hypothetical cases in which we only varied the gender of the litigants. In a family court case, we found judges were more apt to grant a request to allow relocation by a mother than by an otherwise identical father. In a criminal case, we found that judges sentenced a female defendant to less prison time than an otherwise identical male defendant. The results demonstrate that judges engage in benevolent sexism towards female litigants in common legal settings.

> The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage.
>
> -Ruth Bader Ginsburg[1]

"Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[2] So states Section I of the Equal Rights Amendment ("ERA"),[3] as recently passed by the Virginia Legislature.[4] Whether or not the ERA becomes part of the United States Constitution,[5] statutes that explicitly discriminate against women, banning female participation in everything from jury service to bar membership, are largely a relic of the past.[6] Law now demands egalitarian treatment by public officials as well,[7] especially judges. Judges promise to

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1. KATIE L. GIBSON, RUTH BADER GINSBURG'S LEGACY OF DISSENT: FEMINIST RHETORIC AND THE LAW 43 (2018).

2. Proposed Amendment to the United States Constitution, H.R.J. Res. 208, 92d Cong. (1972).

3. *Id.*

4. *See* Laura Vozzella, *Virginia Senate passes federal Equal Rights Amendment*, WASH. POST (Jan. 15, 2019, 12:13 PM), https://www.washingtonpost.com/local/virginia-politics/virginia-senate-passes-federal-equal-rights-amendment/2019/01/15/9836d4fe-18f5-11e9-88fef9f77a3bcb6c_story.html [https://perma.cc/P7VH-9D76].

5. *See* Allison L. Held, Sheryl L. Herndon & Danielle M. Stager, *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113, 117 (1997) (arguing that the "ERA is properly before the states for ratification."); Michael C. Dorf, *The Equal Rights Amendment and Article V*, VERDICT (Jan. 20, 2020), https://verdict.justia.com/2020/01/22/the-equal-rights-amendment-and-article-v [https://perma.cc/3S5R-PGKH] ("[W]hether the ERA takes its place as the 28th Amendment remains uncertain.").

6. *See* DEBORAH L RHODE, SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY 1–2 (1997) (asserting that although women have de jure equality in most areas, they lack de facto equality).

7. *See* Civil Rights Act of 1964 § 7, 42 U.S.C. §§ 2000e(b), 2000e-2(a)–(e); 2000e-3(b).

be impartial in their decisions,[8] and model codes of judicial conduct prohibit consideration of gender as a basis for decision making.[9] One of the fundamental axioms of our justice system is formal equality; justice must be rendered "without respect to persons."[10]

A legal requirement of equality, of course, will not invariably produce equal treatment. Title VII of the Federal Civil Rights Act requires equality in the private workplace, but women continue to earn less than men and have fewer opportunities in many workplaces.[11] Likewise, judges face similar, perhaps even more prominent, prohibitions against racial discrimination, and yet disparities between the outcomes of African-American and white litigants persist.[12] Legal rules might be unwittingly complicit in gender discrimination. Even if facially neutral, rules privileging

8. 28 U.S.C. § 453 ("I will faithfully and impartially discharge and perform all the duties incumbent upon me . . . .").

9. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT r. 2.3(B) (AM. BAR ASS'N 2020) ("A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation . . . ."). Note that throughout we use the term "gender" unless a statute uses the term "sex." Our experimental materials do not actually distinguish between the two, as we discuss *infra* at note 125, but the biases we document are best thought of as arising from a judge's reactions to litigants who identify as male as compared to those who identify as female. We nevertheless sometimes use the term "sexism" rather than "genderism," because the latter does not seem to be a widely accepted term. Our research does not address bias against other categories of gender or bias against LGBTQ individuals.

10. 28 U.S.C. § 453.

11. *See* U.S. BUREAU OF LABOR STATISTICS, REPORT. NO. 1045, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2012 1 (2013) (reporting that**,** nationwide in 2012, women earned an average of $691 per week, or 80.9% of the average amount earned by men, which was $854 per week); Nikki Graf, Anna Brown & Eileen Patten, *The Narrowing, but Persistent, Gender Gap in Pay*, PEW RSCH. CTR. (Mar. 22, 2019), https://www.pewresearch.org/fact-tank/2019/03/22/gender-pay-gap-facts/ [https://perma.cc/53ZF-BAQ9] ("The gender pay gap has narrowed since 1980, but it has remained relatively stable over the past 15 years or so. In 2018, women earned 85% of what men earned . . . . Based on this estimate it would take an extra 39 days of work for women to earn what men did in 2018."). *See generally* Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. ECON. LITERATURE 789 (2017) (providing a thorough review of the causes of the gender pay gap).

12. *See* Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L & SOC. SCI. 203, 221 (2017) ("African-American defendants consistently receive harsher sentences than white defendants." (citing Ojmarrh Mitchell, *A Meta-Analysis of Race and Sentencing Research: Explaining the Inconsistencies*, 21 J. QUANTITATIVE CRIMINOLOGY 439 (2005)).

particular types of damages claims over others may disadvantage those whose claims tend disproportionately to fall within disfavored categories, such as statutory caps on noneconomic damages.[13] More commonly, perhaps, stereotypes and implicit biases can influence judgment.[14]

Gender discrimination, however, can manifest itself differently than racial discrimination. Racial discrimination, particularly involving African Americans, is almost invariably negative.[15] Gender discrimination, however, sometimes appears to benefit women—at least superficially.[16] For example, male offenders receive longer prison sentences than female offenders,[17] and mothers are more apt than fathers to receive custody of children after divorce.[18]

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13. *See* Rebecca Korzec, *Maryland Tort Damages: A Form of Sex-Based Discrimination*, 37 U. BALT. L. F. 97, 98–103 (2007) ("Contemporary tort law elevates some types of injuries, giving them more protection and awarding greater damages. Claims and injuries associated with women often receive less legal protection in the societal hierarchy which tort doctrine reflects. For example, tort doctrine places a higher value on physical injury and property loss than emotional harm."). Because women earn less, they recover less for lost wages than otherwise similarly situated men. *See* Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustices in Disguise*, 70 WASH. L. REV. 1, 80 (1995).

14. *See* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Biases: Scientific Foundations*, 94 CAL. L. REV. 945, 947 (2006) ("[T]he science of implicit cognition suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions.").

15. *See id*. at 956 ("[A]ny non-African-American subgroup of the United States population will reveal high proportions of persons showing statistically noticeable implicit race bias in favor of EA relative to AA.").

16. Policies that benefit some women in the short run may be harmful to most women in the long run. *See* Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 830 (1989) (arguing that policies that facilitate women's differentiation from men in economic life have "encouraged women to 'choose' their own repression").

17. *See* Stephanie Bontrager, Kelle Barrick & Elizabeth Stupi, *Gender and Sentencing: A Meta-Analysis of Contemporary Research*, 16 J. GENDER, RACE & JUST. 349, 366 (2013) (concluding that "[o]verall, 65% of the estimates indicate that women have better sentencing outcomes than men," but adding that there may be a trend toward a reduction in that disparity); Margareth Etienne, *Sentencing Women: Reassessing the Claims of Disparity*, 14 J. GENDER, RACE & JUST. 73, 73 (2010) ("The evidence is clear that courts punish women less often than men for the same offenses, and even when they do punish women, they punish them less severely than their male counterparts."); Amy Farrell, Geoff Ward & Danielle Rousseau, *Intersections of Gender and Race in Federal Sentencing: Examining Court Contexts and the Effects of Representative Court Authorities*, 14 J. GENDER, RACE & JUST. 85, 85 (2010) ("Decades of research confirm that women receive less-severe sanctions than men across all phases of the criminal justice system."); Cassia Spohn, *The Effects of the Offender's Race, Ethnicity, and Sex on Federal Sentencing Outcomes in the Guidelines Era*, 76 LAW & CONTEMP. PROBS., 75, 96 (2013) ("Compared to female offenders, male offenders had higher odds of pretrial detention and lower odds of receiving substantial assistance departures. Males also received longer sentences than females.").

18. Robert Hughes, Jr., *Are Custody Decisions Biased in Favor of Mothers?*, HUFFINGTON POST: BLOG (June 8, 2011, 11:57 AM), https://www.huffpost.com/entry/are-

Benevolent sexism, like any invidious bias, arises from implicit attitudes as well as explicit stereotyping that has harmful implications for women.[19] The effects of gender stereotyping depend on the context. Stereotypical traits attributed to women create advantages for women in some circumstances, but disadvantages in others.[20] The belief that women make better parents of young children, for example, might benefit female litigants in family court, but people who harbor this attitude are also apt to believe that the proper role of women in society is as mothers and might thus have difficulty hiring and promoting women in the workplace.[21] "Benevolent sexism" and "hostile sexism" are two sides of the same coin.[22] Regardless of whether it helps or hurts women, gender has an impact. In many contexts, justice may be blind, but it is not gender neutral.[23]

Do judges still engage in benevolent sexism? To attempt to answer that question, we used experimental methods to test for benevolent sexism in two areas of law: family law and criminal sentencing. Specifically, the 714 trial judges in our study reviewed either a hypothetical family court case or a criminal sentencing case. Each judge reviewed a version of the facts in which we identified the moving party (family law) or the defendant (sentencing) as either male or female. We held all other facts constant so that any difference between the two scenarios necessarily arose solely from the gender of the parties. Unlike archival studies of actual decisions, by comparing the reactions of the judges in the two versions of our scenarios,

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custody-decisions-bia_b_870709 [https://perma.cc/S98H-ACLX] ("Across a wide range of jurisdictions the estimates are that mothers receive primary custody 68–88% of the time, fathers receive primary custody 8–14%, and equal residential custody is awarded in only 2–6% of the cases.").

19. *See* Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. RICH. L. REV. 1039, 1043–45 (2019).

20. *See* Carlos Berdejó, *Gender Disparities in Plea Bargaining*, 94 IND. L.J. 1247, 1248–49 (2019) ("There is also extensive work examining gender disparities that adversely impact women in many other areas including the sciences, sports, healthcare, and even in the purchase of a new car.").

21. *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1153–59 (2012) (reviewing how implicit biases and cultural commitments might affect employment decisions).

22. *See* Peter Glick & Susan T. Fiske, *An Ambivalent Alliance: Hostile and Benevolent Sexism as Complementary Justifications for Gender Inequality*, 56 AM. PSYCHOL. 109, 109 (2001) [hereinafter Glick & Fiske, *Ambivalent Alliance*]; Peter Glick & Susan T. Fiske, *Ambivalent Sexism Revisited*, 35 PSYCHOL. WOMEN Q. 530, 532 (2011).

23. *See generally* Naomi Ellemers, *Gender Stereotypes*, 69 ANN. REV. PSYCH. 275 (2018) (providing a thorough review of the gender stereotype literature).

we can unambiguously determine whether gender of the litigants influenced their judgments.

Although in some—maybe many—areas of law women might fare worse than men,[24] child custody and sentencing decisions seem like areas in which benevolent sexism might hold sway over judges. Judges might believe, whether implicitly or explicitly, that women make better parents than men and decide family law matters accordingly. Likewise, they might see men as more threatening than women and might sentence accordingly. Furthermore, both areas of law afford judges discretion, allowing judges ample opportunity to express implicit or explicit stereotypes.[25]

We found that gender mattered to the judges. Judges were more inclined to grant a request to disrupt an existing familial arrangement from a mother than from a father, even though the circumstances were identical. Likewise, judges sentenced a male defendant more harshly than an otherwise identical female defendant. We conclude that benevolent sexism influences contemporary judges.

We report these results in three parts in this paper. Part II reviews existing evidence for benevolent sexism among judges. Parts III and IV and present our study of benevolent sexism in a family court setting and in a sentencing setting, respectively. Part V contains a discussion of our results and conclusions.

II. BENEVOLENT SEXISM IN FAMILY COURT AND CRIMINAL SENTENCING

Men and women likely have different experiences in the courtroom that arise from gender-role stereotypes in society.[26] Given the wage disparity between genders, it is not surprising, for example, that civil juries award injured male plaintiffs more than female plaintiffs.[27] Likewise, given the

24. *See* Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 35 (1994); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 710 (2007).

25. *See* Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 403–04 (1996) ("Judicial discretion has also been enhanced by the rarity of jury trials in divorce cases; in almost all divorce actions the judge both determines the facts and interprets the law.").

26. *See, e.g.*, Erik J. Girvan, Grace Deason & Eugene Borgida, *The Generalizability of Gender Bias: Testing the Effects of Contextual, Explicit, and Implicit Sexism on Labor Arbitration Decisions*, 39 L. & HUM. BEHAV. 525, 529 (2015) (undergraduates were more likely to deny a wrongful termination grievance in a stereotypically masculine workplace if the grievant was female).

27. *See* Erik Girvan & Heather J. Marek, *Psychological and Structural Bias in Civil Jury Awards*, 8 J. AGGRESSION, CONFLICT & PEACE RSCH. 247, 253 (2016) (finding that juries awarded female plaintiffs merely 59% of what they awarded male plaintiffs). Several mock-jury studies replicate this result in an experimental setting. *See* Jane Goodman, Edith

value society places on female appearance, cases involving facial disfigurement produce higher awards for female plaintiffs.[28] Some research suggests that asylum judges favor women, possibly owing to a benevolent sexism that triggers a greater desire to protect women.[29] The pattern of attorney-fee awards also favors women, perhaps for similar reasons.[30] The same attitude, however, might explain why judges are more apt to invalidate a will executed by a woman for undue influence than a will executed by a man.[31] Even lawyers and judges experience sexism, benevolent and otherwise, in the courtroom.[32]

Greene & Elizabeth F. Loftus, *Runaway Verdicts or Reasoned Determinations: Meek Juror Strategies in Awarding Damages*, 29 JURIMETRICS J. 285, 296 (1989).

28. Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L & WOMEN'S STUD. 1, 39 (1996) (finding that "juries often award women higher damages than men for facial scarring, while they award men more money than women for loss of wages or physical strength."); Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883, 894–95 (1993) (both prospective jurors and arbitrators awarded more for a disfiguring scar when the plaintiff was female in a simulated medical malpractice case).

29. *See* Alejandro Ecker, Laurenz Ennser-Jedenastik & Martin Haselmayer, *Gender Bias in Asylum Adjudications: Evidence for Leniency toward Token Women*, 82 SEX ROLES 117, 117 (2019) (finding that Austrian judges confronting a caseload consisting predominately of male asylum applicants were strongly biased in favor of female applicants, but judges confronting a gender-balanced caseload were not).

30. *See* Talia Fisher et al., *He Paid, She Paid: Exploiting Israeli Courts' Rulings on Litigation Costs to Explore Gender Biases*, 13 J. EMPIRICAL LEGAL STUD. 536, 536 (2016) (finding that unsuccessful male plaintiffs were more likely than unsuccessful female plaintiffs to be ordered to pay the winners' attorneys' fees, that unsuccessful female plaintiffs were ordered to pay less than unsuccessful male plaintiffs, and that prevailing female defendants received larger attorneys' fees awards than similarly situated male defendants).

31. Veena K. Murthy, *Undue Influence and Gender Stereotypes: Legal Doctrine or Indoctrination?*, 4 CARDOZO WOMEN'S L.J. 105, 112–13 (1997) (finding that in a hypothetical case 61.8% of appellate judges determined that a will executed by a woman should be invalidated for undue influence as compared to 30.3% of judges reviewing the same will executed by a man). *But see* Patricia R. Recupero et al., *Gender Bias and Judicial Decisions of Undue Influence in Testamentary Challenges*, 43 J. AM. ACAD. PSYCHIATRY & L. 60, 65 (2015) (presenting a study of 117 probate judges from nine states, finding that "judges' opinions about the presence of undue influence did not differ . . . even when the genders of the testator and beneficiary were reversed").

32. *See* Tonya Jacobi & Dylan Schweers, *Justice Interrupted: The Effect of Gender, Ideology and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. 1379, 1381–85, 1404, 1458, 1467, 1470, 1474, 1478, 1493 (2017) (male U.S. Supreme Court justices interrupt female justices about three times as often as they interrupt male justices); Jessica Salerno, *Closing with Emotion: The Differential Impact of Male versus Female Attorneys Expressing Anger in Court*, 42 LAW & HUM. BEHAV. 385, 385–88, 397–400 (2018) (male

Disparate outcomes suggest sexism in the courtroom, but some disparities might be rational.[33] Disparities in damage awards for lost wages, for example, likely reflect the wage disparity between men and women, however unfair the underlying disparity might be. In an effort to test for clear evidence of benevolent sexism, we focus our attention on two areas of law: family law and criminal sentencing. Both areas seem like prime targets for the influence of benevolent sexism. Most adults—both male and female—more strongly associate men with career-oriented concepts and women with domestic concepts.[34] Men are more apt to commit violent acts than women.[35] These associations, or implicit biases, can lead to judgments that instantiate long-standing stereotypes that will benefit women.[36]

Implicit biases and associations tend to promote harmful stereotypes.[37] Implicit associations between African Americans and violence might be a source of significant racial disparities in the criminal justice system.[38] Implicit beliefs about women also might impede female progress in the

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and female observers found angry male attorneys to be commanding, powerful, competent, and hirable, but found angry female attorneys to be shrill, hysterical, grating, and ineffective).

33. *See, e.g.*, Koenig & Rustad, *supra* note 13, at 9–10; *see also* Vidmar & Rice, *supra* note 28, at 894–95.

34. *See* Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Website*, 6 GROUP DYNAMICS 101, 109 (2002) (reporting "robust associations between male-career and female-family" among a large sample of adults); *see also* Nicole Rogus-Pulia et al., *How Gender Stereotypes May Limit Female Faculty Advancement in Communication and Speech Disorders*, 27 AM. J. SPEECH-LANGUAGE PATHOLOGY 1598, 1600 (2018) ("Implicit gender bias is present in all individuals, regardless of gender, due to exposure to stereotypes through common socialization experiences."); Argharam Salles, et al., *Estimating Implicit and Explicit Gender Bias Among Health Care Professionals and Surgeons*, 2 JAMA NETWORK OPEN (2019) (reporting data indicating that health-care professionals hold implicit and explicit biases associating men with careers and women with family, while surgeons hold implicit biases associating men with surgery and women with family medicine).

35. *See 2018 Crime in the United States Table 33*, FBI: UCR, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-33 [https://perma.cc/9MDH-4A2Y]. Men accounted for roughly 80% of persons arrested for violent crime. *Id.*

36. *See* John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. IN ORG. BEHAV. 36, 45–48 (2009) (reviewing ten studies that show a correlation between measures of implicit bias and behavior).

37. *See* Kang et al., *supra* note 21, at 1126 ("Using experimental methods in laboratory and field studies, researchers have provided convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects.").

38. *See id.* at 1150–51 ("In each of the stages of the criminal trial process discussed, the empirical research gives us reason to think that implicit biases—attitudes and beliefs that we are not directly aware of and may not endorse—could influence how defendants are treated and judged.").

workplace.[39] Implicit biases about Asian Americans reinforce stereotypes about Asians as withdrawn or shy, making it hard to see Asians in more assertive roles, such as litigators.[40] The same implicit biases that make it hard to see a woman as a top executive or politician, however, also facilitate seeing her as a successful parent.[41] Although that bias could benefit women in family court settings, it could also impair women's success in other contexts. Likewise, explicit and implicit associations between men and violence might influence sentencing decisions.[42]

Professionals might not display the same biases. Many of the studies cited above suggesting disparate treatment involve jury decisions, rather than judicial decisions.[43] At least one study comparing professional arbitrators and lay adults showed the effects of gender-role stereotyping in a legal setting that professional arbitrators did not display.[44] That said, research we discuss below in family court decisions[45] and in criminal sentencing[46] strongly suggests that judges treat male and female litigants differently as well. Furthermore, our previous research shows that implicit biases influence judges.[47]

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39. *See generally* Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006) (describing how implicit biases about women can influence hiring and promotion decisions).

40. *See* Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886, 891–92 (2010) ("[I]mplicit stereotypes predicted preferential evaluation of the White litigator (in group favoritism).").

41. *See* Nichole M. Bauer, *A Feminine Advantage? Delineating the Effects of Feminine Trait and Feminine Issue Messages on Evaluations of Female Candidates*, 16 POL. & GENDER 660, 661–64 (2020) (finding that emphasizing feminine traits activates stereotypes about women that suggest that women political candidates are less qualified for leadership roles); *see also* Anne M. Koenig et al., *Are Leader Stereotypes Masculine? A Meta-Analysis of Three Research Paradigms*, 137 PSYCHOL. BULL. 616, 616–18 (2011); Deborah A. Prentice & Erica Carranza, *What Women and Men Should Be, Shouldn't Be, Are Allowed to Be, and Don't Have to Be*, 26 PSYCHOL. WOMEN Q. 269, 269 (2002).

42. *See* Bauer, *supra* note 41, at 662 ("Feminine stereotypes characterize women as caring, compassionate, and sensitive and as more likely to engage in supportive communal activities. Masculine stereotypes characterize men as aggressive, tough, and strong and as more likely to engage in assertive or agentic behaviors.").

43. *See, e.g.*, Kang et al., *supra* note 21, at 1152–53, 1168, 1179–84.

44. Girvan, Deason & Borgida, *supra* note 26, at 9.

45. *See infra* notes 48–88 and accompanying text.

46. *See infra* notes 89–122 and accompanying text.

47. *See* Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195

A. Gender Disparities in Family Court

Preconceived notions of gender and gender-role stereotypes likely influence judges' choices about parental custody.[48] That said, gender bias might harm either men or women.[49] On one hand, judges may assume that children are better off living with stay-at-home mothers.[50] Such traditional views of women as nurturing mothers might push judges in the direction of allowing the mother to retain custody of the children.[51] Judges also may assume that fathers are less capable caretakers unless they demonstrate otherwise.[52] These paternalistic stereotypes, which characterize women as maternal, passive, and dependent on men for protection, serve as a basis for such "benevolent sexism" that might favor female litigants in many settings in family court.[53] Women who move to take better jobs

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(2009) ("We find that judges harbor the same kinds of implicit biases as others [and] that these biases can influence their judgment.").

48. *See, e.g.*, Nicholas Bala, *A Report from Canada's 'Gender War Zone': Reforming the Child-Related Provisions of the Divorce Act*, 16 CANADIAN J. FAM. L. 163, 177 (1999) (noting that the preference for mothers in custody determinations has led fathers' right's advocates to believe that it is result of judicial anti-father bias); Paul Millar & Sheldon Goldenberg, *Explaining Child Custody Determinations in Canada*, CANADIAN J.L. & SOC'Y, Fall 1998, at 209, 221, 224 (1998) ("[W]hile legislation, and the legal standard for custody assignment, has changed [to a gender neutral standard], the empirical fact of gender preference has not."); Lynn Hecht Schafran, *Overwhelming Evidence: Reports on Gender Bias in the Courts*, TRIAL, Feb. 1990, at 28, 28 (1990) (describing the efforts of gender bias task forces in various states, all of which found pervasive gender bias in family law matters); Kathryn E. Abare, Note, *Protecting the New Family:* Ireland v. Ireland *and Connecticut's Custodial Parent Relocation Law*, 32 CONN. L. REV. 307, 307 (1999) (describing the custodial mother as a typical gender stereotype).

49. *See, e.g.*, VT. SUP. CT. & VT. BAR ASS'N, GENDER AND JUSTICE: REPORT OF THE VERMONT TASK FORCE ON GENDER BIAS IN THE LEGAL SYSTEM 100 (1991). *But see* Lynn Hecht Schafran*, Gender Bias in Family Courts: Why Prejudice Permeates the Process*, 17 FAM. ADVOC. 22, 26 (1994) (explaining that although men are stereotyped in custody disputes, they are significantly more successful in receiving primary or joint physical custody than commonly believed).

50. *See* Kathleen E. Mahoney, *The Myth of Judicial Neutrality: The Role of Judicial Education in the Fair Administration of Justice*, 32 WILLAMETTE L. REV. 785, 798 (1996); Nugent, *supra* note 24, at 40; *see* Elizabeth R. Cole et al., *Vive La Difference? Genetic Explanations for Perceived Gender Differences in Nurturance*, 57 SEX ROLES 211, 212 (2007) ("Many people believe that women are 'naturally' nurturing and caregiving, particularly in comparison to men. This difference is often explained in terms of women's biological capacity to bear and nurse children.").

51. *See* RICHARD A. WARSHAK, THE CUSTODY REVOLUTION: THE FATHER FACTOR AND THE MOTHERHOOD MYSTIQUE 30 (1992) (arguing that stereotypes have had a profound influence on custody decisions); Nugent, *supra* note 24, at 40 ("Custody is an area where the biases and stereotypes concerning both sexes influence decision-making.").

52. *See* Nugent, *supra* note 24, at 40 ("Fathers tend to be perceived as less capable caretakers and must prove their ability to parent, whereas mothers are presumed to be capable.").

53. *See* Glick & Fiske, *Ambivalent Alliance*, *supra* note 22, at 115.

or leave marriages to pursue new relationships are acting against these traditional female stereotypes, however, which might provoke unconscious judicial retaliation in child custody and relocation disputes.[54] Both hostile and benevolent sexism thus seem plausible in the realm of family law.

Previous research on disparate outcomes in family court cases provide evidence of sexism that both benefits and harms female litigants.[55] Several studies show that lay adults who are asked to allocate martial assets typically award less than half of the assets to wives—notwithstanding legal requirements of an equitable apportionment.[56] Judges might also, whether consciously or not, further penalize women who deviate from traditional stereotypes or are otherwise seen as engaging in behavior that is harmful to the marriage.[57] Custody decisions favor women, however.[58] Historically, this difference was ensconced in the law in the

54. *See* Millar & Goldenberg, *supra* note 48, at 224 ("Fathers who wish to parent their children post-divorce today face a situation similar to women entering the workforce only a few decades ago."); Nugent, *supra* note 24, at 40 ("[N]umerous cases document situations in which women with live-in boyfriends have lost custody, while men with live-in girlfriends retain custody."); Susan Beth Jacobs, Comment, *The Hidden Gender Bias Behind "The Best Interest of the Child" Standard in Custody Decisions*, 13 GA. ST. U. L. REV. 845, 876, 892–93 (1997) (finding from a study analyzing 378 nationwide custody cases between mothers and fathers from 1990 through 1994 that there is gender bias against mothers when judges consider parents' remarriage and extramarital and post-marital sexual relationships).

55. *See* Karen Czapanskiy & Tricia O'Neill**,** *Report of the Special Judicial Committee on Gender Bias in the Courts – May 1989*, 20 U. BALT. L. REV. 4, 47–48 (1990).

56. *See* Jennifer Bennett Shinall, *Settling in the Shadow of Sex: Gender Bias in Marital Asset Division*, 40 CARDOZO L. REV. 1857, 1892–1900 (2019) (reporting an experimental study in which research subjects awarded the male spouse a greater share of the marital assets than the female spouse); Joni Hersch & Jennifer Bennett Shinall, *When Equitable Is Not Equal: Experimental Evidence on the Division of Marital Assets in Divorce*, 18 REV. ECON. HOUSEHOLD 655, 658, 666 (2020) (reporting results of an experimental study showing that subjects consistently awarded the female spouse less than 50% of the divorcing couple's assets).

57. *See* Shinall, *supra* note 56, at 1896–97 (reporting experimental results in which research subjects disfavored female deviations from traditional roles more than male deviations); *see also* ULRIKE SCHULTZ & GISELA SHAW, GENDER AND JUDGING 35 (2013) (finding evidence in family courts that female judges tend to be less generous than their male colleagues in cases involving women requesting alimony). A likely explanation for this phenomenon is that female judges who are financially and professionally independent are less sympathetic to women who rely financially on their husbands.

58. *See* Richard A. Warshak, *Gender Bias in Child Custody Decisions*, 34 FAM. & CONCILIATION CTS. REV. 396, 397, 406 (1996); Jo-Ellen Paradise, Note, *The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems?*, 72 ST. JOHN'S L. REV. 517, 517 (1998) ("A traditional cultural and legal

form of the "tender years presumption," which presupposes that a mother is the better parent for a young child.[59] Even without this doctrine, in the United States, when the court awards sole custody of a child to one parent, it is typically to the mother.[60]

The fact that far more women than men obtain custody of children after divorce is not, by itself, evidence of sexism. Mothers might be more apt to seek custody than fathers. Women might also, on average, be better positioned to assume the responsibilities entailed by custody. Experimental studies using hypothetical cases in which researchers vary only the gender of the parties are better able to determine whether sexism causes female success in such cases.[61] Researchers have conducted two such studies; both showed that judges favor female claims to custody, even when other factors are identical.[62] This result dovetails with the strong trend favoring awards of custody to mothers in actual cases. That said, judges in the experimental studies might merely be relying on a simple heuristic that mothers usually get custody, rather than a stereotype that mothers are simply always better parents.

To tease out benevolent sexism more clearly, we chose a slightly different area of family law—child relocation decisions. Child relocation cases present some of the most challenging, controversial, and frequently litigated issues in family law.[63] Deciding whether a custodial parent can move a child some

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presumption currently standing is that, upon marital dissolution, children should remain in their mother's custody.").

59. *See* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 7 (1992) ("[T]hroughout most of the present century the mother was presumed to be the preferred custodian of the children."); Phyllis T. Bookspan, *From a Tender Years Presumption to a Primary Parent Presumption: Has Anything Really Changed? . . . Should It?*, 8 BYU J. PUB. L. 75, 78 (1993).

60. *See* TIMOTHY GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2013 4 (2016), https://www.census.gov/content/dam/Census/library/publications/2016/demo/P60-255.pdf [https://perma.cc/SWH9-46H5].

61. *See, e.g.*, Andrea L. Miller, *Expertise Fails to Attenuate Gendered Biases in Judicial Decision-Making*, 10 SOC. PSYCHOL. & PERSONALITY SCI. 227, 232 (2018).

62. *See* Miller, *supra* note 61; Millar & Goldenberg, *supra* note 48, at 224. Also, one experiment demonstrating that people favor mothers in custody decisions used law students as an analogue to judges. *See* Luiza Lopes Franco Costa el al., *Gender Stereotypes Underly Child Custody Decisions*, 49 EUR. J. SOC. PSYCH. 548, 556 (2019).

63. *See* Tropea v. Tropea, 665 N.E.2d 145, 148 (N.Y. 1996) (explaining that relocation cases present the "knottiest and most disturbing problems" in family law); Gary A. Debele, *A Children's Rights Approach to Relocation: A Meaningful Best Interests Standard*, 15 J. AM. ACAD. MATRIM. L. 75, 75 (1998) (describing the controversy over the proper standard to apply in child relocation cases as "pervasive and vexatious"); Lucy S. McGough, *Starting Over: The Heuristics of Family Relocation Decision Making*, 77 ST. JOHN'S L. REV. 291, 293 (2003) (describing relocation cases as a "burning issue" in Europe, Canada, Australia, and the United States); D. A. Rollie Thompson, *Movin' On: Parental Relocation in Canada*, 42 FAM. CT. REV. 398, 398 (2004) (explaining that in

distance from the noncustodial parent forces a judge to choose "between allowing the custodial parent to pursue economic and personal opportunities which benefit both her and the child and the desire to facilitate the child's involvement with both parents."[64]

In the United States, the statutory and judicial approaches to relocation cases vary from state to state and "uniformity is woefully lacking."[65] If the relocation issue arises during the initial custody determination, most courts apply the "best interest of the child" standard.[66] If the relocation dispute arises after custody has been determined, then the original custody order must be modified.[67] In such cases, the parent requesting modification generally bears the initial burden of demonstrating a material change of circumstances that warrants a hearing on whether the child's custody should change.[68] If the proposed relocation amounts to changed circumstances, the judge must then decide whether it is in the child's best interest to move with the custodial parent or to award custody to the nonmoving parent.[69]

Canada relocation is the most frequently contested issue in child custody and parenting). Most family law judges also believe that relocation cases are the "toughest and most time-consuming" type of custody disputes. Leslie Eaton, *Divorced Parents Move, and Custody Gets Trickier*, N.Y. TIMES (Aug. 8, 2004), http://www.nytimes.com/2004/08/08/nyregion/08custody.html. [perma.cc/XNH9-4HXM].

64. Abare, *supra* note 48, at 308 (explaining that relocation disputes inherently involve gender role issues).

65. Linda D. Elrod, *A Move in the Right Direction? Best Interests of the Child Emerging as the Standard for Relocation Cases*, 3 J. CHILD CUSTODY 29, 30 (2006). The Pennsylvania Supreme Court noted in 1990 that there is no "consistent, universally accepted approach to the question of when a custodial parent may relocate out-of-state over the objection of the non-custodial parent." Gruber v. Gruber, 583 A.2d 434, 437 (Pa. Super. Ct. 1990), *superseded by statute*, 23 PA. CONS. STAT. § 5337(h) (2020), *as recognized in* D.K. v. S.P.K., 102 A.3d 467 (Pa. 2014). Elrod observed that decades later, "confusion and controversy remain over what are, and what should be the legal standards to apply" in relocation cases. Elrod, *supra*, at 31.

66. Elrod, *supra* note 65, at 34.

67. *See id.*

68. *See id.*

69. There are essentially three approaches as to whether relocation amounts to changed circumstances warranting modification. First, relocation itself is not a change in circumstances, and so presumption exists in favor of relocation by the custodial parent. *See, e.g.*, Gagnon v. Glowacki, 815 N.W.2d 141, 150 (Mich. Ct. App. 2012) (concluding that relocation was not a change in circumstances and thus the court was not required to conduct a "best interest" analysis). Second, relocation may amount to changed circumstances and the court may use shifting presumptions so that the custodial parent bears the initial burden to prove good faith and that the move is in the child's best interest, and then the burden shifts to the nonresidential parent to demonstrate that the move is not in the child's best interest. *See, e.g.*, Baures v. Lewis, 770 A.2d 214, 230–31 (N.J. 2001). Third, each

Some jurisdictions in the United States have also developed a list of factors for judges to consider when determining whether relocation is in the child's "best interest."[70] Although these factors vary, they are: the reasons for and against the move, whether the move will enhance the child's quality of life, and the availability of a realistic substitute visitation schedule to maintain the child's relationship with the nonmoving parent.[71]

Relocation cases in Canada are also determined based upon the "best interest" standard, but unlike the United States, there is no presumption for or against relocation.[72] Canadian courts apply a multi-factored approach adopted by the Canadian Supreme Court in *Gordon v. Goertz*.[73] Under *Gordon v. Goertz*, a parent seeking to modify a custody agreement must first demonstrate that the relocation presents a material change in the child's circumstances.[74] Once changed circumstances have been established, the judge must then determine whether relocating would be in the child's best interest.[75] In making the "best interest" determination, Canadian courts consider a nonexclusive list of seven factors:

> (a) the existing custody arrangement and relationship between the child and the custodial parent; (b) the existing access arrangement and the relationship between the child and the access parent; (c) the desirability of maximizing contact between the child and both parents; (d) the views of the child; (e) the custodial parent's reason for moving, *only* in the exceptional case where it is relevant to that parent's ability to meet the needs of the child; (f) disruption to the child of a change in custody; and (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.[76]

Although there is no presumption in favor of the custodial parent, that parent's opinion on whether relocation is in their child's best interest is entitled to "great respect."[77]

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party bears the burden of demonstrating why the child's best interest is to be with them. *See, e.g.*, *In re* Marriage of Cooksey, 125 P.3d 57, 65 (Or. Ct. App. 2005); *In re* Marriage of Ciesluk, 113 P.3d 135, 147–48 (Colo. 2005).

70. Elrod, *supra* note 65, at 40. For discussion on the factors developed by leading American cases and statutes, *see* Hon. W. Dennis Duggan, *Rock-Paper-Scissors: Playing the Odds with the Law of Child Relocation*, 45 FAM. CT. REV. 193, 209–11 (2007).

71. Elrod, *supra* note 65, at 34.

72. Hon. Justice Tim Carmody, *Child Relocation: An Intractable International Family Law Problem*, 45 FAM. CT. REV. 214, 214–15 (2007); Thompson, *supra* note 63, at 398.

73. *See* Gordon v. Goertz, [1996] 2 S.C.R. 27, 28 (Can.). This approach applies to relocation disputes during initial custody determinations, as well as those that have been initiated after the original decree has been issued.

74. *See id*. at 28.

75. *See id.*

76. *Id*. at 29 (emphasis added).

77. *Id*. at 28.

The law governing relocation decisions in both countries is thus less than clear.[78] In the United States, the use of multifactor tests with vague criteria affords the trial judge considerable discretion. Canada's approach also has been criticized as creating too much inconsistency by embracing a lengthy and imprecise list of factors.[79] Judges have little way of knowing whether a child's "best interest" supports allowing a move. Judges must also consider that some evidence suggests that relocation often has negative consequences for children's well-being.[80] Consequently, child relocation decisions are highly discretionary.[81] Developing a comprehensive set of rules may be impossible in this area, and there exists little choice but to rely on judges' sound judgment.[82]

The gender of the custodial parent is not supposed to be a factor in custody determination and relocation cases,[83] but such cases likely trigger

78. *See* Duggan, *supra* note 70, at 193 ("The law of child relocation in America is a mess [and i]t is not much better anywhere else.").

79. *See* Thompson, *supra* note 63, at 407.

80. *See* Sanford L. Braver, Ira M. Ellman & William V. Fabricius, *Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations,* 17 J. FAM. PSYCH. 206, 214 (2003) ("We find a preponderance of negative effects associated with parental moves by mother or father, with or without the child, as compared to divorced families in which neither parent moved away.").

81. *See* Julie Hixson-Lambson, Comment, *Consigning Women to the Immediate Orbit of a Man: How Missouri's Relocation Law Substitutes Judicial Paternalism for Parental Judgment by Forcing Parents to Live Near One Another*, 54 ST. LOUIS U. L.J. 1365, 1387–88, 1403–04 (2010).

82. *See* Richard A. Warshak, *Social Science and Children's Best Interests in Relocation Cases:* Burgess *Revisited*, 34 FAM. L.Q. 83, 84 (2000) ("[T]he impact of relocation is dependent on several factors.") Thus, it is unlikely that any specific test or standard can do justice to a decision as complex as relocation.").

83. *See, e.g.*, Linda R. v. Richard E., 561 N.Y.S.2d 29, 32 (N.Y. App. Div. 1990) (stressing the importance of maintaining gender neutrality in custody determinations); Sukin v. Sukin, 842 P.2d 922, 926 (Utah Ct. App. 1992) (finding that custody awards cannot be based directly or indirectly on gender-based preferences or stereotypes); Janet M. Bowermaster, *Sympathizing with Solomon: Choosing Between Parents in a Mobile Society*, 31 U. LOUISVILLE J. FAM. L. 791, 873 (1993) ("[C]ustody standards are gender neutral"); Eiad El Fateh, *A Presumption for the Best?*, 25 CANADIAN J. FAM. L. 73, 106–07 (2009) (explaining that the no-presumption approach set forth in *Gordon v. Goertz* is gender neutral); *see also* Edward Greer, *Custodial Relocation and Gender Warfare: Thinking About Section 2.17 of the ALI Principles of the Law of Family Dissolution*, 13 J.L. & FAM. STUD. 235, 287 (2011) ("[M]aximizing the welfare of children . . . requires punctilious gender-neutrality."). Some state statutes also specifically prohibit the consideration of a parent's gender during custody determination. For example, under Tennessee's relocation statute, courts cannot consider the gender of the relocating parent as a factor either in favor or against relocation. *See* TENN. CODE ANN. § 36-6-108(c)(2) (2020). Similarly, the custody

gender stereotypes. Judges might be more deferential to a relocation request from a mother than a father, thinking that a mother is more apt to have the child's best interest than her own career advancement at heart. Alternatively, judges might think less well of a mother who is seeking to relocate to advance her career than a father who has made the same choice.

Existing research on the issue is inconclusive.[84] One review of all published Missouri appellate court opinions in relocation cases found not "a single instance where Missouri's relocation law was used to bar a father from relocating with his children."[85] Absent a comparison with requests from mothers, however, that result cannot support or undermine any conclusions about sexism in relocation decisions. Another study using published opinions on Westlaw over a five-year period found no real difference: women were denied permission to relocate 48% of the time, while men were denied permission to relocate 51% of the time.[86] Published opinions, however, might be an unusual and biased tip of the iceberg. In one study of 108 relocation cases in British Columbia trial courts, courts allowed mothers to relocate 59% of the time, as compared to only 38% of the time for fathers.[87] Because mothers made 93% of the requests, however, the sample size was too small to reach any definitive conclusions.[88] Therefore, little is truly known about whether gender bias influences judges in making relocation decisions.

B. Gender Disparities in Criminal Sentencing

Disparate sentences based on a defendant's gender contravene sentencing rules[89] and basic societal norms.[90] Nevertheless, research on criminal sentencing suggests that judges impose harsher sentences on men than on

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statutes in California, Oklahoma, Arkansas, and Pennsylvania all expressly require that custody determinations be gender neutral. *See* ARK. CODE ANN. § 9-13-101(a)(1)(A)(i) (2020); CAL. FAM. CODE § 3040(c) (West 2020); OKLA. STAT. tit. 43, § 112(C)(3)(b) (2020); 23 PA. CONS. STAT. § 5328(b) (2020).

84. *See infra* notes 85–88 and accompanying text.

85. Hixson-Lambson, *supra* note 81, at 1369.

86. Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Parenting*, 41 FAM. L.Q. 105, 125 (2007).

87. El Fateh, *supra* note 83, at 78.

88. *Id*.

89. *See* U.S. SENTENCING COMM'N, GUIDELINES MANUAL 464 (2018) ("Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status . . . are not relevant in the determination of a sentence.").

90. *See* Shaina D. Massie, Note, *Orange Is the New Equal Protection Violation: How Evidence-Based Sentencing Harms Male Offenders*, 24 WM. & MARY BILL RTS. J. 521, 523 (2015) ("Penological considerations of gender in sentencing are simply incompatible with abstract notions that criminal offenders appear before the court in their individual capacities.").

women.[91] In fact, "sentencing disparities based on gender are among the most visible and persistent sentencing disparities in this country."[92] Women constitute only 10% of the prison population in the United States.[93] The disparity in incarceration rates almost certainly reflects a disparity in rates at which men and women commit crime.[94] Numerous studies, however, suggest that benevolent sexism influences sentences.[95]

Sentence disparities might not be attributable to judges' decisions—prosecutors,[96] probation officers[97], and other court officers play a role in sentencing. One study by Professor Starr accounts for these various factors and demonstrates that males are treated more harshly at every stage of the process, from arrest to sentencing.[98] Professor Starr's study showed that male criminal arrestees in federal court ultimately receive sentences that are 63% longer than their female counterparts, with judicial decisions causing only a part of that disparity.[99] Because more than 90% of cases

91. U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 2 (2017).

92. Etienne, *supra* note 17, at 73; *see also* Anna Bindler & Randi Hjalmarsson, *The Persistence of the Criminal Justice Gender Gap: Evidence from 200 Years of Judicial Decisions*, 63 J.L. & ECON 297, 310–15 (2020) (finding a persistent gender gap favoring female offenders in jury convictions and judges' sentences in the trial of serious criminal cases in London during 1715–1900).

93. *See* DANIELLE KAEBLE & LAUREN GLAZE, U.S. DEP'T JUST., NCJ 250374, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015, at 15 (2016) (reporting that 202,600 of the 2,145,100 people incarcerated in the United States in 2015 were female).

94. *See* NADIA CAMPANIELLO, IZA WORLD OF LABOR, WOMEN IN CRIME 3 (2019) https://wol.iza.org/uploads/articles/497/pdfs/women-in-crime.pdf?v=1 [https://perma.cc/CK9D-BT9T] (documenting the existence of a pronounced but shrinking gender gap in criminal participation).

95. *See, e.g.*, RACHEL E. MORGAN & BARBARA A. OUDEKERK, U.S. DEP'T OF JUST., NCJ 253043, CRIMINAL VICTIMIZATION, 2018, at 26 (2019); Etienne, *supra* note 17, at 73; Sonja B. Starr, *Estimating Gender Disparities in Federal Criminal Cases*, 17 AM. L. & ECON. REV. 127, 137–38, 141–42 (2015).

96. *See* Spohn, *supra* note 17, at 81–83 (reporting results of a study of sentencing in federal court showing that women were more likely to receive favorable sentencing departures than men).

97. *See* Shawn D. Bushway, Emily G. Owens & Anne Morrison Piehl, *Sentencing Guidelines and Judicial Discretion: Quasi-experimental Evidence from Human Calculation Errors*, 9 J. EMPIRICAL LEGAL STUD. 291, 201–02 (2012) (describing the role of probation officers in sentencing).

98. Starr, *supra* note 95, at 141 (presenting data showing "that significant new disparity favoring women appears to be introduced at every stage of the justice process").

99. *Id*. at 138 ("The overall average disparity [between male and female defendants] . . . is 23 months, or a 63% increase" in sentence length for male defendants relative to female defendants.).

are resolved by plea,[100] and because many plea agreements contain de facto stipulated sentences,[101] plea negotiations play a larger role in the process than the sentencing phase. Moreover, charge bargaining often occurs in plea negotiations, a practice which essentially caps the maximum sentence, limiting still further the judge's ability to depart from the sentence the parties prefer.[102] Professor Starr's research documents this, showing that the majority of the sentencing disparity between men and women in federal court arises from disparities that occur before the sentencing phase.[103] Her result replicates an earlier study of sentencing in federal court.[104] Similar studies of plea bargaining in Wisconsin and California state court also show that prosecutors are more likely to drop the more serious charges against female defendants than male defendants during the plea bargaining process.[105]

Even when researchers try to control for other factors, judges' biases remain a factor in perpetuating the sentencing disparity between male and female defendants.[106] Multiple studies by the United States Sentencing Commission have found that even controlling for offense level and defendant's criminal history under the United States Sentencing Guidelines,

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100. *See* John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial and Most Who Do Are Found Guilty*, PEW RSCH. CTR.: FACTTANK (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty [https://perma.cc/G2LL-4SXF].

101. Starr, *supra* note 95, at 129 ("Plea-bargaining can involve negotiations over charges, stipulations of 'sentencing facts' (for instance, drug quantity), prosecutorial sentencing recommendations, and requests for leniency for cooperators.").

102. For a review of plea-bargaining practices in federal court, see Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post*-Mistretta *Period*, 91 NW. U. L. REV. 1284 (1991).

103. Starr, *supra* note 95, at 141–42 ("Initial charging and charge-bargaining contribute about 9% and 4% of the gap, respectively; Guidelines fact-finding explains 60%, leaving 27% for the final sentencing stage to explain."). Guidelines fact-finding is heavily influenced by the plea agreement, with 92% of judges in one study reporting that their factual findings diverge from the plea agreement either "infrequently" or "never." Scott A. Gilbert & Molly Treadway Johnson, *The Federal Judicial Center's 1996 Survey of Guideline Experience*, 9 FED. SENT'G REP. 87, 89 (1996).

104. Lauren O'Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394, 415, 424 (2010).

105. Berdejó, *supra* note 20, at 1272 (showing that prosecutors drop the more serious charges in 47.48% of cases involving female defendants versus only 39.91% of cases involving male defendants); Cassia Spohn, John Gruhl & Susan Welch, *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175, 183–84 (1987).

106. *See* Kathleen Daly & Michael Tonry, *Gender, Race, and Sentencing*, *in* 22 CRIME & JUSTICE: A REVIEW OF RESEARCH 201, 203, 209, 229 (Michael Tonry ed., 1997).

male offenders received more severe sentences than female offenders.[107] Professor Schanzenbach replicated these results while also accounting for demographic variations among judges,[108] as did Professors Stacey and Spohn.[109] Several studies of state court sentencing that also control for offense type and defendant's criminal history likewise demonstrate a reliable tendency for judges to impose harsher sentences on male defendants.[110]

Accounting for individual defendants' characteristics remains challenging in these studies. Research concerning federal sentences is the most helpful in this regard, as the United States Sentencing Guidelines require judges to identify a specific offense level and a specific criminal history that researchers can use as control variables.[111] As Professor Starr points out, however, gender bias might influence decisions concerning offense level.[112] Studies that focus on "downward departures" help address this point because they focus on a judge's use of discretion to impose a more lenient sentence after all of the factors prescribed by the Guidelines are taken into account.[113] Three such studies suggest that federal judges are more likely to depart downward from the United States Sentencing Guidelines for

107. U.S. SENTENCING COMM'N, *supra* note 91, at 20 ("After controlling for a wide variety of sentencing factors, the Commission found that . . . female offenders of all races received shorter sentences than White male offenders."); U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT'S MULTIVARIATE REGRESSION ANALYSIS 3 (2010).

108. *See* Max Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District-Level Judicial Demographics*, 34 J. LEGAL STUD. 57, 72, 74, 89–90 (2005).

109. *See* Ann Martin Stacey & Cassia Spohn, *Gender and the Social Costs of Sentencing: An Analysis of Sentences Imposed on Male and Female Offenders in Three U.S. District Courts*, 11 BERKELEY J. CRIM. L. 43, 46, 63–65, 73, 76 (2006).

110. *See, e.g.*, Kristin F. Butcher, Kyung H. Park & Anne Morrison Piehl, *Comparing Apples to Oranges: Differences in Women's and Men's Incarceration and Sentencing Outcomes*, 35 J. LAB. ECON. S201, S203, S207 (2017) (finding that among convicted felons in Kansas from 1998–2001, "[o]n average women are 14 (drug crime) to 20 (non-drug crime) percentage points less likely to be incarcerated and receive 44 (drug crime) to 12 (drug crime) percent shorter sentences."); Darrell Steffensmeier, John Kramer & Cathy Streifel, *Gender and Imprisonment Decisions*, 31 CRIMINOLOGY 411, 411, 423–28, 435 (1993).

111. Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991–1992*, 31 LAW & SOC'Y REV. 789, 789 (1997).

112. Starr, *supra* note 95, at 128 ("Most [existing studies] assess the judge's final sentencing decision, controlling for conviction severity or 'presumptive sentence' measures that are themselves produced by charging, plea-bargaining, and fact-finding processes.").

113. Albonetti, *supra* note 111, at 790.

female defendants than for male defendants.[114] This indicates that federal judges are more likely to use their discretion to benefit female defendants than male defendants.

The gender disparity in sentencing is not limited to violent crimes. Studies of sentencing for nonviolent crimes reveal benevolent sexism in sentencing. Male defendants are more apt to have engaged in violent conduct than their female counterparts.[115] Research on sentencing for nonviolent crimes, however, shows a similar pattern of benevolent sexism. For example, a study by Professor Spohn of female and male defendants convicted of drug offenses in three federal districts found that even when the type of crime and background of the defendant are controlled, judges sentence men more harshly.[116] Professor Albonetti found similar effects in an earlier study.[117] Thus, even for nonviolent crimes, female defendants fare better than male defendants.

Benevolent sexism might work against female defendants in juvenile court, however. Researchers argue that the paternalism that undergirds juvenile court produces a difference in how sexism manifests itself.[118] Judges might see girls as in greater need of supervision than their male counterparts. Although some studies bear this out,[119] other research replicates the results in adult criminal courts that female offenders fare better than their male counterparts.[120] Some researchers suggest that the type of crime might matter; juvenile girls convicted of "status" crimes, like running away, have violated gender norms and hence receive lengthier sentences than

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114. *See generally id*. at 789; David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285 (2001); Spohn, *supra* note 17.

115. Men accounted for roughly 80% of persons arrested for violent crime, *2018 Crime in the United States: Table 33*, *supra* note 35, and nearly 90% of all homicide arrests, ALEXIA COOPER & ERICA L. SMITH, U.S. DEP'T OF JUST., NCJ 236018, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, at 3 (2011), https://www.bjs.gov/content/pub/pdf/htus8008.pdf [https://perma.cc/FJC7-4QGD].

116. *See* Spohn, *supra* note 17, at 96.

117. *See* Albonetti, *supra* note 111, at 808.

118. *See* Andrew L. Spivak et. al., *Gender and Status Offending: Judicial Paternalism in Juvenile Justice Processing*, 9 FEMINIST CRIMINOLOGY 224, 224 (2014).

119. *See* Meda Chesney-Lind, *Judicial Paternalism and the Female Status Offender: Training Women to Know Their Place*, 23 CRIME & DELINQ. 121, 124 (1977) ("Not only are girls charged with violations of their sexual role more likely than boys to be referred to court, but they are more likely than boys to be held in jails or juvenile detention facilities across the nation."); Erin M. Espinosa, Jon R. Sorensen & Molly A. Lopez, *Youth Pathways to Placement: The Influence of Gender, Mental Health Need and Trauma on Confinement in the Juvenile Justice System*, 42 J. YOUTH ADOLESCENCE 1824, 1825, 1826, 1829 (2013).

120. *See* Aaron Kupchik & Angela Harvey, *Court Context and Discrimination: Exploring Biases Across Juvenile and Criminal Courts*, 50 SOC. PERSP. 417, 417–18, 427 (2007) ("In the juvenile court, only 1.1% of females (and 8.8% of males) are incarcerated, and in the criminal court, only 10.3% of females (and 23.0% of males) are incarcerated.").

their male counterparts for the same offense.[121] Similarly, a study of adult criminal sentencing found that women who violate traditional gender roles by committing violent crimes more commonly associated with male perpetrators also receive harsher punishment than men.[122] The most common result of this research, however, is that judges impose shorter sentences on women.

Archival studies of actual sentences, just like archival studies of rulings in family courts, inevitably present interpretive difficulties. Pinning down the disparate treatment of male versus female offenders and parents to their gender, as opposed to other characteristics, is challenging. Observing and controlling for every difference between male and female defendants and parents that might affect judges is close to impossible. We thus used controlled experiments to test for sexism in judges. We focused on the two areas of family law and criminal sentencing because these are areas in which we expected implicit and explicit biases to exert influence. Furthermore, the field studies suggest that judges treat men and women differently in these areas of law.

III. FAMILY COURT: METHODS, JUDGES, AND RESULTS

To test whether judges exhibit gender-based preferences in rulings involving the balance between childcare and career in divorce proceedings, we presented a one-page hypothetical scenario involving a child mobility decision to 355 judges in the United States and Canada.[123] We used the same basic fact pattern for both countries.

121. John M. MacDonald & Meda Chesney-Lind, *Gender Bias and Juvenile Justice Revisited: A Multiyear Analysis*, 47 CRIME & DELINQ. 173, 179–80, 189–90 (2001) (analyzing years of data from Hawaii and finding that "at disposition, girls are more likely to receive harsh dispositions for relatively minor offenses.").

122. *See* Sergio Herzog & Shaul Oreg, *Chivalry and the Moderating Effect of Ambivalent Sexism: Individual Differences in Crime Seriousness Judgments*, 42 LAW & SOC'Y REV., no. 2 2008, at 45, 48–49 (collecting sources for the proposition that treating women more leniently at sentencing may be limited to female offenders who conform to traditional gender roles).

123. The National Judicial Institute of Canada translated the Canadian version of the materials into French for the Canadian Francophone judges. The English version is included, *infra,* in the Appendix. We use the term "gender" to describe the litigants because the materials use names and pronouns that suggest gender; the materials do not refer to biological sex.

A. Materials

The materials asked the judges to "[i]magine that you are presiding over a family court case involving a six-year-old girl and her four-year-old brother whose parents divorced two years ago." The materials indicated that the parent with primary custody had requested permission to "move with the children from City A, where they currently reside, to City B, which is located in a different state (about 200 miles away from City A)."[124] The noncustodial parent opposed the relocation of the children.

The materials then provided a rough description of the relevant case law. The version varied slightly by country. In the United States, the materials asked judges to assume that the law in their jurisdiction allows them "to grant the request provided you determine the move is consistent with the best interests of the children." This was kept in a somewhat generic format because, as described below, the judges in the United States came from multiple different jurisdictions. In Canada, the materials listed the factors Canadian judges must address when considering such requests:

> 1) The parent applying for a change in the custody order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child;
>
> 2) If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interest of the child, having regard to all the relevant circumstances relating to the child's needs, and the ability of the respective parents to satisfy them. (See *Gordon v. Goertz*, [1996] 2 S.C.R. 27.)

The materials noted that the custody decree awarded primary custody to one parent, but the noncustodial parent "hosts the children three out of every four weekends, sees them occasionally during the week, and pays child support." The materials indicated that the parents were single and lived near each other. In the United States, the materials stated that "[n]one of the grandparents or other close relatives live" near either the city in which the parents lived or the proposed relocation city. In Canada, the materials added that "[t]he move would also bring the children within an hour's drive" of the parents of the custodial parent and that the parents of the noncustodial parents "live far away from both cities."

The materials then described the custodial parent as having a Ph.D. in geology, having "worked at a small consulting firm that dissolved just before [the] second child was born," and explained that the parent "was unable to find other employment in [their] field in City A, so [they] decided to stay at home to care for the children." The materials indicated that the noncustodial

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124. In Canada, the materials used "300 kilometers" instead, and indicated that the move would not relocate the children out of their home province.

parent "works for a large law firm in City A, doing highly specialized work for investment banks."

The materials noted that the reason for the requested relocation is a "lucrative" job offer to the custodial parent from a large mining company in its corporate headquarters in the distant city. The offer exceeded the noncustodial parent's salary. The materials then presented brief arguments for and against the move offered by each side. The custodial parent argued that "the children would benefit financially from the move" enabling the parent "to pay for the children to attend a prestigious private school." The noncustodial parent contended that the relocation would "uproot the children" and "force him to give up his career because he is unwilling to live so far apart from them." The noncustodial parent also argued that "due to the demands of the job" that the custodial parent was considering, "the children would likely have to spend significant periods of time in day care or with a nanny."

The Canadian materials also added that the custodial parent "is unwilling to move without the children" and noted that the parent would turn down the job and remain at home with the children if the court denies the request. The Canadian materials further added the argument for the custodial parent that it is the noncustodial parent's "turn to sacrifice." Finally, the Canadian materials noted that grandparents were also far away from both the original and the distant city, and hence were not a factor in the decision.

The critical variable was the same in both versions: gender of the litigants. For half of the judges in each group, the materials identified the custodial parent as the Mother; for the other half of the judges, they identified the custodial parent as the Father. All other aspects of the materials were identical. Hence, we employed a between-subjects design. Differences between the success rates of the custodial parent in the two conditions would thus be entirely attributable to the gender of the parent requesting relocation. Both versions of the hypothetical are included in the appendix.

B. Judges

We collected data from judges who attended judicial education conferences in the United States and Canada. Within the United States sample, two of the groups were family and juvenile court judges, and hence had special expertise on this type of problem.

We collected data from judges in the United States who attended one of several different judicial education conferences: 135 judges attending the American Judges' Association conference in Denver, Colorado, in 2010; 44 judges attending the annual conference of the National Council of

Juvenile and Family Court Judges in Austin, Texas, in 2015; and 69 judges attending the New York State Association of Judges of the Family Court of New York Conference in Ithaca, New York, in 2019. Each group of judges attended an educational session at which one of the authors presented research on the psychology of judicial decision making. We gave the sessions titles that did not give a clear indication of the content of the surveys, for example, the Denver session was entitled "How Do Judges Judge." Each presentation was a plenary session, meaning that judges attending the conference did not select this session over others.

As part of the session, the judges responded to several other hypothetical cases in addition to the one on relocation. On the last page of the survey, we asked the judges to identify their gender,[125] years of experience as a judge, and political orientation.[126] Finally, we gave the judges the opportunity to respond to the survey and participate in the educational program, but withdraw their survey for purposes of data analysis. Two of the judges did this and were removed from the analysis. Judges at the two national conferences in Denver and Austin came from all over the United States, although the vast majority were state court judges.[127] We report the demographics of the judges in Table 1.

TABLE 1: DEMOGRAPHICS OF JUDGES IN THE FAMILY COURT STUDY

Group [128]	Sample Size	% Female*	% Republican*	Median Experience* (years)
Denver (AJA)	134	29 (130)	33 (114)	12 (127)
Austin (NCJFCJ)[128]	44	54 (41)	26 (34)	n/a
New York (Family)	69	61 (67)	25 (61)	8 (66)
Canada	116	40 (108)	n/a	7.25 (104)

* Not all judges responded to questions on demographics. We report the number who answered the question in parentheses.

125. We use the term "gender" in reference to the judges because we asked them to self-identify their gender, rather than their biological sex.

126. We used the following question to elicit political orientation: "Which of the two major political parties in the United States most closely matches your own political beliefs?" We then listed the two major parties with a blank next to each for the judges to check. Most judges answered this question; we scored those who did not answer or who wrote "other" as missing responses on this question. We did not ask this question of Canadian judges.

127. All but three of the judges were trial judges.

128. National Conference of Juvenile and Family Court Judges.

We obtained the Canadian sample of judges in a similar fashion. The Canadian judges were attending an annual conference organized by the National Judicial Institute of Canada in 2010, 2018, and 2019. The National Judicial Institute of Canada runs this conference each year for trial judges who have served between five and ten years. Judges in Canada are not obliged to attend the conference. Each year, it draws about forty judges. Our session was entitled "The Working of the Judicial Mind." It was a plenary session at the conference, and all of the judges in attendance completed the survey. Across all three years in which we administered this survey question, we collected results from 116 judges at these three conferences. Among the Canadian judges 20% were French-speaking. All of them had five to twelve years of experience, except for seven "facilitators," who had more than twelve years of experience.

C. Results

In the combined sample of 355 responses,[129] 56% (96 out of 170) of the judges allowed the female parent to relocate, whereas 42% (78 out of 185) of the judges allowed the male parent to relocate. The difference between the two conditions was statistically significant.[130] Table 2 reports the results by judge group.

TABLE 2: PERCENTAGE OF JUDGES ALLOWING MOVE, BY GENDER OF MOVING PARTY AND JUDGE GROUP (AND SAMPLE SIZE)

Group	Condition (Moving Party)	
	Mother	Father
Denver (AJA)	72 (61)	47 (73)
Canada	65 (55)	51 (59)
New York (Family)	19 (31)	16 (32)
Austin (NCJFCJ)	43 (23)	43 (21)
Generalist Combined (Canada and Denver)	70 (116)	48 (132)
Specialist Combined (New York and Austin)	30 (54)	26 (53)
TOTAL	56 (170)	42 (185)

129. Eight judges did not respond.
130. Fisher's Exact Test, $p < 0.01$.

As Table 2 illustrates, the judges in Denver and in Canada reacted similarly. Both groups favored the Mother. The judges at the Austin and New York conferences, however, expressed very little difference. The judges in Denver and Canada were mostly judges of general jurisdiction. That is, although some probably have had some experience with family court, most were judges who hear a variety of civil or criminal matters. They expressed a large difference; 70% granted the Mother's request, but only 48% granted the Father's request. The judges in Austin and New York, by contrast, were family and juvenile court specialists. These judges did not show much of a preference for the Mother (30% versus 26% for the Mother and the Father, respectively). Gender of the moving party thus had a significant effect on the generalists,[131] but not on the specialists.

Across all groups, the male judges were somewhat more likely than the female judges to favor the Mother. Among the male judges, 61% (58 out of 95) granted the Mother's request, as compared to 43% (45 out of 104) who granted the Father's request—a difference of eighteen percentage points. Among the female judges, 51% (34 out of 67) granted the Mother's request, as compared to 43% (31 out of 72) who granted the Father's request—a difference of eight percentage points. The difference between the male and female judges, however, was not significant.[132]

Political orientation did not interact significantly with the condition.[133] Among the judges who identified as Democrats, 51% granted the Mother's request (34 out of 67), as compared to 40% who granted the Father's request (31 out of 77). Among the judges who identified as Republicans, 42% granted the Mother's request (10 out of 24), as compared to 32% who granted the Father's request (12 out of 37). More experienced judges tended to be more inclined to grant the motion, regardless of the gender of the moving party, but this tendency did not interact with gender of the moving party.[134] Among just the specialized judges, experience had no effect.[135]

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131. Fisher's Exact Test, $p = 0.02$.

132. Logistic regression of the judges' decision on the condition, judge's gender, and an interaction of condition and gender showed that the interaction term was not significant. $z = 0.92$, $p = 0.36$.

133. Logistic regression of the judges' decision on the condition, party, and an interaction of condition and party showed that the interaction term was not significant. $z = 0.04$, $p = 0.97$.

134. Logistic regression of the judges' decision on the condition, years of experience, and an interaction of condition and experience showed a main effect for experience, $z = 2.37$, $p = 0.02$, but the interaction term was not significant. $z = 1.34$, $p = 0.18$.

135. Logistic regression of the judges' decision on the condition, years of experience, and an interaction of condition and experience among only the specialized judges showed no main effect for experience, $z = 0.17$, $p = 0.87$, nor the interaction term. $z = 0.42$, $p = 0.67$.

IV. CRIMINAL SENTENCING: METHODS, JUDGES, AND RESULTS

To test whether a defendant's gender affects judges' sentencing decisions, we administered a one-page scenario involving a criminal sentencing decision to 210 federal judges and 141 trial judges from Ohio. We presented nearly identical fact patterns to both the federal and state judges. The questions asked, however, varied slightly to match the sentencing systems in each jurisdiction.[136]

A. Materials

We presented both the Ohio and federal judges a one-page scenario involving a defendant named either Frank or Lisa Smith. The materials indicated that Smith had filed for disability benefits, claiming that he or she could not work and needed assistance to remain in his/her home and keep his/her daughter from starving. A caseworker, however, had denied the claim after concluding that Smith was still able to work. The materials stated that the caseworker subsequently received a threatening letter which said, "I'm going to get even with you for taking away our home." The letter included a photo of the caseworker's home and "a printout of instructions on how to make a crude explosive downloaded from a web site." The materials stated that the police quickly identified Smith as the perpetrator who sent the letter. Smith was charged and pled guilty.

The materials further explained that Smith was "31 years old, widowed, and was living with his/her nine-year-old daughter (although the daughter is now living with Frank's parents). S/He has no criminal history. S/He is in good health, does not abuse drugs or alcohol, and was earning $40,000 per year, but is now unemployed."

In Ohio, the materials indicated that Smith was charged with "threatening retaliation against a public official under Ohio Revised Code § 2921.05(A)." They stated that "'Retaliation' is a 'felony of the third degree.' Ohio Revised Code § 2929.14(A)(3) provides for a prison term of 'one, two, three, four, or five' years in prison and a fine of up to $10,000 under ORC § 2929.18(A)(3)(c)." The materials then asked the judges to sentence Smith, but to disregard the fine.

The federal materials differed slightly to reflect federal law. They indicated that the FBI, rather than the police, conducted the investigation and that Smith was charged "under 18 U.S.C. § 876(c) (sending threatening

136. We include both versions *infra* in the Appendix.

communications through the U.S. mail)." The materials also placed the sentencing decision within the context of the United States Sentencing Guidelines. They noted that

> [u]nder § 2A6.1 of the United States Sentencing Guidelines a threat has a base offense level of 12. The prosecution has agreed that the sentence level should be reduced by 2 levels for accepting responsibility for the crime, thereby producing an offense level of 10. The prosecutor, however, has argued that 6 levels should be added, as "the offense involved any conduct evidencing an intent to carry out such threat" under § 2A6.1(b)(1), which would raise the offense level to 16.

The materials then asked the federal judges two questions. First, they inquired whether the total offence level should be "10" reflecting "A base of 12 for the offense minus 2 for accepting responsibility (which yields a sentencing range of 6 to 12 months)" or "16" reflecting "A base of 12 for the offense minus 2 for accepting responsibility, plus 6 for conduct evidencing an intent to carry out the threat (which yields a sentencing range of 21 to 27 months)[.]" Second, the materials asked the judges to assign a sentence in months. Although we provided no instructions on departure from the sentencing range, the judges could either have sentenced within the range prescribed by the Sentencing Guidelines or departed from it.

B. Judges

All 351 of the judges who evaluated the sentencing scenario were attending judicial education conferences. As with the family court materials, the sentencing scenario was part of a survey that included other scenarios. These sessions were also plenary sessions, meaning that the judges did not select this session out of special interest in the topic. All of the judges were afforded the option of opting out of participation or of having their data used for this analysis. None did so.

The 141 Ohio judges had attended the Ohio Judges' Association winter conference in Dublin, Ohio, in 2013. All of these judges were Common Pleas Judges in Ohio—an elected position. They had an average of 15.2 years of experience, with a median of 13.5 years. Of the 141 judges who identified their gender, 84% were male. Of the 137 who identified their political orientation, 57% were Republican.

The 210 federal judges were all United States District Judges who had attended one of two annual educational conferences organized by the Federal Judicial Center in Seattle and the District of Columbia in 2014. They had an average of 16.4 years of experience, with a median of 17 years. Of the 208 judges who identified their gender, 64% were male. Of the 178 who identified their political orientation, 37% were Republican.

C. Results

1. Overall Sentence

Judges sentenced female defendants more leniently overall. As Table 3 shows, the 167 judges who sentenced the male defendant imposed an average of 14.2 months, as compared to 11.3 months among the 171 judges who evaluated the female defendant.[137] This difference was statistically significant.[138] When tested separately, each group showed a significant effect as well.[139] An analysis of the gender of defendant, type of judge—Ohio or federal—and an interaction term revealed significant effects for gender of defendant, and judge type, but the interaction between the two was not significant.[140]

TABLE 3: AVERAGE SENTENCE IN MONTHS, (SAMPLE SIZE), AND [STANDARD ERROR] BY DEFENDANT GENDER AND JUDGE

Judge	Defendant		
	Male	Female	Combined
Ohio	18.9 (63) [1.7]	13.8 (73) [1.3]	16.1 (136) [1.1]
Federal	11.4 (104) [0.7]	9.4 (98) [0.7]	10.4 (202) [0.5]
Combined	14.2 (167) [0.8]	11.3 (171) [0.7]	12.7 (338) [0.5]

Male and female judges reacted differently to this problem. As Table 4 shows, male judges imposed an average sentence that was 3.7 months less on female defendants than on male defendants, whereas female judges imposed an average sentence that was only 0.7 months less on female defendants. Both the federal and the Ohio judges showed a similar pattern.

137. Note that because the Ohio judges sentenced in years and the federal judges in months, we multiplied the Ohio results by twelve whenever the two groups were combined for the analysis. Thirteen judges did not reply.

138. $t(336) = 2.74$, $p = 0.006$.

139. Ohio: $t(134) = 2.35$, $p = 0.02$; federal: $t(200) = 2.14$, $p = 0.03$.

140. $F(1, 337) = 11.29$, $p < .001$; $F(1, 337) = 31.51$, $p < .001$; $F(1, 337) = 1.99$, $p = 0.16$, respectively for condition, judge, and the interaction. As Table 3 shows, federal judges imposed shorter sentences than did the Ohio judges.

The interaction between gender of judge and gender of defendant was not significant.[141]

TABLE 4: AVERAGE SENTENCE IN MONTHS, (SAMPLE SIZE), AND [STANDARD ERROR] BY DEFENDANT GENDER AND JUDGE

Judge	Defendant		
	Male	Female	Male Minus Female
Ohio-Male	19.4 (52) [1.9]	13.4 (62) [1.5]	6.0
Ohio-Female	16.4 (11) [4.4]	16.4 (11) [3.4]	0.0
Federal-Male	11.5 (73) [7.0]	8.6 (57) [7.2]	2.9
Federal-Female	11.2 (30) [6.0]	10.7 (40) [6.8]	0.5
Combined-Male	14.8 (125) [1.0]	11.1 (119) [0.9]	3.7
Combined-Female	12.6 (41) [1.4]	11.9 (51) [1.1]	0.7

Analysis of political orientation showed that Republican judges sentenced defendants to longer terms on average than Democratic judges: 15.6 versus 10.8 months. This effect was significant, but did not interact with gender of the defendant.[142] Years of experience had no effect.[143]

2. Intent in Federal Judges

The federal judges faced two choices: first, whether "the offense involved any conduct evidencing an intent to carry out such threat"; and second, the choice of the actual sentence. The judges also could have departed from the United States Sentencing Guidelines. The federal judges thus had to make three determinations: 1) whether the defendant was likely to carry out the threat, which would produce a sentence enhancement under the Guidelines; 2) whether they should depart from the Guidelines range, either upward or downward; and 3) what sentence they should impose. The gender of the defendant could have affected any or all of these decisions.

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141. Analysis of variance ("ANOVA") of sentence on gender of defendant, gender of judge, and an interaction term revealed no significant main effect for gender of judge, $F(1, 335) = 0.31$, $p = 0.58$, and no significant interaction term. $F(1, 335) = 1.46$, $p = 0.22$.

142. ANOVA of the sentence on gender of defendant, on political party, and an interaction term revealed a significant main effect for party, $F(1, 304) = 15.6$, $p < 0.001$, but not a significant interaction. $F(1, 304) = 0.46$, $p = 0.50$.

143. ANOVA of the sentence on gender of defendant, on years of experience, and an interaction term revealed no significant effect for experience, $F(1, 334) = 0.96$, $p = 0.32$, and no significant interaction. $F(1, 334) = 2.62$, $p = 0.11$.

Our analysis showed that the gender of the defendant did not significantly influence the judges' assessment of whether the offense involved an intent to carry out the threat.[144] Among the judges who evaluated the male defendant, 37% (39 of 103) determined that the defendant intended to carry out the crime, as compared to 30% (27 out of 90) judges who evaluated the female defendant. We observed no differences in this choice by gender of the judge, experience, or political orientation.[145]

Most of the federal judges imposed sentences within the range prescribed by the Guidelines. For those judges who concluded that the defendant intended to carry out the threat, the Guidelines range was twenty-one to twenty-seven months, and for judges who concluded otherwise, the range was only six to twelve months. As Table 5 shows, we observed little difference by gender of defendant among judges who concluded that the defendant intended to carry out the act; 47% of the judges evaluating the male defendant imposed a sentence below the Guidelines range on the male defendant, as compared to 46% of the judges evaluating the female defendant. Among judges who did not conclude that the defendant intended to carry out the threat, however, we did observe a modest difference, with 13% of the judges who evaluated males imposing a sentence below the Guidelines range as compared to 26% of the judges who evaluated females. This trend was not significant, however.[146]

144. Fisher's Exact Test, $p = 0.29$.

145. Male and female judges gave nearly identical responses on this parameter. Among the male judges, 36% (25 of 72) decided that the defendant had the intent to carry out the crime, as compared to 31% (16 of 52) among the male judges who evaluated the female defendant. Among the female judges, these percentages were 37% (11 of 30) and 30% (11 of 37), for the male and female defendant, respectively. We conducted a separate logistic regression of the choice on condition, each of the three demographic parameters (gender of judge, political orientation, and experience), and an interaction term. None of the interaction terms were significant. z's < 0.80, p's < 0.40.

146. Excluding the three judges who imposed a more severe sentence than the Guidelines range, Fisher's Exact Test, $p = 0.11$.

TABLE 5: SENTENCING DEPARTURES, IN PERCENTAGES, BY ENHANCEMENT DECISION AND CONDITION

Gender of Defendant	Intent? (Range)							
	No (6–12 month range)				Yes (21–27 month range)			
	N	% below	% within	% above	N	% below	% within	% above
Male	62	13	84	3	36	47	53	0
Female	62	26	73	2	26	46	54	0
Total	124	19	78	2	62	47	53	0

The tendency for lenience towards the female defendant among the federal judges thus occurred because judges imposed sentences at the lower end of the Guideline ranges for female defendants.

In Table 6, we report the average number of months above the minimum —within range—sentence that the judges imposed by gender of defendant and the decision on intent. For example, we scored a judge who concluded that the defendant did not intend to carry out the threat and imposed six months a "0"; and we scored a judge who concluded that the defendant intended the threat and imposed twenty-four months as "3." We only included judges who sentenced within the range for purposes of this analysis.

TABLE 6: AVERAGE NUMBER OF MONTHS ABOVE MINIMUM OF SENTENCING GUIDELINE RANGE AMONG JUDGES WHO SENTENCED WITHIN THE RANGE BY INTENT CHOICE WITH (SAMPLE SIZE) AND [STANDARD ERROR]

Gender of Defendant	Intent? (Range)	
	No (6–12 month range)	Yes (21–27 month range)
Male	2.9 (52) [0.4]	0.8 (18) [0.3]
Female	1.8 (45) [0.4]	0.6 (14) [0.5]
Total	2.4 (97) [0.3]	0.8 (320) [0.3]

Table 6 reveals a trend among the judges who found that the defendant lacked the intent to carry out the threat; they imposed shorter sentences when they were evaluating a female, rather than a male, defendant. This trend was not significant, however.[147]

147. ANOVA of the sentence by gender of defendant, determination of intent, and an interaction term revealed that gender of defendant was not significant. $F(1, 125) =$

To summarize, it appears that judges who concluded that the defendant did not intend to carry out the threat were more likely to depart downward from the Guidelines when evaluating female defendants. Judges who did not depart from the Guidelines used the lower end of the sentencing range for female defendants more frequently than for male defendants. Taken together, these tendencies produced a lower overall sentence for female defendants. Gender of defendant did not influence judges who concluded that the defendant intended to carry out the crime, however.

V. DISCUSSION

Our experiments document clear evidence of benevolent sexism in judges. Judges favored mothers over fathers on a child mobility issue and sentenced a male defendant more harshly than a female defendant. Even in a context in which every other characteristic was held constant, judges favored female litigants. The results support the findings from archival research in family law and sentencing that judges themselves are contributing to disparities in the justice system on the basis of gender. Numerous studies show that women have advantages as litigants in family law and every study concerning the impact of offender gender on sentencing in adults shows that women draw more lenient sentences than men. Although research showing these results invariably contains confounding unobserved factors that undermine a clear finding that sexism plays a role, when data gathered in archival studies is combined with the current data, a clear portrait of benevolent sexism among judges emerges.

The pattern of results from the federal judges provides a good indication of how this sexism manifests. The federal judges did not see the male defendant as more likely to commit the violent act. Instead, they simply used the discretion they had to impose lower sentences on female defendants. This only occurred among the judges who concluded that the defendant was not apt to commit the violent act. The result is consistent with judicial sympathy for a nonviolent female defendant and is also consistent with the research showing that judges impose more lenient sentences on nonviolent female offenders.[148] Accordingly, leniency for female defendants does not arise

1.96, $p = 0.11$. Intent was significant, $F(1, 125) = 11.25$, $p < 0.001$, owing to the fact that judges who concluded the defendant intended to carry out the threat almost exclusively used the low end of the sentence range.

148. *See supra* notes 115–17 and accompanying text.

from an implicit association with men and violence, but from a more generalized sympathy for female defendants.

Sympathy for female defendants might actually arise from sympathy for the children of female defendants. In the sentencing scenario, the defendant was a single parent of a nine-year-old child. One of the judges explicitly stated that "sentencing a mother is much more difficult than sentencing a father." This possibility links our two studies. If judges generally see mothers as better parents than fathers, then they may be both more inclined to defer to a mother's choices about relocation and more reluctant to impose a harsh sentence on a mother than on a father.

The impression that mothers are generally more engaged parents than fathers is not without foundation, of course. The vast majority of single-parent households are headed by mothers,[149] and mothers are more likely to seek custody of children in divorce.[150] Most people think of mothers as more nurturing and attentive to children than fathers.[151] Judges in our study might simply have been reacting to these tendencies, both by deferring to the mother's relocation preference and by imposing a lenient sentence on the mother in the criminal case.

Although understandable, the judges' reliance on impressions of mothers creates pathologies in the courtroom that harm both men and women. Most obviously, the stereotyping that likely produced the results we obtained is unfair to male defendants who do not receive the same empathetic treatment as female defendants. It is also potentially harmful to fathers. Expressing biases that favor mothers is inconsistent with egalitarian norms and commands. Judges certainly may make an individualized determination that a defendant is entitled to sympathetic treatment. They must often exercise discretion to identify which of two parents is entitled to greater control over child-rearing decisions. But judges should not make such decisions solely on the basis of gender. Benevolent sexism also reinforces stereotypes of women as serving a primary role as caregivers, which not only harms men, it likely undermines women's claims in other contexts. Female litigants who need to convince a judge of their competence as a professional will be harmed by the same stereotypes that helped women in our studies. Likewise, female defendants who act against stereotypes might find themselves treated more harshly.[152]

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149. Gretchen Livingston, *About One-Third of U.S. Children Are Living with an Unmarried Parent*, PEW RSCH. CTR. (Apr. 27, 2018), https://www.pewresearch.org/fact-tank/2018/04/27/about-one-third-of-u-s-children-are-living-with-an-unmarried-parent/ [https://perma.cc/E4SL-UXW2].

150. Paradise, *supra* note 58, at 518.

151. Cole et al., *supra* note 50, at 212.

152. *See* Herzog & Oreg, *supra* note 122, at 49.

What can be done? Judges have wide discretion in areas of law like sentencing and in family law. Discretion can facilitate bias. Clear standards from legislatures and appellate courts could reduce the influence of bias, but in many areas of law, discretion is essential. Even though the Canadian Supreme Court tried to impose more order on relocation decisions, we found evidence of bias in that context.[153] Hence, it is up to judges themselves to find ways to minimize the influence of sexism on their decisions.

In other work, we have described a range of approaches judges can take to ameliorate implicit bias in a wide variety of contexts.[154] Judges can reduce their own biases by reminding themselves of stereotype-incongruent models such as esteemed professional women and devoted fathers. They can also engage in thought experiments in cases, such as "consider the opposite," in which they imagine the defendant or parent to be of the opposite gender. Further, judges can also self-monitor by keeping track of the outcomes of female and male litigants. Because bias often arises from quick, intuitive thinking,[155] judicial efforts to encourage more deliberative thinking in the courtroom can also combat bias. Judges have several ways to facilitate more deliberative thinking, for example: adhering to decision-making checklists; issuing tentative rulings while inviting feedback from the parties; and writing opinions—even if not published.

Judges might have more difficulty overcoming sexism than racism or other biases. Because benevolent sexism helps women in some ways and feels consistent with cultural norms, it might not seem as evil and is not as universally condemned as racial bias. Therefore, judges who may be implicitly influenced by it are neither as alert to it nor as motivated to overcome it as were the judges in our previous research, who were able to put aside their implicit racial bias when litigant race was made explicit.[156] This suggests that although judges may be able to overcome benevolent sexism, it may require greater training and effort than is necessary to overcome implicit racial bias.

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153. *See supra* notes 73–76 and accompanying text.

154. Andrew J. Wistrich & Jeffrey J. Rachlinski, *Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It*, *in* ENHANCING JUSTICE: REDUCING BIAS 99, 104–19 (Sarah E. Redfield ed., 2017).

155. *See generally* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 92 CORNELL L. REV. 1, 29–43 (2007) (discussing how intuitive thinking may lead to biases in judges).

156. *See generally* Rachlinski, Johnson, Wistrich & Guthrie, *supra* note 47, at 1197, 1221–26.

Judges are bound by oath and by law to avoid bias and prejudice in their decisions. We believe that judges strive to honor those commitments. They are also human beings, however, who live in a culture that affects how all of us think. Our results show that these influences can sway judges when they make decisions. They sometimes dispense compassion and sympathy in ways that track cultural stereotypes. Avoiding reliance on stereotypes will require training and discipline by judges. But we are optimistic that they can do so. We find cause for this optimism in the fact that more expert judges in our parental relocation problem treated mothers and fathers evenhandedly.

VI. APPENDIX: MATERIALS

Parental Relocation [substitute the opposite gender for alternative version]: Denver

Imagine that you are presiding over a family court case involving a six-year-old girl and her four-year-old brother whose parents divorced two years ago. The mother has requested that you authorize her to move with the children from City A, where they currently reside, to City B, which is located in a different state (about 200 miles away from City A). The father contests the relocation.

Assume in your jurisdiction that the law allows you to grant the request provided you determine the move is consistent with the best interests of the children.

Pursuant to the custody decree, the mother has primary custody, although the father hosts the children three out of every four weekends, sees them occasionally during the week, and pays child support. The parents, who have remained single, live only a mile apart in City A. None of the grandparents or other close relatives lives near either City A or City B.

The mother holds a PhD in geology. She worked at a small consulting firm that dissolved just before her second child was born. Because her work is so specialized, she was unable to find other employment in her field in City A, so she decided to stay at home to care for the children. The father works for a large law firm in City A, doing highly specialized work for investment banks.

Recently, a large mining company offered the mother a lucrative position in its corporate headquarters in City B. The mother asserts that the new job would enable her to restart her career. The company has offered her a salary that exceeds the father's current salary. The mother argues that the children would benefit financially from the move. In particular, she argues that her new position would enable her to pay for the children to attend a prestigious private school.

The father opposes the relocation because it will uproot the children. He also argues that the move would force him to give up his career because he is unwilling to live so far apart from them. He further notes that due to the demands of the job the mother has been offered, the children would likely have to spend significant periods of time in day care or with a nanny.

Would you grant the mother's request to move with the children to City B?

____ yes
____ no

Parental Mobility: Canada

Imagine that you are presiding over a family court case. The case involves a six-year-old girl and her four-year-old brother. Their parents were granted a divorce two years ago. The mother has requested that you allow her to move with the children from City A, where they now reside, to City B (which is in the same Province as City A, but is 300 km away). The father strongly opposes the request.

The test for parental mobility is: "1) The parent applying for a change in the custody order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child; 2) If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interest of the child, having regard to all the relevant circumstances relating to the child's needs, and the ability of the respective parents to satisfy them." See *Gordon v. Goertz*, [1996] 2 S.C.R. 27.

Pursuant to the custody decree, which the parents worked out themselves and stipulated to, the mother has primary custody, although the children spend three out of every four weekends with the father. The parents live only two kilometers apart in City A. The father also makes an effort to see the children during the week, as much as his job permits. The custody arrangement has worked smoothly and both children seem well adjusted. At present, the father pays child support. By the agreement of the parents, all marital assets were divided roughly equally during the divorce, except that the mother retained ownership of the home in which they had lived as part of her share. Neither parent has remarried.

The mother holds a PhD in geology. She worked at a small consulting firm that dissolved just before her second child was born. Because her work is so specialized, she was unable to find other employment in her field in City A, so she decided to stay at home to watch the children. The father works for a large law firm in City A, doing highly specialized work for investment banks.

Recently, a large mining company offered the mother a lucrative position in its corporate headquarters in City B. The mother asserts that the new job would enable her to restart her career. The company has offered her a salary that exceeds the father's current salary. The mother argues that the children would benefit financially from the move, even though the father would likely make far less money at any position he could find in City B. In particular, she argues that her new position would enable her

to pay for the children to attend a prestigious private school. The move would also bring the children within an hour's drive of her parents (his parents live far away from both cities).

The father opposes uprooting the children. He also argues that the move would force him to give up his career because he is unwilling to live so far apart from them. The father further notes that due to the demands of the job the mother has been offered, the children would likely have to spend significant periods of time in day care, or with a nanny.

The mother is unwilling to move without the children. If the court denies her request, she will remain unemployed and stay home with them. She argues that she has spent time watching the children at home and that it is the father's turn to sacrifice for her career.

Would you grant the mother's request to move the children to City B?

Yes _____ No _____

Sentencing: Federal Case

United States v. Smith

You are presiding over a criminal trial involving a defendant named [Frank/Lisa] Smith. The facts of the case are as follows:

Several months ago, [Frank/Lisa] filed for disability benefits. S/He asserted that s/he had been injured in a car accident and was unable to work. S/He stated that food stamps and other assistance would keep [him/her] and [his/her] daughter from starving, but that they would have to move and would suffer severe hardship if s/he were denied benefits. A caseworker denied [his/her] claim for benefits after concluding that the medical testimony indicated that [Frank/Lisa] was still able to work.

Shortly after the determination, the caseworker received an anonymous letter at his home. The letter included a photo of the caseworker's house. The person who had taken the photo included a note stating, "I'm going to get even with you for taking away our home." Attached to the letter was a printout of instructions concerning how to make a crude explosive device which had been downloaded from a website.

The FBI investigated the case and determined that [Frank/Lisa] was the person who took the photo and sent the letter. [Frank/Lisa] was arrested and charged under 18 U.S. C. § 876(c) (sending threatening communications through the U.S. mail).

[Frank/Lisa] elected to plead guilty and is now appearing before you for sentencing. The pre-sentence report states that [Frank/Lisa] is 31 years old, widowed, and was living with [his/her] nine-year-old daughter (although the daughter is now living with [Frank's/Lisa's] parents). S/He has no criminal history. S/He is in good health, does not abuse drugs or alcohol, and once earned $40,000 per year as a bus driver, but is now unemployed.

Under § 2A6.1 of the United States Sentencing Guidelines a threat has a base offense level of 12. The prosecution has agreed that the sentence level should be reduced by 2 levels for accepting responsibility for the crime, thereby producing an offense level of 10. The prosecutor, however, has argued that 6 levels should be added, as "the offense involved any conduct evidencing an intent to carry out such threat" under § 2A6.1(b)(1), which would raise the offense level to 16.

In sentencing [Frank/Lisa], which of the following would you assign as [his/her] total offense level:

_____ Offense level 10: A base of 12 for the offense, minus 2 for accepting responsibility (which yields a sentencing range of 6 to 12 months)

_____ Offense level 16: A base of 12 for the offense, minus 2 for accepting responsibility, plus 6 for conduct evidencing an intent to carry out the threat (which yields a sentencing range of 21 to 27 months)

Based on the facts of this case, what sentence would you impose on [Frank/Lisa]? _____ months

(Please disregard the fine for purposes of this question.)

Sentencing: Ohio

State v. Smith

You are presiding over a criminal trial involving a defendant named [Frank/Lisa] Smith. The facts of the case are as follows:

Several months ago, [Frank/Lisa] filed for disability benefits. S/He asserted that s/he had been injured in a car accident and was unable to work. S/He asserted that food stamps and other assistance would keep [him/her] and [his/her] daughter from starving, but that they would have to move and suffer severe hardships if s/he were denied benefits. A caseworker denied [his/her] claim for benefits after concluding that the medical testimony indicated that Frank was still able to work.

Shortly after the determination, the caseworker received an anonymous letter at his home. The letter included a photo of the caseworker's house. The person who had taken the photo included a note stating, "I'm going to

get even with you for taking away our home." Attached to the letter was a printout of instructions on how to make a crude explosive downloaded from a web site.

The police investigated the case and determined that [Frank/Lisa] was the person who took the photo and sent the letter. [Frank/Lisa] was arrested and charged with threatening retaliation against a public official under Ohio Revised Code §2921.05(A).

[Frank/Lisa] elected to plead guilty and is now appearing before you for sentencing. The pre-sentence report states that [Frank/Lisa] is 31 years old, widowed, and was living with [his/her] nine-year-old daughter (although the daughter is now living with [Frank's/Lisa's] parents). S/He has no criminal history. S/He is in good health, does not abuse drugs or alcohol, and was earning $40,000 per year, but is now unemployed.

"Retaliation" is a "felony of the third degree." Ohio Revised Code §2929.14(A)(3) provides for a prison term of "one, two, three, four, or five" years in prison and a fine of up to $10,000 under ORC §2929.18(A)(3)(c).

Based on the facts of this case, what sentence would you impose?
_____ years.

(Please disregard the fine for purposes of this question.)