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**FAMILIAL IDEOLOGY IN THE COURTS:
THE SENTENCING OF WOMEN**

by

Karen M. Masson

B.A. (Sociology), Saint Mary's University, 1990

THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARTS (CRIMINOLOGY)

in the School

of

Criminology

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ABSTRACT

The effect of gender on sentencing decisions is a much-studied topic; however, the research results are conflicting. There have been three different findings: (1) men and women are treated equally, (2) women are treated more leniently than men, and (3) women are treated more harshly than men. By drawing upon the work of feminist writers, this thesis offers an explanation for these conflicting findings and the treatment of women in the courtroom. It is suggested that it is differences among women that determine the type of sentence they will receive. Thus, in some instances, women receive more lenient sentences than men and in other instances harsher sentences than men. Women are differentiated by criminal justice personnel by the personnel's ideas about appropriate gender role behaviour which are based on the patriarchal nuclear family.

This argument was tested with a sample of presentence reports (n=110) written for women convicted of offences in Greater Vancouver from 1980 to the present. Also, nine interviews were conducted with Vancouver judges to illustrate the impact of gender and familial ideology on judicial decision-making.

From the presentence reports, there is evidence that gender and familial ideology are both reflected and reinforced in the courts. A statistical analysis shows that the most important variables affecting the sentencing decision are: (a) the number of previous convictions, (b) the defendant's plea, (c) whether the defendant's children are in

someone else's care, (d) marital status, (e) the type of the offence, and (f) racial designation.

A content analysis of presentence reports indicates that the written arguments utilized by probation officers idealizes the patriarchal nuclear family model, and thus contributes to women's continued subordination. Also, the probation officers' evaluations and recommendations were found to be very influential in judges' sentencing decisions.

The interviews with the judges showed that they maintain certain ideas about appropriate gender role behaviour, consistent with the patriarchal nuclear family, which are reflected in their decisions on sentencing. It was found that judges exercise more discretion in less serious offences. In these instances, family circumstances became more important for both genders, but was more influential when sentencing women.

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Third, I would like to extend my appreciation to the judges who participated in this project. Not only did they participate in the research, but they also provided insightful comments.

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QUOTATIONS

"The social control of women assumes many forms, it may be internal or external, implicit or explicit, private or public, ideological or repressive."

Smart, Carol and Barry Smart
1978. Women, Sexuality and Social Control. London:
Routledge and Kegan Paul, page 2.

"Women's subordination is reflected in our institutional exclusion, in the social myths that define appropriate behaviour, and in patterns of everyday interaction. Women are rewarded for conforming to social expectations and sanctioned for deviating....The circles of social control enclose and encapsulate women"

Wilson, S.J.
1986. Women, The Family and the Economy, 2nd ed.
Toronto: McGraw-Hill Ryerson Limited, page
158.

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CHAPTER I

INTRODUCTION

In the Subjection of Women (1869), John Stuart Mill provides an historical analysis of the subjection of women, and argues that the subordination of women is "wrong in itself" (Mill, 1869:1). Mill compares the social position of women to that of slaves: the latter status has been abolished, but women's position has gradually changed into a milder form of dependence. This dependence is "...the primitive state of slavery lasting on..." (Mill, 1869: 8).

Mill criticized the subjection of women whereas Talcott Parsons (1954: 327-329) assumed that a sexual division of labour is a necessary feature of families because it establishes interdependency between family members. Both males and females are socialized to specific roles which dictate appropriate gender behaviour and which are seen as functional to the maintenance of social order. He uncritically accepted the views that women's main task is to nurture and socialize children, men are expected to provide financial support for the family, and women are appropriately dependent on the husband and/or father for their social position and income.

Socialization, which Parsons argues is necessary in defining appropriate gender roles, is a lifelong process of learning socially approved skills and behaviour. According to Beuf (1974: 144), by the age of five children not only differentiate male and female tasks, but evaluate male tasks more highly. Nemerowitz (1979) similarly found that children in primary school internalize cultural stereotypes which

associate women with housework and men with paid (and, thus, more valuable) work.

From primary socialization within the family, together with socialization through the education system and the media, children learn the roles and rules of "appropriate" female and male behaviour. These expectations of gender role behaviour appear to be significant even in explanations of female criminality.

Women seem to commit crimes in roles auxiliary to men, in keeping with their sex roles and for lesser returns, often making them more vulnerable to arrest (Hoffman-Bustamante, 1973: 131).

[T]he differential socialization of girls is reflected not only in the types of offences committed by women but also in the nature of their participation (Smart, 1977: 67).

Throughout the Western world, both official crime statistics and unofficial crime data reveal that women are more law-abiding than men. Petty property crime is the only offence women commit in similar numbers to men, and these numbers have increased significantly over the past few decades (Naffine, 1987: 1-2). In Canada, in 1987, 70.1% of offences women committed were for property offences. Property offences constituted 55.6% of the offences committed by men (Hatch and Faith, 1990: 441).

It has been argued that women's participation in crime, historically, has not been significantly lower than that of men's. Rather, it is argued that, due to chivalry in the criminal justice system, the types of offences women commit are less likely to be reported, and women are less likely to be arrested or convicted. Thus, according to this proposition, women do not figure highly in official crime statistics (Pollak, 1950; Simon, 1975). However, this claim has

been highly criticized as "...[Pollak] offered no supporting evidence..." (Heidensohn, 1985: 119), and self-report studies suggest that the dark figure is no greater for females than for males (Gavigan, 1987: 51-52). In addition to these criticisms, chivalry must be recognized as "...a racist and classist concept founded on the notion of women as 'ladies' which applies only to wealthy white women and ignores the double sexual standard" (Klein, 1973: 23; also see Smart, 1977). Studies have shown unequivocally that "race"¹ has been a significant influence on sentencing decisions (for example, see Bullock, 1961; Thornberry, 1973; Thomson and Zingraff, 1981; Spohn *et al.*, 1981-82; Hagan, 1975, 1977; Boldt *et al.*, 1983; Bienvenue and Latif, 1974). It appears to be only a specific category of women who have been treated with chivalry, and thus leniency.

Some studies show that female "criminals" do not benefit from chivalry but are less stigmatized than their male counterparts. Steffensmeier and Kramer (1980b: 7) found that when women offend they are not labelled to the same extent as men, and he suggests one of the reasons for this is that women are perceived as neither threatening nor dangerous. Hagan *et al.* (1979: 34) found that the "official criminal" sanction is reserved for men, while informal familial controls are more likely used for deviant females.

¹"Race" is a problematic category for scientific inquiry, given that pure racial groupings do not exist in reality but, rather, signify biases of socially constructed categories. Thus, generalized racial designations are fraught with contradictions. In this study, when I refer to "race," I am not presuming to describe precise locations of racial identity but rather acknowledging the role of criminal justice systems in perpetrating and forming discriminations on the basis of the categories. To speak of "women" is likewise problematic.

There are some authors who argue that gender affects judicial decision-making and that this enables women to escape criminalization. Others, however, take the view that women are more harshly criminalized than men, and more likely to be subjected to discrimination in the criminal justice process. In this view, they are more likely to receive more punitive treatment in comparison with men, even when the severity of their criminal actions is similar, because they transgressed the gender role expectations of judges (Box, 1983: 169).

For over two decades, researchers have recognized that judges impose disparate sentences even when the facts and circumstances of the case are similar. "The formal law as expressed in the [Canadian] Criminal Code and related statutes gives enormous discretionary power to the courts without guidance as to how that power is to be exercised" (Hogarth, 1971: 5). Although Hogarth (1971: 360) found individual judges were "consistent within themselves," he concluded that Canadian magistrates displayed a range of frequently conflicting sentencing practices. Thomas (1979: 64) found that attitudinal preferences lead judges to focus on particular aspects of a case. Thus, discretionary power of judges could lead to differential treatment of men and women in the courts. In one United States study of gender and sentencing, Daly (1987a) quotes a judge as saying:

If a woman has children, that affects me. The kind we usually get has two children. If she is supporting them and if she is doing a crime for the benefit of others, compared to drugs, then that counts positively. For women, if a woman has children, but she in fact has no child care responsibilities, that won't impress me (Daly, 1987b: 278).

This thesis examines the impact of gender and familial ideology, based on the patriarchal nuclear family, on decision-making of judges in Greater Vancouver courts. It is suggested that it is differences among women that determine the type of sentence they will receive. Thus, in some instances, women receive more lenient sentences than men and in other instances harsher sentences than men. Women are differentiated by the ideas of criminal justice personnel about good parenting and appropriate gender role behaviour which have roots in the idealized patriarchal nuclear family. This argument will be tested with a sample of presentence reports (n=110) written for women convicted of offences in Greater Vancouver from 1980 to the present, and interviews conducted with nine Vancouver judges and justices.

Chapter Two provides a brief review of the literature on the sentencing of men and women and a discussion of the various explanations for equal, lenient, or harsh treatment in the courts. Chapter Three examines the patriarchal nuclear family and how a familial ideology² is defined and reinforced by the law, and hence contributes to women's continued subordination. In Chapter Four, the research question and methodology for collecting the data is outlined. Chapter Five sets out the findings of the research. The impact of gender and familial ideology on decision-making of judges in Greater

²For the purposes of this paper, I rely on Mary Eaton's definition of ideology:

The dominant ideology of a society is made up of the models of normality by which people in that society live their daily lives. These models legitimate and justify the divisions and hierarchies within that society. Furthermore, they are accepted by many who derive no material benefit from them, and for whom they are a source of continuous oppression and exploitation....This [ideology], with its perceptions, explanations and justifications is promulgated by the institutions controlled by the dominant classes, particularly those controlled by the state, including the legal system (Eaton, 1986: 88).

Vancouver courts is examined with an analysis of presentence reports and interviews with judges. Finally, Chapter Six presents a summary of the results and the conclusions of this study.

CHAPTER II

LITERATURE REVIEW

Official knowledges have been male constructed to serve the interest of the dominant class. "[M]en *create* the world from their own point of view, which then *becomes* the truth to be described" (MacKinnon, 1982: 537). Naffine (1987: 105) utilizes MacKinnon's (1982) argument that traditional knowledge is male constructed to show how male bias is infused in the discipline of criminology. In criminology, female criminals, like most minority groups, have not been given a voice, have been treated as unimportant, and viewed as "the negative to man's positive" (Smart, 1977: 179). Women's experiences have not been incorporated into the discipline (Naffine, 1987: 105). Prior to the 1970s, the limited work on women and crime was based on uncritical, biased preconceptions about men and women. "Women are to be observed behaving in ways which do not fit the theories, but it is women, not the theories which have been found deficient" (Naffine, 1987: 133).

Smart (1989) argues that "knowledge is not neutral but produced under conditions of patriarchy" (Smart, 1989: 86). She utilizes Foucault's (1971, 1975, 1979a, 1979b) theory of power and his argument of how knowledge is a form of the exercise of power. "He maintains that power is creative and technical. By this it is meant that the mechanisms of power create resistances and local struggles which operate to bring about new forms of knowledge and resistance"

(Smart, 1989: 7). Because our society values "truth," discourses that claim to speak the truth can exercise power. "[I]n claiming scientificity, other knowledges are accorded less status, less value...they can exercise less influence, they are disqualified" (Smart, 1989: 9). For Smart, feminism is one of the knowledges that has been disqualified. She views law "as a discursive field which disqualifies women's accounts and experiences" (Smart, 1989: 86).

The argument that traditional knowledge is male constructed must be recognized when examining the research on the sentencing of women and men. Research to date on the treatment of male and female defendants is conflicting (see Appendix A for summaries of this research). There are three different findings of how women are treated before the court in comparison to men, and these will be discussed in turn.

- (1)men and women are treated equally before the courts.
- (2)women receive more lenient treatment than men.
- (3)women receive harsher treatment than men.

Equality

Hagan and O'Donnel (1978) examined cases in Edmonton at three stages: individuals charged in the crown prosecutor's office; those for whom presentence reports were requested; and those who were subsequently incarcerated. After controlling for prior conviction history, type of offence, and race, they found that while there were differences in the severity of treatment of males and females, the

differences were not significant. In their findings, neither gender alone, nor gender in interaction with ethnicity or legal variables, such as prior conviction history, produces disparity in sentencing.

Green (1961) compared the genders in cases with no prior convictions of a felony, controlling for the severity of the offence, number of charges, prior record, age, and race from data obtained in Philadelphia, Pennsylvania. His results affirmed the equality of men and women before the criminal law. In felony cases the males and the females received practically the same percentages of penitentiary sentences and of non-prison sentences. In misdemeanour cases the women fare slightly, though not significantly, better than the men. However, Green did find that white defendants were more likely than black defendants to receive more lenient treatment. Unfortunately, he did not examine the interaction between race and gender and their effects on sentence severity.

Bernstein *et al.* (1979) studied 2,627 males and 338 females arraigned in state criminal or supreme court in a major United States city. After controlling for number of charges, type of offence, prior arrests, prior convictions, age, race, and education, they concluded that the decision to sentence a defendant more or less harshly is determined similarly for men and women.

Zingraff and Thomson (1984), in a study of 9,464 offenders in North Carolina, found that gender does not affect sentence length for misdemeanour offences. After controlling for prior record, race, age, and court location, their adjusted deviations indicated that the sentence lengths women receive are similar to those received by their male counterparts.

Chesney-Lind and Ghali (1986) also tested the hypothesis that differences in treatment of criminals on the basis of gender exist at different stages of the criminal justice system. They controlled for the following variables: prior arrests, prior convictions, type of crime, whether the defendant is represented by counsel, plea, age, ethnicity, employment status, educational background, and marital status. Using data from Honolulu, Hawaii, they examined 6,747 arrest records, of which 5,226 had dispositions, and found that gender may play a role at some but not all stages in the criminal justice process. Women had a disadvantage at the earlier stages of processing, whereas the later stages maintained a more evenhanded treatment of defendants. For example, arrested females were more likely to be prosecuted than arrested males, but received similar sentences. "The effect of gender on outcomes is not consistent in direction so that one cannot speak of discrimination against or leniency for female defendants" (Chesney-Lind and Ghali, 1986: 168).

Explanations for Equal Treatment

Equality, as symbolized by the image of a blindfolded woman balancing the scales of justice, is among the most fundamental principles of Western law. The legal model of the criminal justice system stipulates that defendants will be treated equally. The studies reviewed above found their results to be consistent with the legal principle of equality. Most of these studies started with the hypothesis that there are differences in sentencing patterns and

attempted to determine if they favoured men or women. However, when legal variables are controlled there is no consistent evidence of a relationship between gender and sentence outcome. These authors see variation as a product of legally relevant variables (such as the type of offence committed and the prior record of the defendant) and not of bias or discrimination.

Although these studies found men and women to be treated equally, the actual existence of equality must be questioned. One of the criticisms to keep in mind when examining these findings is that equality, one of the most fundamental principles of the criminal justice system, cannot be substantiated when men and women are unequal in society.

Legal rhetoric may assert that all are equal before the law, however, there is a contradiction in the promise of equality by the courts in a society in which members are obviously unequal in other respects, e.g. status, resources and power. As a part of the state apparatus the courts may be seen to operate to support the status quo, and in so doing to endorse and reinforce the divisions upon which the status quo is based (Eaton, 1985: 117).

Leniency

A second view of sentencing suggests that women receive more lenient treatment than men. Like the studies that found men and women to be treated equally in the courtroom, most of the researchers with findings of differential treatment have controlled for legally relevant variables. These studies demonstrating leniency appear to outnumber the ones concluding that there is equal

treatment in the courts. This could be due to the fact that prior to the 1970s, research finding leniency had been unchallenged. There was an uncritical acceptance of the belief that women were in need of protection and thus should receive lenient treatment.

The assumption that women are treated more leniently than men in the criminal justice system is so common as to be part of not only the conventional, but also the sociological, "wisdom." Frequently, this assumption is based on little more than a stereotype of an assumed stereotyping process. Thus, sociologists and citizens alike begin, largely without test, by assuming that those who come into contact with the female offender perceive her to be less aggressive, less able to endure punishment, more passive, more polite, "more amenable to discipline," and in sum less *accountable* than her male counterpart. Reasoning from presumption to conclusion, it is then argued that women will receive more lenient treatment throughout the judicial process (Hagan and O'Donnel, 1978: 310; emphasis in the original).

Steffensmeier and Kramer (1980a) examined the sentencing outcomes of male and female defendants in misdemeanour and felony courts in an eastern United States state. After controlling for type of offence, their results show that no gender differences exist for public drunkenness; however, for the remaining offences (shoplifting, murder, embezzlement, seduction of a minor, and resisting arrest), female defendants are more likely to be fined and placed on probation rather than jailed. Similarly, Simon and Sharma (1978) analyzed data obtained from Washington, D.C. and found, after controlling for type of offence and prior convictions, that for most offence categories women received more lenient outcomes, but that for some violent types of crimes males and females were approximately equal in their chances of receiving long terms of imprisonment.

Fenster and Mahoney (1981) examined a sample of male and female defendants in a United States felony court and controlled for prior record and type of offence. They found that as the criminal backgrounds of the genders became more similar, their sentences became more similar. However, when the defendants received differential dispositions, men were more likely to receive the harsher sanction.

Curran (1983) found evidence of preferential treatment in the processing of felony cases in Dade County, Florida. She examined the effects of non-legal variables (race, age, and occupational status) as well as legal variables (number of prior arrests, seriousness of offence, and total number of counts) in three different time periods. She looked at four levels of judicial processing (negotiating, prosecution, conviction, and sentencing) and found women receive preferential treatment only at the sentencing level. Curran also found that the interaction between age and gender had a statistically significant effect on the severity of the sentence for males but not for females. In other words, females are "treated more leniently than some males (younger ones) but not all males" (Curran, 1983: 52).

Johnston *et al.* (1987) compared 1,249 males and 1,241 females sentenced in a superior court in Phoenix, Arizona. They provided a measure of control for prior record, seriousness of offence, and characteristics surrounding the offence. Their results reveal a consistent pattern of preferential treatment of female defendants.

A mixed pattern was found by Pope (1975a) in his study of felony offenders in California. After controlling for type of offence, prior record, age, race, and location and level of the court, he concluded

that women were likely to receive more lenient treatment in the lower courts but were treated equally in superior courts. Looking specifically at assault and burglary offenders, Pope (1975b) found males received harsher treatment than females for both lower and superior courts in rural and urban areas. He also found that rural African-Americans were imprisoned more frequently than white offenders in both lower and superior courts, but did not examine ethnicity in interaction with gender to determine their effects on sentence severity.

Nagel and Hagan (1983) also found a mixed pattern after examining the sentencing practices in ten federal jurisdictions in the United States. After controlling for type of offence and prior record, they found that preferential treatment is more likely to be observed in the less severe sentencing options whereas fewer gender differences are found when examining variation in the more punitive sentencing outcomes.

Explanations for Lenient Treatment

The concepts of both chivalry and paternalism have been used, interchangeably, to explain leniency given to female defendants. The concept of chivalry "emerged in Europe during the middle ages to describe an institution of service rendered by crusading orders to feudal lords, to the divine sovereign, and to womankind" (Moyer, 1985: 12). Chivalry was based on the belief that the female sex needed protecting. Paternalism, on the other hand, "derives from a

Latin-English kinship term that suggests a type of behaviour by a superior toward an inferior resembling that of a parent to a child" (Moyer, 1985: 12).

Gruhl *et al.* (1984: 457) argue that judges will treat women more leniently than men because they do not want to subject the "weaker" sex to the harsh conditions of prison; or because they see women as less violent, and thus as less of a threat to society than men (see also Allen, 1987). "The belief that the law treats women with greater leniency than it does men is one that has been assumed and proclaimed throughout history. Women, it has been said, are the favorites of the law" (Edwards, 1984: 183). Judges are thought to have a protective attitude toward women, and it is believed that women fare much better than men when the trial court has discretion. The idea that women are less violent than men continues to be an issue in criminological thinking. Women have been viewed as lacking a biological disposition to violent behaviour. However, from a sociological standpoint, it appears clear that women are treated protectively because they exhibit less violent behaviour just as it is accepted that women are less violent because they are treated protectively. This, in itself, is a tautological argument. Pollak (1950) utilized the premise that there is a protective attitude toward women to develop his theory of female criminality:

One of the outstanding concomitants of the existing inequality between the sexes is chivalry and the general protective attitude of man towards woman...Men hate to accuse women and thus indirectly to send them to their punishment, police officers dislike to arrest them, district attorneys to prosecute them, judges and juries to find them guilty and so on (Pollak, 1950: 151).

Paternalism and the chivalry factor appear to be logical explanations for women's lenient treatment, at first sight. However, these explanations have failed to examine the real issues at hand. "[I]t is fundamental to view the [criminal justice] system as an instrument of control over people, and in the case of women, reflecting and reinforcing the sexism in society at large. Its class bias explains the phenomenon that has previously been attributed to chivalry" (Klein and Kress, 1976: 43). It has been only a specific category of women who have been treated with chivalry, and thus leniency.

Studies have shown that sentencing outcomes are directly related to the racial designation of the offender. In Canada, Native people are over-represented among the number of people who are arrested and imprisoned and "the disproportionate presence of Native women incarcerated is even greater than for Native men" (Johnson, 1987: 39). In 1985, Native people accounted for an estimated two percent of the Canadian population; however, they constituted eighteen percent of the prison population and more than ninety percent in some areas (Johnson, 1987: 39).

Hagan (1975) compared the sentences of 1,018 men covering a six month period in a medium-sized Western Canadian city. The race of the defendant was designated as white, Indian, or Metis. After controlling for prior arrests, socioeconomic status, severity of the offence, plea, number of charges, and whether the defendant was represented by counsel, he found that race did not have a direct effect on the sentence. However, prior convictions had a direct effect on sentencing, and race had a direct effect on prior convictions. Thus, race was indirectly linked to the severity of the sentence. In other

words, Natives were more likely than whites to have a lengthy criminal record, and therefore they were more likely than whites to receive a harsher sentence.

In another study, Hagan (1977) analyzed 507 questionnaires based on presentence reports completed in all the probation departments located in Alberta. He compared the sentencing patterns for Natives and whites in urban and rural communities by controlling for prior convictions, severity of the offence, number of charges, demeanour, evaluation and recommendation of the probation officer, alcohol use and jurisdiction. He found that probation officers in rural communities recommend harsher sentences for Natives than they do for whites. Also, Natives were more likely to be sent to jail in default of fine payments in rural than in urban communities. In fact, Hagan (1976: 17) argues that thirty percent more Native than white offenders go to jail in lieu of fine payment.

Boldt *et al.* (1983) examined 148 presentence reports of male offenders, representing the total number of reports prepared by the Yukon Probation Services during 1980, to determine the effect of ethnicity on severity of the sentence. They controlled for severity of offence, prior convictions, recommendation of the probation officer, marital status, and employment. Like Hagan (1975), they found race did not affect sentencing directly, but that race had a direct effect on prior convictions which, in turn, had a direct effect on sentence severity. They suggest that racism is more apparent in police practice than in court decisions.

Bienvenue and Latif (1974) examined the arrest, conviction, and disposition of 5,316 males and 679 females in Winnipeg in 1969. Of

all the males convicted, 27.9% were Native and of all the females convicted, 70.6% were Native. After controlling for the type of offence, the authors found that Native women, as compared to non-Native women, were consistently over-represented. Their findings show that Native women constituted 75.5% of the women who received time in custody.

Native women are being incarcerated for more violent offences than are non-Native women. Also, Native women are more likely to be arrested and imprisoned for defaulting on payment of fines. In 1983, Native women accounted for thirty-one percent of the inmate population of Kingston Prison for Women, then Canada's only federal women's penitentiary (LaPrairie, 1987: 103). In 1989, Native women constituted 85% of the inmate population in Saskatchewan (Prairie Justice Research, 1990: 1).

Since the racial designation of the offender has been shown to influence sentencing practices, it is imperative to examine the interaction of gender and racial designation in the sentencing of individuals. It is only certain women who are treated with leniency. The paternalistic explanation has failed to examine the influence of race.

The paternalistic explanation has also failed to examine non-legal variables such as the defendant's family background. For example, Farrington and Morris's (1983) research in Cambridge City, England revealed that gender *per se* is not of direct significance on sentencing, but that magistrates gave weight to different factors in the sentencing of males and females. They controlled for previous convictions, type of offence, whether the defendant was represented

by counsel, plea, age, place of birth, marital status, children, family background, employment, remorse expressed, mental status, current problems, and the gender of the magistrate. The major predictors in sentencing individuals were current problems, previous convictions, mental status, and family background.

Harsh Treatment

The third view in comparing the sentences of women and men is that judges are more punitive toward females for transgressing gender role expectations. It is believed that women are punished for two offences: for the crime they commit and for violating gender role expectations. Thus, when a judge is convinced that the woman before him has committed a crime, he is more likely to overreact and punish her, not only for the criminal offence, but also for transgressing his expectations of womanly behaviour (Simon, 1975: 52).

According to Klein and Kress (1976: 43), women who are construed, by criminal justice personnel, as sexual offenders are more likely to be treated punitively by the law for having jeopardized their socially prescribed reproductive function. On the other hand, women who engage in property crimes are treated more leniently, as they are perceived as being easily managed and economically marginal.

Meda Chesney-Lind was the first feminist scholar to demonstrate empirically that, in terms of gender differences in the criminal justice system, what is called lenient treatment is actually harsh treatment. Chesney-Lind (1973) found that, over a 26 year

period, juvenile judges in Honolulu had consistently ordered physical examinations of female juvenile offenders in order to determine the virtue of the girls. Examination reports told the judges if the hymen was intact, ruptured, or torn, and whether the girl admitted having had intercourse. Chesney-Lind (1977, 1985) also found that "routine police and court procedures seem to select out girls whose offences threaten parental authority and boys whose offences cannot be explained away as 'boys will be boys'" (Chesney-Lind, 1977: 129). Girls were far more likely than boys to be brought into court for status offences, such as running away, truancy, incorrigibility, and sexual immorality, despite evidence that boys commit as much of this type of behaviour as girls.

In her study of Connecticut juvenile institutions, Rogers (1972) showed that 31 percent of the girls had been institutionalized for sexual misconduct but no boys were sentenced for similar behaviour. Another 36 percent of the girls had been incarcerated for noncriminal offences such as running away and incorrigibility, but only 0.05 percent of the boys were incarcerated for these offences.

Nagel and Weitzman (1971) examined nationwide (U.S.) data and found that sentencing depended on the type of crime committed. Those convicted of crimes traditionally associated with women, such as prostitution and shoplifting, received probation or suspended sentences, whereas those convicted of nontraditional crimes were incarcerated.

Nagel (1981) examined the sentences of 2,627 males and 338 females arraigned in the Criminal or Supreme Court in a major city located in New York State. After controlling for severity of the offence,

prior conviction history, marital status, ethnicity, age, and education, she found that legal factors, such as severity of the offence and prior conviction history, did not significantly affect the severity of women's sentences. However, marital status, a variable not found to be significant for men, had a strong effect on a woman's likelihood of being sent to prison: married women were less likely to be sent to prison than unmarried women.

Explanations for Both Lenient and Harsh Treatment

A possible explanation for differential treatment is the madonna/whore duality. In the modern criminal justice system women are viewed in a dual nature, either as madonnas, or as whores. This dual perception seems to have arisen from the two different ways in which female sexuality affected men. On the one hand, women produced children, which was necessary for the survival of the family and community. On the other hand, women inflamed men's passions and prompted them to lose control of themselves. Men have assumed the role of punishers of the whores and protectors of the madonnas. In other words, female defendants who are perceived as violating their gender role will be punished more harshly than female defendants who are not perceived as violating their gender role.

Nagel and Hagan (1983) propose that paternalism and the "evil women" (women who receive harsher treatment for violating gender role expectations) theses are complementary not contradictory. They argue that gender role expectations of social control agents explain both the more lenient and more severe sentences that women receive.

In other words, if women conform to expectations of appropriate female behaviour, they will receive more lenient dispositions.

For example, Harris (1977) claims that any powerful theory of crime involves the stratification of behaviour and identities, and this provides for the "functional preservation of social dominance" (Harris, 1977: 11). He refers to "type-scripts" as specifying the types of actors who are to play certain social roles. Specifying which actors are to commit which types of crime, or, more importantly, which types of crime are seen as unlikely for certain types of actors to commit, is an example of dominant order-maintaining functions of type-scripts.

In order for criminal type-scripts to be functionally effective they must meet a special condition: "the existence or filling of legitimate roles vacated by those actually assigned deviant status must not threaten the institutional hegemony of the socially dominant" (Harris, 1977: 12-13). If this condition is not met, there will be potential for script disarray and the power of the dominant group will be challenged. For example, jailing women would challenge dominant interests as it could lead to the breakup of the family, it could place a financial burden on the family (and on the state) to replace the role of the woman, or it could lead to the withdrawal of men from the workplace to care for the family (Harris, 1977: 13). Thus, women are more likely to receive lenient treatment so that the dominant interests are maintained.

Kruttschnitt and Green (1984) suggest that there is a gap in gender role theory. Gender role theorists argue that female criminality is restricted by the behaviour that is expected of women. "Traditionally, role theorists have explained female crime by focusing

on the differences in offense patterns and levels of involvement in crime between men and women, rather than the responses of social control agents to the criminal behaviour" (Kruttschnitt and Green, 1984: 541). Critics of role theory claim that this explanation fails to examine the economic and cultural factors which cause differences in gender role expectations (Kruttschnitt and Green, 1984: 541-542).

Kruttschnitt (1982a, 1982b) uses variation in informal social control as an explanation for gender differences in sentencing. She argues that women have more informal (family) social control in their day-to-day lives than men; and thus, women are more likely to be subjected to a lower degree of formal (state) control. In developing this argument, she draws upon Black's (1976) conception of law as a quantitative variable, that is, "law varies inversely with other social control" (Black, 1976: 107).

From a statistical analysis of 1,034 female offenders who were processed through a probation department between 1972 and 1976 in a California county, Kruttschnitt (1982a) found that the more "respectable" a woman was, the more likely her sentence to be lenient. She controlled for type of offence, prior record, race, income, age, employment, alcohol/drug use, and psychiatric history. "Respectability" constituted a good employment record, no alcohol or drug use, and no history of psychiatric treatment. The lower a woman's respectability, the greater the likelihood that she would receive a severe sentence.

Kruttschnitt (1982b) also offers economic dependency as a test of social control. Again utilizing Black's (1976) notion of law, she argues that women have a higher degree of informal social control

than men as women are more likely to be economically dependent on others, in particular their husbands or fathers. After controlling for prior convictions, type of offence, race, income, number of children, employment, and dependency on others, Kruttschnitt found that lenient treatment was proportional to women's economic dependency on men.

Social control, then, is the key dimension in the dependency status, and it provides the causal link to predicting the quantity of law in women's lives....Thus, if economically dependent women are subject to a relatively high degree of social control, and if social control is inversely related to legal control, then we would expect dependent women to receive the lighter sentences (Kruttschnitt, 1982b: 498).

Kruttschnitt controlled for race in this study, and it was found to have no effect. However, she suggests that this was due to the interdependence of race and marital status. In her sample, 33% of the white women were married compared to only 16% of the black women. In another study (1980-81: 256), she found race to have an effect on the severity of the disposition. For convictions of disturbing the peace and drug law violations, black women were sentenced more severely than white women.

Kruttschnitt and Green (1984) sampled 1,558 men and 1,365 women who were convicted of theft, forgery, and drug law violations over a period of sixteen years (1965-1980). They controlled for type and severity of the offence, number of arrests, prior record, race, employment status, source of economic support, family composition, number of children, total number of marriages, years of psychiatric treatment, and physical health problems. Using social control arguments to explain gender differences, they found that women are

significantly more likely to obtain pretrial release than men. However, they also found, with regard to the pretrial release decision, "holding constant the social and cultural differences in the lives of male and female offenders significantly reduces evidence of gender-based leniency over the 16-year period" (Kruttschnitt and Green, 1984: 541). The authors found that the effect of gender on the decision to incarcerate can be partly accounted for by the pretrial release decision.

Daly (1987b: 154) suggests that focusing only on the social control proposition creates two problems. First, having others (i.e., children) dependent on women may be a more significant source of informal social control than women's economic dependency on others. Second, social control may explain sentence variation *among* men and women but does not explain variation *between* men and women. "More specifically, women's care for others and men's economic support for families are different types of dependencies in family life, and they elicit different concerns for the court" [and, not incidentally, for researchers] (Daly, 1987b: 154).

Daly (1987b) presents a social control/social costs framework. She examined the impact of a defendant's familial status and the interactive effects of gender and family for five court outcomes. After controlling for number of charges, type of offence, prior record, prior arrests, race, age, marital status, employment, and familial status, she found that "[heterosexual] familial men and women are less likely to be pretrial detained, and they are less likely to receive the harsher types of non-jail sentences than the non-familial men and women; and the mitigating effect of being familial is stronger for women than

men" (Daly, 1987b: 167). In another study, Daly (1987a) interviewed 35 court officials (prosecutors, defence attorneys, probation officers, and judges). She offers familial paternalism (leniency for males or females who have children to take care of) as a replacement and/or explanation for the paternalistic treatment of women. She identifies "having dependents" as the overriding judicial criterion for leniency for both male and female defendants.

Conclusions

The view that women are being treated leniently has always appeared much more compelling as evidenced by the number of studies taking the paternalistic view relative to the number taking the legalistic or gender role expectations views. The greater part of the evidence on the sentencing of men and women suggests that, consistent with the traditional interpretation of the paternalistic view (Pollak, 1950), women receive preferential judicial treatment over men for most offence categories. Steffensmeier (1980: 351-2) suggests, however, that paternalism is a relatively unimportant variable in explaining gender differences in sentencing outcomes, because women are known to commit fewer and less serious offences, and therefore, to have records consisting of fewer and less serious crimes.

The paternalism proposition is countered by the legalistic research which has shown the two genders to be treated in an equal manner when such variables as type of offence and prior conviction history are taken into account. Studies finding women and men being treated equally before the courts have supported Steffensmeier's

argument, especially after these legally relevant variables have been taken into account.

The paternalistic view has also been challenged by evidence of punitive attitudes to certain types of criminal women, particularly those who are perceived to violate their gender roles. Criminologists who take the gender role expectations view have sought to expose the sexist, discriminatory practices which occur under the guise of chivalry, which inflated the judicial view that women are in need of protection.

The present understanding of the treatment of women by the processes of the law is that, even if women are the beneficiaries of "chivalry" in relation to less serious offences (and this is now open to question), as soon as the offending becomes more serious or places their morality in question, they are likely to be dealt with more retributively than males who commit similar offences (Naffine, 1987: 2).

From the literature reviewed in this paper, it can be generally concluded that women and men receive differential treatment when sentenced by the courts. However, researchers have not been united in their explanations for this differential sentencing. This is not surprising as there *are* many reasons for a woman's sentence. Just like judges, researchers do not maintain a unified set of values, and thus are not homogeneous in their decision-making.

According to a paternalism perspective, female offenders who suit gender role prescriptions should receive more lenient treatment so as to not subject the "weaker" sex or mothers to prison. Conversely, there were, and still are, women who receive more punitive sentences than men because they have transgressed these prescriptions; for example, women who have failed to be "good"

mothers. Also, it has been only a specific category of women who have benefitted from paternalism. It has been found that Native women are over-represented in the prison population. The paternalism explanation has failed to account for the interaction between gender and racial designation.

It seems clear that, allowing for class and cultural prejudicial variables, gender role expectations and familial ideology are reinforced by the courts. Ideas about men and women are rooted in time and place and, therefore, must be contextualized. In modern society, these ideas are encapsulated in the nuclear family model. This model is associated with a white middle class family. Gender roles specific to membership in the nuclear family are defined by a sexual division of labour (males viewed as breadwinners, females as caregivers), and this social division appears to be reflected to varying degrees in sentencing practices.

CHAPTER III

GENDER AND FAMILIAL IDEOLOGY

Many injustices are experienced by women as women, whatever the differences among them and whatever other injustices they also suffer from. The past and present gendered nature of the family, and the ideology that surrounds it, affects virtually all women, whether or not they live or ever lived in traditional families. Recognizing this is not to deny or de-emphasize the fact that gender may affect different subgroups of women to a different extent and in different ways (Okin, 1989: 6-7).

The type of family that is considered traditional in our society is the patriarchal nuclear family, associated with a white middle class family, consisting of a husband, a wife, and their children living together in their own home as opposed to an extended family which is composed of the above along with grandparents, aunts, uncles, and cousins.

Functionalists (for example, see Parsons, 1954) argue that the family operates best when it maintains a sexual division of labour. Men and women are assigned specific roles which dictate appropriate behaviour: women's main task is to nurture and socialize children while men are expected to provide financial support for the family. These roles should not overlap or be exchanged by partners as it may cause conflict or disarray in the family and, thus, in society, as these roles are seen as functional to the maintenance of social order (Lindsey, 1990: 117). Even when women work outside the home, their income is considered secondary to that of the husband (for example, see Eichler, 1985), and a woman's employment status is *de*

facto secondary to her primary responsibility for the care of the children and maintenance of the household.

[This] gendered division of labour, and particularly women's responsibility for domestic labour, have been identified as central to women's oppression in...capitalist societies as a whole, and specifically to women's subordination to men within families (Luxton, 1990: 39).

Before discussing how the sexual division of labour, founded in the patriarchal nuclear family, is oppressive to women, we must realize that the nuclear family model is far from the norm today. "[T]he definition of nuclear family is too limited to encompass the many new kinds of households and living arrangements which are emerging" (Lindsey, 1990: 119). In 1961, 6 in 10 Canadian families were of the nuclear family model. In 1981, this figure dropped to 3 out of 10 (Boyd, 1988: 87).

Since World War II, the marriage rate has been slowly declining. Approximately ten per cent of adult North Americans will never marry, and four times this number are single at any point in time (Wilson, 1986: 19). Also, the average age of people at first marriages has increased to 24.6 for women and 26.7 for men, an increase of approximately two years since the mid-1970s (Boyd, 1988: 89). Families are also formed by common-law marriages, remarriages, and lesbian (or gay) marriages, with formal marriages increasingly ending in divorce [in 1989, 1,205.6 of every 100,000 marriages ended in divorce (Statistics Canada, 1992)] and separation. Compared to the traditional nuclear family, characteristic of the 1950s and 1960s, families are composed of fewer children and of more women in the labour force; currently, women represent 45.3% of the total labour

force (Statistics Canada, 1992). For most families, it is virtually impossible, economically speaking, to not have both parents in the workforce. There has also been a recent growth in single parent families. All this points to the multiplicity of family forms in Canada (Boyd, 1988: 101). However, although the nuclear family in practice is no longer dominant in Canada, the model still flourishes. Males and females are socialized by dominant institutions into specific roles and are taught specific behaviour depending on gender. These roles are based on the nuclear family as the ideal family model.

Okin (1989: 142) argues that our society places more emphasis on marriage for girls than for boys. In fact, girls are more likely than boys to consider having a good marriage and family life as important to them. Okin suggests that "when women envisage a future strongly influenced by the demands on them as wives and particularly as mothers, they are likely to embark on traditionally female fields of study and/or occupational paths" (Okin, 1989: 144). She argues that this sets women up to become vulnerable during marriage, and even more vulnerable if their marriage ends. Boyd (1988) suggests that

The *imagery* associated with the husband-breadwinner, wife-homemaker family assumes a highly bifurcated sexual division of labour in which women are responsible for household and childcare tasks. Such *imagery* handicaps women in those Canadian families that depart from this traditional family form (Boyd, 1988: 102, emphasis added).

The ideology of the nuclear family which continues to permeate every aspect of society, has contributed to the oppression of women in the family and in society in general. The idealized feminine woman is presumed to be weak and inferior to men, both intellectually and

physically, and viewed as only having one place in society: the home. This notion of women's proper role as belonging in the private sphere inhibits their public voice in the political, economic, and social realms.

The nuclear family is one which is based on sex role differentiation, that is, males are viewed as the primary breadwinners and females are viewed as the primary caregivers. Women are excluded from gaining direct access to valued resources such as income, recognized and status-giving work, and political authority (Thorne, 1982: 4). They are economically dependent on their husbands. Women's employment status is viewed as secondary to their more important role as mothers and wives. Their unpaid work at home is devalued and the work of mothering is done in relative isolation. In short, the ideology of the patriarchal nuclear family reinforces the economic exploitation of all women.

Women in the workforce make less money than men and they are more likely to hold positions that are viewed as an extension of the female role, based on the nuclear family. Overall, Canadian women's income was 67.6% of men's income in 1990. One of the largest discrepancies in income was found in the medicine and health industry where women on average earned 58.5% of men's wages. One of the smallest discrepancies was found in artistic and recreation-related occupations where women made 83.3% of men's income (Statistics Canada, 1992).

[T]he gender wage gap is a fundamental, continuous, and predictable feature of the Canadian economy, part of a worldwide system of unequal distribution of resources and workload...between women and men. This system allows men to appropriate women's resources and labour through compulsory heterosexuality and marriage, and generally

debars women from direct access to a male standard of living (Roberts, 1990: 217).

Women are more likely to be found in the lower paying and less prestigious occupations and women's work outside the house is accorded less status. For example, Morris (1987) argues that the sexual division of labour is apparent in the criminal justice system. Mainly men occupy the positions of judges, lawyers, police and prison administrators. Women, on the other hand, are employed as secretaries or perform stereotypical services, which are seen as an extension of their domestic role (which is viewed as their primary role), and thus as "women's work" (Morris, 1987: 133-134).

According to Okin (1989: 141), women dominate clerical and service professions such as nursing, grade-school teaching, and library work. In Canada, as of February, 1992, of all women working outside the home, 28.7% were found in clerical occupations and 27.1% in service occupations. Construction and transport, typically viewed as male occupations, consisted of 0.3% and 0.8% of women, respectively (Statistics Canada, 1992).

Luxton (1990: 39) found that studies conducted in the early and mid-1970s concluded that when married women worked outside the home, their husbands were not likely to increase the time they spent on domestic labour (for example, see Hartmann, 1981; Wilson, 1986; Hochschild and Machung, 1989). Thus, "women were bearing the burden of the double day of labour almost entirely by themselves" (Luxton, 1990: 39). Luxton concluded that the same can be said today; a woman's work day does not end when she arrives home. With women continuing to do the majority of the housework, the sexual

division of labour in the family, the root of women's oppression, is reinforced. Thus, women's primary role, based on the nuclear family model, of homemaker is maintained. When husbands do take on some of the domestic labour, they are more likely "to take on those tasks that are the most clearly defined, or sociable and pleasant ones, while leaving the more ill-defined or unpleasant ones to the women" (Luxton, 1990: 48).

Although in most families both parents are forced to work outside the home, there still are women who remain in the household, caring for children and doing housework. In 1981, 24% of the female population were homemakers (Statistics Canada, 1992). However, their work is valued less than the husband's work outside the home.

[M]ale, as opposed to female, activities are always recognised as predominantly important, and cultural systems give authority and value to the roles and activities of men (Rosaldo, 1974: 19, as cited in Imray and Middleton, 1983: 12)

[A]n activity when performed by men is always more highly valued than when performed by women....When men act it is defined by them as acting within the public sphere; when women act men define it as acting within the private sphere...the public sphere has access to a plethora of resources to deal with such eventualities which together constitute control of the private sphere and, moreover, uses such control to mark the boundaries between the two" (Imray and Middleton, 1983: 25-26).

The notion of "separate spheres" has contributed to women's oppression as it has subordinated women's interests to men's. This helps to explain why women receive the lower status occupations and less income than men when they do make entry into the public sphere. This also helps to explain the problems women face when they do not conform to the nuclear family model.

The divorce rate in Canada has been steadily increasing from 1921 to 1968. In 1968, Canadian divorce laws changed allowing a number of grounds for divorce. Prior to the changes adultery was the principal basis for divorce; after the changes, the divorce rate increased dramatically (Wilson, 1986: 21). The divorce rate increased from 39.1 of every 100,000 marriages in 1960, representing 6,980 divorces (Eichler, 1985: 386-387), to 1,205.6 of every 100,000 marriages in 1990 (Statistics Canada, 1992). "Not only has the rate of divorce increased rapidly but the differential in the economic impact of divorce on men and women has also grown" (Okin, 1989: 160).

"Single-parent, female-headed homes form the core of those families living in poverty in Canada" (Wilson, 1986: 22). In 1990, 38.5% of female-headed households were considered low-income earners (Statistics Canada, 1992). In 1976, one in four persons on welfare was a single mother (Wilson, 1986: 23). Many factors contribute to this situation. According to Okin (1989),

By attempting to treat men and women as equals at the end of marriage, current divorce law neglects not only the obvious fact that women are *not* the socioeconomic equals of men in our society, but also the highly relevant fact that the experience of gendered marriage and primary parenting greatly exacerbates the inequality that women already bring with them into marriage (Okin, 1989: 166).

After divorce, women are more likely than men to maintain custody of the children. Thus women's economic needs are more substantial and their participation in the labour force is more limited by the needs of their children (Okin, 1989: 162). Neither child support nor alimony have been the "financial salvation" for these

women (Lindsey, 1990: 155). This is even more so for separated and never-married women with children (Okin, 1989: 165). Also, as discussed previously, women in the labour force receive lower income than men, making it more difficult to pull themselves and their children out of poverty. Okin (1989) argues that the "asymmetric dependency of wives on husbands affects their potential for satisfactory exit, and thereby influences the effectiveness of their voice within the marriage" (Okin, 1989: 167). Thus, women's subordinate position in both the family and society is maintained.

Another reason why women are more likely than men to be financially unstable after the breakup of the marriage is that women are less likely to remarry, leaving them to rely on their own, often inadequate income. Okin (1989: 165) suggests that custody of children, which is almost always the responsibility of women, is a factor that discourages remarriage. In fact, according to Okin, in divorce judgements judges frequently consider the husband's economic needs and even that of his "hypothetical future family" before considering the needs of the wife and children (Okin, 1989: 164-166).

Thorne (1982) provides a good summary of women's subordination as a link to the nuclear family model:

Women's subordination is linked to The Family as a specific household arrangement *and* as an ideology. Within households that resemble The Family in composition, boundedness, and division of labor, women are excluded from gaining direct access to valued resources such as income, recognized and status-giving work, and political authority. They are economically dependent on their husbands; their unpaid work at home is generally burdensome and devalued; and the work of mothering is done in relative isolation, to the detriment of

both mother and child...In short, the ideology of The Family reinforces the economic exploitation of all women (Thorne, 1982: 4, emphasis in the original).

Familial ideology, which devalues women's work, is perpetuated by the state "through the education system, through the media, through regulations and social policies, through the very structure of its organizations, and through the law" (Armstrong and Armstrong, 1990: 125), and according to Gavigan (1988), the law is specifically problematic:

[I]f we look for manifest, explicit discrimination or differential treatment in law or in the courtroom, we will miss the subtle processes (which are less visible but even more important) by which legal doctrine, and judicial interpretation and decision-making reproduces and reinforces the subordination of women....The law, then, is a significant shaper and reinforcer of "the family." Indeed, despite the ideology of family privacy, the dominant family form is in large measure defined and created by law (Gavigan, 1988: 293-294).

Eaton (1986: 47) suggests that, in judicial decision-making, it is assumed that the family is the site of social control. According to Box (1983), "first, as the object of parental, mainly maternal control, and later as the instrument of that control, women find themselves more encapsulated within the nuclear family and consequently, less free to explore and cope with the tensions and temptations of the world beyond the family boundaries" (Box, 1983: 179).

If women do stray from the boundaries of the nuclear family they will be punished for transgressing gender role expectations. If women maintain their position in the nuclear family they will be treated with leniency as their role is deemed to be important in the maintenance of society. For example, in custody decisions, women are losing their children when they do not fit gender role expectations whereas the

ideology of motherhood may favour mothers if they conform to the traditional expectations of motherhood. If they do not, the belief that a father can parent equally as well as a mother may disadvantage her in the custody decision (Boyd, 1989: 125). This provides an incentive for women to maintain the traditional motherhood role as defined by the patriarchal nuclear family model. "The judiciary thus reproduces ideological constructions of gendered behaviour within and outside the home, thereby legitimating both capitalist and patriarchal relations in society" (Boyd and Sheehy, 1989: 259).

These "ideological constructions" are also reinforced in the sentencing of women. "[I]t is necessary to appreciate the effects of the different gender roles of men and women within the family, and the importance attached to these roles by those members of the court who influence sentencing" (Eaton, 1985: 119). Mary Eaton, who has done extensive research on how familial ideology comes into play when sentencing female offenders, observes (1987: 99) that judges based their decisions, at bail hearings, on the circumstances of the case and not on the sex of the defendant. However, "the language of the courtroom both reflects and reinforces the prevailing picture of the social order" (Eaton, 1987: 100). Judges may not explicitly base their decisions on the sex of the defendant, but they incorporate ideas about appropriate gender role behaviour which are based on the nuclear family. Eaton argues that "sexism is manifest not in overt disparities in the treatment of men and women but through the subtle reinforcement of gender roles in the discourse and practice of courtroom practitioners" (Eaton, 1987: 95).

Whether or not a defendant is granted bail or custody hinges on the judge's choice between the formal controls of the prison system and the informal controls of the family. The assumption is that control in the family is more appropriate than control in the prison "...because families are expected to police themselves--that is, to be responsible for the social control of the members, especially the structurally subordinate members, like women and children" (Eaton, 1987: 104).

The language and assumptions used in bail hearings are also used in sentencing decisions. Criminal justice personnel reinforce a dominant family form. In an even more detailed examination of familial ideology, Eaton (1986) provides an analysis of the way in which gender differences are reinforced by summary justice in a magistrates' court. This analysis includes an examination of pleas of mitigation given by lawyers, social inquiry reports prepared by probation officers (which would be equivalent to presentence reports in Canada), and interviews with magistrates.

Eaton found that family circumstances, rather than the sex of the defendant, along with the type of offence committed and the previous record were important in determining the sentence. She argues that we must be alert to the ideology which underlies the perceptions and interpretations, and is manifested in the language, of court personnel. "The language of the courtroom both reflects and reinforces the prevailing picture of the social order. implicit in these pleas is a model of...the family, in which behaviour is measured by a commonly held value system" (Eaton, 1986: 43). Eaton (1986: 45-55) identifies six assumptions about family circumstances utilized in judicial decision-making: (1) the family is the site of social

responsibility, (2) the family is the site of social control, (3) the family is a privileged institution, (4) employment is recognized as a means of providing for the family, (5) the family is an enduring unit, and (6) the basic family unit is a man and a woman. This model of the patriarchal family is reinforced by the lawyers, the probations officers, and the magistrates. "By supporting the dominant model of the family the court is contributing to the cultural reproduction of society and, thereby, to the continued subordination of women" (Eaton, 1986: 97).

The following chapter outlines a research question and methodology for examining the impact of gender and familial ideology on decision-making in Greater Vancouver courts.

CHAPTER IV

METHODOLOGY AND DATA COLLECTION

Research Question

From the existing literature on the sentencing of individuals, it can be argued that women and men have received differential treatment. But does this variation *between* men and women actually exist in practice? As Eaton (1985, 1986, 1987) has argued it is not the sex of the defendant but ideas about appropriate gender role behaviour which are based on the patriarchal nuclear family which influence a judge's decision on sentencing. Also, Daly (1987a, 1987b, 1989a, 1989b) found that regardless of sex, familial defendants were more likely than non-familial defendants to receive lenient treatment. Thus, it would appear that there is not as much of a difference *between* the sentences of men and women as the difference *among* the two sexes. In other words, it is differences *among* women or differences *among* men that determine the type of sentence they will receive. Some women will receive more lenient treatment than other women and some men will receive more lenient treatment than other men. Thus, in some instances women receive more lenient sentences than men and in other instances harsher sentences than men, accounting for the conflicting findings in the research. This study will focus on women to determine the differences, if any, *among* them that affect their sentences.

The following questions have been addressed in conducting this research: What is the impact of gender and familial ideology on decision-making of judges in the Greater Vancouver courts? Also, does the sentencing of women by judges reflect on and reinforce the status quo and, in particular, women's subordinate status?

Presentence Reports

This thesis examines how ideas about appropriate gender role behaviour which are based on the patriarchal nuclear family model affect the sentencing of women. Such an investigation is relevant due to the limited amount of research in this area from both a critical and feminist perspective. It is also necessary because of the lack of Canadian research on this topic.

Previous research has shown the importance of controlling for legal variables such as type of offence, prior conviction history, and number of charges. Some of these studies (for example, Daly, 1987a, 1987b, 1989a, 1989b; Eaton, 1985, 1986, 1987; Kruttschnitt, 1982a, 1982b) have shown the relevance of examining non-legal variables such as marital status, number of children, dependency on others, and occupational status. Information on these non-legal variables is difficult to obtain. After an exploratory examination of both police and crown files it was established that the best source of information would be presentence reports. Presentence reports are documents that may be requested by the courts to aid the judge in making a sentencing decision. These reports contain information on the

defendants' family, educational, and occupational background, and thus provide the researcher with the non-legal variables necessary for a fuller understanding of the sentencing of women. Therefore, this research includes an examination of presentence reports requested for women sentenced in Greater Vancouver courts.

After a preliminary examination of a few reports and consultation with a probation officer, it was established that most of the reports follow a particular format. Keeping in mind that some probation officers provide more details than others and information may not be available or applicable for some defendants, the standard categories in a presentence report are family history, education, employment/financial, drugs/alcohol, medical/psychiatric, criminal record, corrections history, attitude towards offence, and a victim impact statement. The probation officer then provides an evaluation section which consists of a summary of the report and a recommendation for sentencing (see Appendix B for a reproduction of the coding sheet utilized in collecting information from the presentence reports).

The category of family history is most important to this research. This section contains information on the defendant's marital status, residential history, and relationships with children, siblings, and parents (where applicable). This part of the presentence report is the main focus of the research. The balance of the information contained within the presentence report was used to control for intervening variables; for example, the criminal record. The recommendation for sentencing given by the probation officer was also noted as it is

believed that this is influential in judicial decision-making. For example, Eaton (1985) contends that

[P]robation officers focus on the family life of the client, and they endorse or deny the validity of the arrangements which they encounter....the practices of probation officers serve to disadvantage women by their endorsement of a model of family life which involves the oppression and exploitation of women (Eaton, 1985: 122).

During the collection of data, it was determined, from consultation with probation officers, that presentence reports are kept by probation offices only for those women who are currently serving a term of probation. The remaining reports, including those for women who received a fine or a custodial sentence and women who are no longer on probation, are kept in a central depository at Vancouver Court Probation. Thus, 104 of the presentence reports that were examined were collected from this agency.

A large majority of presentence reports do not contain the outcome of the defendant's sentencing hearing. Thus, the sentence had to be obtained from court dockets. The file number on a presentence report corresponds with the file number on the court docket or on a court file, and thus this information was easily accessible.

The central depository maintains an alphabetical filing system, and not every file contains a presentence report. Thus, it was impossible to obtain a list of women for whom presentence reports were completed. Therefore, the sample of 104 women was chosen from an estimated 10,000 files located at Vancouver Court Probation by eliminating files for men and files for women for which no presentence report was written. These presentence reports cover

1980 to the present. A formal random sample would have been difficult to obtain for a couple of reasons. First, women commit approximately 15% of all crime, and thus, most likely, no more than 15% of the files at Vancouver Probation would be on women. Second, this 15% would decrease as presentence reports are not written for all female offenders. Thus, it would have been difficult to determine the population from which to draw a sample. Also, the purpose of this research is not to generalize to a larger population, but to make statements about a particular sample of women. The remaining 6 of the 110 reports were obtained from the Probation Office in New Westminster, constituting all the presentence reports on women written in 1991 in that jurisdiction.

A statistical analysis of the presentence reports was completed to determine what variables affect sentencing. First, there was an examination of legal variables, such as type of offence, the defendant's plea, whether the defendant has a prior criminal record, and the number of previous convictions. It is believed that these variables would be important in sentencing for all individuals, regardless of gender or racial designation. Second, emphasis was placed on non-legal variables, such as racial designation, marital status, number of children, and whether the defendant's children are in the care of others, to determine the impact of familial ideology on decision-making in the criminal justice system. Also, a content analysis was completed to determine if the written arguments of probation officers reflect and reinforce the prevailing social order.

An analysis of presentence reports has at least one limitation: it is difficult to determine if the information contained in the reports

was used by the judges in passing sentences. For example, judges may not *state* the reasons for a particular sentence or they may focus on factors not found in the reports, such as the demeanour of the defendant during her trial.

Interviews

To partially compensate for limitations of presentence reports, a number of interviews were conducted with judges. Emphasis was placed on factors judges take into account in sentencing and whether these factors vary among judges or from one case to another. This enabled the researcher to focus on how ideas of appropriate gender behaviour based on the patriarchal family are reflected in judicial decision-making.

Thirty Vancouver Supreme Court Justices were notified by letter of the research and then later contacted, by telephone, to learn of their willingness to participate in an interview. The Chief Justice of the Supreme Court replied on behalf of a majority of the judges, stating that judges base their sentencing decisions on unbiased calculations of all the facts involved in the case, and thus it would be useless to interview them. Regardless, three Supreme Court Justices were still willing to be interviewed (see Appendix C for correspondence with judges).

In order to increase the number of judges, it was decided to contact all twenty-one Vancouver Provincial Court judges. First, to avoid what happened with the Supreme Court, the Chief Judge of the

Provincial Court was notified of the researcher's intentions. Upon his agreement, the Provincial Court judges were contacted, of whom six agreed to be interviewed for a total of nine judges and justices, of whom one judge was female.

The interview questions (see Appendix D) were derived from a similar study completed by Kathleen Daly (1989a). Duplicating her research is beneficial for two reasons. First, it enables comparisons to be drawn between specific jurisdictions in Canada and the United States. Second, it allows for the potential of a stronger conclusion to be made concerning the impact of gender and familial ideology on judicial decision-making.

Daly's interviews focused on three types of questions. First, the judges were asked, "What specifically do you want to know about the defendant in sentencing?" The judges were then asked "what their considerations were for women defendants." Finally, they were asked to react to the following hypothetical case (adjustments were made so that it would be applicable in Canada):

A defendant is appearing before the court with a [theft over \$1000] charge, and the defendant is found guilty. The record shows two prior convictions, one for selling marijuana and the other for a [theft]. This latest [theft over \$1000] represents a violation of probation. How would you sentence if the defendant was...

a woman with two young children?

a woman who was single and living alone?

a man with a job who was supporting his wife and child?

a man who was single and living alone?

It is suggested that defendants who provide economic support for others are perceived as deserving more lenient treatment than those who are not providing economic support to others. Thus, two more categories were added to Daly's hypothetical case to include those individuals who are unable to provide economic support themselves, but need assistance from the government. Also, two other categories were incorporated to account for single-parent households. This aided in determining if marital status had an effect on sentencing. The four new categories are:

an unmarried woman caring for two young children

an unmarried woman, on social assistance, caring for two young children

a married man, on social assistance, supporting his wife and child

an unmarried man caring for two children

In 1975, Simon made the following statement about judges' attitudes toward sentencing women

Judges treat female defendants more kindly or protectively than they do male defendants because the female defendants remind them of their daughters, or their wives, or sisters - women close to them. Or, just in general, judges find it hard to be as tough on a woman as a man. Or, because most of the women defendants have young children, sending them to prison places too much of a burden on the rest of society (Simon, 1975: 49).

Daly asked the judges if this statement applied to them. However, in order to "see if judges would accept the idea that they protected women independently of women's familial situations" (Daly, 1989a: 14), she modified the statement to exclude the following: "Or, because most of the women defendants have young children, and

sending them to prison places too much of a burden on the rest of society." The Vancouver judges were given the statement twice. The first time it was the same as in Daly's interviews. In the second instance, Simon's original statement was given to the judges. Not only does this test Daly's hypothesis, but allows for the determination of the full effect of family on judicial decision-making.

In the appendix of Daly's article, there is a list of common responses the judges gave to her questions. In this research, the responses Daly received were formulated into questions to allow for the reinforcement of the findings. In the present study, one other question was added to this list: "Are you familiar with the limitations of women's programs in prisons? If so, does this affect your decision?" This question was added because the type or lack of programs available in women's prisons³ may affect a judge's decision to impose a custodial sentence on women.

³In Canada, the most comprehensive exposition of programming limitations faced by incarcerated women was produced by a task force, appointed by Ole Ingstrup, Commissioner of Correctional Services of Canada, in 1990. This document, Creating Choices, details the ways by which women are differentially treated in the criminal justice system, and specifically discriminated against by budgetary restrictions. Women's prisons "...generally do not offer significant programming geared to long-term offenders or the special needs of federally sentenced women" (Golligher, 1990: 7; also see Adelberg and Currie, 1987).

CHAPTER V

RESULTS AND ANALYSIS

Presentence Reports--Statistical Analysis

Table 1 is a summary of the characteristics of the defendants taken from the presentence reports. The violent offences include common assault, aggravated assault, assault with a weapon, assaulting a peace officer, assault causing bodily harm, robbery, and the potentially harmful crime of impaired driving. The property offences include theft, possession of stolen property, fraud, forgery, willful damage, welfare fraud, false pretences, break and enter, and mischief to property. The most common offences committed were theft, fraud, or forgery with 60.0% (n=66). The drug offences include possession of a narcotic, trafficking in narcotics, possession of a narcotic for the purpose of trafficking, and one charge of conspiring to import a narcotic. Finally, the other offences consist of uttering threats, soliciting, and mischief.

Under racial designation, the other category includes one Italian, one Hispanic, and three Chinese. This is an example of how some information contained in the presentence reports may not be available for all the defendants. In 48.2% (n=53) of the cases, the racial designation was not included in the presentence report.

For the category "are children in someone else's care?", types of care include living with the father, grandparents, or other relatives,

living on their own,⁴ living with adoptive parents, or voluntarily given to or apprehended by Social Services. A significant number of women (30.0% of all women, or 51.2% of women who have children) have their children in the care of others. For example, one woman, at the time of her offence, had two sons; one lived on his own, working as a cook, and the other lived in a school for the mentally disabled. Another woman had four children resulting from three separate common-law relationships. At the time of her offence, two were in the care of Social Services and two were living with their grandmother. Finally, there was another woman with four children. The first two were the result of sexual abuse, the first by a stranger and the second by her brother. The other two children were the result of a common-law relationship, but, because both parents were alcoholics and known to abuse drugs, the children were apprehended by the state.

The types of sentences were combined to have the following two categories: non-custodial and custodial. This enabled the researcher to avoid making misleading conclusions due to small numbers in the analysis. Also, as will be seen in the examination of the interviews, judges tend to place more emphasis on non-legal variables when the sentencing decision is a question of sending the defendant to jail or not sending the defendant to jail.

⁴It should be noted that only three of the women had children who were living on their own. According to the analysis later in the paper, these women will not be viewed as "bad" mothers as they have fulfilled their parenting roles. However, on deciding whether to jail these mothers, judges will not have to consider the social costs to the children, as these women are no longer the primary caregivers.

Table 1. Variables and Their Frequencies for 110 Women.

Variable	Frequency	Percentage
Type of Offence:		
Violent	17	15.5%
Property	73	66.4%
Drug	16	14.5%
Other	4	3.6%
Age:		
17-20 years	25	22.7%
21-25 years	27	24.5%
26-30 years	24	21.8%
31-35 years	7	6.4%
36-40 years	13	11.8%
over 40 years	14	12.4%
Marital Status:		
Single	54	49.1%
Married	11	10.0%
Separated/Divorced	26	23.6%
Common-Law	16	14.5%
Widowed	3	2.7%

Table 1. Variables and Their Frequencies for 110 Women, continued.

Variable	Frequency	Percentage
Education:		
Under grade 6	3	2.7%
Grades 6 to 10	57	51.8%
Grades 11 and 12	31	28.2%
Some university	15	13.6%
University degree	4	3.6%
Racial Designation:		
Caucasian	35	31.8%
Native Indian	17	15.5%
Other	5	4.5%
Unknown	53	48.2%
Children:		
No children	46	41.8%
1 child	29	26.4%
2 children	21	19.1%
3 children	9	8.2%
4 children	4	3.6%
7 children	1	0.9%
Employed:		
Yes	32	29.1%
No	78	70.9%

Table 1. Variables and Their Frequencies for 110 Women, continued.

Variable	Frequency	Percentage
On social assistance:		
Yes	64	58.2%
No	46	41.8%
Involved with Drugs:		
Yes	39	35.5%
No	71	64.5%
Alcohol involved:		
Yes	28	25.5%
No	82	74.5%
Previous Record:		
Yes	79	71.8%
No	31	28.2%
Previous convictions:		
None	31	28.2%
One to five	53	48.2%
Over five	26	23.6%
Plea:		
Guilty	54	49.1%
Not guilty	21	19.1%
Unknown	35	31.8%
Are children in care:		
Yes	33	30.0%
No	31	28.2%
Not applicable	46	41.8%

Table 1. Variables and Their Frequencies for 110 Women, continued.

Variable	Frequency	Percentage
Sentence		
Non-custodial	79	71.8%
Custodial	31	28.2%

Table 2. Type of Sentence by Type of Offence for 110 Women.

Sentence	Violent Offences	Property Offences	Drug Offences	Other Offences
Non- Custodial	58.8% (10)	75.3% (55)	62.5% (10)	100% (4)
Custodial	41.2% (7)	24.7% (18)	37.5% (6)	0% (0)
TOTAL	100% (17)	100% (73)	100% (16)	100% (4)

Table 2 shows the type of sentence received by the 110 women in the sample according to the type of offence committed. The other offences were excluded from the analysis as interpreting small numbers can be misleading. There appears to be a relationship between type of offence⁵ and type of sentence. Women who committed violent offences (41.2%) were more likely to receive a custodial sentence than women who committed property offences

⁵There was a lack of variation among the types of crimes women committed. Of the 110 women in the sample, 73 (66.4%) committed property offences.

(24.7%) and women who committed drug offences (37.5%). The percentage difference is more significant between violent and property offences (a difference of 16.5%) than between violent and drug offences (a difference of 3.7%).

Table 3 compares the severity of sentence with the previous record of the women defendants. There appears to be a slight relationship between the two variables. Women with a previous record (30.4%) were more likely to receive a custodial sentence than women without a previous criminal record (22.6%), but this difference is small. This could be due to several reasons. First, the effect of a defendant's prior record may depend on how many previous convictions there are. Second, how recent these convictions are may influence the sentencing decision. Third, whether the previous convictions are related to the current conviction may affect the judge's decision.

Table 3. Type of Sentence by Previous Record for 110 Women.

Sentence	Has No Prior Record	Has a Prior Record
Non-custodial	77.4% (24)	69.6% (55)
Custodial	22.6% (7)	30.4% (24)
TOTAL	100% (31)	100% (79)

Table 4. Type of Sentence by Number of Previous Convictions for 110 Women

Sentence	No convictions	1-5 convictions	6 or more convictions
Non-custodial	77.4% (24)	77.4% (41)	53.8% (14)
Custodial	22.6% (7)	22.6% (12)	46.2% (12)
TOTAL	100% (31)	100% (53)	100% (26)

Table 4 shows that women with six or more prior convictions (46.2%) were more likely to receive a jail sentence than defendants with lower than six convictions (22.6%). A fine or probation was more likely to be given to women with less than six previous convictions (77.4%) compared to women with more than six convictions (53.8%). Deterrence has been an assumed goal of sentencing for a long time. An individual with a lengthy criminal record may be viewed as not benefiting from the court's previous leniency and given a more substantial disposition.

Table 5 compares the defendant's plea with the type of sentence imposed. Unfortunately, the defendant's plea was only available for 68.2% (n=75) of the women. If a woman pleaded not guilty, she was more likely to receive a custodial sentence (52.4%) than a woman who pleaded guilty (22.2%). Due to the amount of cases waiting to be heard in the courts, a judge may welcome a guilty plea that would

decrease the number of trials to be heard, and thus look upon this positively when handing down a sentence.

Table 5. Type of Sentence by Defendant's Plea for 75 Women.

Sentence	Not guilty	Guilty
Non-custodial	47.6% (10)	77.8% (42)
Custodial	52.4% (11)	22.2% (12)
TOTAL	100% (21)	100% (54)

Table 6. Type of Sentence by Racial Designation for 57 Women.

Sentence	Caucasian	Native	Other
Non-custodial	74.3% (26)	58.8% (10)	100% (5)
Custodial	25.7% (9)	41.2% (7)	0% (0)
TOTAL	100% (35)	100% (17)	100% (5)

Table 6 shows the relationship between racial designation and severity of sentence. The other category was excluded from the analysis due to the small numbers in this column. Unfortunately, the

racial designation of the woman was only included on 57 (51.8%) of the presentence reports. It was found that racial designation was more likely to be omitted in the most recent reports, implying that it was a conscious decision to exclude it. However, the exclusion of racial designation from the presentence report does not change anything as the defendant still has to stand up in court, revealing her designated race.

There appears to be a correlation between severity of sentence and racial designation. The table does show that Native women (41.2%) were more likely to receive a custodial sentence than white women (25.7%). White women (74.3%) were more likely to receive a fine or probation than Native women (58.8%). This corresponds with the finding that "in British Columbia, self-identified Native women comprise twenty per cent of all women incarcerated, but Native people comprise only about five per cent of the total British Columbia population" (LaPrairie, 1987: 103).

Table 7 compares severity of the sentence with marital status. Since interpretations of small numbers may be misleading, widowed women were not included in this analysis. It appears, according to Table 7, that women who are divorced or separated (42.3%) are more likely to be sent to prison than women who are married or involved in a common-law relationship (22.2%) and single women (25.9%). Single women (74.1%) and married women or women involved in a common-law relationship (77.8%) were more likely than separated or divorced women (57.7%) to receive a fine or probation.

Table 7. Type of Sentence by Marital Status for 110 Women.

Sentence	Single	Married/ Common- Law	Separated/ Divorced	Widowed
Non- custodial	74.1% (40)	77.8% (21)	57.7% (15)	100% (3)
Custodial	25.9% (14)	22.2% (6)	42.3% (11)	0% (0)
TOTAL	100% (54)	100% (27)	100% (26)	100% (3)

This appears to fit the idea that the nuclear family is reinforced by the courts. Women who have departed from the nuclear family model (i.e., separated or divorced) are more likely to receive a term of imprisonment. On the other hand, married women (women who fit the nuclear family model), women involved in a common-law relationship (women close to fitting the nuclear family model), and single women are less likely to receive a term or imprisonment. Some would argue that single women do not fit the nuclear family model either. However, it is argued here that, depending on her age, a single woman may be viewed as having the potential to fit the nuclear family model.⁶

"[A]s the object of parental...control, women find themselves more encapsulated within the nuclear family..." (Box, 1983: 179). Eaton (1986: 47) suggests that one assumption about family

⁶In this sample, 49.1% of the single women were between the ages of 17 and 22 years.

circumstances utilized in judicial decision-making is that the family is the site of social control. Kruttschnitt (1982a, 1982b) argues that women have more informal (family) social control in their day-to-day lives than men; and thus, women are more likely to be subjected to a lower degree of formal (state) control. Thus, if a woman, in a judge's eyes, appears to have the potential to change her criminal tendencies and restructure her life around the nuclear family model, she may receive a lighter sentence. If her existing family situation (i.e., parental control) is supportive to her rehabilitation, she will be more likely to be viewed as having the potential for change. This could explain why single women were more likely to receive a non-custodial sentence (74.1%) than a term of imprisonment (25.9%).

Table 8 compares the number of children with severity of the disposition. It appears that women with two or more children (34.3%) were more likely to receive a sentence of imprisonment than women with only one child (24.1%) or women with no children (26.1%). This is interpreted to mean that the more children the defendant had, the more likely she was to receive a harsher disposition. Before making a definite conclusion about the effect children have on the sentencing decision, whether these children are in the care of others must be taken into account. If women are not taking care of their children themselves, they most definitely will not be seen as fitting the nuclear family model.

Table 8. Type of Sentence by Number of Children for 110 Women.

Sentence	No Children	One Child	Two or more Children
Non-custodial	73.9% (34)	75.9% (22)	65.7% (23)
Custodial	26.1% (12)	24.1% (7)	34.3% (12)
TOTAL	100% (46)	100% (29)	100% (35)

Table 9 compares the severity of the disposition with the type of care the defendant's children were in at the time her presentence report was written. The table shows that women who have their children in the care of someone else (42.4%) are more likely to receive a term of imprisonment than women taking care of their own children (16.1%) or women without children (26.1%). Women taking care of their own children (83.9%) were most likely to receive a non-custodial sentence. The implication is that these women are needed in the home to take care of the children whereas women with no children and women who have children in someone else's care do not have these family ties. However, women who have children in someone else's care were more likely to receive a custodial sentence than women with no children. It appears that women who are not taking care of their own children are looked upon more negatively when sentencing than women taking care of their children or women without children.

Table 9. Type of Sentence by Type of Childcare for 110 Women.

Sentence	No Children	Children in the Defendant's Care	Children in Someone else's Care
Non-custodial	73.9% (34)	83.9% (26)	57.6% (19)
Custodial	26.1% (12)	16.1% (5)	42.4% (14)
TOTAL	100% (46)	100% (31)	100% (33)

Children seem to be an important variable in sentencing women. It appears that judges do not want to jail women with children due to the social costs to the children and the economic costs to the state (most likely, the state would have to support the children of jailed mothers). However, if these children are in the care of others, judges will not have to worry about the social or economic costs of jailing mothers.

It should be noted that evidence shows that Native children are overrepresented within the child welfare system (Kline, 1989: 132; Monture, 1989: 3). In 1977, 20% of the total number of children in the state's care in Canada were Native children. In British Columbia, 39% of the children in care were Native children (Hepworth, 1980 as cited by Monture, 1989: 2). Johnston (1983) found that Native children were four and one-half times more likely than other Canadian children to be placed into the state's care (as cited by Kline, 1989:

132). The presentence reports examined in this study show that Native women (41.2%) were more likely than Caucasian women (28.6%) to have their children in the care of someone else. "The structure of First Nation's society is based on cooperation and consensus....In the case of child welfare, no parent is left believing he or she is a 'bad' parent. Nor is any child alienated from the family or community" (Monture, 1989: 6). In Native societies, mothers may choose to give the role of childcare to their extended family. These women may be presented in a negative manner because they do not conform to the probation officers' notions of "good" mothering.

It appears that racial designation may also indirectly influence the sentence imposed, as Native women were more likely to have their children in someone else's care and the type of childcare directly influences sentence severity. Any future research in the area of how children affect the sentencing of women must include an examination of the function of child welfare law in general.

In summary, from the examination of percentage differences, the most important variables, of the ones obtained from the presentence reports, that affect the sentencing decision appear to be the defendant's plea, the type of offence committed, the number of previous convictions, whether or not the defendant's children are in the care of someone else, the racial designation of the defendant, and marital status. If a woman's plea was not guilty, she was more likely to receive a jail term rather than a fine or probation. If a woman committed a violent offence, she was more likely to receive a custodial sentence. A woman was more likely to receive a custodial sentence if she had six or more previous convictions. Children also influenced a

woman's sentence but not directly; the effect of children hinged on whether her children were in the care of someone other than the defendant. If the woman's children were in the care of someone else, she was more likely to receive a custodial sentence than women who were taking care of their children themselves. The racial designation of the defendant both directly and indirectly influenced sentence severity. If a woman was Native, she was more likely to receive a custodial sentence. Also, it appears Native women were more likely to receive a custodial sentence as they were more likely to have their children in the care of someone else. Both single and married women were less likely to receive a term of imprisonment than separated or divorced women. It is suggested that this is because married women fit the nuclear family model and single women have the potential to fit this model if they have sufficient informal (family) social control to warrant not using formal (state) social control. Therefore, there is evidence that both gender and familial ideology is reflected and reinforced in the courts.

Table 10. Whether the Judge Followed the Recommendation Given By the Probation Officer for 110 Women.

Recommendation	Frequency	Percentage
Followed		
Yes	79	71.8%
No	26	23.6%
Unknown	5	4.5%
TOTAL	110	100%

Table 10 shows the frequency with which judges in the present study followed the recommendations of probation officers found in the presentence reports. There are 5 unknown cases as the probation officer did not give a recommendation. After providing an evaluation of the defendant, the probation officers usually suggested an appropriate sentence. In 71.8% (n=79) of the reports, the judge chose to follow the recommendation given by the probation officer.

Table 11. Type of Sentence by Recommendation of Probation Officer for 105 Women.

Sentence	Recommended Non-custodial Sentence	Recommended Custodial Sentence
Non-custodial	91.3% (63)	30.6% (11)
Custodial	8.7% (6)	69.4% (25)
TOTAL	100% (69)	100% (36)

Table 11 compares the type of the sentence with the recommendation of the probation officer. There appears to be a strong relationship between the two variables. If a probation officer recommended a non-custodial disposition, in 91.3% (n=63) of the cases, the judge imposed a non-custodial disposition. If the probation officer recommended a period of incarceration, in 69.4% (n=25) of the cases, the judge imposed a period of incarceration. This would suggest that probation officers are more punitive than judges which is

perhaps explained by the conservatism of subordinates vis-a-vis a higher authority. Overall, however, the recommendations of probation officers are very influential in judicial decision-making. Therefore, it is important to examine the written arguments utilized by probation officers in presentence reports. What follows is an analysis of the content of some of the categories within the presentence reports.

Presentence Reports--Content Analysis

The attitudes and assumptions of those involved in the social construction of justice are revealed through the language of the judicial process. In spoken argument and written document, members of the court employ a model of social normality at the centre of which is the family (Eaton, 1986: 89).

It is suggested here that the manner in which probation officers present defendants reflects and reinforces the nuclear family model, and thus contributes to women's continued subordination. In order to understand how the written arguments of probation officers reflect and reinforce the prevailing social order, a closer examination of the presentence reports was required. This was accomplished by a content analysis of the reports.

Type of Offence

Women were most likely to commit offences against property. Property offences constituted 65.5% (n=72) of all offences committed by the women. Of these offences, 60.0% (n=66) were convictions of theft, fraud, or forgery. The circumstances of the offence were rarely found in the presentence reports. However, probation officers tended to elaborate, in certain instances, on the offence type. For example, if the charge was theft (either under or over \$200 or \$1,000), the probation officer would most likely state if it was the result of shoplifting. One probation officer even went as far as to describe the items stolen: "...women's clothing, shoes, purses, and jewelry". The

reason for this may be that the probation officer felt it was important to distinguish between crimes of opportunity and crimes of necessity.

Fraud was also a common offence for the women in this sample. Here the probation officer would elaborate if the fraud was for a large sum of money, stating that it was a "serious breach of trust". S/he would also clarify if it was welfare fraud or fraud under the Unemployment Insurance Act. Welfare and unemployment insurance fraud appears to be looked upon more seriously than regular fraud. For example, one woman, with a previous conviction of fraud, committed a fraud in excess of \$6,313 and received two years probation and one hundred hours of community service work. Another woman, with a previous record of one theft conviction and one conviction of false pretences, committed welfare fraud and received three months incarceration.

Why a woman commits an offence, or why the probation officer believes she committed the offence, is important. If a woman is committing welfare fraud to feed her children, she may not be looked upon so negatively. The woman who received three months jail did not have any children. By contrast, a woman who was convicted of twenty-five counts of uttering a false statement under the Unemployment Insurance Act only received a fine of \$1,000. At the time of her offence, she was recently widowed and she had a twenty year old son for whom she was financing a college education. In the evaluation, the probation officer stated that she came from an "upper middle class background and her present offences appear to stem from her inability to adjust to reduced circumstances."

The second most common type of offences were violent in nature. Of the 18 (16.4%) women who committed violent offences, all but four were convicted of an assault charge. In two known cases, the assault was committed against the woman's partner. In the first case, Annette (the real names of the defendants have been changed) was convicted of assault causing bodily harm against her common-law husband. The probation officer stated that "the present offence has not deterred them from continuing their relationship." Pauline was convicted of an aggravated assault with a knife against her common-law husband. Although this offence is very violent and the defendant was remanded into custody until her sentencing hearing, she received a suspended sentence with three years probation and she was to undergo alcohol counselling. In the evaluation, the probation officer stated that the relationship between her and her husband was neither positive nor constructive. The officer also stated that the husband was upset with his common-law wife, but that he did not think she would do it again.

This supports two of Eaton's (1986) assumptions about family circumstances utilized in judicial decision-making. First, the assumption that the family is a privileged institution: "...there are areas where the state seems reluctant to interfere with the internal constraints and patterns of family" (Eaton, 1986: 49-50). In Pauline's case, it appears that the state does not want to interfere, that this situation can be worked out in the home. Second, the assumption that the family is an enduring unit:

Despite the increasing incidence of marital breakdown the family...is a unit characterised by resilience. Even when

the offence has violated the norms of family life there is still hope that all may be well, and that this will be achieved by the maintenance or re-establishment of a normal family life (Eaton, 1986: 50).

In this case, the probation officer describes Pauline's and her husband's relationship as neither positive nor constructive. Yet, the judge gave a sentence of probation rather than incarceration, hoping the problem could be worked out between them.

Attitude Towards the Offence

The category "attitude towards the offence" usually consisted of how the defendant felt about her past actions. Attitudes shown by defendants included accepting responsibility, and guilt, feelings of remorse, stating that the act was stupid, wrong, or an accident, and feelings of regret. Some women could not recall or remember much about the incident due to their involvement in drugs and/or alcohol. Additionally, the probation officer, in cases in which the offence involved money, stated whether the defendant was willing to reimburse or pay restitution to the victim.

This section also included reasons as to why the defendant committed the crime. Usually they were her reasons, but occasionally the presentence report contained what the probation officer thought were the reasons the defendant committed the offence. Some of the reasons the women gave were: fed up with life, angry with her family, and trying to get attention. One probation officer thought that a young woman's "offence occurred at a time when the subject was apparently experiencing significant conflicts within the family home."

It is in this section that probation officers are most likely to distinguish between crimes of opportunity and crimes of necessity. For example, in the evaluation, one probation officer stated that the defendant committed crimes of opportunity and should receive a term of incarceration followed by a period of probation. Crimes of opportunity are more likely to be looked upon negatively than crimes of necessity, as they are viewed as serving the interests of the offender rather than benefiting others. This would be especially true for females. According to women's gender role, they are expected to be caring and nurturing to others, and not concerned with their own welfare. Therefore, if a woman committed a crime of opportunity, she may be viewed as violating her defined gender role.

The cases of three women, Kimberly, Maria, and Nadine, best illustrate this point. All three women, at the time of their offences, had no previous convictions, and all of them pleaded guilty to their current one. Kimberly committed a fraud in excess of \$1,000. According to her, she needed to supplement her income, so she began to defraud her employer. In Kimberly's evaluation, the probation officer stated that the offence was a serious "breach of trust" and was a result of a "...desire for a lifestyle beyond her means...." Kimberly committed a crime of opportunity and as a result, she received six months in prison.

Both Maria and Nadine committed, or were believed to have committed, crimes of necessity. Maria was convicted of uttering a forged document. After the fact, she felt ashamed and stressed about what she had done. In the probation officer's evaluation, it was said

that Maria "must have done it for the baby." She was sentenced to twelve months of probation.

In a more ambivalent case, Nadine committed a fraud and a theft over \$1,000. At the time of her offences, Nadine's husband was unemployed as he was arthritic, and thus, she was the primary wage earner. Nadine rationalized her offence in terms of need: she had to maintain the family's lifestyle and the altered cheque (the fraud conviction) provided food for the family. However, the probation officer did not hold the same opinion, stating that "a period of custody would be appropriate." The judge disagreed with the probation officer's recommendation and sentenced Nadine to twelve months probation rather than sending her off to jail.

Thus, it appears that if women are committing crimes of necessity, such as altering a cheque in order to put food on the family's table, they are less likely to receive a severe sentence than if they commit crimes of opportunity, such as defrauding one's employer to benefit only one's self. The same can be said in the case of men, but it is suggested here that it would be more influential when sentencing women. Women's gender role emphasizes caring, nurturing, and taking care of others more so than men's gender role. If women commit crimes that are viewed as an extension of their gender role, they will probably be presented in a more positive manner than women who commit crimes that are not viewed as an extension of their gender role.

Employment/Financial Situation

Seventy point nine percent (n=78) of the women in this sample were unemployed at the time of their offence. Of the 110 women in the sample, 64 (58.2%) were on some form of social assistance, such as welfare or collecting unemployment insurance benefits. The high unemployment among these women could explain why such a large number have committed crimes of a monetary value, such as theft, fraud, and forgery. A woman's employment status and her ability to support herself was summed up in the probation officer's evaluation. Here are some comments, common to the presentence reports, made by probation officers:

"...she has made steps to seek employment."

"She is, at present, unemployed and is supported by benefits of Social Assistance."

"She has stated that they are destitute but she is not on social assistance."

"...she has now learned how to budget her money."

"She is employed and willing to pay a fine."

"...she can pay a fine."

"...restitution would not likely be met."

If women were believed to have good, solid goals they were more likely to get a positive report even if those goals were not centered on family life. For example, Joanne worked at an advertising agency, and her employer felt she was a trustworthy and conscientious employee with a "promising future." The probation officer recommended that Joanne receive "a disposition which will have a minimal detrimental

effect on the subject's future. Such a disposition could be conditional upon [Joanne] successfully completing a period of supervised probation." Joanne received a conditional discharge subject to her successful completion of six months probation and fifty hours of community service work.

The fact that women with good goals received positive reports was especially true for students. Patricia was taking a Registered Psychiatric Nursing-Advanced Diploma program and was an above average student when she committed her offence. The probation officer who wrote her presentence report suggested "...a disposition that would not have an adverse effect on any future goal." Patricia received a suspended sentence with one year probation. Michelle had already completed two years of college and one year of university when she was convicted of two counts of theft. The probation officer said she was a "good student" and that "incarceration would not serve any useful purpose," even though Michelle had a previous record that consisted of three convictions for theft. The judge sentenced Michelle to two years probation and two hundred hours of community service work.

Emphasis was also placed on the women's work in the home. It was usually presented in a positive manner. However, this depended on the quality of her work and her mothering (this will be discussed further in the section on family history). Some of the probation officers' comments were:

"...she remained at home to raise her family."

"She is holding a job and providing for her daughter."

"During her period of unemployment she has been a homemaker in the family home."

"Her responsibilities towards her children has come before seeking employment."

Three of these women received probation. The fourth, however, received three months in jail plus one year probation. She was convicted of a more serious offence, robbery. Although, "...she remained at home to raise her family," at the time of her offence all four children were living on their own. Her work as a mother was no longer needed.

Involvement With Drugs and Alcohol

At the time of their offences, 40 (36.4%) women were involved with non-prescribed, illegal drugs and 29 (26.4%) women were involved with alcohol to the extent of addiction. Sixteen (14.5%) women were involved with both alcohol and illegal drugs. Some of the women also had problems with prescription drugs:

"She was 'hooked on nerve pills' until relatively recently."

"She had a former problem with prescription drugs."

"She takes anti-depressants for her depression and suicidal tendencies."

Some women used being under the influence of alcohol or other drugs as an excuse for committing their offence.

"...using cocaine and not thinking in a clear state of mind."

"She was drunk...does not recall...total blank."

"...remembers nothing...consumed alcohol."

"She has been taking prescription drugs and feels they affect her 'thinking' and sometimes she is in a 'blackout' after using them...could not provide a rational explanation for her involvement and attributed same to the possible effects of prescription drugs or her mental state."

Emphasis was placed on family problems as a cause of alcohol or drug abuse. For example, a probation officer said that one woman's alcohol problem was "closely tied to marital problems." In another case, a woman was "recently heavily involved with pills...due to the stresses of her marriage breakup and the death of her father."

If women committed crimes in order to sustain their use of alcohol or drugs, it was presented negatively. For example, one woman was "shoplifting and selling items in order to buy heroin and alcohol." Another woman was "supporting her heroin habit by soliciting." These would be viewed as crimes of opportunity rather than crimes of necessity.

In most cases of alcohol or other drug abuse, the probation officer recommended counselling for their addictions as part of their sentence. If a woman had been attempting to overcome her problems herself it was presented positively. For example, one woman was "sincerely trying to overcome her drug and alcohol problems," and thus the probation officer recommended that she "should not be incarcerated at this time." On the other hand, if no effort was being made by the woman, it was reflected in the probation officer's evaluation. A comparison between two women provides a good example.

Melanie was convicted of fraud and had an extensive prior record which included convictions for theft, possession of a narcotic, and impaired driving. At the time of her offence, she was undertaking

a methadone maintenance program for her heroin addiction. In the evaluation, the probation officer suggested that "a non-intermittent sentence of incarceration would cause the subject some discomfort as she withdrew from methadone." Melanie was sentenced to six months probation.

Miriam was convicted of theft under \$1,000, and she also had a lengthy criminal record, although not as extensive as Melanie's. Her previous convictions included fraud, false pretences, and theft under \$200. At the time of her offence, Miriam had problems with alcohol, heroin, and amphetamines. She told the probation officer that she had been free of drugs and alcohol for one month. However, the probation officer must not have believed her, maybe because her only proof was her word, as it was recommended that "deterrence and treatment are both necessary in order to deal with her addictive and self-destructive behaviour." Miriam was sentenced to two years probation.

Family History

The family background of the defendant constituted a large part of the presentence report confirming Eaton (1986: 45-47) who argues that the family is assumed to be the site of social responsibility and social control. These assumptions are based on the patriarchal nuclear family model. If the defendant's family was believed to be "dysfunctional" or not "normal" in any way, it was stressed in the report.

The presentence reports included a discussion of the defendant's childhood and the past and current situation of her parents, regardless of her age or the length of time she has been living away from her parents. Most of the women in this sample appear to come from "dysfunctional" families. A number of women were sexually and/or physically abused by parents, brothers, strangers, and/or other relatives. Some women ran away from home at an earlier age, whereas others were put up for adoption or voluntarily given to or apprehended by Social Services. For example, Tamara was one of thirteen children apprehended from her mother by the state. Some women had alcoholic parents or parents who were no longer married. Some women had fathers who abused their mothers. Overall, most of these women did not have "happy" childhoods. Some comments include:

"...cut off from parents when she married 16-year old father of her child."

"...abusive and dysfunctional family background."

"...no close relationships with siblings."

"...infrequent contact with mother."

Although most of the women appeared to come from "dysfunctional" families, most probation officers contradicted themselves by concluding their discussion with a statement presenting the women's lives in a positive manner. For example, some comments include:

"...happy and pretty average family life."

"...close relationships with all family members."

"...her parents provided her with a good home."

"She maintains a close, positive relationship with her parents."

"...close relationship with parents and siblings."

"...good home with good relationships."

Although childhood experiences and the situation of parents was discussed for all the women, particular emphasis on this factor applied to women who were still living at home or had recently moved out of their parents' home. If women are believed to have enough informal (family) social control in their day-to-day lives, they are less likely to be subjected to formal (state) social control (Kruttschnitt, 1982a, 1982b). The following are examples of how social control is manifest in the presentence reports compiled by probation officers.

Linda was convicted of her first offence, theft under \$200 when she was twenty years old. She had a "good relationship with both parents and [was] close to her siblings." At the time of her offence, she was engaged to be married. "He [was] aware of the offence and [was] most supportive of [Linda]." Linda's probation officer recommended that she was a suitable candidate for community supervision. Linda received a conditional discharge subject to her completion of six months probation.

Joanne, who, according to the probation officer, had good, solid goals (see the section on employment/financial situation), was also convicted of her first offence, theft under \$1,000. The probation officer stated that the "...offence occurred at a time when the subject was apparently experiencing significant conflicts within the family home." This implies that when Joanne was sentenced (or when the presentence report was completed) these conflicts no longer existed.

Like Linda, Joanne received a conditional discharge subject to the completion of six months probation. She also received fifty hours of community service work.

Kelley was convicted of break and enter and theft to which she pleaded not guilty. At the time of her offence, she had a previous record of fraud and theft under \$200. Kelley was living with her parents and the probation officer said this about her home life: "The parents feel helpless in controlling or influencing [Kelley], *yet will endeavour* to provide a home and guidance" (emphasis added). Although, Kelley committed a serious offence, she received two years probation with one hundred hours of community service work.

At age 18, Tanya was convicted of her first offence, trafficking in narcotics (another serious offence). The probation officer stated in the evaluation that "[Tanya] is assessed as being only peripherally involved in criminal activity; her naive and credulous attitudes are incompatible with much experience in this area and she expresses surprise and anger at her own stupidity." The probation officer recommended "...supervision within the community." Tanya was sentenced to two years probation. The evaluation made by the probation officer corresponds with what Allen (1987) has found.

Allen (1987) examined the depiction of female offenders and their offences in court reports by psychiatrists and probation officers. She argues that these court reports have rendered the female offender harmless by neutralizing her guilt, responsibility, and dangerousness. The crime is also naturalized, rendering it as a "mere event in nature" (Allen, 1987: 85). Thus, this process, along with informal social

control within the family, allows for female offenders to receive less punitive sanctions.

Lisa was convicted of theft over \$200 and had an extensive criminal record including convictions for break and enter, theft, assault, robbery, and impaired driving. As a child, Lisa was the victim of "violence and sexual abuse." "Of the subject's 23 siblings, only 6 were still living at the time the report was written. The others died from accidental deaths or committed suicide." When she was 15, she had a child whom she put up for adoption. Lisa was sentenced to ninety days jail to be served intermittently. She also received 18 months probation. The severity of Lisa's sentence may be partly due to the lack of family support (or informal social control).

Carmen was convicted of assault with a weapon and also had a lengthy previous record, although not as extensive as Lisa's, consisting of break and enter, theft, forgery, willful damage, and false pretences. Prior to her offence, Carmen had been involved in a four and a half year common-law relationship. In the evaluation, the probation officer stated that Carmen came from a "dysfunctional family" and there was "...little hope of [her] successfully completing any form of probation or payment of fines." Carmen was sentenced to three months in prison.

Marital Status

A woman's marital status also appears to influence her sentence. If a woman is married or involved in a serious relationship, she may appear to have more informal social control than if she was separated, divorced, or single, and thus less likely to be in need of formal social control. However, as stated previously, a single woman may receive

more lenient treatment if she has the potential to fit the nuclear family model or if she has enough informal social control within her parents' home. The examples above, along with the following three, illustrate this.

Sonya was convicted of possession of a narcotic. She had a previous conviction of truancy when she was considered a young offender. The probation officer believed that her actions were "products of immaturity," implying that they were isolated incidents. It was recommended that Sonya be sentenced to a fine or community service work as she "[did] not require supervision." Sonya was sentenced to a fine of \$500.

Jessica had a previous record, consisting of theft under \$200, forgery, and breach of probation, when she was convicted of theft under \$200. In the evaluation, the probation officer stated that she had an "unstable home life" and that she was "rebellious against authority." However, she has since "[matured] to some extent" and is "setting goals." In other words, Jessica was believed to have the potential for change. She was sentenced to a fine of \$50.

Mary was convicted of two counts of theft under \$1,000. These were her first two convictions. In the evaluation, the probation officer stated: "I do not know whether she has any reason to change her style of living at this point in her life." As a result, Mary received sixty days in jail to be served intermittently.

When discussing marital status, probation officers focused on both the women's past and present situations. For example,

"She has had as many as 15 common-law relationships."

"...a number of marital and common-law relationships...ended due to her drug use and involvement in prostitution."

"...on and off common-law relationships."

The quality of the relationship was not as important as the mere existence of one. The previous examples of Annette and Pauline (see the section on type of offence) illustrate this point. Both these women assaulted their common-law husbands, yet the couples were left to work it out in the home without intervention. This supports Eaton's (1986) argument that the family is believed to be both a privileged institution and an enduring unit.

The case of Nicole provides further illustration of this point. She was convicted of five counts of false pretences and had no prior criminal record. Nicole's husband had an alcohol problem and he was known to physically abuse her. At the time of her offence, Nicole was "...undecided about continuing the relationship." Although she had no history of psychiatric problems, the probation officer recommended that Nicole undergo psychiatric counselling, perhaps to resolve her marital problems (even though she was apparently not the cause of the problems).

The following four examples elaborate on how marital status influences the sentencing of women. Wendy pleaded guilty to and was convicted of assault causing bodily harm. She had previous convictions for theft under \$200, possession of stolen property, and uttering a forged document. At the time of her offence, she was involved in a common-law relationship, and he was physically abusive to her. However, they have "...future marriage plans and they would like to have children." The probation officer recommended the "...minimum

allowable jail sentence with a period of supervised probation..." Wendy received one day in jail, which is considered time served in court, one year of probation, and one hundred hours of community service work.

Melissa's offence was theft over \$1,000 which also constituted a breach of probation. She had a criminal record that consisted of false pretences, fraud over \$1,000, uttering a forged document, and unemployment insurance fraud. Melissa was involved in a common-law relationship for two years when she was 18. Seven years later she was involved in another relationship that only lasted a short time. She has not been involved in a relationship since then. Melissa may appear to lack the potential to fit the nuclear family model because of her age (30) and "her inability" to establish a lasting relationship. She was sentenced to six months in prison and three years probation. Two more examples illustrate this point.

Martha was found guilty of assault causing bodily harm, her first conviction. At the time of her offence, Martha and her husband were divorced. She stated that they "...weren't suitable together." In the evaluation, the probation officer stated that "she has wed and divorced and at present is unemployed and is supported by benefits of Social Assistance." Martha was sentenced to sixty days jail to be served intermittently.

Susan was convicted of theft over \$1,000, and her report indicated that she had been on probation before. She was divorced at the time of her offence. Her marriage had lasted for only one year. Following their separation, Susan was involved in a physically abusive common-law relationship for two years. Although Susan had two

daughters, she was sentence to twenty-one days of jail and one year of probation.

Children

As was shown in the statistical analysis, children play an important role in the sentencing of women. Women are more likely to be the primary caregivers of children, and thus judges may not want to jail mothers due to the costs to the children. For example, Nora, at the time of her offence, was "...housebound with two small children." In the evaluation, the probation officer suggested that "the Court may wish to consider some leniency in this case..." Victoria was pregnant at the time her presentence report was completed. The probation officer contended that because she was pregnant, there was "...more reason for her to be law-abiding."

Thus, being a mother is an important factor in the probation officers' evaluations. However, the quality of mothering influences the importance placed on being a mother. In other words, probation officers emphasize whether, according to their definitions, the defendant is a good or bad mother, in their eyes. Here are some examples of probation officers' comments:

"...a devoted mother..."

"The subject has provided concerned and adequate mothering..."

"...neglect of her children..."

"...well looked after and a happy healthy child..."

"As a result of alcohol and drug abuse and severe, disturbed behaviour, subject was not a fit parent."

"Friends and [her husband] describe [Rachel] as a loving, caring, and good mother to the child and that the couple are providing a stable home atmosphere for the boy."

"She is described as a caring and capable parent."

"He described [Maria] as a loving person and a very good mother."

One woman had a whole section (over one page in length) in her report devoted to "subject's ability to care for her child." Tara's five year old daughter was, at one time, a ward of the state. At the time the report was written, she was living in a foster home. The probation officer concluded that Tara had "arranged proper care for her daughter."

Type of Childcare

As was shown in the statistical analysis, whether the children were in the care of others also influences the probation officers' evaluations. If the defendant's children are in the care of others, whether it is the father, other relatives, foster care, or the state's care, there is no need to worry about the social or economic costs of jailing mothers. Since women are believed to be the primary caregivers there is a concern that children may suffer emotionally if they are separated upon her being sent to jail. Also, there is some consideration as to who will take care of the children. If she is not a "good" mother or if someone else is looking after her children there is no need to worry about what will happen to the children if she is sent to jail.

For example, Amanda, a Caucasian woman, was convicted of a serious crime, conspiracy to import heroin. At the time her report

was written, she had one child in the custody of the father and two children in her own custody. The probation officer stated that "...arrangements have been made for the care of the children," implying that the judge would not have to worry about the effects of sending the mother to jail on the children as they would be taken care of. Amanda received two years less one day prison and two years probation.

The following examples further illustrate the effect of children and whether these children are in the care of others on the sentencing of women. Connie, a Native woman, was convicted of theft under \$200 and had previous convictions for impaired driving and hit and run. She was a widow with three sons (11, 15, and 17 years). The probation officer said that there was "...no reason to dispose of the matter in any exceptional way." Connie was sentenced to three months probation.

Madeline, a Caucasian woman, pleaded guilty to and was convicted of impaired driving. She had a lengthy criminal record including a previous conviction for impaired driving. She had a two and a half year old child. The probation officer stated that she was "...holding a job and providing for her daughter." Madeline received one year probation.

Gail, an Italian woman, was found guilty of theft under \$1,000. Her previous record consisted of eight theft under \$1,000 convictions and the report stated that she "...has not benefitted from the Elizabeth Fry Shoplifting Program." At the time of her offence, Gail was a housewife with three children. Although, she had not learned from

her past experiences, the probation officer recommended a fine. Gail received a fine of \$600.

Margaret, a Caucasian woman, was convicted of two counts of false pretences. She had a previous record consisting of theft under \$200 and fraud. Her seventeen year old child was in the custody of the father. Margaret was given sixty days jail on the first count of false pretences and fourteen days jail and two years probation on the second count.

Tamara was convicted of willful damage and had prior convictions for serious offences, such as armed robbery and three counts of arson. All three of her children were under the care of the state. At the time the report was written, Tamara had already spent ninety days in jail as she was remanded into custody. Regardless, the probation officer recommended incarceration and probation to follow. She was sentenced to a further six months jail and two years probation.

Anne, a Caucasian woman, was convicted of theft under \$1,000. She had previous convictions for theft under \$200, possession of a narcotic, and breach of probation. At the time of her offence, she had one child who was addicted to drugs due to her abuse during pregnancy. Anne was sentenced to three months jail and six months probation.

Lillian, a Caucasian woman, was convicted of theft over \$200 and had no previous convictions. At the time of her offence, she had two children, both in the care of others. Her daughter was in the father's custody and her son was in the grandmother's custody. Lillian received a sentence of three months jail.

Conclusions

In summary, the family is a major factor in the presentence reports examined in this study. The family is viewed as a site of social control and social responsibility, assumptions based on the patriarchal nuclear family model. If a woman has children, is married, committed a crime for her family, or if her parents have a stable home, she is more likely to be presented in a positive manner by the probation officer, and thus receive a more lenient sentence. This is probably based on the belief that women who fit the patriarchal nuclear family model have less opportunity or desire to re-offend.

The statistical analysis, however, showed that marital status did not have a strong effect on sentence imposed. It appears that more emphasis is placed on the parenting capabilities of the defendant rather than her marital status. In other words, if she is single and a *good* mother, she will still be presented in a positive manner. On the other hand, the statistical analysis did show that separated and divorce women were more likely than single or married women to receive a custodial sentence.

Interviews

The number of factors which a trial judge may consider in sentencing a person convicted of a criminal offence is almost infinite in number (Fiske, 1988: 241).

Sentencing is probably the most important part of the criminal justice process. "Determining the right sentence is far from easy. In some ways, it is the most difficult of all judicial functions..." (Mewett, 1988: 198). In 1985, the Canadian Sentencing Commission surveyed 414 judges (almost one third of the total number of sentencing judges in Canada). According to their results, 88% of the judges believed the protection of the public to be the overall purpose of sentencing. Also, 86% of the judges viewed proportionality as the main principle in sentencing (Canadian Sentencing Commission, 1988: 2). This principle was endorsed by one of the Vancouver judges interviewed:

"I think, basically, my approach would be very much what the Canadian Sentencing Commission advocated back in 1987 and that is that the penalty imposed would have to be proportionate to the gravity of the circumstances and commensurate to the extent of the individual's culpability...I think all sentencing judges draw up a list of any particular offence with the individual, a list of the aggravating features and then there is a corresponding list of the mitigating features and when you tally the aggravating features...Let's just say it is a calculation of the time. Let's just say because of the nature of the offence, it requires a custodial sentence. To be deducted from that initial time will be the mitigating factors to arrive, ultimately, as to what the time is for that sentence. That's the approach I basically take."

The judges were first asked to respond to the following question: "what specifically do you want to know about the defendant in sentencing?" All the judges stated legal variables, such as type of offence and prior convictions, as their top consideration. The severity

of the offence was found to be the most important variable in sentencing. The judges viewed jail as a last alternative. However, in some cases, because of the severity of the offence, jail is the only option. For example, first degree murder carries a mandatory sentence of life imprisonment. If jail is the only option, the length of the sentence is usually determined, as the judge above states, by other aggravating and mitigating factors. These other factors include employment, physical or mental health, substance abuse, family ties, age, criminal record, income, marital status, education, impact of the offence on the victim, attitude towards the offence, aspirations, amount of violence and planning involved in the crime, and the probation officer's recommendation.

When asked what their considerations for women defendants were, all but one judge stated that they were the same for men and women. However, one judge qualified his response with the following:

"The same things, except, of course, you are often in a situation where she's the substantial provider for children at home and so on. This is a substantial factor to consider. Another factor that we have to consider, with respect to particularly women, young offenders and first offenders, is the adequacy, or perhaps more appropriately inadequacy, of the facilities for imprisonment."

The judge that admitted to treating males and females differently said it was due to the fact that women do not "do time" as well as men. He felt prisons were violent and women are less resilient, and thus prisons are not appropriate places for women. Also, he stated that women are less involved in violent crime, suggesting that women are less physically and mentally capable of committing crimes, especially "male" crimes. However, if they act like

males, they will be treated like males. "If they are committing male crimes, they'll do male time."

When given the hypothetical case, all but one of the judges were reluctant to offer a definite sentence. In fact, in five cases the judges were unable to answer on the basis that there was not enough information given. One thing these judges wanted to know was the reason for the commission of the offence. Four of the judges were interested in knowing what was stolen by the woman in the hypothetical case. In other words, was it something for herself or something for her children. One judge made the following comment:

"The question of whether there are or were any extenuating circumstances for the commission of the offence [is important in my decision]. Let's take one that doesn't happen too often - shoplifting. It's a food angle, and it's a situation of a mother who has shoplifted and what she has shoplifted is food to feed her family, her children specifically. If she's never been convicted of an offence before, it seems to me that would be strong extenuating circumstances where obviously she is not going to be sent to jail. The extenuating circumstance or the motivation for committing the crime was a matter of urgent need, assuming that that could be the situation, and I think that probably the utmost leniency would be extended to her."

This suggests that if women commit crimes of opportunity rather than crimes of necessity they may be viewed as violating their defined gender role. According to women's gender role, they are expected to be caring and nurturing to others, and not concerned with their own welfare.

The judges were asked if the following two statements applied to them:

Judges treat female defendants more kindly or protectively than they do male defendants because the female defendants remind them of their daughters, or their wives, or sisters - women close to them. Or, just in general, judges find it hard to be as tough on a woman as a man (Simon, 1975: 49).

Judges treat female defendants more kindly or protectively than they do male defendants because the female defendants remind them of their daughters, or their wives, or sisters - women close to them. Or, just in general, judges find it hard to be as tough on a woman as a man. Or, because most of the women defendants have young children, sending them to prison places too much of a burden on the rest of society (Simon, 1975: 49).

All of the judges somewhat agreed to the last sentence in the second statement. Two of the nine judges agreed with the first statement. One said he was generally more lenient on women because "they *are* women." The other judge responded with the following:

"Well, of course, I'm a little old-fashioned. I still like to call women ladies and all of that sort of thing. Certainly I have more concern, just the same as I wouldn't hit anybody but I would be more appalled at hitting a woman than I would a man. It's that simple. But, it shouldn't, at the end of the day, influence my sentence."

The other seven judges said that the statement was not applicable to them. Some said that this view used to exist or still exists among some of their colleagues. One judge thought it had a element of accuracy among male judges, mainly because women offenders are rare and it is usually their first offence, and thus male judges may see them in a way that reminds them of the women they know. A majority of the judges did say that women offenders are treated more kindly, but this is because they are not involved in violent crime to the extent that men are.

Children were found to be very important in the judges' sentencing decisions. If the decision is whether to impose a custodial

or a non-custodial sentence, a non-custodial sentence is more likely to be imposed if children are involved. In determining the length of the sentence, having children would become a stronger point for leniency. Even if a fine was to be imposed, the cost of taking care of children is considered, particularly if the defendant is on social assistance. In some cases, the judge would hold off sentencing until arrangements for the care of the children could be made.

Children had an effect on the sentencing of both men and women, but appeared to have more of an influence for women. Some of the judges' comments were:

"Basically, I think, being a caregiver of young children or dependents - it could be adult dependents - is a mitigating factor that can be taken into account for leniency."

"Is it good treatment for society to send the mother to jail? Is it good for the kids to send the mother to jail? What substitute parents are available, substitute for the mother?"

"Well, certainly the factor that of her being the care provider for two children would certainly be one that I would have to weigh heavily."

"The fact that people have others to care for, particularly children, is a problem. Obviously, if the defendant can avoid jail that is one of the factors you have to consider."

These comments support Daly's (1987b) contention that judges are concerned with the social costs of jailing defendants with children. The judges' views also reflect the patriarchal nuclear family model of the woman as the primary caregiver and the man as the primary breadwinner. For example, one judge, when sentencing defendants with children, would like to know "what's their relationship with their mother? Have they a relationship with the father?" The judge is

assuming that the children *has* a relationship with the mother and *may* have one with the father. This corresponds with women's defined role as the primary caregiver. Another judge made the following comment:

"If by sending the father to jail I cut off the mainstream income for the family, so the kids would possibly suffer, that's one of the things I'm going to think about."

How old the children are is also important in the sentencing decision. It is believed that the younger the children are, the more they are going to suffer from the loss of their parent, in particular their mother. For example,

"...if the children are of very tender years then that physical need is there."

"...the older they are, the more capable they are of looking after themselves. If they are very young, they need more care."

"They may be more or less independent of mother depending on their age."

"The younger they are, the more concern. Infants need their mothers more so than their fathers."

Most of the judges were not very concerned with the quality of the defendant's parenting. As one judge put it: "we are not sentencing her for being a poor parent." Also, it was assumed that if the state was not stepping in to apprehend the children, then they were being taken care of by their parent(s). For example,

"I assume that if she does have the children and they haven't been apprehended, she is looking after them."

"If you took the most extreme case you could think of, and the quality of her parenting was such that child welfare was moving in to take the children away from her - no, I

would not be terribly concerned about her having children or the children at that point in relation to sentencing her."

The judges were only concerned with the economic costs of jailing defendants to the extent that it must be proportional to the offence committed. Three of the nine judges were concerned with the costs of placing children into the state's care if their only caregiver is placed in jail. They stated that this would be a factor only if it was a decision between a custodial or a non-custodial sentence.

Marital status had an indirect effect on the judges' sentencing decisions. For example, one judge stated:

"Frankly, I don't think the fact of whether she is married or unmarried has very much to do with it. The factor I'm looking at in this aspect of it is the impact upon the two children."

Apparently, marital status only comes into play when children are involved. In sentencing a family defendant in which there is someone else to take care of the children, in particular the other parent, the effect of children on the sentencing decision diminishes.

Finally, the judges were asked if they are aware of the limitations of women's programs in prisons.⁷ Five of the nine judges were not familiar with the limitations. For the other four judges it does not play a large role in their decision, as one judge states:

I don't look upon most of the sentencing we do as a tool to get people better educated. If it happens, it happens, but I don't think it is a major reason why you send people to jail.

In summary, although there were only nine judges interviewed, there appears to be a pattern in judicial decision-making. The most important variable in sentencing defendants is the nature of the

⁷See footnote 3.

offence. In less serious offences, judges have more latitude in exercising discretion. In these cases, and more specifically in the case of a decision of whether to impose incarceration, the fact that the defendant has children plays a large role in sentencing. This is even more so for women as they are viewed as the primary caregivers, and judges do not want to see children suffer from the loss of their mothers. Thus, there appears to be evidence that judges' decisions reflect the ideology of the patriarchal nuclear family model.

However, marital status did not appear to have a strong influence on the judges' sentencing decisions. If a defendant with children is married the effect the children have on the sentence will decrease as the judges assumed the other spouse will take care of the children. In other words, it appears the patriarchal nuclear family model is not being reinforced in judicial decision-making as this model emphasizes the existence of a husband *and* a wife. However, the judges appear to be reinforcing a familial ideology which emphasizes good parenting. Judges regard the care of children as a more important factor in sentencing. It should be noted that this factor was found to be more important for women which supports the ideology of the mother as the primary caregiver and thus reinforces the sex role differentiation defined by the patriarchal nuclear family.

CHAPTER VI

CONCLUSIONS

A large part of the literature on the sentencing of men and women suggests that, consistent with the traditional interpretation of the paternalistic view (Pollak, 1950), women receive preferential judicial treatment over men for most offence categories. This proposition has been contradicted by research which has shown the two genders to be treated in an equal manner when such variables as type of offence and criminal record are taken into account. The paternalistic view has also been challenged by evidence of punitive attitudes to certain types of criminal women, particularly those who are perceived as violating their gender roles.

Paternalism and chivalry as explanations for women's lenient treatment have also failed to examine the real issues at hand. It has only been a specific category of women who have been treated with chivalry, and thus leniency (Klein and Kress, 1976: 43). Additionally, the criminal justice system reflects and reinforces the sexism and racism in society at large (Klein and Kress, 1976; Naffine, 1987).

Eaton (1985, 1986, 1987) argues that it is not the sex of the defendant but ideas about appropriate gender role behaviour which are based on the patriarchal nuclear family model which influence decision-making on sentencing. Also, Daly (1987a, 1987b, 1989a, 1989b) found that regardless of sex, familial defendants were more likely than non-familial defendants to receive preferential treatment. Thus, in some instances women receive more lenient sentences than

men and in other instances harsher sentences than men, depending on whether or not they fit the nuclear family model. This also accounts for the conflicting findings in the research.

"The law...is a significant shaper and reinforcer of 'the family'...the dominant family form is in large measure defined and created by law" (Gavigan, 1988: 293-294). The dominant family form that is presently defined and created by law, and thus reinforced by the courts, is the patriarchal nuclear family, which is associated with a heterosexual white middle-class family. The nuclear family is one which is based on sex role differentiation, that is, males are viewed as the primary breadwinners and females are viewed as the primary caregivers. Even when women work, their income is secondary to that of the husband. Her employment status is also secondary to her more important role as a mother and wife. Even if the wife is working, she generally continues to have primary responsibility for the care of the children and maintenance of the household. Also inherent in the nuclear family is women's and children's dependency on the husband for financial security (for example, see Eichler, 1985).

From the presentence reports, there is evidence that gender and familial ideology, based on the patriarchal nuclear family, is both reflected and reinforced in the courts. The statistical analysis shows that the number of previous convictions, the type of offence committed, the defendant's plea, whether the defendant's children are in someone else's care, the racial designation of the defendant, and marital status are the most important variables affecting the sentencing decision. Also, the probation officers' evaluations and recommendations were found to be very influential in judges'

sentencing decisions. In 71.8% (n=79) of the presentence reports, the judge chose to follow the recommendation given by the probation officer.

If a woman's plea was not guilty, she was more likely to receive a jail term rather than a fine or probation. This could be due to the amount of time a defendant would be saving the court by pleading guilty. It may be looked upon in a more positive manner as the judge has one less trial to hear.

If a woman had a lengthy criminal record, she was more likely to receive a harsh sentence. One of the objectives of sentencing is deterrence. Individuals who continue to commit crimes are not learning the lessons of their previous convictions. They may be viewed as not benefiting from the court's previous leniency and given a harsher sanction.

Women who committed violent offences were more likely to receive custodial sentences than women who committed property or drug offences. The difference in sentences was found to be more significant between violent and property offences than between violent and drug offences.

Marital status also influenced the severity of the disposition. Both single and married women were less likely to receive a term of imprisonment than separated or divorced women. Married women fit the nuclear family model and single women may have the potential to fit this model depending on the amount of informal (family) social control in their lives, and thus these women are more likely to receive a lenient sentence.

Children were also found to be an important variable in sentencing decisions. How children affected a woman's sentence depended on whether her children were in the care of someone else. Women tended to receive more lenient treatment if they had children and they were taking care of them by themselves, probably due to the social costs to the children and the economic costs to the state (most likely the state would have to support the children of jailed mothers) of sending mothers to prison. However, if these children are in the care of others, judges will not have to worry about the social or economic costs of jailing mothers.

The racial designation of the offender was found to influence sentence severity, both directly and indirectly. The results show that Native women were more likely to receive a custodial sentence than non-Native women. Also, it appears Native women were more likely to receive a custodial sentence as they were more likely to have their children in the care of the father, the extended family, or the state.

From the content analysis of the presentence reports, it can be concluded that the written arguments presented by probation officers reinforces a familial ideology which has roots in the patriarchal nuclear family model. The sexual division of labour founded in the patriarchal nuclear family upholds women's economic exploitation by denying women's access to valued resources such as income, status-giving occupations, and political authority. Women's work outside the home is viewed as secondary to their more important role as mothers and wives, and women's work inside the home is devalued. Thus, the ideology of the patriarchal nuclear family contributes to women's continued subordination. However, it appears that more emphasis is

placed on the parenting capabilities of the defendant rather than her marital status. In other words, if she is single and a *good* mother, she will still be presented in a positive manner. It appears that criminal justice personnel have accepted that the nuclear family model is far from the norm today, and place more emphasis on good parenting rather than a good marriage.

The interviews with the judges showed that they maintain certain ideas about appropriate gender role behaviour, based on the patriarchal nuclear family, which are reflected and reinforced in their decisions on sentencing. After considering the severity of the offence, if defendants have children, they can keep themselves out of prison. This is regardless of the defendant's sex, although children have more of an impact when sentencing women as they are viewed as the primary caregivers.

Through the operation of a specific ideology (the ideology surrounding the patriarchal nuclear family), the law is an indirect tool of repression of women. If we focus mainly on explicit discrimination or differential treatment in the courtroom, we will miss how this ideology subtly reinforces the subordination of women (Gavigan, 1988: 293). Both probation officers and judges reproduce this ideology, "thereby legitimating both capitalist and patriarchal relations in society" (Boyd and Sheehy, 1989: 259).

In 1990, just over nine percent of federally-appointed judges in Canada were women (Wilson, 1990: 9). There is an assumption among some feminists that more female judges on the bench will make a difference.

Some feminist writers are persuaded that the appointment of more women judges will have an impact on the process of judicial decision-making itself and on the development of the substantive law. This flows from the belief that women view the world and what goes on in it from a different perspective from men. Some define the difference in perspective solely in terms that women do not accept male perceptions and interpretations of events as the norm or as objective reality (Wilson, 1990: 9).

However, the underlying ideological assumptions of gender and the family that permeate the criminal justice system are held not only by men, but also by women. As Judge Rosalie Abella states: "every decision-maker who walks into a courtroom to hear a case is armed not only with the relevant legal texts but with a set of values, experiences and assumptions that are thoroughly embedded" (as cited by Wilson, 1990: 8). Thus, women judges may not necessarily make a difference as they maintain the same ideas as male judges. To reiterate, familial and gender ideology is perpetuated by the state "through the education system, through the media, through regulations and social policies, through the very structure of its organizations, and through the law" (Armstrong and Armstrong, 1990: 125). It is necessary, through structural change and re-education, to promote transformative measures. This will include a number of complex processes, such as a redistribution of material resources and a commitment to gender equity.

Appendix A

Summaries of the Research on Gender and Sentencing

Study	Years and Location	Sample Size and Type	Legal Variables	Non-legal Variables	General Findings
Hagan and O'Donnel (1978)	October to April, 1973; Edmonton	1,147 persons who were initially charged; 288 persons for whom presentence reports were requested, 282 persons who were subsequently incarcerated	prior conviction history, type of offence	gender, race	The differences in the severity of treatment of males and females were not significant. Neither gender alone, nor gender in interaction with ethnicity or prior conviction history produces disparity in sentencing.
Green (1961)	A period of 17 months during the years 1956-1957; Philadelphia, Pennsylvania	1,437 cases with no prior convictions of a felony	severity of the offence, number of charges, prior criminal record	gender, age, race	In felony cases, males and females received practically the same percentages of penitentiary sentences. In misdemeanour cases the women fare slightly, though not significantly, better than the men.
Bernstein <i>et al</i> (1979)	December, 1974 to March, 1975; a major American city in New York state	2,627 males and 338 females arraigned in a state criminal or supreme court	number of charges, type of offence, prior arrests, prior convictions	gender, race, age, education	They concluded that the decision to sentence a defendant more or less harshly is determined similarly for men and women.

Summaries of the Research on Gender and Sentencing

Study	Years and Location	Sample Size and Type	Legal Variables	Non-legal Variables	General Findings
Zingraff and Thomson (1984)	January, 1969 to December, 1977; North Carolina	9,464 offenders	prior record, total number of prior convictions	gender, race, age, court location (rural, urban)	Gender does not affect sentence length for misdemeanour offences. Sentence lengths women receive are similar to those received by males.
Chesney-Lind and Ghali (1986)	September, 1979 to December, 1980; Honolulu	6,747 arrest records, of which 5,226 had dispositions	prior arrests, prior convictions, plea, type of crime, represented by counsel	gender, age, ethnicity, employment status, marital status, educational background	Women had a disadvantage at the earlier stages of criminal justice processing, whereas the later stages maintained a more evenhanded treatment of defendants. For example, arrested females were more likely to be prosecuted than arrested males, but received similar sentences.
Chesney-Lind (1973)	1929 to 1955; Honolulu	2,283 juvenile offenders	type of offence	gender	Judges consistently ordered physical examinations of female juvenile offenders in order to determine the virtue of the girls.

Summaries of the Research on Gender and Sentencing

Study	Years and Location	Sample Size and Type	Legal Variables	Non-legal Variables	General Findings
Rogers (1972)	June, 1970 to May, 1971; Connecticut	94 males and 66 females sentenced to juvenile institutions	type of offence	gender	Girls were more likely to be institutionalized for sexual misconduct, running away, and incorrigibility than boys.
Pope (1975a, 1975b)	1970; California	2,535 felony offenders	type of offence, prior record, criminal status	gender, race, age, location of the court, level of the court	Women were likely to receive more lenient treatment in the lower courts and in urban areas but were treated equally in superior courts. Looking specifically at assault and burglary offenders, males received harsher treatment than females for both lower and superior courts in rural and urban areas.
Chesney-Lind (1977)	1974	FBI Statistics	type of offence	gender	Girls are far more likely than boys to be brought to court as status offenders, despite evidence that boys commit as much of this type of behaviour as girls.

Summaries of the Research on Gender and Sentencing

Study	Years and Location	Sample Size and Type	Legal Variables	Non-legal Variables	General Findings
Steffensmeier and Kramer (1980)	an eastern American state	75 male and 53 female inmates, 189 students, and 263 people from the community responded to questionnaires with a hypothetical case; also examined actual court dispositions	type of offence	gender	Their results show that no gender differences exist for public drunkenness; but that, for the remaining offences (shoplifting, murder, embezzlement, resisting arrest, and seduction of a minor), female defendants are more likely to be fined and placed on probation rather than jailed.
Curran (1983)	1965, 1966, 1971, 1975, 1976; Dade County, Florida	543 males and females at four levels of judicial processing; negotiating, prosecution, conviction, and sentencing	number of prior arrests, seriousness of offence, total number of counts	gender, race, age, occupational status	After controlling for legal variables, female defendants received more lenient dispositions than their male counterparts.
Johnston <i>et al</i> (1987)	1979 to 1983; Phoenix, Arizona	1,249 males and 1,241 females sentenced in a superior court	prior record, seriousness of offence, characteristics surrounding the offence	gender	Their results reveal a consistent pattern of preferential treatment of female defendants.

Summaries of the Research on Gender and Sentencing

Study	Years and Location	Sample Size and Type	Legal Variables	Non-legal Variables	General Findings
Eaton (1983)	1980, 1981; London	observations of cases for 210 males and 111 females; subsequently social inquiry reports were examined and police officers, probation officers, and magistrates were interviewed	the structure of the study allowed for the examination of all variables	the structure of the study allowed for the examination of all variables	Pleas of mitigation are one way in which practices in the courtroom reinforce the prevailing ideology based on the patriarchal nuclear family
Simon and Sharma (1978)	1974; Washington, D.C.	PROMIS data	type of offence, prior convictions	gender	For most offence categories women received more lenient outcomes, but that for some violent types of crimes males and females were approximately equal in their chances of receiving long terms of imprisonment
Daly (1989b)	1973, 1974; New York City and Seattle	300 Seattle defendants and 1,974 New York City defendants	type and severity of the offence, number of charges, prior record	gender, race, age, employment, family situation, marital status	Gender differences can be explained by the defendant's family circumstances, and that such differences are greatest for black defendants

Summaries of the Research on Gender and Sentencing

Study	Years and Location	Sample Size and Type	Legal Variables	Non-legal Variables	General Findings
Eaton (1985)	1980-1981; Greater London area	37 men and 35 women for whom social inquiry reports were written	type and severity of offence, prior record, number of charges	gender, family circumstances, age, education, employment, drug/alcohol problems, personality problems	The practices of probation officers serve to disadvantage women by their reinforcement of the patriarchal nuclear family model which involves the oppression of women
Daly (1989a)	December, 1981 to January, 1982; March, 1985; Springfield, Massachusetts; Suffolk County, New York	open-ended interviews with 20 male and 3 female judges	the structure of the study allowed for the examination of all variables	the structure of the study allowed for the examination of all variables	The primary objects of judicial protection were children and men's and women's economic support or care for families. However, care giving was believed to be more important than wage earning for the maintenance of families
Hagan et al. (1980)	10 federal district courts	6,562 offenders	type and severity of the offence, prior record, number of charges	gender, ethnicity, age, education, physical health	Gender had a consistently significant effect on sentence. Women were more likely than men to receive preferential treatment

Summaries of the Research on Gender and Sentencing

Study	Years and Location	Sample Size and Type	Legal Variables	Non-legal variables	General Findings
Kruttschnitt (1982b)	1972-1976; Northern California	1,034 female offenders	prior convictions, type of offence	gender, race, income, number of children, employment, dependency on others	Women's leniency was proportional to their economic dependency on men. The more economically dependent women are on men, the more likely they will receive lenient treatment
Kruttschnitt and Green (1984)	1965-1980; Minneapolis, Minnesota	1,558 men and 1,365 women convicted of theft, forgery, and drug law violations	type and severity of offence, number of arrests, prior record	gender, race, employment status, source of economic support, family composition, number of children, total number of marriages, years of psychiatric treatment, physical health problems	Women are significantly more likely to obtain pretrial release than men. The effect of gender on the decision to incarcerate can be partly accounted for by the pretrial release decision
Daly (1987a)	October, 1981 to January, 1982; Springfield, Massachusetts	35 interviews with court officials (prosecutors, defence attorneys, probation officers, and judges)	the structure of the study allowed for the examination of all variables	the structure of the study allowed for the examination of all variables	She identifies "having dependents" as the overriding judicial criterion for leniency for both male and female defendants

Summaries of the Research on Gender and Sentencing

Study	Years and Location	Sample Size and Type	Legal Variables	Non-legal Variables	General Findings
Gruhl, Welch, and Spohn (1984)	1977-1980; Los Angeles County	10,500 felony cases in which only a single charge was levied	prior record, type of offence, type of attorney, whether the defendant injured anyone while committing the crime	gender, race, employment status	They found evidence that females are treated more leniently than males. They also found that judicial paternalism is most evident among blacks
Farrington and Morris (1983)	1979; Cambridge City, England	213,273 males and 48,580 females found guilty of indictable offences	number of previous convictions; recent convictions, type of offence, plea, legal representation	gender, age, place of birth, marital status, children, family background, employment, remorse expressed, gender of the magistrate, current problems, mental status	It was found that women receive more lenient treatment, but these gender differences disappear after controlling for previous convictions and type of offence. However, marital status, family background, and children were variables found to be more important for women than for men
Kruttschnitt (1980-1981)	1972-1976; Northern California	1,034 female offenders processed through an adult probation department	severity of the offence, prior record	gender, race, income, age, employment	Sentencing patterns are not due to sex <i>per se</i> but of the social situation each sex holds relative to the other.

Summaries of the Research on Gender and Sentencing

Study	Years and Location	Sample Size and Type	Legal Variables	Non-legal Variables	General Findings
Fenster and Mahoney (1981)	United States felony court	felony offenders	prior record, type of offence	gender	As the criminal backgrounds of the genders became more similar, their sentences became more similar. However, when the defendants received differential dispositions, men were more likely to receive the harsher sanction
Kruttschnitt (1982a)	1972-1976; a California county	1,034 female offenders processed through a probation department	type of offence, prior record	gender, race, income, age, employment, alcohol/drug use, psychiatric history	The lower a woman's respectability, the greater the likelihood that she would receive a severe sentence. "Respectability" constituted a good employment record, no alcohol or drug use, and no history of psychiatric treatment

Summaries of the Research on Gender and Sentencing

Study	Years and Location	Sample Size and Type	Legal Variables	Non-legal Variables	General Findings
Nagel and Hagan (1983)	1974-1977; ten federal jurisdictions	9,068 defendants	type of offence, prior record	gender	Preferential treatment is more likely to be observed in the less severe sentencing options whereas fewer gender differences are found when examining variation in the more punitive sentencing options
Nagel (1981)	1974 and 1975; New York	2,627 males and 338 females	severity of the offence, prior conviction history	gender, marital status, ethnicity, age, education	Legal factors did not significantly affect the severity of women's sentences. However, married women were less likely to be sent to prison than unmarried women
Daly (1987b)	4 month period in 1974-1975; New York City	2,004 defendants prosecuted in a lower level criminal court	number of charges, type of offence, prior record, prior arrests	gender, race, age, employment, familial status, marital status	Gender differences can be explained by the defendant's family situation. Having dependents determines the outcome of the defendant's sentence

Summaries of the Research on Gender and Sentencing

Study	Years and Location	Sample Size and Type	Legal Variables	Non-legal Variables	General Findings
Tjaden and Tjaden (1981)	January 1, 1977 to January 1, 1978, Colorado	1,663 offenders against whom felony charges were filed	prior record, criminal status, indicators of recent criminal activity, other felony cases pending, type of offence	gender, age ethnicity, marital status	Women were more likely to receive probation or a suspended sentence than men. However, differences in the treatment of male and female offenders were not major
Nagel and Weitzman (1971)	1962; nationwide (U.S.)	survey of convicted defendants	type of offence	gender	Sentencing depended on the type of crime committed. Those convicted of crimes traditionally associated with women received probation or suspended sentences, whereas those convicted of non-traditional crimes were incarcerated

APPENDIX B

Coding Sheet for the Presentence Reports

File Number:

Age:

Racial or Ethnic Designation:

Marital Status:

Quality of the Relationship:

Number of Children:

Quality of the Relationship:

Education:

Employment/Financial:

Drugs/Alcohol:

Psychiatric/Medical:

Type of Offence:

Attitude to Offence:

Previous Record:

Evaluation/Recommendation:

Sentence:

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Dear

As a member of the SFU Criminology faculty, I am presently enjoying the opportunity to supervise the work of an excellent student in our Master's program, Karen Masson. I am writing to request your participation in her thesis research.

Karen is studying effects of gender on men and women processed by the criminal justice system. She is particularly interested in researching ways by which gender may be a factor in sentencing, with an emphasis on family circumstance. She will be examining pre-sentence reports, and she would also benefit from interviews with judges. Would you be willing to participate in an interview for this study?

As you may be well aware, research on women in conflict with the law has increased in recent years, with studies producing contradictory results as to whether or not women have traditionally or do now receive lighter or harsher sentences than men, taking other variables into account. It has been shown by studies in England and the United States that family circumstances may be a more salient factor in sentencing than gender, and this is a central question in Karen's thesis research.

All interviews for this study will, of course, be conducted with protections for anonymity. The interview will consist of open-ended questions, and will require approximately one hour for completion. The time and place of the interview would be arranged for your convenience.

I have been very impressed by Karen Masson and my colleagues and I have full confidence in her ability to complete a first-rate Master's thesis. She has well-developed research skills, and is very committed to this work. She does, however, need the assistance of those who are directly engaged in making the decisions that are the focus of her study. I do hope that you will find Karen's research of interest, and that you will consent to the interview.

If you have questions please call me at 291-3018, or leave a message at 291-3213. I can be reached by fax at 291-4140. Karen Masson will call your office in the near future to learn your response to this request and, if favourable, to make an appointment for the interview.

Thank you for your consideration.

Sincerely,

Karlene Faith, Ph.D.
Assistant Professor



March 13, 1992

Dr. Karlene Faith
Assistant Professor
Simon Fraser University
School of Criminology
BURNABY, B.C.
V5A 1S6

Dear Dr. Faith:

A number of judges of this court have received your form letter of March 3 requesting participation in an interview by one of your students. As all of those with whom I have spoken agree that it would not be appropriate to take part, I thought it best that I outline our views on behalf of the court.

In sentencing as in every other area of judges' work, our role is to listen to the evidence and submissions and then to apply the law as we understand it to the facts of each case as we find them, in order to arrive at a decision. We give reasons for our decision. We must seek to do this as impartially as possible, not permitting our personal views to intrude. We all, of course, have personal views but were we to base our decisions on them we would breach our obligation of impartiality.

An interview such as you propose would necessarily focus on personal views and would not be helpful. The grounds for decision can be derived from an analysis of reasons for judgment.

I trust that you will understand that these objections are based on what we see as an important principle and not on any lack of willingness to co-operate in a worthy endeavour. It may be that some judges do not share the view which I have expressed and you may already have heard from some of those to whom you have written. But this letter will explain the lack of response from others.

Yours very, truly,

/Chief Justice

WAE:acj

SIMON FRASER UNIVERSITY

FACULTY OF ARTS
SCHOOL OF CRIMINOLOGY



BURNABY, BRITISH COLUMBIA
CANADA V5A 1S6
Telephone: (604) 291-3213

March 24, 1992

The Honourable William A. Esson
Chief Justice
The Law Courts
800 Smithe Street
Vancouver, B.C.
V6Z 2E1

Dear Justice Esson:

Dr. Faith, my graduate supervisor, passed your letter of March 13, 1992 on to me. Your suggestion of analyzing the reasons for judgment on sentencing given in those cases for which a presentence report was prepared is well appreciated. I had in fact planned to access as many court transcripts as possible. However, for several reasons stated below, this method would not be altogether feasible for me, nor would it substitute for the interviews.

(1) Lack of money and time:

To rely on reasons for judgment for my analysis, I would have to obtain transcripts, which at \$4.00 per page is prohibitive for my sample of approximately 110 presentence reports. Additionally, due to my sample size and the fact that the presentence reports are from a number of Greater Vancouver courts, I do not have the time needed to complete this by my graduation date (August, 1992), and I lack funding to remain in school and postpone graduation.

(2) Replicating previous research:

In 1989, Kathleen Daly of Yale University completed a study which researched the impact of family circumstances on judicial decision-making via interviews with judges. One of the purposes of my research is to replicate her study. Replicating her research is beneficial for two reasons. First, it enables comparisons to be drawn between jurisdictions in Canada and the United States. Second, it allows for the potential of a stronger conclusion to be made as to whether gender and family status affect judicial decision-making.

(3) Views of judges:

First, one purpose of my research is to obtain general views of judges concerning family circumstances and sentencing. Second, within each interview I am presenting a standardized hypothetical case, so as to obtain some measure of consistency among judges.

Once again I thank you for your suggestion. I hope that my comments will encourage you (and your colleagues) to reconsider your decision concerning an interview.

I look forward to hearing from you.

Sincerely,

Karen M. Masson,
291-6758 (home)
291-3213 (messages)

KMM/sr

cc Dr. Karlene Faith, Assistant Professor
SFU School of Criminology

The Honourable Mr. Justice B.I. Cohen
The Honourable Madam Justice C.M. Huddart
The Honourable Madam Justice M. Anne Rowles
The Honourable Mr. Justice W.B. Scarth

THE HONOURABLE WILLIAM A. ESSON
CHIEF JUSTICE



THE SUPREME COURT
OF BRITISH COLUMBIA

THE LAW COURTS
800 SMITHE STREET
VANCOUVER, B.C.
V6Z 2E1

March 27, 1992

Ms. Karen M. Masson
SFU School of Criminology
Faculty of Arts
BURNABY B.C.
V5A 1S6

Dear Ms. Masson:

Thank you for your letter of March 24. My reference to analyzing reasons for judgment may have obscured the point I sought to make. It is simply this. We consider it inappropriate for judges to publicly express their personal views on matters of this kind, or to grant interviews designed to bring out those views.

Those judges interviewed for the Yale University study no doubt saw the matter differently. Neither that circumstance, nor any of the other points which you raise, provide any ground for altering a response which is based on a point of principle.

Yours very truly,

Chief Justice

WAE:acj

cc: Mr. Justice Cohen
Madam Justice Huddart
Madam Justice Rowles
Mr. Justice Scarth

APPENDIX D

Interview questions:

What specifically do you want to know about the defendant in sentencing?

What are your considerations for women defendants?

Hypothetical situation:

A defendant is appearing before the court with a theft over \$1000 charge and the defendant is found guilty. The record shows two prior convictions, one for selling marijuana and the other for a theft. This latest theft over \$1000 represents a violation of probation. How would you sentence if the defendant was...

a married woman caring for two young children?

an unmarried woman caring for two young children?

an unmarried woman, on social assistance, caring for two young children?

an unmarried woman with no children?

a married man with a job supporting his wife and child?

a married man, on social assistance, supporting his wife and child?

an unmarried man with no children?

an unmarried man caring for two children?

Does the following statement in the research literature apply to you?

"Judges treat female defendants more kindly or protectively than they do male defendants because the female defendants remind them of their daughters, or their wives, or sisters - women close to them. Or, just in general, judges find it hard to be as tough on a woman as a man."

Does this statement apply to you?

"Judges treat female defendants more kindly or protectively than they do male defendants because the female defendants remind them of their daughters, or their wives, or sisters - women close to them. Or, just in general, judges find it hard to be as tough on a woman as a man. Or, because most of the women defendants have young children, sending them to prison places too much of a burden on the rest of society."

Are you concerned about children in sentencing family defendants?

Do you have other concerns (other than children) about jailing defendants?

Are you concerned with the quality of a defendant's parenting (i.e., if s/he's a good mother/father)?

Are you interested to know the ages of children (e.g., whether preschool or infant)?

Are you concerned with what happens to the children when jailing female defendants?

If so, how does this affect your decision?

In what ways do you take into account the potential breaking up of families (e.g., other family members would be punished, breadwinners would be removed, or children need their mothers)?

Are you concerned with the economic costs of jailing defendants with a family (e.g., costs more to taxpayers)?

Are you familiar with the limitations of women's programs in prisons?
If so, does this affect your decision?

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