

Women Offenders and the Sentencing Guidelines

The Honorable Nancy Gertner*

The case was a classic one: The defendant, a woman named Amhru Dyce, pled guilty to being a drug courier, commonly known as a “mule.” She had no criminal record. She was the principal caretaker of two young children and a three-month-old infant whom she was still nursing. The district court judge labored over her case. He held hearings over four days in which he explored the question of who would care for the children, and in particular, how the infant would be nourished. He worried aloud that, in time, all three children would receive inadequate attention, and perhaps even be sent to foster care.

Finally, he decided to grant a downward departure from the sentencing range required by the Federal Sentencing Guidelines (hereinafter “Guidelines”) on a number of grounds, one of which involved her care of her children. While the Guidelines suggest that family circumstances are not “ordinarily relevant” to the sentencing decision, § 5H1.6 permits departures for what has come to be known as “extraordinary family circumstances.”¹ Instead of sentencing Ms. Dyce to five years imprisonment, as prescribed by the Guidelines, the court sentenced her to five years of probation, two of which were to be served in a residential treatment program, followed by one year in a community correctional facility or halfway house.²

The Court of Appeals for the District of Columbia Circuit reversed, finding “nothing to suggest that Dyce’s family circumstances were in any degree ‘extraordinary,’”³ and then refused rehearing en banc.⁴ The trial judge’s concern for the welfare of Amhru Dyce’s three children was, in the panel’s words, “ill-founded.”⁵ The court concluded that “[t]he unfortunate fact is that some mothers are criminals; and, like it or not, incarceration is our criminal

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1. U.S. SENTENCING GUIDELINES MANUAL § 5h1.6(2001) (“Family ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range”) [hereinafter GUIDELINES].

2. *United States v. Dyce*, 874 F. Supp. 1 (D.D.C. 1994) [hereinafter *Dyce I*], *rev’d*, 78 F. 3d 610 (D.C. Cir. 1994) [hereinafter *Dyce II*].

3. *Dyce II*, 78 F.3d at 255.

4. *United States v. Dyce*, 91 F.3d 1462 (D.C. Cir. 1996) [hereinafter *Dyce III*].

5. *Dyce II*, 78 F. 3d at 616.

justice system's principal method of punishment. . . ."⁶ So, Ms. Dyce went to jail. We don't know what happened to her children.

The issue is not just that "some mothers" are criminals. It is that the overwhelming majority of women accused of crime are mothers, and many are single parents. The decisions of the drafters of the Sentencing Reform Act ("SRA")⁷ and the Sentencing Guidelines to discourage consideration of family circumstances has a disproportionate impact on women offenders, and their dependents, wholly without penal justification.⁸ Moreover, whatever the Commission and Congress did to the consideration of family obligations, the various courts of appeals have done worse. The Guideline's language in § 5H1.6 has been narrowed in some cases virtually to extinction without basis in law, fact, or policy. Judge Wald, in her oft-cited dissent in *Dyce*, was poignant and pointed. While she noted that the Court "misread the record" about the adequacy of care for Dyce's children,⁹ her concerns were more profound:

Talmudic distinctions between ordinary and extraordinary suffering aside, this is a strange kind of jurisprudence for a family-oriented society. The panel's conclusion, even if factually correct, is based entirely on a notion that so long as the extended family can provide economic care and physical custody, no further inquiry is necessary as to the import of separating the siblings from each other, as well as from their mother, without realistic possibility of even visitation. Even the constraining effect of the Guidelines does not prohibit consideration of these factors—all of which are central, I think, to a nuanced determination of whether family circumstances qualify as 'extraordinary' or not.¹⁰

The Guidelines' treatment of family circumstances is emblematic of the Guidelines' treatment of women offenders. I say this even while acknowledging that both before and after the enactment of the Guidelines, women offenders have been treated more leniently than male offenders.¹¹

6. *Id.* at 617.

7. Sentencing Reform Act of 1984, Pub. L. No. 96-473, 96 Stat. 1967 (codified in scattered sections of 18 U.S.C. and 28 U.S.C.).

8. This is not to deny that large numbers of male offenders are fathers, whose incarceration has a significant impact on the lives of their children. Rather, it is to recognize the reality of child rearing patterns in our society in general; responsibility for raising children falls disproportionately on women. Myrna Raeder's work is particularly instructive. She paints a dramatic portrait of the "lopsided effect" that imprisoning women has on their children, because of the documented asymmetry in child rearing responsibilities in the society in general, and in the offender population in particular. Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 950 (1993).

9. *Dyce III*, 91 F.3d at 1475.

10. *Id.*

11. For a discussion of the lenient sentencing of women offenders in the pre-Guidelines era, see Raeder, *supra* note 8, at 916. For one example of continuing leniency after the Guidelines, see Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment Policy Choices and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181, 216 (1994) (finding that women disproportionately benefit from downward departure from the sentencing range for substantial assistance to the authorities, downward

Nevertheless, it is also true that many more women, who would have received no jail time pre-Guidelines, are now imprisoned, for longer and longer periods.¹²

It is not unreasonable to ask why. Why have incarceration rates for women increased so dramatically? Is this increase justified by the statutory purposes of sentencing,¹³ or any criminal justice policy at all? Are the sources of women's crime different? Do different factors trigger their rehabilitation than with male offenders? What is it about just deserts, or deterrence, or incapacitation that undergirds this policy?

The short answer is that women's crime *is* different from men's crime. Women commit different crimes than men, generally non-violent crimes. Their life circumstances are different from the life circumstances of men as are the factors that motivate them to break the law. Family ties play a more significant role in women's offenses, in the likelihood that they will recidivate, and in their chances of rehabilitation. Because family obligations fall disproportionately on women in this society their imprisonment has a disproportionate impact on the children in their care.

Women's relationships with their male codefendants may also be different. It is not unusual to see women defendants who have been subject to coercion, abuse, and even battering. When they commit crimes, women are less likely to be in leadership roles, more likely the girlfriends or wives of the leaders.

A sentencing system that does not take these differences into account is hardly just, and surely not neutral.

I. FROM BEING "NEUTRAL" TO BEING "IRRELEVANT"

The Sentencing Reform Act and the Guidelines were enacted because of general concerns about "unwarranted disparity" in sentencing,¹⁴ particularly with respect to race and national origin.¹⁵ While the drafters were aware of the disparity between the treatment of men and women offenders pre-Guidelines, it

departure for atypical facts and circumstances, and selection of sentence in the low-end of the sentencing range).

12. Raeder, *supra* note 8, at 926-27.

13. The SRA directs that the court shall consider the following in imposing a sentence: "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide for just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2).

14. The SRA authorized the United States Sentencing Commission to create sentencing guidelines that "provide certainty and fairness in meeting the purposes of sentencing, [thus] avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B).

15. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4-5 (1988).

was hardly of paramount importance.¹⁶ In any case, where women are concerned the “cure” for disparity may well be worse than the disease. The Guidelines’ gender equality is illusory.

The SRA directed the Commission to develop guidelines and policy statements that are “entirely neutral as to the race, sex, national origin, creed, and socio-economic status of offenders.”¹⁷ The Commission, however, took that directive and promulgated § 5H1.10. Section 5H1.10 notes that these factors, including sex, are “not relevant in the determination of the sentence.”¹⁸ But being “neutral” as to gender and characterizing gender as “not relevant” are not necessarily the same thing.

Employment discrimination law under Title VII of the 1964 Civil Rights Act,¹⁹ for example, recognized two theories of discrimination—“disparate treatment” and “disparate impact.” In disparate treatment analysis, the focus was on the individual wrongdoer who inappropriately used gender in making decisions. In disparate impact analysis, the focus was on rules which were neutral on their face, but had a discriminatory impact on women. Beginning with *Griggs v. Duke Power Co.*,²⁰ and to varying degrees over the past decades, courts have recognized that the formal neutrality of the rule, while important, was not the end of the analysis. Some “neutral rules” were in fact a pretext for continuing discrimination, like the poll taxes imposed by state governments in the South following the Civil War. Some neutral rules had a differential impact on women because of past discrimination; one example was rules requiring past experience in the job, when the employer had formerly refused to hire women. Other neutral rules had a differential impact derived from societal discrimination, or physiological differences between men and women, such as rules prohibiting workers with school-age children in certain jobs, or some height and weight requirements.²¹

Plainly, the word “neutrality” in the SRA refers to the “disparate treatment” model. The legislative history suggests that Congress was concerned about the judge who explicitly took race or gender into account.²² The goal of reform was to guard against the use of these factors in upward

16. KATHLEEN DALY, *GENDER, CRIME AND PUNISHMENT* (1994) (arguing that it was the “compelling stories of racial disparity that spawned the sentencing reform movement. . .”).

17. 28 U.S.C. § 994 (d) (1994). Section 5H1.10 is a policy statement. In addition to the Guidelines themselves, the Supreme Court has held even policy statements are binding on the courts, so long as they do not violate the Constitution or are inconsistent with the statutory directives. *Stinson v. United States*, 508 U.S. 36, 38 (1993).

18. GUIDELINES, *supra* note 1, at § 5H1.10.

19. 42 U.S.C. 2000(e) et seq.

20. 401 U.S. 424, 432 (1971).

21. Nancy Gertner, *Bakke on Affirmative Action For Women: Pedestal or Cage?* 14 HARV. C.R.-C.L. L. REV. 173, 189-91 (1979) (typology of neutral rules).

22. Symposium, *Equality Versus Discretion in Sentencing*, 26 AM. CRIM. L. REV. 1813, 1815-16 (1989) (statement of Commissioner Ilene Nagel).

departures for poor, disadvantaged and minority defendants.²³ Nothing in the SRA or its history suggests that the Commission in drafting the Guidelines, or courts in interpreting them, were supposed to turn a blind eye to the disproportionate impact of neutral rules on offenders in these categories, especially women offenders. The language of the Senate Report suggests otherwise. "The requirement of [sentencing] neutrality with regard to such factors [race, sex, national origin, creed, and socio-economic status] is not a requirement of blindness."²⁴

Consider the following: If a company prohibited annual leave based on family obligations for all employees, while it allowed leave for other reasons, we would be concerned about the disproportionate impact such a policy would have on women workers who more often had principal responsibility for children. If the qualifications for jury service encouraged the exclusion of citizens on account of family obligations, we would be concerned that the net effect of such a policy would be to exclude women from an important obligation of public life. Likewise, a host of decisions made by the Guidelines' drafters, though neutral on their face, have redounded to the detriment of women offenders. To address the problem of unwarranted disparity, the Guidelines tried to enact a formal equality, to treat similarly situated defendants similarly. But the reference point was skewed. As I describe below, the drafters sought to compare offenders for the most part with reference to so-called objective factors, like offense conduct and criminal history, but not so-called subjective factors, like family circumstances or mens rea. While offense conduct and criminal history might be adequate to define the sentence of most offenders—although even that point is debatable—these factors do not remotely address the problems of women offenders. The result of discouraging departures for family responsibilities of both men and women, for example, is like the famous critique of legal equality—rich and poor can both sleep under the bridge.²⁵ It is an empty equality.

I use a number of sources for my presentation. First, my own docket, the cases that I have seen and decided. Second, my knowledge of the cases before other judges in my court which I examined as part of my role as liaison judge to the Probation Department, and as part of my sentencing methodology.²⁶ Third,

23. The legislative history of the provision suggests that the Congress discouraged courts from considering family ties and responsibilities, education and vocational skills, merely to "guard against the inappropriate use of incarceration for those defendants who lack education, employment and stabilizing ties." S. REP. NO. 225, 98th Cong., 1st Sess. 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3221-23 at 3358.

24. S. REP. NO. 225, 98th Cong., 2d. Sess., *reprinted in* 1984 U.S.C.C.A.N. 3220, 3354 n. 409.

25. *Lewis v. Thompson*, 252 F.3d 567, 586 (2d Cir. 2001) (citing ANATOLE FRANCE, *LE LYS ROUGE* ch. VII (1894)) ("The law, in its majestic equality, forbids the rich as well as the poor to sleep under the bridges, to beg in the streets, and to steal bread.")

26. For example, *see* *United States v. Thompson*, 190 F. Supp. 2d 138 (D. Mass. 2002) (hereinafter *Thompson III*). This case involved the re-sentencing of the defendant, John Thompson, in light of the First Circuit's decision in *United States v. Thompson*, 234 F.3d 74 (1st Cir. 2000) (hereinafter

the work of a number of authors who have studied women offenders, and in particular, the work of Cassidy Kesler, a Yale Law student, who has compiled a substantial amount of previously unpublished information regarding women offenders sentenced under the Guidelines in her insightful paper, *Where Women Fit: Gender and the Federal Sentencing Guidelines*.²⁷

In particular, Kesler describes the difference between “gender-related” disparity between offenders and “gender-based” disparity:

[Gender-based] disparity describes a situation where a judge makes a more or less harsh sentencing determination because of an offender’s gender. In contrast, gender-related sentencing disparity describes a situation where a judge makes a more or less harsh sentencing determination because of other factors that happen to correlate with gender. While gender-based sentencing disparity is a highly charged issue that relates to conceptions and expectations of equality, gender-related sentencing disparity can be explained and even justified in gender-neutral terms.²⁸

She concludes: “Although the Guidelines are facially neutral with respect to gender, underlying sentencing factors are not distributed evenly across gender, and thus the weight or lack thereof given by the Guidelines to various gender-related factors has a disproportionate effect.”²⁹

My goals in this very short presentation are to evaluate how the Guidelines treat each of the gender-related attributes that Kesler and others have identified. In addition, I have tried to flesh out the Guidelines’ treatment of additional sentencing factors which I hypothesize are likely to have a gendered impact. Finally, in a very preliminary way, I hope to point the way to legislative and guideline changes, and even suggest changes in judicial interpretation of the existing framework.

II. GENDER-BASED DISPARITY/ DISPARATE TREATMENT

Obviously, disparity in sentencing *based* on gender is troubling and should be eliminated. One might expect to find such disparity in the decisions of judges concerning where, within the Guidelines range, to sentence offenders. One might also expect to find such disparity in judicial departure decisions,

Thompson II). The original district court decision is found at 74 F. Supp. 2d 69 (D. Mass. 1999) (hereinafter *Thompson I*).

27. Cassidy Kesler, *Where Women Fit: Gender and the Federal Sentencing Guidelines* (Nov. 8, 2002) (unpublished manuscript, on file with Yale Journal of Law and Feminism). A summary of her paper, as well as a presentation she made of her findings at the Symposium on the Federal Sentencing Guidelines held at Yale Law School on November 8, 2002, will be published in the *Federal Sentencing Reporter* in 2003.

28. *Id.* at 4.

29. *Id.* at 8.

when the court concludes that the Guidelines range is not appropriate to the case at bar.³⁰

In fact, as Kesler reports, most offenders—but women even more so than men—are sentenced at the low end of the Guidelines range.³¹ In addition, men are more likely than women to be sentenced to the range maximum.³² At the same time, while earlier commentators concluded that judges were granting downward departures from the Guidelines range disproportionately more for women than for men,³³ Kesler looked at more recent data and suggests otherwise. Kesler found that overall downward departure rates for men and women were nearly identical: women receiving substantial assistance departures at a slightly higher rate, and men receiving other downward departures at a slightly higher rate.³⁴

Without further research, there is no way of knowing whether judges are sentencing women at the low end of the range because of inappropriate generalizations about women—the classic, gender-based factors—or because of a desire to compensate for the Guidelines' failure to account for specific gender-related factors.

III. GENDER RELATED DISPARITY/ DISPARATE IMPACT

A. Women Offenders Have More Responsibility for Children than Male Offenders

Perhaps the most significant gender-related problems are those involving women with children, like Amhru Dyce. In my personal experience, and as reported by various scholars,³⁵ women offenders are more likely than men to be single parents. Kesler, again using recent data, reports that women offenders are more likely to be divorced, widowed and separated than men offenders.³⁶ In addition, she found that married women offenders are more likely to report

30. 18 U.S.C. § 3553(b) instructs a court that, in determining whether there exists an aggravating or mitigating circumstance of a kind or to a degree not adequately considered by the Commission. In doing so, the court is obliged to consider "only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." See also GUIDELINES, *supra* note 1, § 5A2.0.

31. Kesler, *supra* note 27, at 18, 45-47.

32. *Id.*

33. See generally Nagel & Johnson, *supra* note 11.

34. Kesler, *supra* note 27, at 17-18, 45-47. To be sure, in a recent conversation, Kesler noted that it is important to conduct further research on downward departures with regard specifically to border districts and the way in which "fast-track strategies" in such districts may skew national departure rates since most of the defendants in such districts are male. Interview with Cassidy Kesler, Yale Law School student (Nov. 15, 2002).

35. Raeder, *supra* note 8, at 913.

36. Kesler, *supra* note 27, at 11-12, 33-35.

having at least one dependent than men offenders.³⁷ Although the Sentencing Commission's data is ambiguous on the question of who is a dependent, Kesler notes it is possible that men are more likely than women to count spouses as dependents.³⁸ Even with the imperfections of the data, Kesler's work suggests that women offenders are more likely to be single parents or have primary caretaking responsibilities for their children than men offenders. While that conclusion entirely matches my experience, further study is obviously necessary.

Despite this reality, the approach of the panel majority in *Dyce* has been the paradigmatic approach of the courts of appeals—disallowing the departure with, as Judge Wald described, little or no nuanced analysis.³⁹ Few courts have asked, for example: “What is the purpose of this departure?”⁴⁰ The consensus seems to be that the purpose of the departure is to minimize the harsh consequences of an offender's imprisonment on innocent third parties, like children and spouses, but beyond that there is little clarity.⁴¹ The Guidelines include little or no explanation of what the Commissioners intended, no legislative history, no committee reports, no data on which the Guideline was based. And on this tabula rasa, appellate courts have simply announced that the Guidelines' statement that family circumstances are “not ordinarily relevant” to sentencing, means that only an “atypical” impact on family members can be the basis for a departure. What, after all, does “typical” mean? As compared to whom?⁴² Is the enterprise empirical—just counting up the number of offenders

37. *Id.*

38. *Id.* at 12.

39. *Dyce III*, 91 F.3d at 1475.

40. The Commission has given little guidance, as I noted in *United States v. LaCarubba*, 184 F. Supp. 2d 89, 92 (D. Mass. 2002):

While other guidelines—what the base offense level is for a given quantity of drugs, for example—are precise, this guideline [§5H.16] is vague. While other guidelines provide an elaborate rationale or even specific examples, this guideline does not. Nor did the Commission publish evidence to support its conclusions that “offender characteristics are not ordinarily relevant,” even though Congress encouraged it to “subject those factors to intelligent and dispassionate professional analysis” . . . It never made available to courts and advocates the data supporting the “typical case,” from which to judge the atypical. There is no legislative history . . . no committee reports, no public hearings [transcripts] . . .” (footnotes omitted).

41. The question is whether the family circumstances departure is defendant-focused, namely to reward a defendant's extraordinary good works, or to take account of an extraordinary burden on the defendant, such as losing custody of a child, to address the impact of incarceration on innocent family members? The consensus is the latter. *Id.* at 92.

42. In *Thompson I*, I asked:

. . . What is the standard by which to judge “extraordinary” family obligations or an “extraordinary” work history? What class of defendants define “ordinary”? While the Sentencing Commission and the case law offer little guidance on the subject, one thing is clear: The baseline is not, nor should it be, ‘Ozzie and Harriet,’ the fictional two parent, two child, suburban home.

Thompson I, 74 F. Supp. 2d at 70. See also Karen R. Smith, *United States v. Johnson: The Second Circuit Overcomes the Sentencing Guidelines' Myopic View of "Not Ordinarily Relevant" Family Responsibilities of the Criminal Offender*, 59 BROOK. L. REV. 573, 607 (1993) (“That the Commission at least considered family circumstances is clear, but what it believed to be ‘ordinary’ family

that qualify? If it is not, if the courts are really making judgments concerning *how* typical an offender's circumstances have to be—one in one-hundred, one in four—aren't they making normative, even policy judgments?⁴³ What are those normative judgments based on? What sentencing purposes are being advanced?

The resulting decisional law is not only chaotic, but unfair. The same data that shows that the disproportionate impact on women of discouraging consideration of family obligations has somehow been transformed by the courts into a justification for continuing it. Single parenting is indeed "typical" for women offenders and tragically so. Because it is so typical, because women invariably wind up with a disproportionate share of caretaking responsibilities, courts have suggested that such responsibilities should not be considered in sentencing any offenders.⁴⁴ Moreover, since statistics suggest that single parent status is more typical of Black women than White women, the standard especially disadvantages them.⁴⁵ Finally, since the basis for the family departure is entirely unexamined, it opens the door to other biases, notably economic and class biases.⁴⁶ Some courts understand the impact of an

circumstances and the ordinary and tolerable consequences of incarceration upon a family is somewhat shrouded in mystery and subject to intense speculation.").

43. See *LaCarubba*, 184 F. Supp. 2d at 93:

How does this human being compare to others the trial court has seen? But it necessarily involves more than simply counting noses. How atypical does he or she *have* to be — one in a million, five in a million, five percent of all defendants, etc.? This kind of line-drawing involves the exercise of normative judgments: What kind of punishment do human beings facing these situations deserve given the purposes of the [SRA]? Where *ought* the line between typical and atypical be? No bright line rule was announced by the Commission; none can be announced by a court.

44. The First Circuit has gone even further. For example, in *United States v. Pereira*, 272 F.3d 81 (2001), it suggested that the defendant must show that the care he or she rendered was "irreplaceable" to qualify for a departure. The court subsequently amended the "irreplaceable" standard in an errata form. Ironically, the "irreplaceable" standard may be more helpful to women than the "typicality" standard. It looks more to impact and less to statistics.

45. Raeder, *supra* note 8, at 950-51:

While currently almost two-thirds of single parents are White, single parenting is much more prevalent among Blacks than Whites. In fact, almost sixty-three percent of Black family groups with children are single-parent, as compared with twenty-three percent of White family groups. Single parenting among Hispanics has also increased, now comprising about one-third of Hispanic family groups with children. Presently, 92.6 percent of Black single parents are female, compared to 86.7 percent who are Hispanic and 83.7 percent who are White. It is almost a certainty that a majority of female federal prisoners are minority women. This is consistent with Sentencing Commission data which shows that minority women are now the majority of sentenced female offenders. Moreover, Black females consistently have comprised a higher percentage of the federal female inmate population than the comparable percentage of Black males. Therefore, Black and Hispanic female offenders are more likely to be disadvantaged by the inability to obtain departures based on their status as single mothers than are White women. (footnotes omitted)

46. The legislative history of the provision authorizing the "family circumstances" guideline suggests that Congress's goal was to discourage courts from considering family ties in order to keep them from departing upward in the case of disadvantaged defendants. Congress warned the Commission to "guard against the inappropriate use of incarceration for those defendants who lack education, employment and stabilizing ties." S. REP. NO. 98-225 at 175, *reprinted* in 1984 U.S.C.C.A.N. at 3358. See also Susan E. Ellingstad, *The Sentencing Guidelines: Downward Departures Based on a Defendant's Extraordinary Family Ties and Responsibilities*, 76 MINN. L.REV. 957, 973 (1992). As I noted in *Thompson II*:

imprisoned family member on the families of white collar defendants more readily than the impact of imprisonment on other families.⁴⁷

The issue—the impact on families of the imprisonment of the defendant—needs to be carefully reexamined by all the participants in the federal sentencing system. I am not suggesting a departure for women only. For the purpose of this presentation, my approach is more limited: I am suggesting a more nuanced reexamination of the issue for all offenders, recognizing the importance of the issue and the disproportionate impact of its exclusion on women. Nothing about the existing guidelines or the existing decisional law should prevent this examination. The courts, after all, have chosen to interpret guidelines on family circumstances that are in fact ambiguous in the crabbed way suggested by *Dyce*. There were other options more respectful of the real circumstances of offenders and their families, and of the purposes of sentencing.⁴⁸

Yet, it appears from my review of the records, that the situation Congress was concerned about has, to a degree, continued. Of the 48 cases in which downward departures were given, just over 60% were in white collar cases, largely involving defendants with advantaged backgrounds. By contrast, over the last five years, only 27% of the sentencings in this District were for white collar offenses.

190 F. Supp. 2d at 145. Specifically, I indicated:

Data provided by the Probation Department tracking sentencings in this District demonstrates this point. White collar offenses—including tax offenses, obstruction of justice, perjury, money laundering, gambling, fraud, forgery, counterfeiting, and embezzlement—constituted 25.5% of 546 sentencings in calendar year 2001, 24.9% of 576 sentencings in 2000, 28.2% of 517 sentencings in 1999, 26.5% of 522 sentencings in 1998, and 31.3% of 454 sentencings in 1997. While this data does not extend all the way back to 1992, the beginning of my review of defendants who received family circumstances departures, there is no reason to believe that the percentage of defendants convicted of white collar offenses between 1992 and 1996 would be remarkably different from the percentage between 1997 and 2001.

Id. at 145, n.14.

47. I have observed analogous problems in pre-sentence reports prepared by probation officers. One report will say — if the defendant goes to prison, his family will be obliged to get government assistance, Aid for Families with Dependent Children — and implies that that would be a devastating blow. Another report would describe the very same impact — children on AFDC — and suggest that the impact is less than substantial. In the case I observed, the former was the report of a white defendant, the latter the report of a black defendant. No discrimination was intended; the pre-sentence report writers were different. It may well be a question of perspective — whose situation inspires empathy in the probation officer. Some may say that the best way to address this potential bias, however inadvertent, is by eliminating all instances in which discretion may be exercised. That approach was consistent with the approach of initial Guideline drafters — to minimize subjective decisionmaking. See generally Breyer, *supra* note 15. I do not agree. Eliminating the exercise of judgment about the lives of human beings creates a mindless uniformity, heedless of real differences between offenders.

48. Indeed, it may well be that because the drafters of the Guidelines considered the impact on women offenders so little, departures should be considered on the general grounds under 18 U.S.C. § 3553(b), a mitigating circumstance not adequately considered by the Commission. As Raeder indicates:

Unquestionably, pregnant women and single mothers should be eligible for downward departures in the current Guidelines regime. Such departures are warranted because neither single mothers nor mothers-to-be are ordinary when viewed in the framework of the total sentenced population. Alternatively, such departures are authorized because the Guidelines did not contemplate the effect of incarceration on the children of single mothers. Even though the Guidelines are written in gender-neutral language, some of the policy, commentary, and application notes were drafted using solely male pronouns. . .

Raeder, *supra* note 8, at 949. See also *supra* note 30. For different points of view see Jennifer Segal, *Family Ties and Federal Sentencing: A Critique of the Literature*, 13 Fed. Sent. Rep. 258 (March/April

B. Women Offenders Commit Less Serious Crimes

Women are sentenced to shorter sentences, as a general matter, because the crimes they commit are less serious than the crimes that men commit. The crimes of women offenders cluster around drugs, embezzlement and fraud.⁴⁹ Lower offense levels are likely to mean more sentencing options, including probation, home confinement, and community confinement.⁵⁰

But although there are real differences between the kinds of crimes men and women commit those differences are minimized by the structure of the Guidelines. Offenders who plead guilty and accept responsibility for their offenses are given a downward adjustment of two points. Those whose offense level is at least sixteen, however, receive a full three-level reduction for acceptance of responsibility.⁵¹ Paradoxically, since women are less likely to commit crimes at a higher offense level, they receive less credit for their assistance to the administration of justice, pleading guilty and accepting responsibility for their actions.

IV. WOMEN ARE MORE LIKELY THAN MEN TO BE FIRST TIME OFFENDERS

Kesler's data concerning the criminal history of men and women offenders is especially striking. She reports that women are twice as likely as men to have no prior record.⁵² In addition, women are more likely to be in the lowest criminal history category (I).⁵³

These statistics mask a serious difference between men and women offenders. The first-offender criminal history category under the Guidelines, Category I, includes all in a single category individuals who have never had any encounters with the criminal justice system at all, those who have not even been arrested, as well as individuals who have been arrested and convicted but received relatively short sentences.⁵⁴ Women are disproportionately clustered in the no arrest/first-offender category, a difference that the Guidelines do not adequately take into account.

For all other criminal history categories, the Guidelines permit a judge to evaluate whether or not the category overstates or understates the likelihood of

2001); Amy Farrell, *Distinguishing Among the "Unhappys": The Influence of Cultural Gender Norms on Judicial Decisions*, 13 Fed. Sent. Rep. 268 (March/April 2001).

49. Kesler, *supra* note 27, at 9-10, 24-25; Phyllis J. Newton, et. al., *Gender, Individuality and the Federal Sentencing Guidelines*, 8 Fed. Sent. Rep. 148, 150 (1995).

50. GUIDELINES, *supra* note 1, § 5A. See also Kesler *supra* note 27, at 13-14, 37-38 (finding women offenders more likely to receive sentencing options and more likely to be a lower sentence zone than men offenders).

51. GUIDELINES, *supra* note 1, § 3E1.1(b). This may explain why women are less likely to get the full three point reduction. Kesler, *supra* note 27, at 14; Newton et al., *supra* note 49, at 150.

52. Kesler, *supra* note 27, at 15, 40.

53. *Id.*

54. GUIDELINES, *supra* note 1, § 4A. See also Kesler, *supra* note 27, at 15.

recidivism or the offender's culpability and depart accordingly.⁵⁵ In the case of Criminal History Category I, however, the judge can go no lower.⁵⁶

Again, it may be that judges account for these limitations in the Guidelines' treatment of first offenders by sentencing women to the rock bottom of the Guidelines' range.⁵⁷ The question is whether even that correction is enough to account for meaningful differences between offenders in Criminal History Category I, especially women offenders.

V. WOMEN OFFENDERS AND ADJUSTMENTS FOR THEIR ROLE IN OFFENSES AND MENS REA

The SRA explicitly directed the Commission to consider whether and to what extent sentences should reflect a defendant's "role in the offense" and his or her "mental and emotional conditions."⁵⁸ Plainly, such factors had been an important part of sentencing pre-Guidelines, central to the goal of setting punishments that were proportional to the crime and the defendant's culpability. The Commission's response, however, has been widely criticized.⁵⁹ To a considerable extent, the Guidelines denigrated such factors in determining punishment. And that approach, like the others described above, has had a substantial impact on the sentencing of women offenders.

A. Role in the Offense

Sentences can be increased or decreased depending on whether the offender was an organizer, leader or supervisor of a group who engaged in criminal activity, or was only a minor or minimal participant.⁶⁰ However, the sentencing adjustment for role in the offense is minor relative to other

55. See GUIDELINES, *supra* note 1, § 4A1.3. See also, e.g., *United States v. Lacy*, 99 F. Supp. 2d 108, 120 (D. Mass. 2000); *United States v. Leviner*, 31 F. Supp. 2d 23, 33 (D. Mass. 1998).

56. For a time, courts fashioned what was in effect a super first-offender category, one for whom the offense was characterized as "single acts of aberrant conduct." The Commission noted in its initial guidelines that it had "not dealt with . . . single acts of aberrant behavior that still may justify probation at higher offense levels through departures." GUIDELINES, *supra* note 1, § 1A, cmt. 4(d). In any event, the circuits split on the application of this concept — more rigidly in some and more leniently in others. Compare *United States v. Grandmaison*, 72 F.3d 555 (1st Cir. 1996), and *United States v. Glick*, 946 F.2d 335 (4th Cir. 1991). The Commission "resolved" the differences by effectively splitting the difference: making the test stricter, but not as strict as the most rigid courts. GUIDELINES, *supra* note 1, § 5K2.20.

57. "That the percentage of first-time women offenders is twice that of men could both explain and justify certain aggregate gender differentials in sentencing, such as the higher percentage of women offenders who receive sentencing options in addition to or instead of prison only." Kesler, *supra* note 27, at 15.

58. 28 U.S.C. § 994(d)(4).

59. See Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 Fed. Sent. Rep. 121 (1994).

60. GUIDELINES, *supra* note 1, § 3B1.1, cmts.

Guideline factors.⁶¹ Factors which can be objectively measured, like drug weights or the amount of money involved, can increase a sentence from offense level six to forty-three, with a corresponding imprisonment range extending from probation to life imprisonment. “Role in the offense” adjustments, however, rarely affect the base offense level more than two or four levels. The result is that all offenders may find themselves held responsible at sentencing for criminal behavior of a scope and severity about which they may not have been fully aware. And for women, the problem is exacerbated. If criminal enterprises mirror “legitimate” enterprises, then one would expect to find women clustered at the bottom, more minor players than major ones, more couriers and mules than distributors and dealers. Indeed, the data concerning adjustments for role in the offense bear this out.

While Kesler found that male offenders are more likely to receive upward adjustments for an aggravating role and female offenders are more likely to receive downward adjustments for a mitigating role,⁶² most offenders receive no adjustment at all.⁶³ The adjustments women offenders *do* receive, however, may be less than the adjustments they *should* receive. And even when they receive a downward adjustment on this basis, the change in their sentence is relatively minor.

B. Mens Rea/Coercion

The Commission promulgated § 5H1.3, indicating that “mental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the guideline range.”⁶⁴ It was a major step. *Mens rea* had been a significant part of sentencing for over a hundred years. But while it was clear that the Commission wanted to discourage the application of these factors in the sentencing calculus, how that applied in a concrete case was less than clear. As was the case with family circumstances departures, nowhere in the Guidelines themselves, or the interpretive material, is there any definition of when mental and emotional conditions are relevant—i.e., what is ordinary and what is extraordinary.

Notwithstanding § 5H.1.3, certain mental condition departures are encouraged under the Guidelines. Section 5K2.13 allows the court to depart from the Guidelines for defendants who qualify as suffering from “diminished capacity.” But there are limits: Only offenders who have committed nonviolent offenses may qualify, and their “significantly reduced mental

61. Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938 (1988).

62. Kesler, *supra* note 27, at 16-17, 43-44.

63. *Id.*

64. GUIDELINES, *supra* note 1, § 5H1.3.

capacity”⁶⁵ cannot have resulted from the “voluntary use of drugs or other intoxicants.”⁶⁶ Finally, the departure does not apply to those defendants whose criminal history indicates “a need for incarceration to protect the public.”⁶⁷

In addition, § 5K2.12⁶⁸ provides that coercion or duress, though not amounting to a complete defense, may also justify the court’s granting a downward departure. But this departure ground is also limited: “ordinarily” coercion is sufficiently serious to warrant departure only when it involves a threat of physical injury.⁶⁹ Battered women’s syndrome, for example, may be considered in connection with a departure for diminished capacity. The underlying issue concerns mental capacity, not gender, even though the syndrome is one that correlates with gender.⁷⁰

From the literature, it seems clear that more women than men do take advantage of these provisions.⁷¹ But what we do not know is the numbers of women offenders who should have done so. We have no statistics regarding the number of women offenders who might have qualified for coercion or duress defenses, or for battered women syndrome. This information would have to be gleaned from pre-sentence reports, which may or may not reflect the real complexity of the situation.

Apart from the limitations built into these provisions, their use is limited by the fact that they are framed as Guideline “departures” rather than ordinary adjustments to the Guideline sentence. In order to make a case for such a departure, counsel has to be proactive—preserve the issue (in the event of a plea), make the record, present the information in a coherent form, provide supporting data. In order to justify such a departure, the court has to agree with counsel, and has to make express findings on the record.

In my experience, few lawyers even bother to examine the relationship between the woman offender and her male codefendants, much less litigate it.

65. *Id.*

66. *Id.*

67. *Id.*

68. GUIDELINES, *supra* note 1, § 5K2.12.

69. *Id.*

70. *United States v. Johnson*, 956 F.2d 894, 898-904 (9th Cir. 1992) (permitting battered women syndrome to be considered as under § 5K2.10, which provides that if the victim’s wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence); *United States v. Whitetail*, 956 F.2d 857 (8th Cir. 1992). Moreover, there are issues short of duress or coercion, which the Guidelines do not address. As Raeder noted:

While it may be stereotypical to assume that men lead women astray, and therefore women are not fully responsible for their criminal offenses, one federal prison warden has observed, “Females who make their way to prison have been socialized more toward dependent relationships, as opposed to life activities that promote independence.” Thus, a number of women offenders whose circumstances do not fit the classic definition of physical coercion appear to be dominated by a male with whom they have a relationship. In one case the judge described a woman as being under the “Svengali” spell of her boyfriend. . . .

Raeder, *supra* note 8, at 972-73.

71. Raeder notes that “In practice, departures for coercion are more significant for females than for males, and are used more frequently by White women than minority women.” Raeder, *supra* note 8, at 969-70.

In one case before me, for example, a woman pled guilty with a plea agreement permitting neither side to move for a departure. The pre-sentence report, however, suggested that the woman may have been battered by the drug dealer for whom she worked. I called for further psychiatric evaluation to explore the woman's mental state and, in particular, to determine if the defendant suffered from battered women stress disorder. The report concluded that she did, and I departed downward.

It is difficult to know how many other such offenders should have been treated in the same way but were not because of the failure of advocacy, or the reticence of the court.

VI. CONCLUSION

Throughout the 70s and 80s, feminist litigators recognized the limitations of formal equality. Rules in employment or school settings that were equal on paper were nevertheless seen as unfair if they had a disproportionate impact on women for a host of social and cultural reasons. Equally unfair is a sentencing regime that fails to take into account the real differences between male offenders and female offenders, differences that may well correlate with the sources of women's crime, and, perhaps, with the seeds of their rehabilitation.

FEMINIST JUSTICE, AT HOME AND ABROAD

