

JUDITH RESNIK

SENTENCING WOMEN

Judith Resnik*

The Federal Sentencing Reporter has provided an important service by publishing this symposium, *Gender and Sentencing*. I am honored to participate by offering a few introductory comments.

A thoughtful group of commentators turn our attention to the distinctive issues facing women who are defendants in the federal criminal justice system. While many may aspire to a legal system in which gender has no relevance, we live in a world in which gender, race, and ethnicity structure so many aspects of our lives that one cannot but ask: What, if any, are the effects of gender on women who are defendants and/or incarcerated under federal law?

The question is both asked and answered in this series of essays, which explore problems from sentencing to incarceration and probation. Professor Kathleen Daly provides an overview; in her aptly titled essay, *"Gender and Sentencing: What We Know and Don't Know From Empirical Research,"* she reviews the literature (including data from her own studies) and discusses the difficulties of comparing women and men. Because gender is reflected in occupational status, role in offenses, and a host of other variables, it is difficult to determine what, if any, effects gender has, qua gender. As she puts it, "[m]ost sentencing criteria are, in fact, gender-linked." The federal sentencing guidelines do not assume women are the "presumptive subjects" of sentencing; instead the prevailing assumption is that men are defendants. Norms of so-called "neutrality" are not in practice neutral because women and men are not currently similarly situated outside the criminal justice system. Daly finds that, while women and men are treated similarly in some respects, women and men with obligations of care for others ("familied women" and "familied men") are not treated similarly.

That theme—of women defendants involved with their families and responsible for providing care—is central to several of the essays. Judge Patricia M. Wald of the United States Court of Appeals for the District of Columbia Circuit asks: "What About the Kids?": Parenting Issues in Sentencing. For Judge Wald, the critical facts are that about "80% of the 7,000 incarcerated federal women prisoners have young children; almost 70% of those children lived with their mothers before conviction; two-thirds of the women are single parents." The Sentencing

Commission has, however, issued the rule that "[f]amily ties and responsibilities are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." Judge Wald believes that judicial inquiry into what constitutes "ordinary" and "extraordinary" family circumstances is a misguided enterprise; instead, the fact of being a caregiving parent should be directly relevant to sentencing.¹ As she puts it: "Neither Congress nor the Sentencing Commission has yet come forth with a convincing rationale why parenting should not be a legitimate consideration in the sentencing of low-risk offenders."

District Judge Julian Abele Cook, Jr., Chief Judge of the United States District Court for the Eastern District of Michigan, shares Judge Wald and Professor Daly's concerns, that "the professed 'neutrality' makes certain women's issues—especially family responsibility and dependent relationships—virtually invisible." To illustrate his views, he provides a detailed discussion of a particular case of a married couple charged with involvement in a drug conspiracy; as he describes, federal sentencing guidelines "strongly discourage" federal judges from considering a defendant's pregnancy, her family responsibility, or her spouse's acceptance of greater responsibility for an offense. Judge Cook calls for his colleagues on the bench to respond to the need to "administer justice" by pressing for changes in the guidelines to permit consideration of family roles and obligations.

Both Judges Wald and Cook invoke the work of Professor Myrna S. Raeder, author of a detailed study on gender and sentencing,² who writes here about nonviolent women offenders as "forgotten" by federal "reforms" based on a "punitive pro-prison model for sentencing males who are assumed to be violent and/or major drug dealers." According to Professor Raeder, more women are incarcerated under the guidelines and for longer terms than before the guidelines were established. She then turns to analyze case law on departures provided for single mothers and pregnant offenders, and finds "continuing hostility to family based departures" in some circuits. After considering this case law and judicial responses to claims of battering, coercion, dominance and abuse made by women defendants, Professor Raeder calls for a "Federal Task Force," akin to that created in Canada, to consider sentencing policies designed with women in mind.

Mary-Christine Sungaila shares Professor Raeder's concerns about how "gender-based circumstances," such as coercive treatment of women by men, are dealt with in federal sentencing law. More optimistic about the current state of the law on this issue, Attorney Sungaila believes that while "the guidelines make no express accommodation for women offenders, they do allow sentencing courts to take into account mitigating circumstances dispropor-

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tionately experienced by women offenders because of their sex." For her, defense counsel has a critical role to play in making presentations to courts to enable them to respond appropriately to problems presented by female defendants.

Commission staff members Phyllis J. Newton, Jill Glazer, and Kevin Blackwell share Sungaila's view of the need to attend to women. Newton, Glazer, and Blackwell make several suggestions for how the guidelines might, consistent with Commission policy, be altered to take into account the concerns about women that have now been raised. First, given that the Commission's enabling legislation urges "non-imprisonment alternatives for appropriate first-time non-violent offenders," both women and men may have options; the Commission itself is "re-examining its approach to alternatives to imprisonment." Second, the Commission is also considering whether downward departures are appropriately based on offender characteristics, such as parenting. Third, the Commission is reviewing implementation of its guidelines to assess whether "inadvertent gender effects"—such as the imposition of greater hardships on women than men prisoners by placement of women at greater distance from their families—are occurring.

That issue—incarceration and its alternatives—is the focus of essays by Maria Rodrigues McBride, Chief United States Probation Officer for the District of Connecticut, and by Anupam Chander, a lawyer. According to McBride, to the extent either prosecutors or judges treat women any more leniently than they do men, it is in an effort to deal "fairly and realistically with a minority female population within a woefully inadequate system designed for male offenders." She reviews the small number of prisons for women, the limited implementation of prison classification systems, and the distance of incarcerated women from their families. Calling for equal treatment, she hopes that instead of women being treated as "harshly" as men, the efforts made to respond to inadequacies for women will be used as the model for the treatment of men. Anupam Chander offers one kind of practical implementation of this suggestion: that federal judges have the authority "to designate the place of confinement if the defendant is sentenced to *probation*." Chander reviews the legislative and judicial authority in support of this proposition, in the hopes that both women and men will benefit from it.

A fitting conclusion to this introduction is to turn readers' attention to the essay by Judge John C. Coughenour, who chaired the Ninth Circuit Gender Bias Task Force,³ and who considers both the sentencing of women and the conditions of their confinement in the federal system. Judge Coughenour examines the hardships imposed on women in prison, ranging from their distance from their homes, families, and lawyers, to limited medical facilities, often not

responsive to women's health needs, and inappropriate treatment (including the occasional shackling of pregnant defendants). Judge Coughenour offers a series of practical responses, including contracting with local officials to provide a wider set of facilities for women prisoners, alteration of sentencing guidelines, and judicial efforts to provide relevant information to the Bureau of Prisons.

As Judge Coughenour puts it, "much remains to be done." A central problem is the lack of information about women in the federal criminal system. The Ninth Circuit's Task Force on Gender found that no information was kept centrally to identify where all women defendants and prisoners are housed or to detail their conditions of confinement.⁴ Further, the Task Force's efforts to understand the distinct experiences of women of all colors, races, and ethnicities within the federal criminal justice system was similarly limited by an absence of attention and data.⁵ Systematic data about women and sentencing were also lacking; case law reports provide snapshots but do not give the whole picture, and Commission data do not consider all the variables one would want to take into account.

But, as the essays that follow ably demonstrate, we know enough to be worried about the effects of governing principles on women in the federal criminal justice system. While some of the commentators are more positive than others about the options for women available under current law, all agree that more attention needs to be paid to the specific problems faced by women defendants.

I should add that attention needs to be paid to women both as members of families (either giving care or upon occasion subjected to abuse) and as women outside of families who are neither identified by their familiar role nor always in positions traditionally associated with females.⁶ Women are not a singular set, but differ on many dimensions, including those of race, class, sexual orientation, age, parental status, occupational position, and the like. Women share the ways in which the social order is organized by gender, but that organization is varied and complex; reforms must themselves be predicated on a nuanced appreciation of the diverse situations of women and speak to this range of concerns.

We know that gender matters, in and outside of prison, in and outside of families, in and outside of courts. Law cannot wish away inequalities of treatment but must instead explore what substantive equality entails and then how to achieve it in practice.

NOTES

¹ Compare the discussion in *United States v. Dyce*, No. 94-3171 (D.C. Cir. Mar. 8, 1996), reprinted *infra*, 8 Fed. Sent. R. 183 (1995) (reversing a district court's reduction of a

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woman's sentence based on family responsibilities; characterizing the care of two young children, nursing of a child, and a third expected as not "extraordinary" and finding no other basis for a downward departure).

² Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women and Other Sex-Based Anomalies in the Gender Free World of the Sentencing Guidelines*, 20 Pepp. L. Rev. 905 (1993).

³ The Ninth Circuit Gender Bias Task Force, *The Effects of Gender: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. Cal. L. Rev. 745 (1994).

⁴ The Ninth Circuit, *The Effects of Gender*, *supra* note 3, at 916.

⁵ *Id.* at 918.

⁶ See Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. Rev. 1682 (1991).