THE EFFECT OF SENTENCING ON WOMEN, MEN, THE FAMILY, AND THE COMMUNITY†

*Jack B. Weinstein**

There are two provisions in the Federal Sentencing Guidelines ("Guidelines") that make no sense in the real world: one dictates that sex—along with race, national origin, and other factors—is not relevant to sentencing.[1] The other asserts the "general inappropriateness" of considering "family ties and responsibilities" in determining the term of imprisonment.[2]

The first provision is merely inappropriately worded. Of course these factors may be relevant. In my opinion, what the Sentencing Commission means is that sex and such factors should not be used in a biased way.

The second provision is so cruelly delusive as to make those who have to apply the guidelines to human beings, families, and the community want to weep. Family ties and responsibilities must be considered. The effect of removing a single caretaker-nurturer from dependent family members needs to be seriously considered. Even with respect to two-parent families, the harmful effects of destroying a stable family, particularly now that the widespread prevalence of dysfunctional families threatens to tear apart our social fabric, must be taken into account.

These considerations sometimes require downward sentencing departures for men.[3] More often they require minimizing women's

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*Senior United States District Judge, Eastern District of New York. I appreciate the assistance of my law clerks, Karin Schwartz and Michèle Stephenson, in preparing this Article.

[1]U.S.S.G. § 5H1.10 (1995); see also 28 U.S.C. § 994(d) (1995) (congressional mandate to the United States Sentencing Commission). Omitted from this article are my views on the terrible effect of dividing the sexes by prison walls. Prison systems often deemed less 'progressive' than our own allow conjugal visits and may be far more humane. For married couples, particularly, the effect of preventing childbearing can be cruel. See, e.g., Michael Gold, And Hannah Wept (1988); Machelle M. Seibel, Infertility: A Comprehensive Text, 24-26 (1990) (psychological impact of infertility on men and women). But cf. United States v. Lopez-Aguilar, Docket No. 95-1332, January 5, 1996 (2d Cir. 1996).

[2]U.S.S.G. § 5H1.6 (1995); see also 28 U.S.C. § 994(e) (1995). Family ties and community ties may, however, be considered with respect to "the nature, extent, place of service, or other incidents of an appropriate sentence." 28 U.S.C. § 994(d) (1995).

[3]Under the sentencing statute, a court may depart from a guideline-specified

sentences in prison and substituting nonincarcerative punishments and treatments.

I. CONSIDERATION OF SEX

The prohibition against giving weight to sex, race, and class should be interpreted to incorporate the ideal that criminal sanctions are to be based on individual culpability and individual circumstances, rather than on group membership.[4] This prohibition does not itself prevent judges from considering factors that may disproportionately affect specific women, or specific men, or members of other societal subgroups. Our American society is a conglomeration of subcultures. These differences, which often profoundly affect what we do, cannot be ignored.

Nonetheless, the women whom I sentence often share many of the same characteristics. For example, women who have come before me have often committed economic crimes less out of a selfish desire for personal advancement than to provide for the basic needs of their children. Many women who commit drug crimes do not act completely under their own volition, but rather out of fear of the dominant, abusive men in their lives. While these factors do not negate guilt, they are relevant in sentencing. The policy statement asserting the irrelevance of sex does not prevent consideration of such factors in individual cases.

Nonetheless, other provisions in the Guidelines make it difficult for judges to consider pervasive sociological aspects of women's participation in crime. Specifically, the provisions controlling departures from the Guideline's ranges do not account for some women's unique experiences and backgrounds.[5]

The Guidelines establish fixed ranges of sentences based on the crime committed and the defendant's criminal background. Departures from the

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sentence only when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). See also U.S.S.G. § I.A.4.4(b) (1995).

[4]U.S.S.G. § 5H1.10 (1995) explains, "Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement): These factors are not relevant in the determination of a sentence."

[5]The recent United Nations Women's Conference in Beijing highlighted once again that different societies treat women differently. In some countries women are subject to such extreme oppression that they are not considered free agents fully responsible for their own independently-willed conduct. See, e.g., Jill Smolowe, All For One?, Time, Sept. 11, 1995, at 42.

Guidelines are permitted only in enumerated circumstances, or where a judge determines that "there exists an aggravating or mitigating circumstance of a kind . . . not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . . ."[6]

The enumerated bases for departures are insufficient.[7] For example, the provisions permitting a departure on the basis of "coercion or duress" do not accommodate the realities of male physical and psychological abuse of women in some parts of our society. Less frequently, this dominance role is reversed.

Many women who commit crimes, to put it bluntly, are oppressed and driven by the males in their lives to a greater degree than are women more favored in our society. Often female defendants in drug cases become involved in criminal activity through their subservience to dominant, often abusive, males.[8] This appears to be particularly true for defendants from cultures possessing highly determined gender roles, where a widespread

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[6]U.S.S.G. § 5K2.0 (1995) (quoting 18 U.S.C. § 3553(b) (1995)).

[7]For a discussion of the criticisms of the federal as compared to the state guidelines for their hardships and inadequate judicial discretion, see Symposium, Twenty Years of Sentencing Reform, 78 Judicature 169 (1995).

[8]See, e.g., United States v. Ekwunoh, 813 F. Supp. 168, 179 (E.D.N.Y. 1993), sentence vacated, 12 F.3d 368 (2d Cir. 1993), on remand, 888 F. Supp. 364 (E.D.N.Y. 1994), order supplemented by 888 F. Supp. 369, 372 (E.D.N.Y. 1994) (female defendant characterized as "obedient underling in her boyfriend's operation"); United States v. Gaviria, 804 F. Supp. 476 (E.D.N.Y. 1992) (discussed below). See generally Myrna S. Raeder, Gender Issues in the Federal Sentencing Guidelines and Mandatory Minimum Sentences, 8 Crim. Just. 20 (1993); New York County Lawyers' Association Drug Policy Task Force, Report and Recommendations of the Drug Policy Task Force, December 11, 1995, at 33-34.

Some theorists are critical of an approach that acknowledges this aspect of women's involvement in crime:

> This conclusion does women a disservice by implying that women are dominated by men and their behavioral patterns, instead of being independent actors who make their own choices. . . . [The argument asserts] that women are criminals not because of their own self-directed actions, but because they were subjected to abuse by a stronger outside party. . . . [S]uch an approach dangerously depicts women as stereotypically weaker and more "touchy-feely" than men.

Leah Guggenheimer, Women Prisoners: A Forgotten Population, 17 Harv. Women's L.J. 237, 241 (1994) (book review). The answer to this criticism lies in part in an understanding that many women in the United States—as well as in other parts of the world—grow up in an environment of domination quite different from that known to women who have had advantaged nurturing. See also Smolowe, supra note 5.

pattern of dependence, domination, and victimization of women is more likely to be present. But it is present to different extents in almost every class and social subgroup that we see.

As the New York County Lawyers' Association Drug Policy Task Force recently pointed out:[9]

> Women, particularly minority women, have disproportionately felt the adverse impact of the harsh drug sentencing laws.[10] A study of female "drug mules" was conducted by the Correctional Association of New York,[11] focused on prosecutions occurring in Queens, New York, where JFK International Airport serves as a major entry port for international travel. The Correctional Association found a startling increase in the number of women arrested and charged with "A-I" felony narcotics offenses, many of whom were first time arrestees. This was primarily a result of the combined effect of the accessorial liability statute and the "Rockefeller Drug Laws," so that women suspected of being used as couriers by drug smugglers frequently faced mandatory prison sentences of 15 and 25 years-to-life, even on their first arrest.[12]
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> The report further found that despite the fact that many of these women claimed to be unwitting agents of drug distributors, or marginally involved in drug operations, they did not go to trial because of the excessively high stakes involved. Plea bargain agreements, which guaranteed relatively short sentences of 3 years-to-life, were "too good" an offer to refuse, (although unconscionable under many individual circumstances), given the risk of a much more severe sentence if found guilty at trial. Many of these women were mothers,[13] unable or unwilling to risk being separated from their children for considerably longer

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[9]Report at 33-34. Report approved by the Board of Directors of the New York County Lawyers' Association on December 11, 1995. The footnotes in the quotation are from the Report, renumbered.

[10]In the five years from 1989 to 1994, black, non-hispanic women from the ages of 20 to 29 faced the highest growth in criminal justice "control rates," (i.e., incarcerated, on parole, or on probation) which increased 78% during this period. In the five-year period from 1986 to 1991, black, non-hispanic women overall faced the highest growth in numbers of those incarcerated in state prisons for drug offenses, with an increase of 828% during this period.

[11]Correctional Association of New York, Injustice Will be Done: Women Drug Couriers and the Rockefeller Drug Laws (February 1992).

[12]For federal arrestees, the potential sentence after conviction for similar crimes, under the Federal Sentencing Guidelines, is 50 years-to-life.

[13]80% of women prisoners are the sole caretakers of children under age 18. L.A. Greenfield and S.M. Harper, Women in Prison, U.S. Bureau of Justice Statistics, Special Report (1991).

> periods in the event of conviction after trial, and therefore pleaded guilty even if they were innocent or able to present valid defenses to the offense charged.
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> In these cases, women are disproportionately affected by the lack of judicial discretion involved in the mandatory sentences statutes, regardless of any mitigating circumstances which may exist.[14]

One case before me involved a twenty-one-year-old Colombian, born in poverty, who was physically and sexually abused throughout her life, first by members of her family and then by her husband.[15] Once in the United States, she had little choice but to do what her husband ordered her to do. She was completely dependent on her husband because she did not speak English, possessed no money of her own, and did not know how to travel. While these factors did not constitute duress sufficient to negate guilt for the crime committed, it did seem to me that they were relevant to sentencing.

The Guidelines do not account for the long-term psychological effects of socialized dependence and abuse. Although a departure may be justified based on coercion or duress, the coercion must "involve[] a threat of physical injury [or] substantial damage to property . . . ."[16] The undifferentiated fear and pattern of dependence under which many women live may not constitute the type of threat of palpable physical harm that is anticipated by the Guidelines.[17]

A variety of special hardships may accompany incarceration of women in particular.[18] Others have documented the hardships that female inmates experience because of differences in prison resources, rehabilitation programs, and vocational training.[19] There is some evidence that female

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[14]See, for example, M. Letwin, Sentencing Angela Thompson, N.Y. L.J., Apr. 18, 1994, at 2, col. 3.

[15]United States v. Gaviria, 804 F. Supp. 476, 477 (E.D.N.Y. 1992).

[16]U.S.S.G. § 5K2.12 (1995).

[17]Cf. Raeder, supra note 8 (discussing application of the Guidelines in cases of battered women's syndrome).

[18]Women may be particularly vulnerable for a number of reasons. See, e.g., United States v. Cordoba-Hincapie, 825 F. Supp. 485, 534 (E.D.N.Y. 1993) (four-point downward departure justified by defendant's "medical condition, her dependent children and her weak emotional state which will subject her to potential abuse in prison"); United States v. Perez, 756 F. Supp. 698 (E.D.N.Y. 1992) (downward departure permitted where female defendant suffered sudden and unexpected death of only child, a son born while she was in custody).

[19]See generally Guggenheimer, supra note 8; Nicole Hahn Rafter, Even in Prison, Women are Second-Class Citizens, 14 Hum. Rts. 28 (1987).

inmates are more likely to be treated with tranquilizers and psychotropic medications.[20] Certainly, the relatively smaller number of facilities for women means they are likely to be incarcerated far away from family members, including their children, making visitation more difficult.[21] The enumerated set of bases for departure fails women in other ways. Since women are often only minor players in criminal conspiracies, they tend to have less assistance to offer government prosecutors, and therefore are less likely to be beneficiaries of a "5K1.1" motion by the government for a downward departure because of the defendant's "substantial assistance" in the investigation.[22] Dominance by males engaged in the drug trade and fear for their children often make it impossible for them to cooperate and to obtain a "5K1.1 letter" from the government.

The Guidelines provision acknowledging a judge's discretion to depart downwardly for reasons not taken into account adequately by the Sentencing Commission is not much help. The judge may only permit a departure if the mitigating circumstance is present to an "unusual degree."[23] This requirement has been strictly interpreted by several circuit courts.[24] It seems strange to some courts to treat characteristics shared by many members of a deprived group as "unusual."

As others have noted, the Guidelines ranges themselves may be biased in ways that ignore women's experiences.[25] Because men tend to commit the majority of crimes, factors specific to women may be discounted by the

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[20]Guggenheimer, supra note 8, at 237.

[21]Rafter, supra note 19, at 28. See also United States v. Guiro, 887 F. Supp. 66 (E.D.N.Y. 1995) (downward departure to a sentence of eight months in a halfway house was not possible because a suitable halfway house could not be located near defendant's work and family home in New Jersey. Defendant was sentenced instead to three years probation, conditioned on eight months of home confinement and 500 hours of community service, plus a $50 special assessment).

[22]See Raeder, supra note 8, at 60. The U.S.S.G. § 5K1.1 basis for departure allows a judge to downwardly depart from the base offense level where the defendant has provided substantial assistance to authorities. This provision may be considered by the judge upon motion by the government stating the assistance defendant has provided.

[23]U.S.S.G. § 5K2.0.

[24]See, e.g., United States v. Mogel, 956 F.2d 1555 (11th Cir.), cert. denied, 113 S. Ct. 167 (1992); United States v. Headley, 923 F.2d 1079 (3d Cir. 1991); United States v. Brand, 907 F.2d 31 (4th Cir.), cert. denied, 498 U.S. 1014 (1990); United States v. Brewer, 899 F.2d 503 (6th Cir.), cert. denied, 498 U.S. 844 (1990). See generally Jefri Wood & Diane Sheehey, Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues 124-26 (1994).

[25]Raeder, supra note 8, at 23.

society-wide male-skewed "averages" on which the Guidelines ranges are based.[26]

II. FAMILY CIRCUMSTANCES

The Guidelines' prohibition against explicit consideration of sex is not nearly as disturbing as the prohibition against consideration of "family ties and responsibilities." This prohibition wreaks havoc on some women, some men, single parents generally, and particularly on children. In many cases, it makes it difficult for the judge to comply with other statutory mandates that he or she impose a sentence "not greater than necessary" to achieve the statutorily defined purposes of sentencing, primarily deterrence and rehabilitation.[27]

The conundrum we face was posed in biblical times when the Hebrews made the great step forward of substituting individual responsibility for that of the family.[28] Instead of the children being punished for the parent's delicts, only the parent would be punished. Ezekiel puts it this way:

> The word of the Lord came unto me again, saying: What mean ye, that ye use this proverb concerning the land of Israel, saying: The fathers have eaten sour grapes, and the children's teeth are set on edge? . . . [Ye] shall not have occasion any more to use this proverb in Israel.

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[26]The same can be said of the Guidelines' treatment of race or ethnicity:

> Differences in behavior among races may also play a role in the disproportionate number of minorities serving prison terms, especially when these behavioral differences interact with other factors such as the patterns in the deployment of law enforcement resources and the differing rates of apprehension, conviction, and imprisonment of racial minority offenders.

Placido Gomez, The Dilemma of Difference: Race As A Sentencing Factor, 24 Golden Gate U. L. Rev. 357, 364 (1994) (referring to Research on Sentencing: The Search for Reform 1 (Alfred Blunstein et al. eds., 1983) at 13). See Fox Butterfield, More Blacks in Their 20's Have Trouble With the Law, N.Y. Times, Oct. 5, 1995, at A18. See also United States v. Jobim Rose, 885 F. Supp. 62, 66 (E.D.N.Y. 1995).

[27]18 U.S.C. § 3553(a)(2) (1995); see also 18 U.S.C. § 3553(a)(1) (1994) (consideration of offender's individual history and characteristics); 18 U.S.C. § 3661 (1995) (same). See generally United States v. Concepción, 795 F. Supp. 1262, 1271-73 (E.D.N.Y. 1992), disapproved on other grounds, United States v. Deriggi, No. 94-1219, 1995 WL 30884 (2d Cir. Jan. 26, 1995) (stating that the guidelines reflect the traditional purposes of punishment).

[28]See, e.g., Oliver Wendell Holmes, The Common Law (1881); see also Frederick Forsyth, The Fist Of God 103-105 (1995).

> When the son hath done that which is lawful and right, and hath kept all My statutes, and hath done them, he shall surely live. The soul that sinneth, it shall die; the son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son; the righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him.[29]

But the punishment of the parent may so adversely affect the innocent child that punishment of one is in practical effect punishment of both. This is especially true of the adverse psychological effects of deprivation of a parent's presence during the initial years of development.

So how can we punish the parent while at the same time keeping to a minimum the adverse effect of that punishment on the child? One solution is not to sentence parents to excessive prison terms. Another is to use alternatives to prison such as house arrest and community treatment facilities allowing work and frequent home visits.

A. Statutory Conflict

As previously noted, in developing a just and appropriate sentence, a judge must take account of all of the facts and circumstances of an individual case. Family ties and responsibilities are relevant to this determination. They may be implicated in the reasons the crime was committed, in the hardship incarceration will impose on an individual defendant, and in the likelihood of recidivism. Most importantly, the impact of incarceration on what Columbia University Law Professor Martha Fineman refers to as the "caretaker-dependent relationship"[30] must be considered. Day after day I ask: "What will happen to the children? What will happen to the aged parent? What will happen to the sick husband or wife left home alone?"

By limiting the sentencing judge's consideration of family circumstances to "extraordinary cases," the Guidelines work against the statutory goals of fitting the punishment to the criminal as well as to the crime and to the needs of society. They often require punishment of the innocent, who in these cases are the children.

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[29]Ezekiel 18:1-3, 19-20 (King James).

[30]See Martha Albertson Fineman, The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies 8 (1995).

B. Difficulty of Application

What role can and do a defendant's familial ties play in sentencing? The Guidelines state that "[f]amily ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."[31] I read this as mandating that a defendant may not receive credit for her motherhood. Moreover, the Guidelines do not address the more critical problem of whether the court can consider the welfare of the defendant's children in determining the sentence. Fortunately, the Second Circuit Court of Appeals, in *United States v. Johnson*,[32] has adopted the view that the potential of imprisonment to effect "destruction of an otherwise strong family unit" is a basis for a judge's discretionary departure from the Guidelines range.[33]

Such case law sends us in the right direction, but it is not enough. According to the Guidelines, a departure based on family circumstances is warranted only when the detrimental effect is out of the ordinary. The devastation caused by removing a parent from a household is terrible in every case. Does this mean that harm caused by removing a parent is never out of the ordinary, and therefore a downward departure is never warranted on these grounds?[34]

The families themselves are rarely "ordinary." Often, the pre-sentence report that the judge consults at sentencing reveals an extraordinary family situation. This evaluation is often confirmed by the sentencing judge's observations in court of the family members and their emotional relationship to the defendant—factors that an appellate court cannot observe. If an "ordinary" family consists of two responsible adults caring for one or more minor children, then few defendants have ordinary families. This observation is borne out by data describing the statistical decline of the "traditional" nuclear family.[35] Given the multiplicity of family

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[31]U.S.S.G. § 5H1.6 (1995).

[32]964 F.2d 124 (2d Cir. 1992).

[33]Id. at 129 (citing United States v. Alba, 933 F.2d 1117, 1122 (2d Cir. 1991)).

[34]See, e.g., United States v. Brand, 907 F.2d 31, 33 (4th Cir.), cert. denied 498 U.S. 1014 (1990) ("[S]uch a situation is not extraordinary. A sole, custodial parent is not a rarity in today's society, and imprisoning such a parent will by definition separate the parent from the children."). See generally Raeder, supra note 8.

[35]See Margaret L. Usdansky, "Blended," "Extended" Now All in the Family, USA Today, Aug. 30, 1994, at 3A ("Just over 56% of white kids live in [nuclear] families, compared with about 26% of black kids and about 38% of Hispanic kids."); see also Pamela Miller, Families Under Fire: Single Moms Under Siege, Star Tribune, Oct. 28, 1994, at 24A; Mary Ellen Murphy, Looking to Forge a New Nuclear Family,

arrangements in New York City, the use of the term "ordinary" in the Guidelines gives the judge little guidance. (Defense counsel might be well-advised to put video cassettes in evidence at the sentencing hearing so that appellate judges would have to see what defendant and their families look like, their home and health circumstances, and their relationships.)

We cannot, for example, ignore the need to encourage fathers as well as mothers to work together in raising their children. In certain cases, in view of the necessity of maintaining family stability in environments where father role models are few and far between, downward departures from the Guidelines and a search for alternatives to incarceration are a necessity for male defendants. It is equally important to provide that flexibility for male defendants who are heads of households and have acted responsibly toward their children or extended family.[36] Loving parents and an extended family or caretakers are a treasured asset in our times. We should not unnecessarily destroy such relationships.

C. Harsh Effects

The problem is more serious than an abstract conflict between statutory provisions. The family ties and responsibilities provision wreaks great hardship on real people living in real communities: female defendants, male defendants, homosexual couples, single parents, and children.

The majority of women who commit crimes tend to bear the traditional burdens of family care to an even greater degree than the middle- to upper-class people who are the lawyers, judges, and legislators deciding their fates.[37] And, because they lack resources, they often bear a greater risk of permanently losing custody of their children if they are incarcerated.[38] When fathers are incarcerated, there are often other family members, including mothers themselves, available to care for the children.[39]

Tampa Tribune, Jan. 29, 1995, at 3; Elizabeth Shogren, Traditional Family Nearly the Exception, Census Finds, L.A. Times, Aug. 30, 1994, at A1.

[36]See United States v. Concepción, 808 F. Supp. 166 (E.D.N.Y. 1992); United States v. Rose, 885 F. Supp. 62 (E.D.N.Y. 1995); United States v. Jackson, CR-94-1106, (E.D.N.Y. Jan. 9, 1995).

[37]Anne Hawke, Alternative Sentences: A Just Women's Issue, Nat'l L.J., Jan. 15, 1996, at A19 ("Of the 90,000 female inmates in the U.S. today, approximately 67 percent are primary or sole caretakers. For example, 81 percent of the female prison population in the state of Illinois have children, and most are primary caretakers.")

[38]See, e.g., United States v. Pokuaa, 782 F. Supp. 747 (E.D.N.Y. 1992) (downward departure warranted in light of defendant's potential permanent loss of custody of her child). See generally Guggenheimer, supra note 8.

[39]Raeder, supra note 8, at 24 (citing 1992 census figures demonstrating that 88%

Mothers are more often the primary—or only—caretakers.[40] Removal of the mother may mean destruction of the entire family unit.

Visit my courtroom sometime when tearful young children watch their mother being sentenced. Jail would mean destruction of the only loving relationship they have. It may mean institutionalization for these children, or worse. The lack of parental supervision resulting from incarceration of heads of households can lead into a vicious downward spiral of criminal activity, jail sentences, and possible death for such children at a young age. The message needs to be clear that parental presence in the home is essential to encourage children to complete their schooling.[41] Avoiding punitive solutions based solely on incarceration for defendants who are heads of households may prevent the children from being victimized because of their parents' acts while at the same time it may guarantee a certain degree of stability that can encourage a home environment where the children can pursue alternatives beyond criminal activity.

Strict adherence to the general principle that family circumstances should not be considered in sentencing may yield nonsensical results. For example, in one case I had to sentence fifty-five Dominican women who fraudulently obtained assistance from AFDC, food stamps, and Medicaid programs.[42] Many of them were mothers in families with absent fathers; they were working at menial jobs to feed and clothe their children and themselves. These were not dangerous people pursuing a flamboyant lifestyle of luxury, but rather poor hard-working women seeking to provide basic sustenance for their children. As I noted in my opinion, it would have been especially ironic if I could not have considered the "family circumstances" where the very program the defendant abused was for the benefit of children. In an effort not to damage parental ties needlessly, I utilized nonincarcerative punishments which included combinations of alternatives such as probation, house arrest, restitution, home confinement,

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of single parents are women).

[40]See Usdansky, supra note 35, at 3A. Most single-parent households are headed by a mother. 78% of all families contain two parents; 21.2% have a mother only; 2.7% have a father only; and 3.3% have some other configuration. Single mother families are even more prevalent in the black community. The percentages are 41.7% (two-parent), 46.7% (mother only), 2.4% (father only), and 9.2% (other). Single parent households led by a father are more likely to include another adult (37% include another adult woman and 18.7% include another adult man) than are those led by a mother (20% include an adult male and 18.9% include an adult female). Id.

[41]See, e.g., United States v. Jackson, CR-94-1106, (E.D.N.Y. Jan. 9, 1995).

[42]United States v. Concepción, 795 F. Supp. 1262 (E.D.N.Y. 1992); United States v. Concepción, 808 F. Supp. 166 (E.D.N.Y. 1992); United States v. Concepción, 825 F. Supp. 19 (E.D.N.Y. 1993).

and community service, as well as inducements to work and go to school.[43]

We need to make available more institutions that permit some form of community or home confinement with families kept intact. Keeping people out of traditional prisons, where possible, saves taxpayer money as well as lives of defendants and family members.

It is not only the individual defendant about whom we have to be concerned. We must look at the impact on the families that these defendants leave behind and the disruption to the social structure of which they are a part.[44] People are parts of communities. Tearing apart one family in a close-knit community may have repercussions beyond that family. It is increasingly clear that deterioration of the traditional two-parent family, particularly among the poorer in society, has created tremendous strains in the stability of our social network.

This analysis does not call for a mechanical tilt towards women in sentencing. In many instances, it is the male that is the center of the family. In other instances, he shares that role with others.[45] Where a man is the sole caretaker for the children, the analysis must be the same as that applied in the more conventional circumstances where a woman is the sole nurturer.

Some feminists, I am told, disapprove of my considering the special needs of women.[46] Let them try to live the life of one of those Dominican women I just referred to for a month and see if the facts of life affect their

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[43]See 808 F. Supp. at 166 (E.D.N.Y. 1992).

[44]United States v. Abbadessa, 848 F. Supp. 369, 382-83 (E.D.N.Y. 1994), vacated and remanded sub nom., United States v. Deriggi, 45 F.3d 713 (2d Cir. 1995) (defendants' presence in community "helps create a more stable environment and a model of the work ethic that is vital to the health of New York's neighborhoods."); Concepción, 825 F. Supp. 19, 23-25 (discussion of community values and deterrence); United States v. Jackson, 94-CR-1106 (E.D.N.Y. Jan. 9, 1995) (sentencing transcript) (discussing rarity in defendant's Detroit community of two-parent household).

[45]Abbadessa, 848 F. Supp. at 382 (considering impact on families and larger community of removing defendants, "all male, . . . working class people, most of whom support wives and children."); United States v. Rose, 94-CR-243 (E.D.N.Y. Feb. 6, 1995) (sentencing transcript) (downward departure permitted where defendant, who was second cousin to children of drug abusers, acted as "the male representative of the family in dealing with the children"); United States v. Jackson, 94-CR-1106 (E.D.N.Y. Jan. 9, 1995) (sentencing transcript) (downward departure permitted for 46-year-old "family man" involved in heroin offense, where four children required his stabilizing
influence); see also supra note 40 (statistics on single-parent families).

[46]Cf. Raeder, supra note 8, at 3.

evaluation of theory. Professor Martha Nussbaum of Brown University put it well when she wrote:

> [G]ood feminist thought, in the law and in life generally, is like good judging: it does not ignore the evidence, it does not fail to say that injustice is injustice, evil evil—but it is [capable of a sympathetic understanding of individual human beings and of mercy].[47]

III. CONCLUSION

Commendable impulses may well have motivated the provisions in the Guidelines seeking to establish gender neutrality in sentencing. Unfortunately, ostensibly gender-neutral provisions do not lead to gender-neutral results in a society in which many male and female experiences with crime, family life, and community differ.

Instead of ensuring gender equity in sentencing, the Guidelines have obstructed—for both sexes—the consideration of individual culpability and just punishment. Families, and a society made up of families, continue to pay too high a price for this myopia.

As the Beijing conference has helped demonstrate, many women here and abroad share a sense that their interests and standing remain subsidiary to those of men, despite the fact that the number of female headed households continues to grow around the globe.[48] The sixth annual Human Development Report commissioned by the United Nations and conducted by an international panel of scholars found that in no country are women offered the same education, income, and health opportunities as men.[49]

We cannot ignore the reality that abusive practices against women persist here, as well as in other parts of the globe. Such practices shape the familial and life experiences of incarcerated women. Our legal system must take gender inequalities which result from such experiences into account. We must not forsake reality by adopting "neutral" measures that disregard family circumstances and end up jeopardizing the future of women and children in our society who are in the greatest need of protection.

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[47]Martha C. Nussbaum, Equity and Mercy, 22 Phil. & Pub. Aff. 83, 125 (1993) (footnote omitted); id. at 94 (defining "suggnômê" (sympathetic understanding of human beings); id. at 102 (defining "clementia" (mercy)).

[48]See Hillary Rodham Clinton, Speaking for the Rights of Women Worldwide, Chi. Trib., Sept. 7, 1995, at 27.

[49]See Smolowe, supra note 5.