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Recommended Citation
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INTRODUCTION

[W]omen defendants . . . appear to have received more lenient sentences, but we have not been able to determine whether the small differences observed relate just to gender, or instead reflect actual differences between men and women defendants, differences, for example, relating to [the] effect on children of incarceration . . . .

Professor Vicki C. Jackson's remarks reflect an unanswered policy concern which continues to plague the criminal justice system. The dilemma demands new research and new explanations aimed at better understanding the judicial system's treatment of women. This Note will attempt to address this concern. Further, it will discuss the equally important questions of whether issues such as the presence of children should be taken into consideration by judges.

For many years, academic discourse on women in the criminal justice system was neglected, due to the historically male demographics of prison populations. However, throughout the last twenty years there has been an increasing interest in women in the judicial process as a result of both the

* The author is a 1999 graduate of the University of California, Hastings College of the Law. I would like to thank Dr. Vema Keith for her guidance through the early development of this Note, and Dr. Gary Rolison for his help in setting up the empirical model. I would also like to express my gratitude to Dr. Reuel Schiller and George Neil Parducho Valdes for their comments and editing. Finally, I would like to thank Stephanie Acuña for her never-ending support.

2. See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 213 (1993) (explaining that the relative lack of women in the criminal justice system has been consistent throughout United States history).
rising numbers of women in the criminal justice system and the growth in feminist jurisprudence. One issue that has received a great deal of attention is the analysis of gender differences in sentencing. Theories accounting for disparate treatment in the criminal justice system are split in opposing directions: harsher treatment of females, versus more lenient treatment of females. These theoretical categories reflect the historical trend of the courts. Past decisions suggest that women have historically been treated more harshly than men, while recent judicial decisions show that women are generally being treated with more leniency. These recent trends have created great interest, and in turn, an abundance of theories attempting to explain the apparent present-day lenient treatment of women.

Growing interest in sentencing disparities by policy makers and academics culminated in the creation of the Sentencing Commission and the passage of the United States Sentencing Guidelines in 1987. While race was arguably the greatest motivating factor in attempts to create a system of unbiased sentencing, gender disparities were also a large concern. Policy makers recognized the apparent lenient treatment of

3. The percentage of women among all convicted offenders in U.S. District Courts was 7% in 1963, 10.8% in 1979 and 16.4% in 1992. See ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS 1963, at 10 (1964); ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL OFFENDERS IN UNITED STATES DISTRICT COURTS 1979, at 75 (1980); U.S. SENTENCING COMM’N, ANNUAL REP., Table 13 (1992). Also note that there have been various attempts to explain the relatively recent increase of women in the criminal justice system, but most are based on theories of men being the center and women being part of the periphery. See, e.g., FREDA ADLER, SISTERS IN CRIME (1975) (arguing that increase in female crime is a result of women becoming more like men, from factors such as women’s liberation). See also KATHLEEN DALY, GENDER, CRIME, AND PUNISHMENT 11 (1994) (criticizing many studies which compare men and women, arguing that by simply “comparing women to men, a male standard is left intact”) [hereinafter DALY, GENDER, CRIME, AND PUNISHMENT].


5. See, e.g., Robert Terry, The Screening of Juvenile Offenders, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 173 (1967) (stating that when women committed crimes, they broke moral standards and received harsher punishment); David R. Johnson & Laurie K. Scheuble, Gender Bias in the Disposition of Juvenile Court Referrals: The Effects of Time and Location, 29 CRIMINOLOGY 677 (1991) (demonstrating that women’s traditional roles were strictly enforced and if women deviated from them, they were stringently punished).

6. See generally note 4, supra.


9. See DALY, GENDER, CRIME, AND PUNISHMENT, supra note 3, at 5 (arguing that it was the “compelling stories of racial disparity that spawned the sentencing reform movement . . .”).

10. See Ilene H. Nagel & Barry L. Johnson, The Role of Gender in a Structured
female offenders and instituted the gender-neutral guidelines. However, while gender-neutral sentencing in theory may seem to be a rational goal, it creates injustice in practice.

In hindsight, it is apparent that policy makers were acting on a largely underdeveloped area of research. Early studies on modern gender disparities in the criminal justice system showed more lenient treatment for women, but did not convincingly explain why women seemed to be treated more leniently. In response, sentencing guidelines were created which restricted the consideration of gender and also largely restricted the consideration of the family life and responsibilities of the defendant—most importantly, their children.

Previous studies have established the lenient treatment of women in the judicial process. This Note looks to expand on that research by examining the reasons for the variation in the decision-making process. Different areas in the judicial process can be tested; this study examines the pretrial period. This Note will determine which groups of women are more likely to attain a pretrial release and from those women, who receives lower

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Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines, 85 J. CRIM. L. & CRIMINOLOGY 181, 182 (noting the “significant efforts” made at both federal and state levels to reform sentencing disparities in race, gender and class).

11. See U.S.S.G., supra note 8, at § 5H1.10 (policy statement of guidelines).

12. In part II of this note, I will address various problems surrounding the current guidelines. A number of authors have criticized the Commission for ignoring the gendered role of crime. See, e.g., DALY, GENDER, CRIME, AND PUNISHMENT, supra note 3, at 7; Myrna S. Raeder, Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines, 20 PEPP. L. REV. 905, 977–79 (1993) (explaining the gendered role of women in conspiracies and how that should affect severity of their punishment).

13. Research in the late 1970s and early 1980s tended to explain gender disparities as a result of paternalism and chivalry, therefore leading many to believe that the lenient treatment many women received was based solely on being female and therefore unwarranted. See, e.g., ELIZABETH F. MOULD, CHIVALRY AND PATERNALISM: DISPARITIES OF TREATMENT IN THE CRIMINAL JUSTICE SYSTEM 277-99 (Susan K. Datesman & Frank R. Scarpetti eds., 1980); Christy A. Visher, Gender, Police Arrest Decisions, and Notions of Chivalry, 21 CRIMINOLOGY 5 (1983).

14. See Kathleen Daly, Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing, 3 GENDER & SOC’Y 9, 11 (1989) (Daly suggests “the need to be more precise in identifying the objects of judicial protection”) [hereinafter Daly, Rethinking Judicial Paternalism]. More advanced theories on gender disparities were being developed in the early 1980s, but it is not clear if members of the Federal Sentencing Commission were interested in the reasons for disparity. See generally RITA SIMON, WOMEN AND CRIME (1975) (purporting that leniency is a result of the impracticality of sending women who have children to prison, because of the impact on family). Seemingly ignoring these types of studies, the Commission sought only to eliminate the disparity. See Charles J. Ogletree, Jr., The Death of Discretion? Reflections on the Federal Sentencing Guidelines, 101 HARV. L. REV. 1938 (1988) (stating that guidelines were created to increase uniformity and proportionality in sentencing by controlling judicial discretion).

bail/bond amounts. More specifically, this Note will explore the demographic and contextual characteristics of those who are more likely to receive a pretrial release, and which characteristics affect their bail/bond amount. These analyses will allow for a clearer understanding and more accurate application of the competing theories on why the variations in leniency exist. Furthermore, this will help to answer the far-reaching question of why women, as an aggregate, are treated with more leniency. Resolving the question of why certain women are treated with more leniency lends itself to answering the question of whether this special treatment is proper.

Nonetheless, the goal of this Note is not to simply examine whether courts treat men and women differently. The purpose of this empirical study is to test whether courts concern themselves with protecting the children of female offenders, and whether they act on these concerns by giving women with children more lenient treatment. Additionally, this Note argues that as a matter of policy, courts should be allowed to consider the presence of innocent children beyond what federal sentencing guidelines currently permit.

Part I of this Note is dedicated to an empirical analysis of how extra-legal factors affect women's treatment in the judicial system. Part II will question whether extra-legal factors—such as parenthood—should be taken into consideration when judicial decisions are made. The empirical analysis indicates that the courts do take extra-legal factors—especially parenthood—into consideration. The conclusion of this Note demonstrates that simply denouncing gender disparities and blindly setting gender-neutral policies ignores gendered roles in society. This results in harming both mothers and their innocent children by often treating women more harshly. Ultimately, judges must consider the familial responsibilities of defendants. Both federal and state sentencing guidelines must be amended to allow for regular consideration of these familial circumstances of offenders.

PART I: EMPIRICAL ANALYSIS

A. LITERATURE REVIEW

All areas of the judicial system are relevant in assessing gender discrimination. Areas of the process which have been tested include: sentencing severity; police arrest decisions; pretrial release decisions;  

16. See generally DONALD BLACK, THE BEHAVIOR OF LAW (1976) (espousing macrotheoretical propositions which are pertinent in all areas of the law); see also Candace Kruttschnitt, Social Status and Sentences of Female Offenders, 15 L. & SOC’Y REVIEW 247, 249 (1980-81) [hereinafter Kruttschnitt, Social Status & Sentences] (stating that “all aspects of legal life” can be used to test theories on disparities in the legal system).

17. See e.g., Daly, Structure and Practice, supra note 4; Bickle & Peterson, supra note 4.
probation officer sentencing recommendations;\textsuperscript{20} and convictions.\textsuperscript{21} In this study, like many others, the interest is in the determinants of being incarcerated versus not being incarcerated, as well as the cost of non-incarceration. Here, pretrial release decisions will be used to investigate the effects of extra-legal factors on the judicial decision-making process.

Sex role traditionalism,\textsuperscript{22} as well as an unconventional application of paternalism,\textsuperscript{23} are two theories that attempt to explain the harsher treatment of females in the criminal justice system. However, there is an abundance of theories attempting to explain the lenient treatment of women, and the theory of paternalism is only a beginning point for most of them.\textsuperscript{24} In fact, the majority of theories on women in the criminal justice system are attempts to explain the lenient treatment of women. Clearly, this is due to the consistency of findings that show a trend in lenient treatment for women.\textsuperscript{25}

1. Harsher Treatment of Women

The theory of sex-role traditionalism\textsuperscript{26} argues that women are subjected to harsher treatment than men are in the judicial system. More specifically, the theory suggests that illegal behavior by women is seen as unsuitable because it is in direct conflict with the traditional role of women in society.\textsuperscript{27} Where the male's traditional role normally includes occasional
infractions of the law, females are supposed to be "dependent, gentle, and compliant." Since criminal actions by women breach their traditional role, according to this theory, they will be punished more severely. A number of studies indicate that throughout American judicial history, women have generally received harsher treatment by the courts. However, in the last thirty years, harsher treatment of women in sentencing has only been seen in exceptional cases. Therefore, the sex-role traditionalism model has only limited application in these current judicial decision-making trends. However, in other specific time periods, regions and types of dispositions women have been more likely to receive harsher penalties than men. Examples illustrating this trend include studies by sociologists Robert Terry and Linda Hancock, where juvenile females who committed crimes that offended traditional moral standards received harsher sanctions than juvenile males. Meda Chesney-Lind also confirms this position, reporting that girls were more likely to be referred for status offenses than boys.

Studies analyzing specific historical periods have also shown support for sex-role traditionalism. Sociologist Helen Boritch states that, "while much of the contemporary sentencing research has sought to explain (and sometimes, qualify) the predominant pattern of leniency toward female offenders, the historical evidence suggests that the opposite pattern of gender discrimination prevailed (quite often) in the past." Boritch analyzed sentencing during the Urban Reform Era (1871–1920) in Canada, which coincided with the Progressive Era in the United States, and the findings showed that women in general received harsher sanctions than males.

28. David R. Johnson & Laurie K. Scheuble, Gender Bias in the Disposition of Juvenile Court Referrals: The Effects of Time and Location, 29 CRIMINOLOGY 677, 678 (1991). Sex-role traditionalism explains that men are not treated as severely because often when a man breaks the law, it is viewed as "a consequence of independence, aggressiveness, and self-reliance, which are strong components of the traditional male role." Id. at 678. In other words, society expects men to break the law as an expression of their maleness, while women are expected to remain docile and obedient. See id.
29. See id.
31. See Terry, supra note 5 (in a sample of juveniles taken out of the Midwest, there was a significant relationship between gender and sentencing, girls being treated more harshly than boys).
32. See Linda Hancock, The Myth That Females are Treated More Leniently than Males in the Juvenile System, 16 AUST. & N. Z. J. SOC. 4 (1980) (in a sample taken from Victoria, Hancock found girls were more likely to receive probation while boys were more likely to receive dismissals, adjournments, or fines).
33. See Meda Chesney-Lind, Judicial Paternalism and the Female Status Offender: Training Women to Know Their Place, 23 CRIME & DELINQ. 121 (1977) (showing harsher treatment of girls; illustrating both greater likelihood of being charged with a status crime and more severe sentencing for that crime).
34. See Boritch, supra note 30, at 312, 316.
35. Id. at 316.
men. Some of the most significant gender differences were in the areas of public disorder offenses and vagrancy (which was specifically used to charge prostitutes). As will become clear below, studies on present day judicial decisions indicate leniency—as opposed to historical studies, which indicate harsher treatment of women. For this and future studies, it is important to note the changing boundaries that have been forced upon women throughout history, and that these social norms continue to affect sentencing.

Another explanation for the harsher treatment of women is an unconventional application of the theory of paternalism. A conventional application of paternalism would result in women receiving more lenient treatment out of a desire to protect women. However, Chesney-Lind demonstrates that it can function in the opposite manner as well. In a study of young women and men, Chesney-Lind found that women were treated more severely than men. She argued that judicial paternalism results in higher rates of detention for young women than young men because of the court’s belief that women need more guidance and control.

2. Lenient Treatment of Women

a. Paternalism Generally

Paternalism has traditionally been used as the theoretical basis for explaining the lenient treatment of women. It is necessary to define paternalism because certain definitions in the past have wrongly equated leniency with paternalism. Paternalism may plausibly cause leniency, but not all leniency is a product of paternalism. Furthermore, paternalism can potentially result in harsher treatment for women. Female Paternalism, where a distinction is made between chivalry and paternalism, is the “power [relationship] reflecting women’s social and legal inferiority to men because of their putative need to be supported, guided, and

36. See id. at 303, 316-19.
37. See id. at 316-17.
38. Boritch discusses the apparent reasons for the historically harsher treatment of women, concluding that they are a result of gender- and class-based stereotypes and structural factors. See id. at 318-19. More specifically, courts viewed the men’s position in the family as more important because men are the “providers”; courts seemed to take into consideration the lack of state support for families and therefore determined that incarcerating the male provider would be more detrimental than incarcerating the woman who was viewed as the caretaker. See id. at 319. Therefore, the result in this period often was harsher treatment of women than men. Furthermore, class-based stereotypes played a part in the decision-making process, in that most women before the court were working-class women and working was an indication they were inadequate mothers because their place was supposed to be in the home. See id.
39. Id. at 320.
40. See Chesney-Lind, supra note 33, at 124.
41. See id.
42. See Daly, Rethinking Judicial Paternalism, supra note 14, at 10.
Definitions which make no distinction between chivalry and paternalism, "define female paternalism as chivalrous attitudes and behaviors that reflect a degree of respect toward women." However, some scholars have shown the latter definition to be problematic, because paternalism is not applied to all women; it is only applied to those who fit into the traditional sex-role. Furthermore, paternalism might only benefit white and middle-class women.

Although all of these distinctions in paternalism are important, the basic theory of paternalism is of marginal use here because it has not consistently nor uniformly explained the differentiation in recent judicial decision-making trends. One of the first expansions of paternalism was the practicality theory, which noted the importance of gender-based family roles in judicial sentencing. This theory explained that the court believes that it is impractical to incarcerate a mother out of concern for the welfare of the children.

Despite the apparent judicial concern for families, the question remains whether the courts are protecting children or protecting familial labor. As historical studies indicate, the courts have had little trouble deciding to incarcerate mothers in previous periods. Therefore, the practicality theory is applicable when women are treated with leniency, but, as in the Urban Reform Era, when women were treated more harshly, the courts seemed to believe that it was practical to jail women with children. Notwithstanding the fact that women were completely responsible for taking care of the children in that era, it seems that the court believed that economic support from the father was more important than childcare from the mother. In the early 1900s, a second parent was almost always present to support the children—therefore, the loss of the mother was not completely devastating. However, today the prevalence of one-parent households—especially single mother households—forces courts to face the grim reality that there might not be anyone to take care of the children.

43. Id. at 10 (citing MOULDS, supra note 13, at 279-82).
45. See Visher, supra note 13, at 6.
46. See Dorie Klein, The Etiology of Female Crime: A Review of the Literature, 8 ISSUES IN CRIMINOLOGY 3 (1973).
47. See, e.g., Daly, Rethinking Judicial Paternalism, supra note 14, at 11 (pointing out a need to “be more precise in identifying the objects of judicial protection”).
48. See Simon, supra note 14, at 49.
49. See id.
50. See Daly, Rethinking Judicial Paternalism, supra note 14, at 11.
51. See generally Boritch, supra note 30 (study showing that women received more severe sentences than men in a sample over the late 19th Century to early 20th Century).
52. See id.
53. See id. at 319.
if the mother is incarcerated.  

In an attempt to explain specific circumstances where the practicality theory fails, some scholars have employed an economic-based theory of leniency. The Functional Theory of Deviant Type-Scripts operates on the idea that white "men have an [economic] interest in maintaining women's familial labor in the home." It follows that, if women were continually imprisoned, the continuance of white male hegemony would also be threatened, because the unpaid familial labor performed by females would be eliminated. Therefore, the lenient treatment of females reflects the interest of men in keeping women in the home to perform free labor.

b. Informal Social Control

Candace Kruttschnitt posits a theory of informal social control to explain gender disparities in sentencing. She finds two main sources of informal social control for women: economic dependency (on a spouse or the state), and the high levels of "supervisory activity associated with women's residing with others." Kruttschnitt argues that lenient sanctioning trends for women reflect their high degree of informal social control stemming from family and work ties. Her theory predicts that the degree of informal social control placed on a person is related inversely to the amount of formal (state) control placed on that person.

In one study, Kruttschnitt used probation officer sentence recommendations to identify a variety of infractions. When using a composite measure of dependency as her main independent variable, the

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54. The courts' protection of children will be further discussed in the section on familial paternalism.
55. See Anthony R. Harris, Sex and Theories of Deviance: Toward a Functional Theory of Deviant Type-Scripts, 42 AM. SOC. REV. 3 (1977).
56. Daly, Structure and Practice, supra note 4, at 270 (referring to Harris' theory).
57. See Harris, supra note 55, at 13.
58. See id. Furthermore, this theory argues that non-white women will not receive lenient treatment, because they "are not essential to the maintenance of white male hegemony." Id.
59. See Kruttschnitt, Social Status and Sentences, supra note 16, at 247.
60. Bickle & Peterson, supra note 4, at 373 (explaining the elements of Kruttschnitt's use of informal social control theory).
61. See Kruttschnitt, Social Status and Sentences, supra note 16, at 259, 262. The theory of informal social control builds upon Black's theory of law, especially concerning social status and the law. See id. at 249 (citing BLACK, supra note 16).
62. See Kruttschnitt, Social Status and Sentences, supra note 16, at 259, 262.
63. See generally id. See also Kruttschnitt, Women, Crime and Dependency, supra note 4 (both publications covered the same data set, with the first analyzing actual sentencing and the second looking at probation officer recommendations). The crimes analyzed within the sample were disturbing the peace, assault, forgery, drug law violations and petty theft. See id.
64. The composite measure of dependency is a combination of independent variables. Here the composite measure of dependency was constructed with a cross-tabulating source of economic support, marital status and whether or not the defendant lives with her husband or child. See Kruttschnitt, Women, Crime and Dependency, supra note 4.
data showed that this variable significantly affected sentencing severity for women convicted of petty theft and forgery, but not for those convicted of disturbing the peace, assault and drug violations.\textsuperscript{65} When changing her main independent variable to a source of support indicator, the variable was significant for sentencing severity in all offense types, except for drug violations.\textsuperscript{66} The results of further studies\textsuperscript{67} testing this theory were somewhat complicated because different measures of social control were used.\textsuperscript{68} The most notable result of her group of studies is that the individual-based measures of informal social control (source of support and household composition) confirm the predicted relationship with the chance of a pretrial release, but not necessarily with her sentencing model. In general, the research shows more limited support for the theory.\textsuperscript{69} When testing this theory, it is important to use a wide range of measures of social control: employment, children, age, income and marital status.

While Kruttschnitt's studies are informative, there are problems with the analyses. Daly stresses that "two flaws are apparent: the locus of informal social control is misspecified, and gender differences in court outcomes cannot be adequately explained by it."\textsuperscript{70} The misspecification to which Daly refers is Kruttschnitt's use of economic dependency of women on men. Daly purports that the locus should be whether or not women have dependent children.\textsuperscript{71} This criticism represents the main distinction between Kruttschnitt and Daly's theories. Daly's criticism is probably justified, because Kruttschnitt's definition of the theory relies on the dependence of women on men. Today, this dependence is disappearing, and expanding the scope of informal social control seems warranted. The locus of economic dependency can be widened to the dependency on a source of income, which includes employment. However, the informal social control placed on a person from a family remains the other important part of this theory.

Here it should also be noted that Kruttschnitt does not thoroughly

\begin{itemize}
\item \textsuperscript{65} See generally id.
\item \textsuperscript{66} See generally id.
\item \textsuperscript{67} See Candace Kruttschnitt, \textit{Sex and Criminal Court Dispositions: The Unresolved Controversy}, 21 RES. IN CRIME & DELINQ. 213 (1984) [hereinafter Kruttschnitt, \textit{Sex and Criminal Court Dispositions}]; Kruttschnitt, \textit{Legal Outcomes and Legal Agents}, supra note 20 (in these studies, as well as in others not cited herein, Kruttschnitt further examined gender disparities in pretrial releases and sentencing).
\item \textsuperscript{68} She has measured social control with: a composite measure (which was used above), children; family composition; employment status; and source of support. See Bickle & Peterson, supra note 4, at 374.
\item \textsuperscript{69} See id. Bickle and Peterson question the value of Kruttschnitt's findings, because of their "sporadic rather than consistent support for her hypotheses." \textit{Id}.
\item \textsuperscript{70} See Kathleen Daly, \textit{Discrimination in the Criminal Courts: Family, Gender, and the Problem of Equal Treatment}, 66 SOC. FORCES 152, 154 (1987) [hereinafter Daly, \textit{Discrimination in the Criminal Courts}].
\item \textsuperscript{71} See id.
\end{itemize}
analyze discrepancies in the data for racial factors, which could have significance in sentencing. However, most statistical sentencing studies show that gender differences favoring women are more frequently found than race differences favoring white offenders.

c. Familial Paternalism

Kathleen Daly offers an alternative to Kruttschnitt’s informal social control model. Daly distinguishes between the judiciary’s concern for protecting women (female paternalism) and the desire to protect children and families (familial paternalism). Through qualitative analyses, she finds that the court distinguishes between familied and nonfamilied defendants, with familied defendants receiving greater leniency. Daly’s theory combines a narrow version of informal social control and practicality theory. In general terms, Daly finds that courts see familied defendants as more responsible and ‘anchored’ because they have people dependent upon them. She suggests that courts realize the impracticality of imprisoning a person on whom people depend, because it not only punishes the defendant but also the defendant’s children. Hence, Daly argues the gender differentiation in judicial decisions derives from the

72. See Daly, Neither Conflict nor Labeling nor Paternalism Will Suffice, supra note 19, at 141 (pointing out that different measures or controls can create different results from the same data set).

73. See id. at 140-42. This points to a critical issue in the study of how race affects judicial decisions. Race has historically played a large part in judicial decisions; however in recent empirical studies, only capital punishment studies have data that consistently shows that racial effects are substantial. See J. Hagan & K. Bumiller, Making Sense of Sentencing: A Review and Critique of Sentencing Research, in 2 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 31-32 (A. Blumstein et al. eds., 1983) (noting that while black women comprise a large portion of arrests and half of all incarcerated women, racial disparities are not detectable in judicial decision making); cf. McCleskey v. Kemp, 481 U.S. 279 (1987) (citing David C. Baldus et al., Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983) (study on capital punishment, showing that defendants convicted of killing white victims were 4.3 times as likely to receive the death penalty as defendants convicted of killing black victims; it is an illustration of one of the few areas where racial disparities have been consistently proven empirically)). However, this is not to say that stereotypes and racism do not continue to play a significant role in many areas of the judicial process. As Kathleen Daly points out, quantitative studies may not be accurately measuring racial differences, because as is seen when legal scholars have focused on individual cases, racial differences are present. See DAILY, GENDER, CRIME AND PUNISHMENT, supra note 3, at 5. This issue will be further reviewed in section D, subsection 3 below.

74. See Daly, Neither Conflict nor Labeling nor Paternalism Will Suffice, supra note 19, at 138.

75. See Daly, Discrimination in the Criminal Courts, supra note 70, at 168. Not only do familied defendants receive more lenient treatment, but familied women receive more lenient treatment than familied men. See id. This seems to be a result of the court’s belief that women with children play a larger role in care-taking than do the men. See id.

76. See Daly, Neither Conflict nor Labeling nor Paternalism Will Suffice, supra note 19, at 138.

77. See id.
judiciary’s belief that it is more costly to jail women with families than men with families. 78

Daly has performed extensive qualitative studies79 that test and confirm the familial paternalism theory, but has only one quantitative study.80 In Daly’s quantitative study, racial variation is also examined.81 In short, just as Kruttschnitt’s studies had discrepancies in the data on race, Daly’s research also resulted in inconsistent findings.82 It is important to keep in mind that, as Daly notes, “[v]arying sample sizes and different measures or controls can produce significant or negligible race effects from the same data set.”83

Bickle and Peterson, building on Daly’s and Kruttschnitt’s theories, use “a more comprehensive set of role factors” than either Daly or Kruttschnitt used respectively in the past.84 Bickle and Peterson test whether effects of family roles vary by sex or race.85 In a sample of federal forgery offenders,86 they found—with some qualifications—that family roles influence sentencing by increasing leniency for males and resulting in even greater leniency for females.87 In addition, the impact of family role factors

78. See Daly, Discrimination in the Criminal Courts, supra note 70, at 168.
79. See, e.g., id. This study looked to four court decisions made in typical cases—pretrial release, dismissal, type of conviction and sentencing—and using observational studies and interviews with court officials, Daly found that both men and women who had children received lenient treatment, but with women receiving more leniency than men. Id. Other studies consisting of interviews with court officials have found that families defendants received more leniency. See, e.g., Daly, Structure and Practice, supra note 4; Daly, Rethinking Judicial Paternalism, supra note 14.
80. See Daly, Neither Conflict nor Labeling nor Paternalism Will Suffice, supra note 19. It should be acknowledged here that Daly’s studies do have limitations. As Daly has criticized Kruttschnitt for using an incorrect locus of informal control, Daly’s studies can be criticized for excluding measures of economic dependence. My statistical model analyzes both economic and familial variables.
81. See id.
82. See id. at 158–61 (pointing to possible statistical deficiencies, as well as inherent problems in understanding and testing “multiple influences of gender, race or ethnicity, class, and family in the criminal court”).
83. Id. at 141. Daly has also formulated another point of attack in analyzing sentencing disparities. See Daly, Gender, Crime, and Punishment, supra note 3, at 5-12 (suggesting that there is actually very little gender disparity in treatment by the courts, but that apparent lenient treatment of women is actually a result of different crimes and biographies of women). This issue will be more thoroughly discussed in the methods section below.
84. Bickle & Peterson, supra note 4 (testing both familial paternalism and informal social control theories in order to determine what the courts actually look to in determining who is deserving of lenient treatment).
85. See id. at 377.
86. Their sample included 124 female and 390 male defendants convicted of forgery in federal district courts from 1973 to 1978. See id.
87. See id. at 388–90. They found general support for both familial paternalism and informal social control. The data showed the importance of marital status, the presence of dependents, care-taking and living arrangements. See id. at 390. However, the variables for economic support and the source of economic support did not affect sentencing severity. See id.
do vary by the race of the defendant. The results of this study can only be taken as marginal, because of its small sample size and narrow population focus. However, this study's comprehensive set of family role factors—a combination of social control and familial paternalism—is an important starting point.

d. Statement of the Problem

This study is relevant because of increased female criminalization, the rising number of single mother households and continued concern about fair judicial decision making. There are two main goals that I would like to accomplish with this study. First, I would like to assess the competency of the two competing theories: familial paternalism and informal social control. While familial paternalism views having children as the major factor in explaining these variations in the judicial process, informal social control points to economic dependency and general family restraints. Second, I would like to strengthen the validity of findings on variations in judicial decision-making by using a nation-wide data set.

This Note poses the question: Can we separate the importance of these two theories, as well as the variables that they use to predict judicial decisions? The conclusion is, "No"; it would be too exclusive of seemingly important factors. Together, the two theories encompass a comprehensive set of variables which this Note predicts will affect the likelihood of pretrial release and the bail/bond amount. The following predictions are made. A high degree of informal social control—through economic dependency and responsibility in the form of a job, marriage and/or children—will be found significant and will increase the chance of a pretrial release, as well as decrease the bail/bond amount. Also, as predicted by informal social control, the following variables will be significant: age, education level completed prior to imprisonment, and total income in year preceding imprisonment. At the same time, familial paternalism, having children and to a lesser extent being married, will be found significant, and the presence of children, and/or being married, will increase the probability of pretrial release and decrease the bail/bond amount.

88. See id. at 390. Black women received more lenient treatment for providing significant emotional support to dependents, while white women did not. However, white women received lenient treatment merely for having emotional dependents, while black women did not. See id. As Bickle and Peterson discuss, there are a number of possible explanations for these differences, but it is clear that they are a result of different judicial assumptions about black versus white mothers. See id. at 391.

89. Both familial paternalism and informal social control models predict that having children will create more lenient treatment, but each for different reasons. Familial paternalism theorizes that courts want to protect defendants' innocent children. On the other hand, informal social control theorizes that courts view having children as an indicator of defendants being grounded and less likely to be a recidivist because of the responsibility of taking care of children.
Note that marriage is a part of both theories. Informal social control views marriage as a factor that places more control on women, and also indicates that women have a higher level of dependency and responsibility. Familial paternalism views marriage as a part of the family responsibility, therefore arguing that it would be impractical to incarcerate the defendant. Based on indications from prior studies, being African American, Latina, or residing in the South will probably decrease or eliminate the leniency that the two theories predict.

B. METHODS

In this study, 14,649 cases were analyzed from the Survey of Inmates of State Correctional Facilities. This data set is the only resource available on a national basis. It allows for greater generalization to the U.S. population, which has never before been possible. The data set was reduced to include only women, and after more cases were dropped due to

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90. Marriage is a much less important variable in the familial paternalism model, because the theory is based on the idea that courts will protect the children, but not necessarily the entire family. In fact, it is quite possible that being married would create a lesser chance of leniency when there are children present, because then there would potentially be another parent to care for the children.

91. The word Latino/a will be used instead of Hispanic herein. While the two are generally used synonymously, Latino/a is more self-defining—i.e., chosen by Spanish speaking people within the U.S.—and it comes from the word latinoamericanos. See ILAN STAVANS, THE HISPANIC CONDITION: REFLECTIONS ON CULTURE AND IDENTITY IN AMERICA 25 (1995). Hispanic, on the other hand, is a word used by the media and government and is generally preferred by conservatives. See id. at 25-27 (giving a brief history of the names used, and even the fallacy of the correctness of the label “Latin America”).

92. Before the methods of the study are explained, it is necessary to comment on the use of a quantitative model, as opposed to a qualitative-case-by-case analysis. While empirical research is invaluable to the study of law, there is great debate on which types of research are more valuable/reliable—qualitative or quantitative. The result of this debate is probably that both methods are necessary to tell policy makers and scholars different things. Statistical models can tell us general trends of the courts, and qualitative studies can help explain the processes/rationales that lead to those outcomes. See Daly, Neither Conflict nor Labeling nor Paternalism Will Suffice, supra note 19, at 137. What is also learned from this debate is that the way data is collected is very important. Additionally, while it is very difficult for quantitative studies to take into account the small, yet important, differences between the crimes of men and women who are convicted of the same crimes, they still allow us to determine if there are significant effects from certain factors, such as parenthood.

93. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, No. 8711, SURVEY OF INMATES OF STATE CORRECTIONAL FACILITIES, 1986 (1988). The data were collected from 275 facilities in face-to-face surveys. The data utilized in this study were made available in part by the Inter-University Consortium for Political and Social Research. The data for the Survey of Inmates of State Correctional Facilities, 1986 were originally collected by the Bureau of the Census for the Bureau of Justice Statistics. Neither the collector of the original data nor the consortium bear any responsibility for the analyses or interpretations presented here.

94. The shortcoming of this data set is that it is not sufficiently thorough, like those that are found in local data sets, especially in qualitative studies. The advantage is that it is a national data set. Ultimately, you must lose specificity to gain wider applicability.
missing data, there were between 638 and 888 subjects—depending on which analysis was used.\footnote{95}{See tables 1-4 infra, at 392-95.}

Many of the variables chosen for the model were picked out of common sense predictions for which extra-legal factors may have an effect on severity. Others were chosen following other analogous studies, which tested them and found them significant.\footnote{96}{Choosing variables is concededly one of the most subjective points of quantitative empirical analysis, but it is clearly necessary for reasons of time and space. It would be impractical to include hundreds of variables in a model and attempt to analyze the results.}

The independent variables fall into three categories: legally prescribed variables, extra-legal offender characteristics and contextual factors. As for the legally prescribed variables, the model is divided into two, by offense type (with sections of violent and property offenders). It was divided into two offense severities for two reasons: first, to demonstrate the different effects in serious and less serious crimes; and second, a few offense types, which are not commonly associated with women, had very low subject totals. The most notable of these categories was murder, a typically male offense.

The offender characteristic variables include only women,\footnote{97}{I include only women in the model for the following reasons. First, there is a tendency to always place men at the center of discussion and theory for crime. Secondly, women generally receive more lenient treatment than men, indicating that there are multiple factors influencing women’s treatment—more so than men. Lastly, a much smaller proportion of male offenders are primary caregivers, and studies tend to show that men with children do not receive nearly as much leniency as women with children. See Daly, Discrimination in the Criminal Courts, supra note 70, at 167-68. Therefore, while the courts should also give lenient treatment to men who are primary caregivers, the concerns for the protection of children are best studied in the area where it most commonly arises—in female offenders.} and the only significant races and ethnicities represented are African American, Caucasian, and Latina.\footnote{98}{All other races had too few numbers in the data set to be reliable.} Since the study includes only two races and one separate ethnicity, those variables are coded as African American versus non-African American (white) and Latina versus non-Latina. Race was chosen as a variable in the model because it is historically known to play a role in the judicial system.

The other independent variables are as follows: age, ‘school level pre-admit’ (highest school level completed prior to being admitted) and ‘total income yr before’ (total income earned the year preceding admission). The remaining characteristic variables are all dichotomous: whether or not they had a job; whether or not they were married; and whether or not they have children. The geographic location is the only contextual factor variable, and it is also dichotomously coded as residing ‘in the South’ versus ‘not in the South.’

Following Daly’s approach, this study uses pretrial release decisions to
measure the effects of familial paternalism and/or informal social control.\textsuperscript{99} More specifically, there are two stages to be tested in the pretrial process. The first stage is dichotomously coded as whether or not they had a pretrial release. A pretrial release means a release by the court, before trial but after being charged. Offenders are generally given this privilege on a discretionary basis on the condition that they will not break any laws and will appear for their scheduled court date. The second part of the pretrial process is the bail/bond amount assigned to the defendant (coded into a monetary scale). Taken together, these variables allow for a comprehensive look at the pretrial decision-making process, as they relate to extra-legal factors.

Using sentencing severity would likely be the best measure for analyzing variations in judicial treatment. Sentencing tends to reflect the most comprehensive overview of the defendant’s actions and history. Unfortunately, the data set here has not allowed the use of this measure. The variables measuring sentencing severity had incredibly high rates of missing data, and this forced the focus of analysis to the pretrial process.\textsuperscript{100} Analysis of the pretrial process is generalizable to sentencing because many of the court’s concerns are the same, and extra-legal factors seem to affect the two decision-making processes similarly. Furthermore, studies of the two areas have shown similar results.

Linear and logistic regression\textsuperscript{101} were both necessary to analyze the two dependent variables in the model. In the analysis of the pretrial release decisions, logistic regression was utilized because it is a dichotomous dependent variable. On the other hand, linear regression was used in the bail/bond amount analysis because it is a continuous variable. Each of these procedures has been regularly employed in recent studies of pretrial release and sentencing decisions.\textsuperscript{102}

\textsuperscript{99} See Daly, \textit{Neither Conflict nor Labeling nor Paternalism Will Suffice}, supra note 19 (analyzing both pretrial releases and sentencing).

\textsuperscript{100} Another disappointing factor was that a good measure of prior offenses was not available from the data set. All the measures for prior offenses had significantly high incidence of missing data, or were not comprehensive on total legal history. It is important to note that the lack of a prior offense variable dramatically reduces the R-Square in the analysis of bail/bond amount but does not affect the validity of the rest of the analysis.

\textsuperscript{101} Multiple regression allows one to hold variables constant in order to more accurately determine the impact of other variables. Therefore, it allows one to accurately determine the impact of individual variables that may have a high correlation with one another. For example, education level and income level are highly correlated. However, a correlational model will not allow one to determine what other factors may also be causing the increased income level. Multiple regression allows one to enter in many variables, and the statistical model will allow one to see the exact impact that each variable causes on the dependent variable.

\textsuperscript{102} See, e.g., Daly, \textit{Neither Conflict nor Labeling nor Paternalism Will Suffice}, supra note 19; Bickle & Peterson, supra note 4.
C. RESULTS

1. Pretrial Release Decision

The descriptive variables in the sample indicate a few interesting results in and of themselves. On average, violent offenders are a few years older than property offenders and also tend to have slightly less education. Roughly one half of both violent and property offenders have jobs, and violent offenders tend to make slightly less money. The most dramatic set of statistics was found when the percentage of married were compared to the percentage with children. While the proportion of offenders who received a pretrial release and have children is quite high (violent = 76% and property = 80%), the proportion who are married is quite low (violent = 17% and property = 22%). It is likely that an offender who is both married and has children would be highly significant. The data seems to match the trend in recent studies where high proportions of offenders in the criminal justice system have children, while few are married.

Table 2 shows the results of the logistic regressional analysis for pretrial release. As predicted, the significance of specific variables varied by offense severity. While having children was only marginally significant for violent offenders, it was clearly significant for property offenders. The odds ratio shows that property offenders with children are 1.4863 times as likely to receive a pretrial release than property offenders without children. A similar result was found in the case of having a job or business. For property offenders, having a job or business made them 1.344 times as likely to receive a pretrial release than unemployed offenders.

Being married had no significant effect on the likelihood of pretrial release among property offenders. For violent offenders, on the other hand, married women are 1.5692 times as likely to receive a pretrial release than non-married women. Also significant, Latina property offenders are 0.3008 times less likely to receive a pretrial release than non-Latinas.

Violent offenders residing in the South, interestingly, are 1.3897 times as likely to receive a pretrial release than violent offenders not in the South. The last significant variable, age, has only a minimal affect. For every one year increase in a violent offender’s age, she is 1.0152 times as likely to receive a pretrial release. As for the less important variables, ‘school level pre-admit’ and ‘total income year before’ were both not significant in the pretrial analysis. Surprisingly, being African American was also not significant in the pretrial analysis.104

2. Bail/Bond Amount

The descriptive variables for the analysis of bail/bond amount are quite

103. See table 1.
104. I will analyze these results in the discussion section below.
similar to those for the pretrial release. The variable worth pointing out is the bail/bond amount, which shows a large difference between means for violent offenders and those for property offenders (violent = $56,418.08 and property = $18,659.95).

Table 4 illustrates the linear regressive analysis of bail/bond amount for violent and property offenders. It is immediately evident that there are less significant variables in the bail/bond amount analysis for property offenders than in any other part of the model. For property offenders, being African American is not quite significant; but for violent offenders, it has the largest effect in the bail/bond analysis. If a violent offender is African American, she will have on average a $40,969 decrease in her bail/bond amount. Interestingly enough, being Latina has no significant effect on bail/bond amount. If a female offender is in the South, no matter what type of offense, she will receive a lower bail/bond amount. Violent offenders in the South receive a $22,345 decrease in their bail/bond amount, as opposed to non-southern offenders. Also, property offenders in the South receive a $7,556 decrease in their bail/bond amount.

Surprisingly, having a job or business was not significant. School level prior to admittance is the only variable in the analysis that increased bail bond amount. For every grade level increase among violent offenders, the bail/bond amount increased by $3,312. It is also important to note that marriage was not significant in affecting the bail/bond amount. However, having children was significant for violent offenders. Violent offenders with children receive $18,591 lower bail/bond amounts than do violent offenders without children. Taken together, the two analyses (pretrial release and bail/bond amount) form a comprehensive reflection of the pretrial decision-making process. The results of the statistical analyses will now be explained within the present theoretical framework.

D. DISCUSSION

1. Familial Paternalism

As predicted, having children had a significant effect in increasing the likelihood of pretrial release and decreasing the bail/bond amount. Even though the effect of having children is not the same across offense types, the finding is still consistent with the hypothesis of this study. The analysis indicates that violent offenders do not have an increased likelihood of a pretrial release when they have children. Several reasons could explain this effect. First, as a part of familial paternalism, the court may find that the violent act expresses a characteristic of the mother that makes her unfit to

105. See table 3.
106. This large difference makes sense considering the differing severity of offenses. The large standard deviations also illustrate the wide range of bail/bond amounts within each section (violent and property).
care for her own children. If the court perceives this from the offender she will not be granted an opportunity for release or will receive a larger bail/bond amount. While this is possible, it is only likely to occur in rare cases, because the analysis shows that violent offenders with children are likely to receive lower bail/bond amounts. Therefore, the result of this scenario is that most offenders who have children are generally seen as fit mothers.\footnote{107}

The most obvious explanation for this lack of significance (of having children for violent offenders in the pretrial release analysis) is simply that, regardless of having children, the bail/bond amount for violent crimes is too high for a large number of people to pay. The average bail/bond amount for violent offenders is $56,418.28, and even with their decreased bail/bond amount from having children (-$18,591) the amount is still too high for many of them to afford. This is compounded by the fact that, on average, violent offenders only made $5,667 in the year preceding their incarceration.\footnote{108} Another statistic that supports this explanation is the difference in the percentage of women who actually get a pretrial release. For violent offenders, only forty-three percent of them were released, while fifty-two percent of property offenders received a pretrial release. The difference may seem small, but it is likely that the cost of release explains much of the difference in who was actually released.

The only other competing explanation for the different percentage of offenders that do receive a pretrial release is that some violent offenders are not given the option by the court. However, there are actually very few women who commit serious enough crimes to have their bail/bond option revoked. Therefore, it is consistent with the theory of familial paternalism for the violent offenders not to have a greater likelihood of pretrial release when they have children. The more important question was whether property offenders—who on average have much lower bail/bond amounts—were more likely to receive a pretrial release if they had children, and that was found to be true.

An interesting finding on the significance of having children is that on average, while property offenders with children have an increased chance of a pretrial release, they do not receive decreased bail/bond amounts.\footnote{109} The most important test of familial paternalism is whether violent offenders with children receive bail/bond reductions, and in the analysis here they do.

\footnote{107. Having a decreased bail/bond amount because a woman has a child does not necessarily mean that the judge sees her as a good mother. However, one can at least conclude that the judge deems the defendant to be a good enough mother to want her to be at home with her children, as opposed to being held in jail.}
\footnote{108. Note there is also the possibility that they would put up a piece of property as collateral on a bail/bond or have another relative do the same. However, one must remember the low socioeconomic status of the vast majority of these offenders. The mean income for all the groups in the data set was around $6000. See tables 1 and 3.}
\footnote{109. Compare tables 2 and 4.}
However, property offenders did not receive this decrease and that creates a strange predicament. One would assume that property offenders would be more likely than violent offenders to receive lenient treatment for having children because a violent offender would be more likely deemed an unfit parent; however, the data does not seem to indicate this. A possible explanation for this discrepancy is that courts might not really be concerned about the children. Instead, the increased chance of pretrial release for property offenders with children could originate simply from the mothers who have the extra incentive to go home to their children. This would then explain why there is no decrease in bail/bond amounts for these property offenders. However, it is unlikely that judges do not consider the presence of children since violent offenders with children receive lower bail/bond amounts. The more probable explanation for the lack of significance for property offenders is that bail/bond amounts for property offenders are already low. Even with their concern for the offender’s children, judges may feel that the mother should be able to post that bond and are not inclined to lower the amount further.

The second, yet less significant, part of familial paternalism is marriage. The only time that being married was significant was in the increased likelihood of pretrial release for violent offenders. I interpret this to mean one of three possibilities. First, it could mean that judges are trying to protect family solidarity (following the theory of familial paternalism). Second, it could mean that judges believe the individual is well grounded from informal social control (i.e., from her spouse) and doesn’t need the supervision of the state (i.e., does not need to be held prior to the trial). However, these two possibilities can be rejected because marriage was not found to lower the bail/bond amount, and the bail/bond amount is generally the only other way the judge can affect whether the individual will actually be released before trial (another possible way would be denying release which only happens in rare circumstances). The third, and most logical explanation, is probably that married female offenders are more likely to have the money to afford their bail/bond amount because of the additional financial resources provided by their spouse. However, even this explanation is not entirely consistent because property offenders should therefore also be able to enjoy the increased likelihood of release from having extra resources from their spouse.¹¹⁰

Assuming that this last explanation is true implies that within the

¹¹⁰. Marriage poses somewhat of an anomaly in statistical studies. An informal social control model would predict that marriage would create lenient treatment. However, some scholars predict that marriage may actually create harsher treatment because: 1) the judge will believe that children will be cared for by the spouse, or 2) sexist/chivalrous argument—that the defendant with a spouse (and the responsibilities that go along with marriage) should have known better than to risk committing a crime. Note that the latter argument can also be applied to a theory for the harsher treatment of mothers—they are risking incarceration and putting their children at risk.
familial paternalism framework the judge is basically thinking about protecting the children only—not the family in general. Therefore, the marriage variable does not inhibit the explanatory success of familial paternalism, but it does create problems for the theoretical accuracy of informal social control.\footnote{111. The general lack of significance for marriage shows that the theory of familial paternalism should be narrowly construed to include only the variable of children—that courts are only concerned with protecting innocent children.}

2. Informal Social Control

This study found limited confirmation on informal social control. The theory predicts that children, marriage, employment, and to a lesser extent, age, income and education will create more leniency for the defendant. First, as explained above, children were found to be generally significant in creating leniency. However, for the theory to be accurate, some of the other variables must also be significant. If having children was the only significant variable, then it would only lend itself to suggesting that the courts are concerned with children, not that the defendants have more informal social controls on them.

Second, being married is not a consistent factor which increases the chance of pretrial release, nor a factor that decreases the offender’s bail/bond amount. This is a failed prediction on which the theory depends, although it is only part of what the hypothesis and theory entail. Another prediction of informal social control is that having a job will increase the offender’s chances of a pretrial release and decrease her bail/bond amount. The hypothesis is correct only in that property offenders were more likely to have a pretrial release if they had a job or business. Again, this does not truly confirm the theory’s prediction. When looking at the possible reasons why having a job increases the probability of having a pretrial release, the explanation does not necessarily support informal social control. The rationale behind this theory is that the court will view an offender that has a job as more grounded, already having informal social control placed on their lives, and are therefore lacking the need for formal control. If the court was acting as the informal social control theory predicts, property offenders’ bail/bond amounts would have been reduced as well. Moreover, courts do not appear to act consistent with informal social control in regards to violent offenders, which is probably a product of the court’s unwillingness to stretch it’s confidence in this rationale to people who have committed violent crimes.

Possible explanations can be inferred from this discussion on pretrial releases into the discussion on the lack of significance of having a job or business on bail/bond amount. It seems reasonable that courts would not be willing to lower the bail/bond amount for violent offenders, and this probably correlates with the lack of significance for pretrial release of
violent offenders. As for the bail/bond amount for property offenders, the lack of effect from having a job or business may reflect the court’s disregard for the offender’s employment status. On the other hand, this could also be a product of the court’s view that a person with a job should be able to pay the standard bail/bond for the crime. To conclude, while the likelihood of having a pretrial release is increased by having a job, the increase is most likely due to the offender having money, not the court’s leniency from its confidence in informal social controls. The general lack of significance for employment and marriage make informal social control’s predictions frequently inaccurate for this data set.

Other findings further undermine the validity of the theory of informal social control. An offender’s total income the year before her arrest was not found significant in any area. This is a bit troubling for the theory: an offender’s income should partially reflect her level of grounding and responsibility, again the prediction fails.

The limited significance of both age and the offender’s education prior to her arrest (school level pre-admit) seem to answer the final questions about informal social control’s predictions in this study. The projections made by informal social control have generally not been supported. The general insignificance of most of informal social control’s predicting variables seems to show that courts are not very concerned with the defendant’s level of responsibility and grounding when it comes to pretrial decisions. Note that one of informal social control’s predicting variables is having children, and that variable was in fact found to be significant. This could possibly demonstrate that courts are looking at the defendant’s responsibility and grounding, making the theory relatively accurate. However, the lack of significance of the other informal social control variables suggests otherwise. As far as extra-legal factors, the courts seem to be mainly concerned with innocent children when it comes to decisions that affect the likelihood of the women’s releases.

3. Race and Ethnicity

The results of the analysis regarding African American and Latina offenders show highly significant, albeit inconsistent, support for the predictions. The two variables with the largest effects in the two stages (pretrial release and bail/bond amount) of the model are being African American and being Latina. However, each variable is not significant in both stages—nor are they significant in both offense types. If a property offender is Latina, she is much more likely not to be released before trial, but there is no effect for either pretrial release for violent offenders or for the bail/bond amount for either offense. Since the Latina effect is not universal, one can argue that their low likelihood of pretrial release is not a product of overt racial discrimination, but that it is a result of financial circumstances. Latinas do not have higher bail/bond amounts, thus pretrial
detainment may be from lack of funds for bail. The only competing explanation for the lower likelihood of pretrial release is that property offenders are rarely held over with no possibility of posting bail/bond. Therefore lower likelihood seems to be a product of circumstance and not judicial discrimination. This finding does not follow predictions, although its inconclusiveness seems to follow in the trend of prior studies. 112

If a violent offender is African American, she will receive a large decrease in the level of her bail/bond amount (-$40,969). This is a tremendous decrease and does not follow predictions. There are three possible explanations for this finding. First, differing from prior qualitative research and case studies, these results may indicate that the court does not racially discriminate in pretrial decisions. It is also possible that the court is taking the economic circumstances of African Americans into account. Due to historically ingrained institutional factors—rooting from slavery and Jim Crow—a substantial proportion of the African American population is in a low socioeconomic status, 113 and as a result, black offenders are more likely to have lower incomes than white offenders. The court may be taking this into account by lowering their bail/bond amount to make it more proportional to their income. If this is true, it may indicate that the court is more sympathetic to systematic oppression than we thought; however, research on institutional racism and case studies show that this is unlikely. 114 This possible sympathy by courts is also questionable because Latina offenders do not receive the same decrease in their bail/bond amount, and they tend to face relatively similar systemic oppression.

Second, another possibility is related to the phenomenon in which defendants are treated more leniently when the victim of the crime is African American. This type of treatment could explain the dramatic drop in bail/bond amounts for African American offenders, because most crimes committed by African American offenders are perpetrated on other African Americans—thus the phenomenon of 'black-on-black' crime.

The third possible explanation for this finding on race and ethnicity is

112. See, e.g., Daly, Neither Conflict nor Labeling nor Paternalism Will Suffice, supra note 19, at 137, 140-43; Bickle and Peterson, supra note 4, at 377.
114. See, e.g., PAUL HARRIS, BLACK RAGE CONFRONTS THE LAW 265-66 (1997) (illustrating institutional racism by pointing to examples such as crack cocaine versus powdered cocaine mandatory sentencing disparities). Harris also points to other studies such as: a 1995 study of 80,000 federal convictions which found that African Americans received sentences which on average were 10% higher than similarly convicted white offenders; a study in California which demonstrated that white offenders had their charges "reduced more often than African Americans or Latino/as, and that white offenders received community-based rehabilitation placements at twice the rate of African Americans." Id. at 265.
that intersections between race, gender and parenthood are very complicated. Judicial perceptions and stereotypes on these intersecting issues seem to play a large role in determining who receives leniency if they have children.\(^{115}\) What furthers this argument are findings in other studies that show that African American men do not receive leniency for having children, while African American women do.\(^{116}\) This is compounded by the finding that white men also receive leniency for having children.\(^{117}\) This would indicate that judges do not concern themselves with race when it comes to mothers and the welfare of their children, but race does matter for fathers. Other studies have also found that perceptions of African American and Latina parents have influenced judicial decisions. For example, African American women’s “childcare arrangements—a model of sharing with female kin—may not comport with court officials’ notions of appropriate motherhood.”\(^{118}\) Furthermore, although there is a strong popular perception that Latino men and Latina women are more “family oriented,” studies provide little judicial corroboration of this perception.\(^{119}\) The result of these intersecting issues is a difficult phenomenon to measure. However, what is clear is that race is not consistently found to be significant in statistical studies but is found to be important in qualitative studies.

4. Geographic Location

Residence in the South has a surprising effect. If an offender (violent or property) is in the South, she will receive a much lower bail/bond amount than if she were outside the South. Also, if a violent offender is in the South she will be much more likely to have a pretrial release. The most plausible explanation for this finding is the traditional chivalrous treatment of women that is often found in the South, which seems to show a degree of willingness to let the women off easier because the men do not want to

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115. Note that these inconsistent findings are actually similar to most findings in other quantitative studies. See, e.g., Daly, Gender, Crime, and Punishment, supra note 3, at 5 (Daly points out that most statistical studies do not find racial differences and argues that this may be a result of mismeasurements of justice—i.e., it may be literally impossible to measure the racial differences statistically because of all the intersecting factors that go into the judge’s rationale).

116. In general, discrimination against African Americans tends to be more severe against men than women. See, e.g., Cassia Spohn et al., Women Defendants in Court: The Interaction Between Sex and Race in Convicting and Sentencing, 66 Soc. Sci. Q. 178, 182 (1985) (author found that black men were sentenced more harshly than black women and concluded that it was a result of race discrimination, and not paternalism, in favor of women). See also Coramae Richey Mann, Race and Sentencing of Female Felons: A Field Study, 7 INT’L. J. WOMEN’S STUD. 160, 170 (1984).

117. See Daly, Neither Conflict nor Labeling nor Paternalism Will Suffice, supra note 19, at 143, 160.

118. Id. at 143 (citing E.M. Miller, Street Woman (1986)).

119. Id. at 143 (citing M. Baca Zinn, Mexican-American Women in the Social Sciences, 8 Signs: J. Women in Culture & Soc’y 259 (1982)).
see 'their' women in prison. It is possible that leniency comes from respect for women, but it is more likely a result of traditional female paternalism—that women are inferior "to men because of their putative need to be supported, guided, and protected."¹²⁰ This is an unexpected finding, and seems to revive some use for the basic theory of female paternalism.

5. Theoretical Conclusions

Overall, the theory of familial paternalism seems to be the most accurate explanation for the effects of extra-legal factors on judicial decision-making. Children, and not marriage, is the factor which appears to create substantial leniency in the pretrial process. Informal social control theory did not accurately predict factors that create leniency. This study lends more support to Daly's critique of Kruttschnitt's theory. She believes Kruttschnitt mistakenly looks to economic factors instead of the issue of parenthood.¹²¹ These findings show that informal social control mistakenly puts the locus of control on economic factors instead of on protecting children. The other major finding that can be taken from this study is the effect of being in the South on the decision-making process. This possibly paternalistic trend, occurring only in the South, highlights a judicial inconsistency that needs to be addressed.

In hindsight, there are a number of measures that could have been taken to increase the validity of this study, which should be noted for future research. In order to more accurately explain the results of this study, the bail/bond amount should have been added as an independent variable in the pretrial release analysis. This would have helped to explain the effects of being Latina and African American in the pretrial release analysis. Also, marriage and children could have been coded together in stages to further analyze the predictions of familial paternalism. Additionally, having children could have been combined with the other variables to provide further comparisons.

One major step that should be taken in future research in this area is the creation of a national data set that includes an accurate account of prior offenses and a meticulous account of the severity of the offender's current crime. Up to this point, no data of this type exists. When analyzing the results in this study, one can only hope that prior offenses are not heavily skewed for one group versus another, yet this remains as a possibility. Other researchers have conducted state and regional studies on narrow offense types with accurate prior offense variables, but their results are of only limited generalizability. To increase the validity of empirical studies on the judicial process and factors of lenience, a well-rounded national data set must be constructed.

¹²⁰ Daly, Rethinking Judicial Paternalism, supra note 14, at 10.
¹²¹ See Daly, Discrimination in the Criminal Courts, supra note 70.
Table 1. Means/Percentages and Standard Deviations of Variables Used in the Analyses of Pretrial Release

<table>
<thead>
<tr>
<th>Variable</th>
<th>Violent Offenders (N=888)</th>
<th>Property Offenders (N=861)</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American</td>
<td>0.49 (.500)</td>
<td>0.524 (.500)</td>
</tr>
<tr>
<td>Latino</td>
<td>0.087 (.282)</td>
<td>0.063 (.243)</td>
</tr>
<tr>
<td>South</td>
<td>0.454 (.498)</td>
<td>0.502 (.500)</td>
</tr>
<tr>
<td>Age</td>
<td>31.949 (9.531)</td>
<td>30.17 (7.536)</td>
</tr>
<tr>
<td>School Level Pre-Admit*</td>
<td>10.938 (2.707)</td>
<td>11.828 (2.515)</td>
</tr>
<tr>
<td>Had Job/Business</td>
<td>0.511 (.500)</td>
<td>0.494 (.500)</td>
</tr>
<tr>
<td>Total Income Yr Before</td>
<td>$5667 (3,854.00)</td>
<td>$6275 (3,969.00)</td>
</tr>
<tr>
<td>Married</td>
<td>0.171 (.377)</td>
<td>0.224 (.417)</td>
</tr>
<tr>
<td>Have Children</td>
<td>0.756 (.430)</td>
<td>0.8 (.400)</td>
</tr>
<tr>
<td>Pretrial Release</td>
<td>0.426 (.495)</td>
<td>0.519 (.500)</td>
</tr>
</tbody>
</table>

Notes:
*Numbers represent High School level last finished.
Numbers in parentheses are the standard deviations.
Table 2. Analyses of Pretrial Release for Violent and Property Offenders

<table>
<thead>
<tr>
<th>Variable</th>
<th>Violent Offenders (N=888)</th>
<th>Property Offenders (N=861)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>B</td>
<td>Exp (B)</td>
</tr>
<tr>
<td>---------------------</td>
<td>----</td>
<td>--------------</td>
</tr>
<tr>
<td>African American</td>
<td>.1496</td>
<td>1.1613</td>
</tr>
<tr>
<td></td>
<td>(.1435)</td>
<td></td>
</tr>
<tr>
<td>Latino</td>
<td>-.4144</td>
<td>0.6607</td>
</tr>
<tr>
<td></td>
<td>(.2678)</td>
<td></td>
</tr>
<tr>
<td>South</td>
<td>.3291*</td>
<td>1.3897</td>
</tr>
<tr>
<td></td>
<td>(.1417)</td>
<td></td>
</tr>
<tr>
<td>Age</td>
<td>.0150*</td>
<td>1.0152</td>
</tr>
<tr>
<td></td>
<td>(.0075)</td>
<td></td>
</tr>
<tr>
<td>School Level Pre-Admit</td>
<td>-.0090</td>
<td>0.991</td>
</tr>
<tr>
<td></td>
<td>(.0270)</td>
<td></td>
</tr>
<tr>
<td>Had Job/Business</td>
<td>.2011</td>
<td>1.2228</td>
</tr>
<tr>
<td></td>
<td>(.1446)</td>
<td></td>
</tr>
<tr>
<td>Total Income Yr Before</td>
<td>.0182</td>
<td>1.0184</td>
</tr>
<tr>
<td></td>
<td>(.0194)</td>
<td></td>
</tr>
<tr>
<td>Married</td>
<td>.4506*</td>
<td>1.5692</td>
</tr>
<tr>
<td></td>
<td>(.1844)</td>
<td></td>
</tr>
<tr>
<td>Have Children</td>
<td>.2392</td>
<td>1.2702</td>
</tr>
<tr>
<td></td>
<td>(.1662)</td>
<td></td>
</tr>
<tr>
<td>-2 Log Likelihood</td>
<td>1182.561</td>
<td></td>
</tr>
<tr>
<td>Model Chi-Square</td>
<td>28.774</td>
<td></td>
</tr>
<tr>
<td>df</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>Significance</td>
<td>0.0007</td>
<td></td>
</tr>
</tbody>
</table>

Notes:
* p < .05
** p < .01
*** p < .001
Numbers in parentheses are the standard errors.
### Table 3. Means/Percentages and Standard Deviations of Variables Used in the Analyses of Bail/Bond Amount

<table>
<thead>
<tr>
<th>Variable</th>
<th>Violent Offenders (N=669)</th>
<th>Property Offenders (N=638)</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American</td>
<td>0.495 (.500)</td>
<td>0.547 (.498)</td>
</tr>
<tr>
<td>Latino</td>
<td>0.085 (.279)</td>
<td>0.05 (.218)</td>
</tr>
<tr>
<td>South</td>
<td>0.433 (.496)</td>
<td>0.517 (.500)</td>
</tr>
<tr>
<td>Age</td>
<td>31.816 (9.774)</td>
<td>29.967 (7.405)</td>
</tr>
<tr>
<td>School Level Pre-Admit*</td>
<td>10.996 (2.658)</td>
<td>11.823 (2.415)</td>
</tr>
<tr>
<td>Had Job/Business</td>
<td>0.499 (.500)</td>
<td>0.506 (.500)</td>
</tr>
<tr>
<td>Total Income Yr Before</td>
<td>$5,589 (3,839.00)</td>
<td>$6,136 (3,916.00)</td>
</tr>
<tr>
<td>Married</td>
<td>0.188 (.391)</td>
<td>0.234 (.423)</td>
</tr>
<tr>
<td>Have Children</td>
<td>0.761 (.427)</td>
<td>0.787 (.410)</td>
</tr>
<tr>
<td>Bail/Bond Amount</td>
<td>$56,418.28 (96,411.08)</td>
<td>$18,659.61 (45,327.95)</td>
</tr>
</tbody>
</table>

Notes:
* Numbers represent High School level last finished.
Numbers in parentheses are the standard deviations.
### Table 4. Analyses of Bail/Bond Amount for Violent and Property Offenders

<table>
<thead>
<tr>
<th>Variable</th>
<th>Violent Offenders (N=669)</th>
<th>Property Offenders (N=638)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>B</td>
<td>Beta</td>
</tr>
<tr>
<td>African American</td>
<td>-40.969***</td>
<td>-0.21262</td>
</tr>
<tr>
<td></td>
<td>(7.463)</td>
<td></td>
</tr>
<tr>
<td>Latino</td>
<td>-24.246</td>
<td>-0.07026</td>
</tr>
<tr>
<td></td>
<td>(13.398)</td>
<td></td>
</tr>
<tr>
<td>South</td>
<td>-22.345**</td>
<td>-0.11494</td>
</tr>
<tr>
<td></td>
<td>(7.437)</td>
<td></td>
</tr>
<tr>
<td>Age</td>
<td>-0.116</td>
<td>-0.01184</td>
</tr>
<tr>
<td></td>
<td>(0.379)</td>
<td></td>
</tr>
<tr>
<td>School Level Pre-Admit</td>
<td>3.312*</td>
<td>0.091336</td>
</tr>
<tr>
<td></td>
<td>(1.430)</td>
<td></td>
</tr>
<tr>
<td>Had Job/Business</td>
<td>8.821</td>
<td>0.045781</td>
</tr>
<tr>
<td></td>
<td>(7.507)</td>
<td></td>
</tr>
<tr>
<td>Total Income Yr Before</td>
<td>0.106</td>
<td>0.004257</td>
</tr>
<tr>
<td></td>
<td>(1.015)</td>
<td></td>
</tr>
<tr>
<td>Married</td>
<td>-5.857</td>
<td>-0.02377</td>
</tr>
<tr>
<td></td>
<td>(9.396)</td>
<td></td>
</tr>
<tr>
<td>Have Children</td>
<td>-18.591*</td>
<td>-0.08232</td>
</tr>
<tr>
<td></td>
<td>(8.616)</td>
<td></td>
</tr>
<tr>
<td>Intercept</td>
<td>65.981</td>
<td>8.266</td>
</tr>
<tr>
<td></td>
<td>(21.909)</td>
<td></td>
</tr>
<tr>
<td>R Square</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Adjusted R Square</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Notes:
* p<.05  ** p<.01  *** p<.001
Coefficients are divided by 1000 for ease of interpretation.
Numbers in parentheses are the standard errors.
PART II: SHOULD PARENTHOOD BE CONSIDERED BY JUDGES?

Since it appears that judges often take the presence of children into account, the question remains whether this practice should be stopped. Congress and many state legislatures have taken steps to restrict judicial discretion, attempting to create balanced and gender-neutral sentencing.\(^{122}\) Their basic goal has been to treat defendants who have committed the same crime similarly.\(^{123}\) However, their efforts appear overzealous and shortsighted. First, restricting judges' discretion when it comes to issues of familial responsibility affects the children of both male and female defendants. For example, the United States Federal Sentencing Guidelines include a system in which considering the familial circumstances of the defendant is the exception, not the norm.\(^{124}\) Second, gender-neutral laws do not take into consideration the gendered nature of crime and the gendered nature of care-taking. As a result, female offenders who are most often the primary caretakers of children\(^ {125}\) are actually more stringently penalized along with their innocent children.\(^ {126}\)

On the other side of this debate are the concerns of some feminists, who argue that allowing for consideration of familial circumstances actually perpetuates female stereotypes. Put in this framework, we seem to be forced to choose between fair sentencing, which allows for consideration of protecting innocent children, and discouraging sexist stereotypes of women's roles in society. However, these two goals may not actually oppose one another. It may be possible to work towards both of these goals by creating a new gender-conscious or gender-neutral system that allows judges to take familial responsibilities into consideration.

Part A addresses the issues concerning the protection of children and why leniency for parents is often necessary to protect children. Part B briefly explains the Federal Sentencing Guidelines and the guideline rules against ordinarily considering familial circumstances. Lastly, Part C will address issues on gendered roles, the gendered nature of crime and the feminist debate on the lenient treatment of parents (who are predominantly mothers). The conclusion is that over-regulation to achieve uniformity in sentencing is not the answer; fairness to each individual defendant in the system must be our primary concern in order to allow for greater protection of children.

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122. See U.S.S.G., supra note 8, at 5H1.10.
123. See id.
124. See U.S.S.G., supra note 8, at § 5H1.6 (stating that "[f]amily ties" are "not ordinarily relevant" in determining whether a departure from the guidelines will be granted).
125. The children of most male offenders end up with the mother; however, the children of most female offenders cannot rely on their fathers. See Raeder, supra note 12, at 952.
126. See id. at 923.
A. PROTECTING CHILDREN

Meet Sandy.127 She is 27 years old and has two children—James (2 years old) and Andrea (6 years old). Sandy is a cashier at a food store, where she works from 35 to 40 hours a week. However, as she is considered a part-time employee she and her children have no health benefits and she cannot afford health insurance. Sandy’s ex-husband, who was abusive to her and the children, refuses to help support the children financially. Her mother is dead and she never knew her father. She is not close to any other family members. Sandy works in the suburbs but lives in the inner-city, she must commute to work every day. Sandy is a working-class woman. She lives paycheck to paycheck with just enough money for rent, food and daycare.

However, her life took a turn for the worse when her car broke down. She needed four hundred dollars to get her car fixed, she had no money and has bad credit. Sandy has no means to pay the bill, and, therefore, no way to get to work. She feels trapped and will do anything to get the money. She remembers that a young man who lives down the hall in her apartment building offered her a ‘courier’ job at one time, and she suspected it could have meant transporting drugs, but that no longer mattered to her. He paid her four hundred dollars to make a list of deliveries—she was arrested midway through her list. She was charged and convicted under federal law on drug charges. Now comes the sentencing phase of trial. She has two priors—when she was eighteen years old she was arrested for shoplifting and possession of marijuana. Should she go to jail? What happens to her children if she does? Is it probable that she will ever sell drugs again? Is she a threat to society?

This hypothetical scenario is an example of the common background of a female offender who stands in front of a court everyday somewhere across the country.128 Meanwhile, policy makers and legislators have been attempting to determine what would constitute fair punishment. However, most legislators do not seem to picture this woman when creating a model of punishment.129 Policy makers use the average male offender as their center-point when creating legislation that regulates sentencing to shrink judicial discretion.130 Judges, on the other hand, function differently; they see the defendant standing in front of them and take into account a wide range of extra-legal factors. Many recently enacted sentencing statutes are aimed at curbing this wide-open evaluation process where judges have traditionally reigned free.

127. Sandy is a fictitious creation, compiled through facts of real cases. See, e.g., infra note 160 (actual profiles of defendants).
128. See id.
129. See DALY, GENDER, CRIME, AND PUNISHMENT, supra note 3, at 269.
130. See id. Daly argues that gender neutral policies are actually not neutral, but are “male centered.” See section C below for expansion of this discussion.
Why do judges tend to take children into consideration? There is ample evidence indicating that incarcerating a parent, especially a mother, is detrimental to her children. To put this effect into context, consider that incarcerated people are predominantly single. For example, in the study above, only seventeen to twenty-three percent of the women in state prison were married. Furthermore, other studies have shown male marriage rates ranging from twenty-one percent to thirty-one percent. Therefore, a second parent is often not readily available to care for the child. As will be discussed below, fathers of the children of female offenders are less likely to make themselves available to care for the children than mothers of the children of male offenders.

The detrimental effects of incarceration on children are astounding. When the second parent is unavailable, these children are placed with relatives, neighbors, foster care or even in institutional orphanages. Incarceration of a parent is also known to create a host of behavioral and psychological problems for children. Furthermore, it results in the increased likelihood of criminal behavior by the children, creating a cycle of crime. Judges have commented on the effect of incarcerating a parent by stating that it "tends to result in the child ending up in prison as well." Myrna Raeder also points out that incarceration can lead to the loss of parental rights in many states. Indeed, the economic, criminal, psychological and social costs of incarcerating parents create substantial reasons to consider parenthood when sentencing.

It is a difficult process to balance these utilitarian concerns with those of punishment, incapacitation and deterrence. How one weighs these different concerns is influenced by political beliefs and personal interests. For example, most socio-legal and criminology scholars who research in the area of sentencing and its impact on children tend to find the consideration of children a necessity. However, Ilene H. Nagel, a

131. See, e.g., tables 1 and 3.
132. See id. The range in percentages are taken from the different parts of the model for both violent and property offenders, and as can be seen, the frequency of marriage stays relatively similar through the different parts of the model.
133. See Daly, Neither Conflict Nor Labeling Nor Paternalism Will Suffice, supra note 19, at 144.
134. See Bickle & Peterson, supra note 4, at 382.
135. See Raeder, supra note 12, at 953.
137. See, e.g., Raeder, supra note 12, at 953-54.
138. United States v. Concepcion, 795 F.Supp. 1262, 1283 (E.D.N.Y.1992). While one cannot simply conclude from this that parental incarceration is the sole cause of the increased criminality of the children, it is clear that parental incarceration plays a substantial part in causing criminality in children.
139. See Raeder, supra note 12, at 954.
140. See, e.g., Raeder, supra note 12, at 959-60; Daly, Gender, Crime and Punishment,
member of the United States Sentencing Commission argues for the greater importance of deterrence and punishment to uphold the underlying policies behind the Sentencing Reform Act.\textsuperscript{141} Nagel also argues that consideration of children dilutes sentencing policies and places too much importance on issues that are “exogenous to these sentencing purposes.”\textsuperscript{142} While giving some consideration for utilitarian concerns for children, Nagel and Johnson state that “exogenous considerations are rarely sufficiently important to outweigh either culpability or crime control considerations in the allocation of sentences.”\textsuperscript{143} It is unfortunate that members of the United States Sentencing Commission do not place more importance on children, while they concurrently give more lenient treatment to offenders who assist prosecutors by offering evidence against other criminals.\textsuperscript{144} What happened to their concerns about just desserts and equal punishment? It seems that giving offenders their just desserts is only done when it is at their convenience. These policies send the message that individual justice and fairness are not as important as the commission’s underlying goals of incarcerating as many offenders as possible, for as long as possible.

As a society, we must evaluate the cost of uniformity in sentencing when innocent children are involved.\textsuperscript{145} This is not to say that all or even most parents should be treated leniently by the courts. There are clear cases where the offender has committed a crime of such high severity that he or she must be punished with incarceration for the purposes of retribution and societal protection. In those cases, it may be in the interest of the children to be separated from the parent.\textsuperscript{146} However, those determinations involve fact-specific issues which are best left to be determined by judges.\textsuperscript{147}

\textsuperscript{supra} note 3, at 169, 270-71 (arguing against what Daly terms the “charade” of gender neutral sentencing and the male centered view of present theories of punishment).

\textsuperscript{141.} See Nagel & Johnson, \textsuperscript{supra} note 10, at 207-08.
\textsuperscript{142.} Id. at 207.
\textsuperscript{143.} Id.
\textsuperscript{144.} See U.S.S.G., \textsuperscript{supra} note 8, at § 5K1.1, p.s.
\textsuperscript{145.} Daly notes that there is an inherent conflict between uniformity and individuality. While uniformity demands equality of treatment against each offender, individuality demands evaluating the specific factors about each offender and their case. See \textsuperscript{Daly, Gender, Crime, and Punishment, supra} note 3, at 265.
\textsuperscript{146.} Some scholars also argue against a mechanical process to determine departures because it not only takes the decision out of the hands of the judge, who is in the best position to make the most equitable decision, but also because it “might result in vulnerable single parents and pregnant women being pressured into committing crimes,” similar to the attraction for minors. See Jody L. King, \textit{Avoiding Gender Bias in Downward Departures for Family Responsibilities Under the Federal Sentencing Guidelines}, 1996 \textit{Ann. Surv. Am. L.} 273, 303 (1996).
\textsuperscript{147.} The Federal Sentencing Guidelines, for example, have outlined average “heartland” cases in order to demonstrate where judges should fit actual cases into the guidelines. U.S.S.G., \textsuperscript{supra} note 8, at § 1A4(b). However, as will be discussed in section B below, these attempts to categorize crimes have restricted judges’ discretion in cases where the crimes do not seem to warrant severe punishment, and where other factors, such as children,
Also note that the average female offender is a nonviolent offender, with fewer and less severe priors than the average male offender.\textsuperscript{148} As will be discussed in section C below, when we recognize the gendered roles in society and the gendered nature of crime, we are then forced to ask whether gender-neutral laws are actually equitable. But first, it is necessary to show the processes and results of a gender-neutral sentencing law—the Federal Sentencing Guidelines provides a perfect example.

B. FEDERAL SENTENCING GUIDELINES

The Federal Sentencing Guidelines went into effect in 1987.\textsuperscript{149} The purpose of the Guidelines is to eliminate disparity in sentencing and are based upon the notion that all offenders deserve uniform punishment.\textsuperscript{150} The procedure established by the Commission requires judges to follow a model in which they sentence offenders according to a baseline that corresponds with the current crime.\textsuperscript{151} That baseline level is adjusted up or down for exacerbating or mitigating factors.\textsuperscript{152} This adjusted level is then cross-listed with the defendant’s criminal history to create a limited guideline range for the judge.\textsuperscript{153}

Beyond this the judge is allowed to use limited discretion. The guidelines are intended to be used if the offender’s conduct and crime fit within the prescribed “heartland” cases.\textsuperscript{154} If the judge determines that the offender does not fit within these “heartland” cases, then he or she is permitted to grant a departure from the guidelines.\textsuperscript{155} However, to depart from the guideline range, the judge must state reasons justifying the departure. The guidelines set forth two areas where departures are permitted: when offenders provide assistance to prosecutors in prosecuting another person;\textsuperscript{156} and for factors or characteristics which were never adequately considered by the Commission.\textsuperscript{157}

The Commission has determined that race, sex, national origin, creed, religion, socio-economic status and lack of guidance as a youth are not seem to warrant giving more lenient treatment.

\textsuperscript{148} Women commit less serious types of crimes than men, and some argue that women are involved in “less serious forms of some crimes” also. DALY, GENDER, CRIME, AND PUNISHMENT, supra note 3, at 260.
\textsuperscript{149} See U.S.S.G., supra note 8, at § 1A2.
\textsuperscript{150} See id. at § 1A3, p.s. See also United States v. McHan, 920 F.2d 244, 247 (4th Cir. 1990) (“one of Congress’ primary purposes in establishing the Guidelines was to reduce sentencing disparities and to rest sentences upon the offense committed, not upon the offender”).
\textsuperscript{151} See U.S.S.G., supra note 8, at § 1B1.1(a), (b).
\textsuperscript{152} See id., at § 1B1.1(c), (d), (e).
\textsuperscript{153} See id., at U.S.S.G. § 1B1.1(f), (g).
\textsuperscript{154} See id., at § 1A4(b), p.s. (the heartland cases are the types of cases which are typical to the offense, thus deserving the set punishment).
\textsuperscript{155} See id.
\textsuperscript{156} See id., at § 5K1.1, p.s.
\textsuperscript{157} See id., at § 5K2.0, p.s.
relevant to sentencing and therefore cannot be used to determine sentence length.158 Furthermore, it determined that family and community ties, age, education, vocational skills, mental and emotional condition, physical condition, appearance, employment and community service are "not ordinarily relevant."159 Following the guidelines, all the courts of appeals have held that departures for family responsibilities are permitted. However, they are only permitted when family responsibilities are deemed extraordinary.160 Clearly, the Commission's policy is against frequent consideration of family responsibilities by judges.161

In deciding if departures are permitted, many courts grapple with the question of how to determine what is extraordinary. This problem is compounded by the fact that there is a great deal of conflict between the circuits on which family circumstances are extraordinary. For example, the Second and D.C. Circuit courts are the only jurisdictions to liberally construe this rule and hold that single parenthood and often parenthood itself are extraordinary.162 Other circuits have been less willing to allow for departures.163

158. See id., at § 5H1.10, p.s.
159. See id., at §§ 5H1.1-1.6, p.s.
160. See United States v. Rivera, 994 F.2d 942, 948 (1st Cir. 1993) (holding that the Guidelines allow for departures in unusual cases); United States v. Alba, 933 F.2d 1117, 1122 (2d Cir. 1991) (same); United States v. Gaskill, 991 F.2d 82, 85 (3d Cir. 1993) (same); United States v. Brand, 907 F.2d 31, 33 (4th Cir. 1990) (also holding that the Guidelines allow for the possibility of downward departures for family responsibilities in extraordinary circumstances), cert. denied, 498 U.S. 1014 (1990); United States v. Brown, 29 F.3d 953, 961 (5th Cir. 1994) (court held that a departure for parental responsibilities was improper unless there are unique circumstances), cert. denied, 513 U.S. 1021 (1994); United States v. Brewer, 899 F.2d 503, 506 (6th Cir. 1990) (court must determine if the case is sufficiently unusual to warrant a departure), cert. denied, 498 U.S. 844 (1990); United States v. Canoy, 38 F.3d 893, 906 (7th Cir. 1994) (holding that the court may depart from the Guidelines if family ties are extraordinary); United States v. Harrison, 970 F.2d 444, 447 (8th Cir. 1992) (same); United States v. Mondello, 927 F.2d 1463, 1470 (9th Cir. 1991) (same); United States v. Pena, 930 F.2d 1486, 1495 (10th Cir. 1991) (same); United States v. Mogel, 956 F.2d 1555, 1562 (11th Cir. 1992), cert. denied, 506 U.S. 857 (1992) (same); United States v. Blackwell, 897 F. Supp. 586, 588 (D.C. Cir. 1995) (same).
161. See U.S.S.G., supra note 8, at § 5H1.6, p.s.
162. See, e.g., Unites States v. Johnson, 964 F.2d 124, 129 (2d Cir. 1992) (stating that defendant's independent responsibility for three young children was extraordinary); United States v. Jackson, 756 F.Supp. 23, 28 (D.C. Cir. 1991) (finding that a departure from the Guidelines was permissible for a single mother with two children); United States v. Agu, 763 F.Supp. 703, 704-05 (E.D.N.Y. 1991) (holding that potential loss of child custody was extraordinary and sufficient for a departure).
163. See, e.g., United States v. Headley, 923 F.2d 1079, 1082-83 (3d Cir. 1991) (a defendant's responsibility for five young children was not extraordinary); United States v. Carr, 979 F.2d 51, 54 (5th Cir. 1992) (supporting district court's finding that a single parent defendant was not extraordinary); United States v. Calhoun, 49 F.3d 231, 237 (6th Cir. 1995) (holding that having responsibility for a 14-month old infant was not extraordinary); United States v. Harrison, 970 F.2d 444, 448 (8th Cir. 1992) (finding single parenthood not extraordinary); United States v. Cacho, 951 F.2d 308, 310-11 (11th Cir. 1992) (holding that departure was not warranted for a defendant who was the mother of four small children).
The frequency of departures as a result of these rules on family responsibilities will now be considered. As Jody L. King points out, it seems that women are not receiving departures as often as they should.\textsuperscript{164} Women received fifty-six percent of the family-based departures given in 1992,\textsuperscript{165} and only forty-five percent of them in 1991. However, eighty percent of female inmates are single parents, while only nine percent of male inmates are single parents.\textsuperscript{166} Notwithstanding other factors at play here, King estimates that family-based departures for female offenders should constitute around eighty percent of all the family-based departures given.\textsuperscript{167} Also, proportional to other departures granted, family-based departures have steadily declined since 1989—falling from five percent of all departures in 1989, to two percent in 1992.\textsuperscript{168} Moreover, Myrna S. Raeder argues that more departures would probably be given for family-based reasons “if the appellate climate were more hospitable.”\textsuperscript{169}

Another problem with the extraordinary departure framework of the guidelines is that groups of offenders who have high rates of potentially problematic personal circumstances—such as having children—may no longer be considered to have extraordinary circumstances in the future. For example, a single woman with children has become a common trend; eighty-eight percent of all single parents are female.\textsuperscript{170} The impact of incarceration on the children of an incarcerated single mother is great, and as single motherhood becomes more common it also becomes less extraordinary,\textsuperscript{171} these women will have less of a chance to receive departures—even though the detriment of incarcerating these mothers will be the same. Thus, the ‘extraordinary’ framework ignores the gendered nature of roles played by men and women.

C. GENDERED NATURE OF CRIME AND FEMINIST DEBATE ON LENIENT TREATMENT

“In sentencing, the deletion of gender assumes a world in which men and women have equal custody of their children.”\textsuperscript{172} Limiting the court’s

\textsuperscript{164} See King, supra note 146, at 298.
\textsuperscript{165} See Raeder, supra note 12, at 937.
\textsuperscript{166} See King, supra note 146, at 296.
\textsuperscript{167} See id. (88% of all single parents are female). \textit{See also} \textsc{Bureau of the Census, U.S. Dep’t of Commerce, Marital Status and Living Arrangements xi} (1992).
\textsuperscript{168} \textsc{U.S. Sentencing Comm’n, Annual Rep. Table IX at 50} (1989); \textsc{U.S. Sentencing Comm’n Annual Rep. Table 49} (1992).
\textsuperscript{169} Raeder, supra note 12, at 937.
\textsuperscript{170} \textit{See Bureau of the Census, supra note 167}.
\textsuperscript{171} Single mothers are clearly not typical of the entire offender population. While men make up the overwhelming majority of offenders in the criminal justice system, male offender are much less likely to have primary child care responsibilities. \textit{See} \textsc{Douglas C. McDonald & Kenneth E. Carlson, Federal Sentencing in Transition, 1986-90, Bureau of Justice Statistical Special Rep. 2} (1992).
\textsuperscript{172} Raeder, supra note 12, at 951.
discretion to grant departures for the presence of children will obviously harm the children of both male and female offenders. However, this type of limitation will more frequently harm children through the incarceration of female offenders. In the vast majority of cases, female offenders are the predominant caregivers of their children, while only a small percentage of male offenders are primary caregivers. 173

Of federal inmates surveyed, ninety-one percent of men indicated that their child lives with the child's mother, while only thirty-three percent of women indicated their child's father was caring for their child. 174 The same trend emerged in a state prison survey, where ninety percent of men indicated their wives were taking care of their children, while only twenty-two percent of women indicated their husbands were taking care of their children. 175 Furthermore, the children of African American and Latina women are more prone to being harmed by this system, because single parenthood is more prevalent in these groups than in white women. 176

There are also other ways in which women bear a disparate impact of harsher treatment from a sentencing system that ignores children. First, women are more likely to lose their parental rights when incarcerated because they are much more likely to be primary-caregiving single parents. 177 Further, most fathers do not make themselves available to take care of the child while the mother is incarcerated. As one scholar pointed out, the loss of parental rights acts as a double punishment for these women's crimes. 178

Second, female offenders are more likely to be placed further away from their family, because there are fewer federal prisons for women. 179 Out of sixty-eight federal prisons in the country, only fourteen have female inmates. 180 Third, the gendered nature of crime also affects the disparate impact on women. Much more frequently than men, female offenders are convicted of crimes where they participated along with their spouse or companion. Many of these female offenders are involved with men who

173. See King, supra note 146, at 296. (80% of female offenders are single parents, and only 9% of male offenders are single parents.).
174. See id. at 952 (citing Federal Bureau of Prisons, Office of Research and Evaluation Table 2 (1993)).
176. See id. at 950 (Table F, at 9).
177. See id. at 7. The state prison survey indicated that 28% of the female inmates lost their parental rights as a result of incarceration.
180. See id.
"are described as being central to the conspiracies in question."\textsuperscript{181} While the women usually play relatively marginal roles in the commission of the crime, they are often charged with the same offenses.\textsuperscript{182} It is suggested by some authors that the overall increased criminality of women is a result of this participation with their husbands or boyfriends.\textsuperscript{183}

Some critics argue that the consideration of the presence of dependent children and allowing for lenient treatment of mothers will "unintentionally reinforce gender stereotypes."\textsuperscript{184} Nagel and Johnson argue that this will send the message that it is acceptable for mothers to break the law, because the courts will grant them leniency to let them take care of their children.\textsuperscript{185}

However, the overall effects from not considering the presence of children are manifested in both the harm to the children of offenders in general, and an increased probability of harm to the children of female offenders. Gender-neutral policies like the Federal Sentencing Guidelines ignore these realities. Consideration of the presence of children is warranted and some scholars go so far as to argue for a woman-normed approach to policy making.\textsuperscript{186} That is, imagining the female offender as the lawbreaker when creating sentencing guidelines and then applying this to male offenders. This may be a good step in the direction of creating just punishment for every individual, considering that courts seem to scrutinize female defendants more closely than male defendants.\textsuperscript{187}

\section*{III. CONCLUSION}

Some critics may argue that criminal mothers are just as culpable as fathers and should therefore be punished equally. Furthermore, they may wonder what will deter single mothers if we do not incarcerate them.

Perhaps fines would be sufficient; but this large group of single mothers in the criminal justice system tend to be from the poorest sector of society. Probation may be another possibility, and this may be sufficient punishment considering that women are less prone to be recidivists than men.

However, these issues do not address the reasons why many of these women commit crimes. It is an ineffectual argument to say that it is not the job of the criminal justice system to address societal factors that affect the offender's decision to commit a crime. While it may be imprudent to over-

\footnotesize{181. Raeder, \textit{supra} note 12, at 977.  
182. See id. at 978.  
183. See id.  
185. See id. at 208.  
186. See D\textsc{aly}, \textsc{gender}, Cr\textsc{ime}, and P\textsc{unishment}, \textit{supra} note 3, at 269.  
187. See L\textsc{orraine} Sch\textsc{mall}, \textit{Forgiving Guin Gar\textsc{cia}: W\textsc{omen}, the Death Penalty and Commutation}, 11 W\textsc{is. Women's L.J.} 283, 288 (1996) (Schmall argues that courts pay more attention to female offender's stories and the contexts of their criminal behavior, and that this should also be applied to men.).}
generalize, most female offenders are far below the poverty line, commit non-violent crimes—including many drug-related offenses involving male partners. How can the penal system effectively deter crimes if policy makers do not address the poverty and gendered role of women’s crimes?

Looking to causes will force us to see the gendered role of crime, institutional racism and poverty. This will force us to realize that our society is not providing even a minimal basis of living for a huge segment of this country’s population.\textsuperscript{188} This should open the eyes of policy makers to the fact that crime is necessarily tied to other social factors, and must be dealt with within that framework. “Addressing ourselves more to the human needs of the people who become involved in criminal activity might evolve more productive policies than those policies which emphasize police hardware and tougher prison security.”\textsuperscript{189}

Unfortunately, policy makers and politicians today would rather close their eyes to both the sources of problems and the long-term solutions, and instead lock up single mothers under mandatory sentencing laws. The ultimate price of this sentencing structure is the cost to their innocent children. What policy makers fail to see is that when children pay the price, so does society as a whole. These children do not simply disappear; they often end up in the same system as their parents. Lock-up is not the long-term answer. Children should not pay for politicians’ short-term aspirations and political goals.

\textsuperscript{188} See generally Wilson, supra note 113 (pointing to the disappearing jobs, especially in the inner cities in the United States, and how this is directly linked with poverty and crime).

\textsuperscript{189} Raeder, supra note 12, at 930 (citing Moulds, supra note 13).