Women as Litigants

Stuart S. Nagel
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By Stuart S. Nagel**

and

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The purpose of this article is to describe how women are treated relative to men in criminal, personal injury, and divorce cases—three fields which constitute most of the trial court litigation in American courts. The findings presented will generally be based on quantitative nationwide data. The article will particularly examine the extent to which women are disfavored, favored, or treated neutrally as criminal defendants, personal injury plaintiffs, and divorce litigants. It will also discuss some of the effects of having more women as jurors and judges on the relative treatment of male and female litigants.

Women as Criminal Defendants

In the literature dealing with women's rights, researchers have indicated that "in several states higher penalties are imposed on a woman who commits a crime than on a man who commits the same crime."1 These statements, however, have been based on those few state statutes and appellate test cases which describe the law on the books rather than the law in action. Empirical data has been needed to show how much time the average woman spends in prison as compared to the time spent by the average man, or at least showing the length of sen-

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tences given on conviction for various crimes to the average woman as compared to the average man.

Likewise, the literature dealing with discrimination against women has often drawn analogies between American society's treatment of women and of blacks. These analogies may be valid in some fields like employment discrimination where one can sometimes explain both racial and sexual discrimination in terms of the desire of workers to limit competition and the desire of employers to have cheap labor, but the similarities between racism and sexism do not necessarily apply to all fields. Empirical data has also been needed to test the analogy's applicability to the treatment of blacks and women as criminal defendants by comparing black-white sentencing practices with male-female sentencing practices. Additionally, data on presentencing treatment (e.g., being released on bail or receiving a jury trial) might provide valuable comparative insights.

In 1962 Lee Silverstein of the American Bar Foundation (ABF) arranged for attorneys and court personnel in a scientifically determined sample of 194 counties located in all 50 states to systematically compile data on 11,258 criminal cases. The data was primarily designed to study procedures for providing attorneys to indigent defendants. Silverstein, however, included many other variables in his data such as the race, sex, and age of the defendants and the treatment they received at all stages of the criminal justice process from the preliminary hearing through the sentencing stage.

Two basic patterns of discrimination emerge when one uses the ABF data to correlate the background characteristics of criminal defendants with their criminal procedure treatment while holding constant the crime charged. One pattern, which might be called the disadvantaged or disfavored pattern, applies to indigent, black, or elementary-educated defendants. This pattern involves unfavorable treatment at virtually all stages of the criminal justice process including (1) re-

3. Some of the data was the basis for L. Silverstein, Defense of the Poor in Criminal Cases in American State Courts (1965) in which the data compilation methods are described at pages 175-79, 183-86, and 207-12. The data can now be obtained on magnetic tape or punched cards from the Inter-University Consortium for Political Research at Ann Arbor, Michigan.
4. For further details on these and other disparities in criminal procedure see S. Nagel, The Legal Process from a Behavioral Perspective 81-112 (1969) [herein-after cited as Nagel]. Those pages also provide some reinforcing data from the federal courts, but the sample of women in the federal criminal cases used is too small to be meaningful.
ceiving a preliminary hearing, (2) being released on bail, (3) having a hired attorney rather than assigned counsel or no attorney, (4) being subjected to relatively long delay while in jail if not released on bail, (5) receiving a jury trial, (6) being dismissed or being acquitted, (7) receiving probation or a suspended sentence if convicted, and (8) receiving a relatively short sentence if jailed. One could generalize the disadvantaged or disfavored pattern to include personal injury and divorce cases by defining it as a pattern of court behavior in which there is harshness or relative deprivation in both the decisional outcomes and judicial processing of those groups which a society considers to be socially inferior.

The second discriminatory pattern or syndrome might be called the paternalistic pattern. It particularly applies to juveniles under age 21 as contrasted to adults. In criminal proceedings, it involves unfavorable treatment with regard to such safeguards for the innocent as having an attorney or having a jury trial. It involves favorable treatment, however, with regard to being kept out of jail pending trial, not being convicted, and not being sentenced to jail if convicted. One could generalize the paternalism pattern to include personal injury and divorce cases by defining it as a pattern of court behavior in which there is favoritism for the weak in the reluctance to impose negative sanctions, and disfavoritism in the awarding or enforcing of monetary awards and in the informality of judicial processing.

When female criminal defendants are compared with male criminal defendants, the treatment pattern fits the paternalistic mold much more closely than the disadvantaged mold as is indicated in table 1. The table separates the cases into those in which the single charge against the defendant was grand larceny (the most common felony against property) and those in which the charge was felonious assault (the most common felony against persons). This property-persons breakdown was made because it was important in understanding the differential treatment found between urban courts (which tend to be relatively more sensitive to crimes against persons) and rural courts (which tend to be more sensitive to crimes against property). The property-persons breakdown was also important in understanding the differential sentencing of blacks who commit larceny (which tends to be a crime between races) and blacks who commit assault (which tends to be a crime within races).

5. Id. at 98-101.
6. Id. at 94. See also M. Wolfgang, Crime and Race: Conceptions and Misconceptions (1964).
### Table 1
How the Treatment of Females Differs from Males as Defendants in Criminal Cases*

<table>
<thead>
<tr>
<th>CASE TYPE AND TREATMENT STAGE</th>
<th>Number of Defendants with Available Info</th>
<th>Percent Receiving the Treatment</th>
<th>Difference in percentage points</th>
<th>Does paternalism hypothesis seem to be confirmed?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Females</td>
<td>Males</td>
<td>Females</td>
<td>Males</td>
</tr>
<tr>
<td>I. GRAND LARCENY CASES</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>A. Being JAiled</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Released on bail</td>
<td>63</td>
<td>771</td>
<td>76%</td>
<td>50%</td>
</tr>
<tr>
<td>2. Had less than 2 months delay of those awaiting trial in jail</td>
<td>10</td>
<td>231</td>
<td>60</td>
<td>67</td>
</tr>
<tr>
<td>3. Case dismissed or acquitted</td>
<td>71</td>
<td>841</td>
<td>24%</td>
<td>13%</td>
</tr>
<tr>
<td>4. Received suspended sentence or probation of those convicted</td>
<td>47</td>
<td>656</td>
<td>64</td>
<td>43</td>
</tr>
<tr>
<td>5. Received less than one year imprisonment of those imprisoned</td>
<td>9</td>
<td>241</td>
<td>33</td>
<td>45</td>
</tr>
<tr>
<td>B. Formal Safeguards</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6. Received preliminary hearing</td>
<td>42</td>
<td>606</td>
<td>57</td>
<td>55</td>
</tr>
<tr>
<td>7. Had or given a lawyer</td>
<td>61</td>
<td>781</td>
<td>90%</td>
<td>87%</td>
</tr>
<tr>
<td>8. Received a jury trial of those tried</td>
<td>18</td>
<td>283</td>
<td>47</td>
<td>31</td>
</tr>
</tbody>
</table>
II. FELONIOUS ASSAULT CASES

A. Being Jailed
   1. Released on bail  43  615  77%  58%  19  Yes
   2. Had less than 2 months delay of those awaiting trial in jail  6  152  17  49  X  Too few women released on bail
   3. Case dismissed or acquitted  45  638  36  23  13  Yes
   4. Received suspended sentence or probation of those convicted  25  415  44  36  8  Yes
   5. Received less than one year imprisonment of those imprisoned  9  172  89  57  X  Too few women imprisoned

B. Formal Safeguards
   6. Received preliminary hearing  31  451  74  73  1  Difference too small
   7. Had or given a lawyer  42  620  88  89  1  Difference too small
   8. Received a jury trial of those tried  24  262  19  45  26  Yes

* Based on 1103 grand larceny cases and 846 felonious assault cases from all 50 states for 1962
The paternalistic discrimination against and for women (like juveniles), however, applied almost equally in grand larceny and felonious assault cases. Relative to men though, women were somewhat more likely to be jailed in assault cases than in larceny cases. This may be due to the fact that assault is a more manly crime than larceny (as shown by the ratio of male to female defendants in the top and bottom halves of Table 1), and women are therefore treated more like men when they commit assault than when they commit larceny.

Within the larceny cases (section I) and the assault cases (section II), the data is broken down between the chronological stages that relate to being jailed before or after conviction (rows 1 through 5) and the stages which emphasize formal safeguards for the innocent (rows 6 through 8). Blacks and indigents are particularly discriminated against when it comes to being released on bail. Just the opposite discrimination is evident for women. Of the 63 female larceny-defendants, 76 percent were released on bail; whereas of the 771 male larceny-defendants, only 50 percent were released on bail, giving a difference of 26 percentage points (section I, row 1). This difference is in conformity with the paternalism pattern which shuns keeping juveniles and women in jail pending trial or after conviction. The same jail avoidance phenomenon pending trial can be observed for assault cases where a 19 percentage points difference is present (section II, row 1).

Likewise, women are given more lenient treatment than men if they are convicted. In grand larceny cases, 64 percent of the women received a suspended sentence or probation, whereas only 43 percent of the men did so (section I, row 4). A related although weaker difference is shown for the felonious assault cases (section II, row 4). Of those defendants who actually spent time in jail, there were too few women (20 or less) in the sample to make meaningful comparisons

7. No data was compiled on the arrest stage prior to the preliminary hearing. Women, however, may be arrested for some crimes that equally guilty men are not arrested for (e.g., prostitution), and men may be arrested for some crimes that equally guilty women are not (e.g., statutory rape). Kanowitz, supra note 1, at 15-25. Likewise no data were compiled on the parole stage subsequent to sentencing. Women, however, may be more readily paroled than men for similar crimes (as indicated by their more readily receiving pretrial release and postconviction probation), although imprisoned women may represent a subsample of women who are particularly high recidivists. While in prison, women may also be treated differently than men. See D. Ward & G. Kassenbaum, Women’s Prison (1965); Tittle, Inmate Organization: Sex Differentiation and the Influence of Criminal Subcultures, 34 Am. Soc. Rev. 492 (1969).

8. Twenty was used as a cut-off partly to make theoretical sense out of the data presented and partly because Guilford says: “If one asks, How small is N before we have a small sample? . . . Some place it is as low as 20.” J. Guilford, Fundamental
with men as to the length of the pretrial jailing (rows 2) or the length of postconviction imprisonment (rows 5).\(^9\) Possibly as a means of avoiding the imprisonment of women and avoiding the stigma of a criminal record, a lesser percentage of them are convicted than their male counterparts. Thus, it is indicated that 24 percent of the women were acquitted or had their larceny cases dismissed, whereas only 13 percent of the men did (section I, row 3). A similar difference is present for assault cases (section II, row 3).

When it comes to formal safeguards for the innocent, namely having a lawyer and having a jury trial, the favorable balance toward juveniles and women tends to tip in the other direction. Indeed until the case of *In re Gault*, juveniles in many states did not have a right to court-provided counsel.\(^10\) They still do not have a constitutional right to a jury trial.\(^11\) Since *In re Gault*, although the law has changed, empirical studies have shown that juveniles are still more easily persuaded against exercising and are more reluctant to exercise their right to counsel than are adults.\(^12\)

Table 1, however, does not show a discriminatory pattern with regard to having a lawyer when women defendants are compared with men defendants in either larceny cases or assault cases (rows 7). The

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\(^9\) There would have been more imprisoned men and women on row 5 if convicted defendants ordered to serve indeterminate sentences had been included. Indeterminate sentences were excluded because they lack preciseness for making comparisons, unless one obtains data on time actually served, or unless one somewhat arbitrarily translates indeterminate sentences into determinate ones by averaging the minimum and maximum when those two figures are available. Of the 363 women in the total sample of 11,258 cases who received sentences, 27 percent received indeterminate sentences; while 35 percent of the 5,898 men who received sentences received indeterminate ones. Such sentences are associated with more serious crimes (e.g., murder and arson) which men are more likely to commit relative to women than the less serious crimes (e.g., bad checks). Even when the crime is held constant, however, the above data shows men usually receive a slightly higher percentage of indeterminate sentences. Such sentences generally have higher maximums and sometimes even higher minimums than the fixed sentences for the same crimes and probably result in longer prison stays. These indeterminate-sentence findings are thus consistent with the fixed-sentence findings in that under both types of sentences, women tend to receive shorter sentences than men.


percentage differences are 3 and 1, respectively, and are too small to explain. Likewise, no discrimination is observed with regard to receiving preliminary hearings (rows 6) although they are probably not as important a safeguard for the innocent as having counsel or a jury trial.

Women, however, in conformity with the paternalism hypothesis, are less likely to receive the formal treatment of a jury trial than are men, at least in assault cases where the difference was 26 percent (section II, row 8). This disparity is contrary to the interests of women since juries are generally less likely to convict than are judges. Conviction by a jury normally requires the unanimous agreement of twelve persons which is usually more difficult for a prosecutor to achieve than convincing a single judge. One disadvantage of jury trial is that a time-conscious prosecutor may have greater desire to recommend a longer sentence for a jury-convicted defendant than for one who pleaded guilty or took a relatively quick bench trial. The University of Chicago Jury Project research shows that both juries and judges tend to favor women in criminal verdicts, but juries do so to a greater degree.

If juveniles and females are treated paternally in criminal cases

13. The cut-off level in this article is between differences that are too small to explain (7 percent and under) and differences that merit an explanation (9 percent and over). A percentage difference of 8 is the gray area in terms of making theoretical sense out of the empirical data presented.

A difference of approximately 8 percent is attributable to chance less than 5 times out of 100 if the total sample size on which it is based (males plus females) is about 150. Guilford, supra note 8, at 178-82, 190-92, and 538-39. The smallest total samples in tables 1, 2, and 4 tend to be as large as or larger than 150. Such a probability calculation assumes one has hypothesized the direction of the difference between males and females as has been done in the tables in light of the paternalism hypothesis. Id. at 207-08.

14. Of these three safeguards, only preliminary hearings have not been made a due process right for adults by the Supreme Court. See Duncan v. Louisiana, 391 U.S. 145 (1968) (jury trial), and Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel). For a discussion of the functions of preliminary hearings, defense counsel and jury trials see D. Fellmann, The Defendant's Rights (1958); L. Orfield, Criminal Procedure from Arrest to Appeal (1947).


16. Id. at 191-218. Juries relative to judges may be especially sympathetic to women relative to men in more serious crimes and also in less manly crimes. This might explain why the lawyers of women defendants asked for jury trials more in grand larceny cases than in felonious assault cases. Larceny is generally a more serious crime bringing a more severe sentence, as indicated by comparing the percentages on row 5 (length of sentence) of the larceny section with row 5 of the assault section. Larceny is also a less manly crime, as indicated by the female to male ratio in the larceny and assault sections of table 1.
(meaning favoritism on jailing and discrimination on jury trial and counsel), then female juveniles are probably treated the most paternally and male adults the least paternally. That is the finding when one uses the American Bar Foundation data to correlate sex and treatment of persons under 21 (while controlling for felonious larceny or assault) although few female juveniles were included in the data.\textsuperscript{17} Between these two outer categories of paternalism, the categories of male juveniles and female adults are treated about equally, although male juveniles are less likely to have an attorney, jury trial, or preliminary hearing; whereas the female adults are more likely to be kept out of jail before and after conviction.

When the American Bar Foundation data is used to correlate race and treatment of women defendants, it appears that white women are less likely to be jailed before or after conviction than black women, but they are also less likely to have a lawyer. White women thereby better fit the paternalistic mold. With respect to having a lawyer, however, the data may reflect the greater likelihood of whites being nonindigent and thereby ineligible for court-appointed counsel.\textsuperscript{18} Black women (unlike black men) do receive more favorable treatment than white men with regard to being jailed before or after conviction, when controlling for felonious larceny or assault. When sexual paternalism and racial discrimination are mixed, the results as to receiving a jury trial follow no consistent pattern.

Looking at table 1 from an overall perspective and integrating

\textsuperscript{17} Where the sample sizes are large enough to compare length of postconviction incarceration of female and male juveniles, female juveniles on the average are confined about two months longer when the nature of the crime is not held constant between females and males. \textit{Childrens Bureau, U.S. Dep't of Health, Education and Welfare, Statistics on Public Institutions for Delinquents} (1970). The longer confinement is generally justified on the grounds that young girls are more in need of protection, especially sexually, from the outside world than young boys are. See K. Olson, \textit{For Her Own Protection: A Case Study of the Conditions of Incarceration for Female Juvenile Offenders in the State of Connecticut, 1971} (unpublished paper, Yale Law School). In the Connecticut juvenile data, the main commitment reasons for boys were breaking and entering (33 percent), theft (22 percent), and car theft (20 percent); whereas for girls the main reasons were runaway (30 percent), pregnancy (16 percent), and sexual misconduct (15 percent). There were too few boys and girls committed for the same reason to be able to hold the “crime” constant.

\textsuperscript{18} The correlation coefficient is +.16 being white and being nonindigent in the 1,949 state criminal cases on which table 1 is based, and the correlation is +.20 between being nonindigent and lacking an attorney. The correlation is +1.00 between being classified as nonindigent and not having a court-appointed attorney in the federal data. These correlation coefficients are numbers similar in meaning to those in the “Difference” column of table 1 although the differences in table 1 are not stated as decimals, and the plus and minus signs are eliminated.
all of the data, there seems to be a pattern—women are substantially less likely than men to be subjected to jail before or after trial, but are less likely to have a jury trial. The differences discussed were of enough magnitude and based on sufficiently large samples that they could not readily be attributed to chance. However, some of the differences may have arisen from the fact that grand larcenies and felonious assaults committed by women may be generally less severe than those committed by men. Therefore, there may be generally less to merit a jury trial and less to merit a severe sentence when women are involved.

To the extent that the male and female larceny cases are comparable, and likewise with the assault cases, differences can possibly be explained by judicial attitudes which assume that women and juveniles are weaker and would therefore be more harmed by pretrial and postconviction jailing than would men. The empirical data does show that women and juveniles are less likely to be hardened criminals in the sense that they are somewhat less likely to have prior records. Likewise, judges may feel that both juveniles and women should be treated in a more informal, more fatherly, less legalistic way, and that jury trials and defense counsel interfere with such paternalistic informality. To supplement the behavioral case data of table 1, perhaps future psychological questionnaire studies of judicial attitudes will throw more light on how judges subjectively view jailing and jury trials for women defendants.

The few statutes which provide different sentences for women and men generally provide for more indeterminate sentences for women, just as juvenile statutes provide more indeterminate sentences

19. Judges may also give shorter sentences to women than to men convicted of the same crimes because judges think the weaker nature of women also makes them (1) less dangerous to society, (2) more deterred from repeating their crime, and (3) more easily rehabilitated. These points are in conformity with the custodial, deterrence, and rehabilitation goals of imprisonment.

20. Nagel, supra note 4, at 111. The correlation between being a man and having a prior record, however, was only +.08 in the federal data, and prior record was unavailable for the defendants in the state data.

21. A questionnaire answered by 118 state and federal supreme court judges who were serving in 1955, contained the statement that "women are not the equals of men in intelligence and organizing ability." Seventeen percent of the judges agreed, and 73 percent disagreed. Nagel, Off-the-Bench Judicial Attitudes, in JUDICIAL DECISION-MAKING 29, 32, 53 (G. Schubert ed. 1963). No questions were asked, however, which specifically dealt with judicial attitudes toward the jailing of women and jury trials for women defendants. Only 12 percent of a nationwide sample of state legislators agreed with the same questionnaire item. Nagel, supra note 4, at 199, 205.

for juveniles. Legislators probably think that both women and juveniles are more susceptible to rehabilitation than are males and adults, and that indeterminate sentences contingent on prison progress facilitate rehabilitation. Testing that hypothesis would require determining legislators' attitudes, although it is probable that the more important attitudes concerning increasing or decreasing sexual discrimination are held by the judges who apply criminal statutes that allow for discretion.

Women as Personal Injury Plaintiffs

In personal injury cases, the real defendant is usually an insurance company and thus has no male or female sex, just as the state as plaintiff in criminal cases cannot meaningfully be labeled male or female. Plaintiffs in personal injury cases, however, are sometimes male and sometimes female. What does the empirical data show with regard to their relative treatment?

First it should be noted that the paternalism hypothesis which made some sense in explaining, or at least integrating, data on the treatment of women as criminal defendants does not make sense if applied in the same way to women as personal injury plaintiffs. Personal injury plaintiffs are not in jeopardy of being placed in jail or of being stigmatized with criminal records. The basic issue is whether they should be given a monetary award in a society that has limited monetary resources thereby necessitating priorities. If women are disfavored in receiving monetary awards in society in general, one would expect a similar pattern of negative discrimination to be present in personal injury cases. However, if the paternalism hypothesis is defined as favoritism of the weak when imposing negative sanctions but disfavoritism when awarding or enforcing monetary awards, then either the paternalism or disadvantaged hypothesis would apply and would predict discrimination against women personal-injury plaintiffs.

Just as there were separate stages at which discrimination could occur in criminal cases, so also there are separate stages in personal

(D. Conn. 1968). Even if both women and men are subject to indeterminate sentences, the average sentences given and especially served may differ. See notes 7, 9 & 17 supra.


24. After this article was written, a New York Times study headlined: "Crime Rate of Women up Sharply Over Men's." N.Y. Times, June 13, 1971, at 1, col. 1. The article quotes Phil Levin, a social work consultant to the Dallas police, as saying, "We in the criminal justice system are becoming less tolerant of women. They are becoming apprehended more frequently and not sheltered as in the past." Id. at 72, col. 5. This may portend decreased paternalism toward women criminal defendants in the future.
<table>
<thead>
<tr>
<th>Table 2: How the Treatment of Females Differs from Males as Victims and Plaintiffs in Personal Injury Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>SUIT FILED</strong></td>
</tr>
<tr>
<td>Number of Persons with Available Info.</td>
</tr>
<tr>
<td>Treatment Stage and Case Type</td>
</tr>
<tr>
<td>1. Suit filed by serious injury victims</td>
</tr>
<tr>
<td>2. Claim was paid in bodily injury cases</td>
</tr>
<tr>
<td>3. Victory in jury trial cases (to plaintiffs)</td>
</tr>
<tr>
<td>4. Victory in jury trial cases (to adult plaintiffs)</td>
</tr>
</tbody>
</table>

*Does Discrimination hypothesis seem to be confirmed? (By Col. 7)*
III. AVERAGE AMOUNT AWARDED

<p>| | | | | | |</p>
<table>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5. Award in jury trial cases (to plaintiffs of all ages)</td>
<td>376</td>
<td>——</td>
<td>2% below average</td>
<td>1% above average</td>
<td>3</td>
</tr>
<tr>
<td>6. Award in jury trial cases (to adult plaintiffs)</td>
<td>2,795</td>
<td>3,976</td>
<td>2% below average</td>
<td>6% above average</td>
<td>8</td>
</tr>
<tr>
<td>7. Award for loss of victims services (to spouse plaintiffs)</td>
<td>28</td>
<td>314</td>
<td>$5,585</td>
<td>$6,524</td>
<td>$939</td>
</tr>
<tr>
<td>8. Award for victims death (to spouse plaintiffs where victim employed age 21-29)</td>
<td>——</td>
<td>——</td>
<td>$67,524</td>
<td>$39,820</td>
<td>$27,454</td>
</tr>
<tr>
<td>9. Award for urino-genital injuries</td>
<td>——</td>
<td>——</td>
<td>$11,835</td>
<td>$31,966</td>
<td>$20,131</td>
</tr>
</tbody>
</table>

* Based on data compiled by Alfred Conard, Dept of Transportation, and the Jury Verdict Research Corporation
injury cases. The first stage, analogous to being arrested in criminal cases, involves filing a personal injury complaint. One study of the economics of personal injury cases compiled data on the background characteristics of auto accident victims in the state of Michigan who subsequently became personal injury claimants. The key sex data (summarized on row 1 of table 2) shows that of 166 seriously injured male accident victims, 38 percent filed suit; whereas of 178 seriously injured female accident victims, only 30 percent filed suit. The absolute difference of 8 percentage points represents a 27 percent relative increase from the 30 percent base.

The reason a smaller percentage of female victims than male victims filed suit might be due (1) to a possibly higher rate of precomplaint settlements where females are involved or (2) to a possible tendency of females to suffer slighter injuries than males. Perhaps a more meaningful explanation is that women are encouraged to be less aggressive in asserting their legal rights in personal injury cases, just as they may be less aggressive in asserting their right to trial by jury in criminal cases.

Once a suit is filed, the next stage is establishing the defendant's liability to the plaintiff. In the Department of Transportation study of personal injury claims, nationwide data shows virtually no difference between males and females with regard to the likelihood of their respective claims being paid when bench, jury, and nontrial cases are lumped together (row 2). Also, there is no difference between male and female victory percentages in jury-trial cases, at least when adult and minor plaintiffs are lumped together (row 3). This data comes from the nationwide compilation of the Jury Verdict Research Corporation of Cleveland, Ohio. It further shows that there is a lower vic-

26. Relative percentages are shown in table 2 so as to provide a common measure for comparing: (1) differences between percentages like those on row 1; and (2) differences between dollar amounts like those on row 7. An increase of 10 percentage points also means more if one starts at 5 percent than if one starts at 80 percent. Where a relative percentage can be calculated, its size is referred to in determining whether the discrimination hypothesis seems to be confirmed.
28. 4 JURY VERDICT RESEARCH CORP., PERSONAL INJURY VALUATION HANDBOOKS, REP. No. 41, at 2025-26 (1964) [hereinafter cited JVR]. Sometimes the JVR Handbooks do not give the exact sample size of female or male plaintiffs on which their percentages or dollar amounts are based as indicated by the dashes in columns 2 and 3 of table 2, but the sample sizes are generally quite substantial in view of the extensive data
tory rate for both sexes in cases that have to go to a jury decision (row 3) as contrasted to cases that are settled with or without a trial (row 2), possibly because the nontrial cases more clearly favor the plaintiff.

A discriminatory pattern begins to appear if one compares adult male plaintiffs with adult female plaintiffs (row 4) since adult male plaintiffs win 76 percent of their jury trials and adult female plaintiffs win 69 percent of theirs. Sexual discrimination is possibly less prevalent in comparing girl minors and boy minors than in comparing women adults and men adults since minors (especially pre-teenage minors) probably tend to be perceived as children, whereas adults tend to be perceived as women and men. One can also readily see that both male and female adults have a better chance of winning than male and female children (comparing row 4 and row 3), probably because child plaintiffs often negligently contribute to their injuries and because juries identify more with the adult defendant than the child plaintiff.

Once liability has been established, the next stage conceptually (although the two may occur concurrently) involves determining the amount of money to be awarded. Little difference appears in the average amount awarded to male and female plaintiffs when adults and minors are lumped together (row 5, like row 3) although a small percentage difference may involve a substantial number of dollars. When adult female plaintiffs are compared to adult male plaintiffs, the pattern of amounts awarded is more favorable to men (row 6, like row 4). Males averaged 6 percent above the expected awards to plaintiffs for similar types of injuries, medical expenses, and lost wages whereas females averaged 2 percent below what would be expected.

The more interesting male-female comparisons relate to specific kinds of personal injuries rather than to personal injuries in general. For example, when husbands sue for their losses caused by their wives' injuries, they collect more than wives collect when wives sue for their losses caused by their husbands' injuries (row 7). This is so in spite of the fact, as previously shown (row 6), that when women sue for their own injuries they tend to collect less than do men. In other words, men collect (1) more for their own injuries and (2) more vicariously

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30. 4 JVR, REP. NO. 41, at 2027-29 (1964).

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collected unless the JVR Handbooks indicate otherwise. For an analysis of the concepts and methods of the Jury Verdict Research Corporation see Nagel, Statistical Prediction of Verdicts and Awards, 1963 Modern Uses of Logic in Law 135.
for injuries to their women than women collect vicariously for injuries to their men. Note also that there are more than eleven times as many sample suits by husbands for the losses of their wives' services than by wives for the losses of their husbands' services (row 7). The 28 wife-plaintiff suits represent a big increase from the 1964 Jury Verdict Research Report which showed only 3 such cases. Indeed, in some states the law still allows only husbands, not wives, to sue for the loss of a spouse's services, this stemming from a time when wives were almost considered property of their husbands.33

The generally larger amounts awarded to male plaintiffs (row 6) may be partially explained by the greater earning power of males, temporarily or permanently reduced by the injury. Personal injury juries have no control over this factor which reflects employment and educational discrimination against women. The most permanently damaging injury is death, and as expected men are valued there more highly than women (row 8).34 The difference, however, may be less than anticipated because a wife-plaintiff seeking to collect for a killed husband as contrasted to a husband-plaintiff is seeking to collect for a killed wife, thereby mixing discrimination as to the victim's sex with favoritism as to the plaintiff's sex.

There are some injuries that are not generally relevant to one's work capacity, and therefore differences in the amounts awarded to male and female plaintiffs for such injuries cannot be readily explained in terms of differential earning power. Urino-genital injuries are an example since probably few men or women in the Jury Verdict sample made a living from their genitalia, and if they did, they probably would not have so informed the jury. Nevertheless, the inequality pattern here was greater than it was with any other type of bodily injury. The average male plaintiff who won a urino-genital injury case in the sample studied collected $31,966, whereas the average female plaintiff in similar cases collected only $11,835 (row 9).35 This represents an absolute difference of $20,131 or a relative difference of 170 percent. In other words, male genitalia seem to have been valued almost three times as much as female genitalia. This may be an indication of a sexist view in the American court system. Much of the difference, however, may be due to the fact that urino-genital damage to the male rather than the

34. Compare 2 JVR, REP. No. 102, at 425-26b (1969) with id., REP. No. 100, at 407-08b (1968).
female plaintiffs is usually more severe and more likely to be permanent.\textsuperscript{36}

Looking at table 2 from an overall perspective integrating all the data, there seems to be a pattern in which adult women are less likely than men to file suits, to establish liability, or to receive a relatively high award, especially for certain types of injury. In that regard, the possible discrimination pattern of women plaintiffs is more like that of black plaintiffs than juvenile plaintiffs. In personal injury cases, children,\textsuperscript{37} blacks,\textsuperscript{38} and women, in that order, have greater difficulty establishing liability than adults, whites, and men. Thus, given this order of discrimination against children, blacks, and women on a victory rate continuum, women plaintiffs are closer in treatment to blacks than to children. Women, however, are closer to children than to blacks on a damages-awarded continuum with blacks furthest behind.

The extent to which women are less likely than men to establish liability and also to collect higher damages for similar injuries can probably be traced back to employment and educational discrimination, to the traditional subordination of women in the family, to a rationing of limited monetary resources, and in some cases to Freudian castration and other sexual anxieties (possibly indicated in the genitalia award comparisons). As these possible causal factors diminish through societal and legal change, the differential victory rates and damages awarded should become more equal.

\section*{Women as Divorce Litigants}

Prevailing public opinion may conceive of divorce cases as a manifestation of female domination or even exploitation of men since only

\begin{itemize}
\item \textsuperscript{36} \textit{Id.} If females who lose their child-bearing ability in an accident could be compared with males who lose their propagating ability, the damages awarded would probably be more equal since severity and permanence would be held constant and since women have been especially valued in society for their child-bearing ability.

Although one might think women would receive higher awards for facial scarring injuries than men, given society's emphasis on feminine beauty, the average awards for both sexes are about equal although the especially high awards tend to go to women. 6 JVR, REP. No. 70, at 127-29F (1966).

37. The victory rate for children under 12 is 46 percent versus 61.3 percent for plaintiffs in general. If children collect anything, they tend to either get very little or very much as compared to the general population. Their very small and large damage awards, however, give them an average award close to the general population if they collect. 5 JVR, REP. No. 45, at 3025-32 (1964).

38. The victory rate for blacks is 57 percent as compared to 61.3 percent for plaintiffs in general. Damage awards to black plaintiffs average 15 percent lower than to plaintiffs in general. 5 JVR, REP. No. 43, at 2076-79 (1964).
\end{itemize}
women litigants normally seek and obtain alimony or child support. In spite of this, empirical data on women as divorce litigants may show actual male domination and exploitation.

Although women tend to be the formal plaintiffs in divorce cases, existing data indicates that this is a nominal status, and that the husband in reality takes the de facto rather than the de jure initiative in dissolving the marriage. Among the poor, desertion by the husband is a frequent substitute for divorce and is a major cause of eligibility for welfare aid. The fact that wives seem to have better formal grounds for divorce and thus become the plaintiff-complainants possibly shows greater provocation on the part of husbands. Although women have become more independent as a result of increased employment opportunities, they are still more economically dependent on their husbands than vice versa, and they would therefore tend to resist divorce if it were not for their husbands' cruelty, non-support, desertion, or other provocation.


40. In a 1963 sample of divorce cases in 22 states, wives were plaintiffs in 72 percent of the cases, and husbands were plaintiffs in 28 percent. Division of Vital Statistics, U.S. Dep't of Health, Education & Welfare, Divorce Statistics Analysis 39 (1967) [hereinafter cited as HEW, Divorce Statistics].

41. On the basis of extensive interviewing of a sample of 425 divorced women, Goode concludes that "the husband more frequently than the wife is the first to desire a divorce; and . . . it is the husband more often than the wife who adopts (whether consciously or not) a line of behavior, a 'strategy,' which forces the other spouse to suggest a divorce as the appropriate solution." W. Goode, After Divorce 133 (1956).

42. Seventy-six percent of the 1,300,000 families receiving benefits under the aid to families with dependent children program in 1967 involved families where the father was absent from the home. Nat'l Center for Social Statistics, U.S. Dep't of Health, Education & Welfare, Findings of the 1967 AFDC Study: Data by State and Census Division, pt. 1, table 22 (1970). Categories of absence include desertion (18 percent), nonmarriage to the mother (28 percent), divorce (13 percent), separation (12 percent), and imprisonment (3 percent). Id. In 35 percent of the families, the father's whereabouts were unknown. Id., table 24. On middle class desertion see L. Weitzman, Social Suicide: A Study of Missing Persons, June 1970 (unpublished Ph.D. dissertation in Columbia University Library).

43. An alternative explanation for why wives are often made the plaintiff in divorce cases is because both husband and wife realize the wife has a better chance of winning. In divorce cases where decrees were granted, the wife as plaintiff lost only about 2 percent of the time (i.e., the husband was granted the decree); whereas the husband as plaintiff lost about 10 percent of the time (i.e., the wife was granted the decree).

44. The formal legal grounds given in a 1963 nationwide sample of divorce decrees are cruelty (54 percent), non-support (19 percent), desertion (18 percent), and indignities (16 percent). Other grounds are less than 3 percent. Grounds may be multiple. HEW, Divorce Statistics, supra note 40, at 39.
In descriptions of the divorce trial process, there are references to the often degrading paternalistic procedures to which women litigants are subjected.\textsuperscript{45} Begging for alimony may be particularly degrading even if alimony is considered (1) income accrued as a result of inadequately compensated wifehood and motherhood and (2) payment for obtaining educational rehabilitation and training.\textsuperscript{46} Seeking child support may also be a frustrating ordeal even if judges recognize the concept as covering (1) some of the considerable work mothers must do in caring for children and (2) some of the considerable out-of-pocket expenses involved in raising children which husbands have fathered. In custody disputes, a double standard of morality may prevail which condemns extramarital activities by wives, but tolerates them by husbands.\textsuperscript{47} In some states this double standard allows husbands to obtain divorces on sexual grounds which are not available to wives.\textsuperscript{48}

The real test of possible discrimination in the judicial process, however, is not at the initiation or suit-filing stages or even at the judgment stage, but rather at the judgment-enforcement stage. To a lesser extent, this reasoning also applies to personal injury and criminal cases, but a much higher percentage of the results of those cases are determined at the presentencing and predamages stages. In addition, data does not seem to be available on the collection of personal injury damages by sex as contrasted to the awarding of damages, or on the paroling of convicts by sex. Data is available, however, showing what happens to monetary judgments awarded to women divorce litigants.

Table 3 shows the probability of a divorced woman collecting any child support money. It is based on data gathered by Kenneth Eckhardt from a 1955 sample of fathers who were ordered in divorce decrees to pay child support in a metropolitan Wisconsin county.\textsuperscript{49} Within

\textsuperscript{46} On the goals to be served by alimony and child support, see H. Clark, The Law of Domestic Relations in the United States §§ 14.1, .5, at 441-42 (alimony), § 15.1 (child support) (1968).
\textsuperscript{47} At first glance, it may appear to be a victory for the wife to obtain custody of (and responsibility for) the children which she does about 95 percent of the time. W. Goode, supra note 41, at 311. Husbands, however, admitted that they agreed with the custody decrees 85 percent of the time. Id. at 313.
\textsuperscript{48} Kanowitz, supra note 1, at 96-98. For example, a common provision allows husbands to divorce wives who were pregnant at the time of the marriage, but wives cannot divorce husbands who have made other women pregnant at the time of the marriage. Id. at 96.
\textsuperscript{49} Eckhardt, Deviance, Visibility, and Legal Action: The Duty to Support, 15 Social Problems 470 (1968).
one year after the divorce decrees, only 38 percent of the fathers were in full compliance with support orders (row 1). Twenty percent had only partially complied, and in some cases partial compliance only constituted a single payment. Forty-two percent of the fathers made no payment at all. By the tenth year, the number of open cases had dropped from 163 to 149 as a result of the death of fathers, the termination of parental rights, or the maturity of children. By that year, only 13 percent of the fathers were fully complying, and 79 percent of the fathers were in total noncompliance.

If noncompliance is so great with child support orders, it is probably even greater with alimony orders although alimony orders are relatively infrequent. If noncompliance is so great with child support orders, it is probably even greater with alimony orders although alimony orders are relatively infrequent.\(^5\) It should be noted that the original child support orders probably did not meet the full support needs of the children.\(^5\)

50. In an analysis of 12,000 Chicago divorce cases, the wife requested postdivorce alimony in only 7 percent of the cases and waived it in 93 percent. M. VIRTUE, FAMILY CASES IN COURT 92 (1956). In 1922, which is the last year the Census Bureau kept alimony data, their data showed alimony was decreed in 15 percent of a nationwide sample of decrees although women were less independent at that time than in the 1950's. P. JACOBSON, AMERICAN MARRIAGE AND DIVORCE 126 (1959). For an in-depth analysis of alimony and other matters in a sample of 40 Kansas divorce cases, see Hopson, The Economics of a Divorce: A Pilot Empirical Study at the Trial Court Level, 11 KAN. L. REV. 107 (1962).

51. The smallness of child support and property settlements in divorce decrees is discussed with empirical data in W. GOODE, supra note 41, at 218-23. Of 172,000 minor children involved in divorces in Chicago in 1949-50, one third were awarded no child

\[
\begin{array}{|c|c|c|c|c|c|}
\hline
\text{Years Since} & \text{Number of} & \text{Full} & \text{Partial} & \text{No} & \text{Non-Paying Fathers} \\
\text{court order} & \text{open cases} & \text{Compliance} & \text{Compliance} & \text{Compliance} & \text{against whom legal} \\
\text{One} & 163 & 38\% & 20\% & 42\% & 19\% \\
\text{Two} & 163 & 28 & 20 & 52 & 32 \\
\text{Three} & 161 & 26 & 14 & 60 & 21 \\
\text{Four} & 161 & 22 & 11 & 67 & 18 \\
\text{Five} & 160 & 19 & 14 & 67 & 9 \\
\text{Six} & 158 & 17 & 12 & 71 & 6 \\
\text{Seven} & 157 & 17 & 12 & 71 & 4 \\
\text{Eight} & 155 & 17 & 8 & 75 & 2 \\
\text{Nine} & 155 & 17 & 8 & 75 & 0 \\
\text{Ten} & 149 & 13 & 8 & 79 & 1 \\
\hline
\end{array}
\]
Some of the orders may also have been further reduced judicially when the father re-married, or when his financial status otherwise worsened. Thus, if only a minority of husbands pay anything and even those pay a substantially less-than-full support order, most child support is actually carried by the mother or by the state.

In spite of available sanctions like contempt of court, civil action, and criminal prosecution, and in spite of the state's incentive to avoid unnecessary welfare payments, legal action is seldom initiated against nonpaying fathers (last column of table 3). This is so especially as children grow older and probably require even more support money. Only 19 percent of the 101 nonpaying fathers at the end of the first year had legal action taken against them, and only one percent of the 128 nonpaying fathers in the tenth year. Indeed, of all criminal and civil court orders, monetary divorce awards (and small claims judgments) are probably the least complied with and the least enforced.

The explanation for the nonenforcement is not that fathers are unable to comply since: (1) support orders consider the ability of the father to pay; and (2) Eckhardt's data shows that less able working-class fathers are more likely to be prosecuted than more able middle-class fathers because (a) their ex-wives are more likely to be on welfare and (b) they are more likely to already have criminal records. A possible explanation for nonenforcement lies in the promale bias of the prosecutors, judges, and legislators who could more meaningfully enforce the law. An additional explanation may be the greater complexity of nonsupport cases (especially where interstate enforcement is involved) and the greater age of such claims compared to other, more current cases.

More vigorous prosecution may not be a realistic remedy for the nonenforcement of child support orders, although it may be merited in flagrant cases. Instead, a dignity-preserving system of social insurance might more effectively cover the situation. The concept of survivorship under social security could be expanded to include children of a deserted or divorced father as well as a deceased father. Other social support at all. Robson, The Law and Practice of Divorce—The Judge's Point of View, in UNIVERSITY OF CHICAGO LAW SCHOOL CONFERENCE ON DIVORCE 4 (Conference Ser. No. 9, 1952).

52. L. Weitzman, Non-Compliance with Small Claims Court Orders (forthcoming). The legal actions referred to in Table 3 are contempt proceedings for noncompliance with the divorce decree, rather than prosecution for nonsupport.


54. A. SCHORR, EXPLORATIONS IN SOCIAL POLICY 21-68 (1968).
alternatives include child allowances, negative income tax, or an expanded family assistance plan.\textsuperscript{55} A national program of wholesome day-care centers\textsuperscript{56} and government stimulation of employment opportunities\textsuperscript{57} would also enable women to work who wish to do so, rather than to rely on child support or welfare.

**The Effect of the Sex of the Jury**

The unequal treatment of male and female litigants may be affected by whether the judge is a man or a woman and by whether the jury is predominantly male or female.\textsuperscript{58} Because there are few female judges, and no data found comparing them with male judges vis-a-vis male and female litigants, this section of the article will deal solely with male and female jurors, but one can possibly extrapolate the findings to male and female judges.\textsuperscript{59} Likewise, because of the rare occurrence of jury trials in divorce cases, there seems to be no data available on how male-dominated juries differ from female-dominated juries vis-a-vis male and female divorce litigants.\textsuperscript{60}

There are five meaningful hypotheses which one can formulate concerning the effect of the sex of jurors on male-female treatment in criminal and personal injury cases. One hypothesis, which may be called the opposites-attract hypothesis, predicts that men will favor women and women will favor men.\textsuperscript{61} A second, the chivalry hypothe-

\textsuperscript{56} See F. RUDERMAN, CHILD CARE AND WORKING MOTHERS (1968); Special Issue on Day Care, 44 CHILD WELFARE 124 (1965).
\textsuperscript{58} The concern here is only with the effect on sexual discrimination (not on sentences or awards in general) of changing the sexual representation of judicial decision-makers. Studies that deal with the effect on sentences or awards in general are not directly relevant. Such studies include R. SIMON, THE JURY AND THE DEFENSE OF INSANITY 109 (1967) which shows that housewives are less punitive than men in burglary and possibly other theft cases, but more punitive in father-daughter incest and possibly other male-female sex crimes.
\textsuperscript{59} For a comparison of the effects of various background characteristics (other than sex) on the decisional propensities of judges (rather than jurors), see NAGEL, supra note 4, at 227-44.
\textsuperscript{60} "Of several thousand divorce cases [in Chicago], juries were used in only three." M. VIRTUE, supra note 50, at 58.
\textsuperscript{61} A. White, Selecting the Jury, in SUCCESSFUL JURY TRIALS: A SYMPOSIUM 119, 123 (J. Appleman ed. 1952) says: "If you are representing a personable young man, try to seat kindly old ladies in the jury box. If you are representing an attractive young woman, have as many male jurors, old or young, as possible."
sis, predicts that men will favor women and women will also favor women because supposedly women need special treatment. Third is the brainwashing hypothesis which says that men will be favored by both men and women because they have been indoctrinated to believe that men are more valuable. Fourth is the equality hypothesis which says men favor neither sex, and women favor neither sex. This is the implicit or explicit hypothesis of cases which have found no denial of equal protection in state actions which systematically decrease the chances of women serving on juries. Fifth is the likes-attract hypothesis which predicts that men favor men, and women favor women.

With regard to criminal cases, the most relevant data seems to be contained in a quantitative empirical study by Arnold Rose and Arthur Prell. A sample of students taking courses in introductory sociology and social psychology at the University of Minnesota in 1953 were asked what sentences they would hand down if they were serving as judges or jurors in a variety of hypothetical fact situations. One situation involved a male convicted of a certain crime. Elsewhere on the list, another situation involved a female convicted of the same crime. The male respondents tended to give the male defendant a lower sentence than the female defendant, whereas the female respondents tended to give the female defendant a lower sentence than the male defendant. In other words, men tended to favor males and women tended to favor females. To the extent this finding can be extrapolated to real juries or real judges, it confirms the likes-attract hypothesis.

With regard to personal injury cases, there is data available on real, not just simulated, juries. Table 4 presents data from the Jury Verdict Research Corporation on how the treatment of females and males differs in personal injury cases when considering the sex of the jury. The upper half of the table answers the question: "If I know the sex of the plaintiff, what can I predict with regard to victory and damages before male-dominated and female-dominated juries?" The lower half of the table answers the question: "If I know the dominant sex of the jury, what can I predict with regard to victory and damages for male and female plaintiffs?"

Both parts of the table show that holding constant the sex of the jury makes no significant difference with regard to establishing liability.

64. Id. at 257.
<table>
<thead>
<tr>
<th>Treatment Stage and Jury Sex</th>
<th>Number of Cases with Available Information</th>
<th>Differential Treatment</th>
<th>Difference</th>
<th>Does hypothesis seem to be confirmed that men and women favor own sex?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Female Plaintiffs</td>
<td>Male Plaintiffs</td>
<td>Female Plaintiffs</td>
<td>Male Plaintiffs</td>
</tr>
<tr>
<td>I. LIABILITY ESTABLISHED</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Victory with a predominately <em>male</em> jury</td>
<td>117</td>
<td>149</td>
<td>63%</td>
<td>65%</td>
</tr>
<tr>
<td>2. Victory with a predominately <em>female</em> jury</td>
<td>35</td>
<td>63</td>
<td>60%</td>
<td>68%</td>
</tr>
<tr>
<td>II. AVERAGE AMOUNT AWARDED</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Award with a predominately <em>male</em> jury</td>
<td>117</td>
<td>149</td>
<td>-17% below average</td>
<td>+12% above average</td>
</tr>
<tr>
<td>4. Award with a predominately <em>female</em> jury</td>
<td>35</td>
<td>63</td>
<td>+17% above average</td>
<td>+3% above average</td>
</tr>
</tbody>
</table>
## WOMEN AS LITIGANTS

<table>
<thead>
<tr>
<th>Treatment Stage and Plaintiff Sex</th>
<th>Female Juries</th>
<th>Male Juries</th>
<th>Female Juries</th>
<th>Male Juries</th>
<th>Difference</th>
<th>Does hypothesis seem to be confirmed that plaintiffs are better off with jurors of their own sex?</th>
</tr>
</thead>
<tbody>
<tr>
<td>III. LIABILITY ESTABLISHED</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5. Adult male Plaintiffs</td>
<td>63</td>
<td>149</td>
<td>68%</td>
<td>65%</td>
<td>3</td>
<td>Diff. too small</td>
</tr>
<tr>
<td>6. Adult female Plaintiffs</td>
<td>35</td>
<td>117</td>
<td>60%</td>
<td>63%</td>
<td>3</td>
<td>Diff. too small</td>
</tr>
<tr>
<td>IV. AVERAGE AMOUNT AWARDED</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7. Adult male Plaintiffs</td>
<td>63</td>
<td>149</td>
<td>+3% above average</td>
<td>+12% above average</td>
<td>9</td>
<td>Yes</td>
</tr>
<tr>
<td>8. Adult female Plaintiffs</td>
<td>35</td>
<td>117</td>
<td>+17% above average</td>
<td>−17% below average</td>
<td>34</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Both parts, however, show that holding constant the sex of the jury makes a substantial difference with regard to the average amount awarded. For instance, male-dominated juries gave awards to male plaintiffs that averaged 12 percent above the expected average for the type of injury, medical expenses, and lost wages (row 3); whereas male-dominated juries gave female plaintiffs awards that averaged 17 percent below the expected average. With female-dominated juries, the direction of favoritism between female and male plaintiffs was reversed (row 4). The validity of the likes-attract hypothesis is further reinforced by other data on the average amounts awarded (rows 7 and 8). Note, however, that although women favor women, they do so to a lesser extent than men favor men.

In table 4 and to a lesser extent in table 2, discrimination, or at least inequality, between men and women seems to be greater in the amount of damages awarded than in the establishment of liability. Some of the difference between these two stages may be attributed to the fact that extremely large awards (those over $100,000) tend to be rendered for work accidents resulting in crippling injuries. Relatively few women are injured in such circumstances. In table 4, however, the type of injury (e.g., whiplash) and the out-of-pocket expenses are statistically controlled in calculating percent above or below the expected average. Some of the difference in liability versus damages may be due to the fact that the differential earning power rationale only applies to assessing damages, not to establishing liability, and male jurors may place more emphasis on that rationale than do female jurors. Much of the difference may also be attributed to the greater subjectivity involved in determining damages. Thus, prejudice is more easily exercised there than in the more objective legalistic decision of establishing liability. Likewise, the greater inequality present at bail and sentencing stages in criminal cases as compared to procedural safeguards may be partly attributable to the relatively greater subjectivity and lesser legalistic restraint involved in bail-setting and sentencing.

Since table 4 shows that disparities in the treatment of male and female litigants can be affected by the sex of the decision-makers, this should be further reason for society to seek an increase in the number of women judges and jurors in addition to more democratic representation. In order to obtain more women judges, it is necessary to encourage more women to become law students and eligible lawyers.

As for jurors, a majority of states by law still allow women to be more easily excused or exempted from jury service than men, probably resulting in an underrepresentation of women on the juries of those states. In some states, however, women may already approximate 50 percent of the jurors. A Pennsylvania study showed an unbalance toward male jurors in Lancaster County, an unbalance toward female jurors in Philadelphia County, and approximate equality in Allegheny County. These wide variations under the same state law seem to illustrate the empirical importance of local administrators and judges with regard to jury selection laws.

Conclusions

Looking at tables 1, 2, 3, and 4 from a general overall perspective, one can conclude that women as litigants do not receive the same treatment that men receive as litigants. In criminal cases, women are much less likely to be jailed before or after conviction and are also less likely to have a jury trial than are men charged with the same crime. In personal injury cases, adult women are less likely to win than adult men, and they collect substantially smaller awards, especially for certain types of injuries and especially before male-dominated juries. In divorce cases, where there is always a woman on one side and a man on the other, the woman seems to win if one analyzes only divorce decrees; but she generally loses if one analyzes collection records.

These findings seem consistent with how women are generally treated in American society. There exists a paternalistic protectiveness, at least toward white women, that assumes they need sheltering from manly experiences such as jail and from subjection to the unfriendliness of overly formal proceedings in criminal or family law cases. At the same time, however, when it comes to allocating limited valuable resources like personal injury monetary awards or child support money,


68. Vanderzell, The Jury: A Community Cross-Section, 19 West. Pol. Q. 136 (1966). In the jury panel list for the Los Angeles courts, women constituted about 63 percent of the names. Holbrook, Composition of Juries as a Group in CIVIL JUSTICE AND THE JURY 195, 198 (C. Joiner ed. 1962). A majority of Los Angeles attorneys and judges who were interviewed also indicated they thought women were over-represented on actual juries. Id. Both Pennsylvania and California are among the minority of states that do not by law make it easier for women to be excused from jury service. See note 67 supra.
women are more likely to be slighted than their male counterparts.

Perhaps more equal treatment will be achieved by increasing the awareness of disparities in the treatment of male and female litigants and by increasing the representation of women as jury and judicial decision-makers. More specifically focused changes in the legal system are needed to improve the legal process for both men and women.

For example, the remedy for disparities in the jailing of women does not lie in reducing their release on bond or increasing their post-conviction imprisonment. Instead, a more socially useful remedy probably lies in providing pretrial release for all persons, regardless of sex, mainly on the basis of their likelihood of appearing for trial, possibly using the quantitative methods devised by the Vera Institute. Likewise, society needs to provide posttrial sentencing for all persons, regardless of sex, on the basis of the likely rehabilitation and deterrent effects of imprisonment, possibly using a more scientific approach than has heretofore been used in sentencing.

Along related lines, the remedy for disparities in personal injury awards and child support collections probably does not lie in lowering the damages awarded to males or in more vigorously prosecuting wayward fathers. Instead, society may need to try collective action like no-fault insurance and expanded social security. These measures, however, will probably still not eliminate whatever discrimination exists against women litigants until discrimination against women in general is further decreased in accordance with current trends.


72. See notes 51-52 & the accompanying text supra.