

STRUCTURE AND PRACTICE OF FAMILIAL-BASED JUSTICE IN A CRIMINAL COURT

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Many explanations have been proposed for gender differences in criminal court outcomes, but none has been grounded in a systematic study of the reasoning processes used by court officials in sanctioning male and female defendants. Interviews with thirty-five court officials (prosecutors, defense attorneys, probation officers, and judges) are presented here to assess extant theory and to offer a reconceptualization of why gender differences may emerge in the course of "doing justice." The interviews reveal that the sanctioning process is structured by familial paternalism, that is, a concern to protect family life, men's and women's labor for families, and those dependent on defendants. Familial paternalism more accurately explains family- and gender-based disparities in sentencing than existing social control arguments, and it is distinguished from female paternalism, which is based on the view that women, as the "weaker sex," are subject to greater court protection than men before the criminal court.

I. INTRODUCTION

A variety of theories have been advanced to explain gender differences in criminal court outcomes. They include court paternalism (e.g., Nagel and Weitzman, 1971; Moulds, 1980; Curran, 1983); gender differences in informal social control (Hagan *et al.*, 1979; Kruttschnitt, 1982, 1984; extending upon Black, 1976); sociostructural "typescripts" by which men exercise institutional hegemony by maintaining women's familial labor (Harris, 1977); and multifactor explanations that include court chivalry, attributions of male and female criminality, and the practical problems of jailing women with children (Simon, 1975; Steffensmeier, 1980). Each attempts to explain a body of statistical evidence showing that women are sentenced more leniently than men (see Nagel and Hagan, 1983; Parisi, 1982; Chesney-Lind, 1986).

These theories all evince a common problem: None has

This research was supported by a fellowship grant from the National Institute of Justice. My thanks to Aida Rodriguez for her encouragement, research assistance, and friendship.

LAW & SOCIETY REVIEW, Volume 21, Number 2 (1987)

been grounded in a systematic study of the decision-making processes of court officials. For example, those who have found significant sex effects favoring women, say these differences arise from “court paternalism.” Yet how do we know that paternalism structures court officials’ reactions to men and women? How do we know that other interpretations of officials’ reasoning are more accurate? Although sentencing studies may reveal more lenient outcomes for women, they tell us little about how court officials arrive at these decisions.¹

Concerned with the paucity of qualitative evidence on how gender enters into the “commonsense reasoning practices” and “conceptions of justice” (Feeley, 1979: 284; Maynard, 1982: 347) of court personnel, I observed court proceedings and interviewed court officials (prosecutors, defense attorneys, probation officers, and judges) in a western Massachusetts courthouse from October 1981 through January 1982. Reported here are the results from my interviews with thirty-five officials concerning their considerations in sentencing men and women. The interviews reveal a pattern of responses not adequately explained by existing theory but instead is consistent with a model I call *familial paternalism*. Before illustrating how this familial-based logic is used in the adjudication process and how it affects the court’s response to men and women, I shall review extant theory.

II. THEORETICAL REVIEW

Current theoretical explanations for the more lenient treatment of female defendants are court paternalism toward women, multifactor explanations, and social control arguments.

A. *Paternalism*

The most frequent explanation in the literature is that judges and other court officials try to protect women as the “weaker sex,” from the stigma of a criminal record or the harshness of jail.² Precisely why such a notion might arise in

¹ As Maynard (1982) suggests in his critique of “variable analysis,” this problem obtains generally for American criminal court research and is not specific to research on gender differences. Although Kruttschnitt (1984) and Kruttschnitt and Green (1984) present examples of probation officers’ evaluations of female defendants, and Simon (1975: 108-110) refers to her interviews with 30 midwestern judges and prosecutors, the kind of qualitative research on gender in the criminal courts conducted by British scholars (e.g., Eaton, 1983, 1985; Edwards, 1984) has yet to be seriously entertained by their counterparts in the United States (but see Lipetz, 1984).

² Like Nagel and Hagan (1983), I will consider chivalrous and paternalistic treatment to be synonymous, though Moulds’s (1980) discussion of their differing meanings is useful. Note that paternalism is rarely defined precisely

the criminal courts and how officials justify this gender-based disparity have not, however, received empirical attention. Typically, researchers either interpret statistics indicating that women are favored as evidence of judicial paternalistic attitudes (e.g., Nagel and Weitzman, 1971; Moulds, 1980; Curran, 1983), or conclude that “widespread conviction” (Martin, 1934: 58) and “popular beliefs” (Baab and Furgeson, 1967: 497) offer convincing proof. Feminist critiques of the paternalism thesis include Klein’s (1973) argument that only a few women before the court (white and middle class) may be subject to court protection, Moulds’s (1980) concern that the protection of women as the “weaker sex” reflects unequal power relations between men and women, and Chesney-Lind’s (1978) and Edwards’s (1984) conclusions that paternalistic treatment can promote more harsh outcomes for women.

Although scholars continue to debate whether paternalism generates more lenient or more harsh treatment of women (Nagel and Hagan, 1983: 115), the concept is so entrenched in the literature that few have raised the more fundamental and more critical question: Do court officials use paternalistic reasoning, that is, are they in fact concerned with protecting women?

B. Multifactor Explanations

Simon (1975) and Steffensmeier (1980) identify several factors in addition to paternalism that bear on gender differences in court outcomes. Both emphasize the difficulty judges have in jailing women with children. Steffensmeier also suggests that court officials hold differing gender-based conceptions of the seriousness of criminality (men are perceived as more dangerous) and of the potential for reform (women are viewed as more easily directed to law-abiding behavior). In addition to assessing the merits of the paternalism thesis, another aim of my interviews was to determine whether judges find it difficult to jail women with children and, if so, why. I also wanted to see if court personnel believed that women had greater potential for reform than men.

C. Social Control Arguments

Kruttschnitt (1982, 1984) and Kruttschnitt and Green (1984) use social control arguments to explain gender differences in the treatment of defendants, and Hagan *et al.* (1979)

and can even be defined differently by the same author (compare, e.g., Nagel, 1969, with Nagel and Weitzman, 1971).

use them to explain gender differences in juvenile offending rates. Their arguments center on the impact of an inverse relationship between informal and formal social controls for the criminal involvement, arrest, and sanctioning of men and women.

As applied to criminal court practices, a social control explanation takes the following form: The more tied a person is to others (e.g., family members), the more that person is subject to informal social control; thus, the chances for future law-abiding behavior are greater, and the need for formal social control (especially penal sanctions) is reduced. To explain gender differences in criminal court outcomes, Kruttschnitt (1982: 496-498) and Kruttschnitt and Green (1984: 542-543) suggest that the differences in the amount of informal (i.e., familial) social control in the lives of men and women promote differences in the degree to which they will be subject to formal control. Further, they argue that informal social control is greater in women's than men's lives because women are more likely to be economically dependent on others (e.g., a spouse or the state). Their interpretation of why women are less likely to be subject to formal social control differs from the view of Harris (1977). He theorizes that women are less likely to be incarcerated than men not because women are more dependent on others, but because men have an interest in maintaining women's familial labor in the home.

Does social control reasoning operate in criminal court decision making? Does it explain differences in the court's treatment of men and women? I explore these questions, together with the different ways in which Kruttschnitt and Harris explain why women are less likely subject to jail time than men. Does leniency arise because women are more likely than men to be dependent on others, or because men are dependent on women's familial labor?

III. JURISDICTION, OBSERVATIONS, AND INTERVIEWS

I conducted the research in the Springfield, Massachusetts, Hall of Justice, a building housing both the lower (District) and the upper (Superior) criminal courts. Located in a city of some 152,000 residents, the Springfield court's annual caseload ranks third to that in the Boston and Worcester area courts. In comparison to the Springfield population, defendants appearing before the court are more likely to be young, members of minority groups, and male—a profile typical in state criminal

Table 1. Court Personnel Interviewed

	District Court	Superior Court	Total	<i>N</i> Female
Judges	5	6	11	3
Probation officers	5	4	9	3
Prosecutors	3	3	6	2
Defense attorneys	(worked in both courts)		9	2
Total	13	13	35	10

court samples.³ My observational study of the lower court's routines and dispositions showed patterns similar to those in other jurisdictions: Most cases are disposed of by guilty plea, a minority of defendants receive jail sentences (Feeley, 1979), and the individualized decision-making model is utilized (Hogarth, 1971; Gaylin, 1974; Rosett and Cressey, 1976; Heumann, 1978; Mann *et al.*, 1980; Maynard, 1982).⁴

Although observations of courtroom discourse can reveal how justice is constructed in a public forum, I was interested in how court personnel themselves describe their decision-making processes. Specifically, how do they reach the sentencing decision? How, if at all, might this process vary depending on the sex of the defendant? The thirty-five court officials interviewed worked in the upper and lower courts, and included eleven judges, nine court probation officers, six prosecutors, and nine defense attorneys (see Table 1).⁵ Interviews lasted from one to two hours, and the responses were recorded by shorthand.

I tailored the interview to the specific concerns of each of

³ In 1980 the Springfield population was 75% white, 16% black, and 9% Hispanic. During the 25 days of observation in the lower court, 60% of the defendants whose cases were disposed were white, 20% were black, and 20% were Hispanic; 80% were male.

⁴ The results of the observational study (Daly, 1983) are remarkably similar to Eaton's (1983) study of a British magistrate's court. Both of us find that: (1) sentences in the lower court were similar for men and women, a result attributed to the typically routine and low-stakes nature of cases disposed (i.e., few involved jail sentences); and (2) the defendant's work and familial situation was the major biographical element used by defense attorneys to explain the incident and justify a sentence.

⁵ The number of judges includes all those sitting on the bench during December 1981 and January 1982. Among prosecutors, I selected the more senior, full-time, individuals. I chose 4 of the 8 lower court probation officers who worked in the courtroom, together with the head of the District Court's probation department; in Superior Court, I chose the probation officers based on varying years of experience and differing viewpoints. Of the 9 defense lawyers, 5 were public defenders; the remainder were private attorneys working daily in the upper and lower courts. I oversampled women in comparison to their proportions as court personnel to see if there were gender differences in court officials' perceptions of the handling of male and female defendants. Although some differences were found, male and female court workers' conceptions of justice were quite similar.

the four groups of court officials. For example, I asked judges, "What specifically do you want to know about a defendant's background before sentencing?," while the corresponding question of prosecutors was, "In what ways do background characteristics of defendants have a bearing on making deals with defense counsel?"

Other items centered on the relations between the four groups of court workers. For example, I asked court probation officers whether judges typically heeded their recommendations or those of prosecutors, and I queried defense attorneys about their power to influence judges' decisions in comparison to that of prosecutors and court probation officers. Some questions were directed to judges only, including their response to a hypothetical sentencing situation and their reaction to the paternalism thesis. I also obtained information on the court workers' legal background. All the questions were open-ended, and the interview ended with several general questions, including "Are there things I should know about your role as ——— that I've overlooked?" and "Are there other things about the handling of male and female defendants that you think I should know?" While most interview questions centered on the identification of the factors influencing the sanctioning process and whether these varied for men and women, broader questions helped me obtain a comprehensive picture of the experience and concerns of the court personnel.

IV. ANALYSIS OF INTERVIEWS

To understand the context of the interview responses, it is important to know the ways in which court officials oriented themselves to the questions. Two predictable response sets emerged when I asked them what they considered in sentencing: All immediately focused on the "in-out" decision, and all emphasized case individualization.

All interpreted "the sentencing decision" to mean whether a defendant should receive jail time or probation. Thus, when contemplating the exercise of discretionary power, they reflected on the decision that poses dilemmas for them and has the greatest consequences for defendants. Wheeler *et al.* (1982) suggest that the in-out decision is the "first and hardest" for federal judges, and this holds true for these state court officials as well. The interview analysis focuses on their considerations for this particular decision, although the same types of concerns are evident for the pretrial release decision.

Case individualization was stressed by all court personnel,

reflecting their emphasis on rehabilitation as a primary aim of punishment.⁶ Indeed, initial reactions to the question “What factors are important to you in sentencing?” were radically individualistic, and included responses such as, “Each case is unique,” “Every crime has a different set of facts,” or “Defendants are all individual human beings so it is hard to say.” But as Maynard (1982) and Mann *et al.* (1980) show, case individualization is patterned, even if specific selected elements of the defendant’s biography and the incident are complexly interwoven. Springfield court personnel repeatedly mentioned three factors in characterizing cases: the defendant’s prior record; the specific aspects of the incident, including the circumstances that gave rise to it and the defendant’s motivation; and the defendant’s work and family situation.

A. *Work, Family, and Differential Treatment*

Court officials consistently drew on the categories of work and family in explaining why some defendants deserved leniency. The following comments serve to illustrate the major themes in a reasoning process widely shared by all court personnel.

One theme is that defendants who provide economic support or care for others deserve more lenient treatment than those without such responsibilities. I shall refer to these defendants as “familied” and “nonfamilied,” respectively.⁷ When identifying the factors important in sentencing, one judge said:

Is he or she employed and what is the employment history? If you have a defendant who has worked at the same job for 5 years, has a wife and 2 children, I would be less inclined to put him in jail than one who is not working and who doesn’t have a wife. Otherwise, you may be short-changing the pound of flesh. You have got to think of the good for society. You try to balance equities.

Leniency toward the familied defendants is thus justified on the grounds that these defendants are more stable and have more to lose by getting into trouble again, as one prosecutor put it:

I look at it this way. People with family responsibilities are being given a break. You can’t say that singles

⁶ While court workers generally emphasized rehabilitation rather than general deterrence or retribution as primary punishment goals, prosecutors and judges who had worked as prosecutors were more likely to defend the latter.

⁷ A “familied man” or “familied woman” can connote different meanings, although having dependents is common to both. A familial man is mar-

are being treated more harshly; it's that people with dependents are being treated more leniently. There's the maxim: "There's more stability in these defendants because they have a family." The fact of being hit with incarceration, the kids being taken away from you, losing a job—the chances are more likely that they won't get in trouble again.

The prosecutor's comment reveals a second theme: Leniency toward familial defendants is legitimate and just because these defendants have more informal social control in their lives and have a greater stake in normative social adulthood. Although such social control reasoning is apparent in the court's risk-taking calculus of those thought to be deserving of leniency, court officials typically justify leniency in other ways. They would repeatedly refer to the negative consequences for families and society if familial defendants were jailed. When the judge above says, "You have got to think of the good for society," he is concerned with the potential social cost of a broken family. And, as the defense attorney argues below, when familial defendants are jailed, the defendant's dependents are also punished. This attorney likes to "stress the family situation" in defense summations because if the defendant is

supporting the household and a couple of kids, you are trying to show the judge that he will be hurting other people. He should pay for it, but not other people. . . . Who is going to pay the price if we send them away? Does he pay the price, or does the family? Do the kids pay the price?

This concern with the negative consequences of jailing familial defendants anticipates a third theme: Familial women deserve greater leniency than familial men. This probation officer alludes to the "special consequences for the family unit" if women with children are jailed:

I am looking for support. Are there small children that would be better with parents? Will they need social services? Is the person employable? Is he supportive of the family? Will the incident happen again with the same family situation? For women with children, there may be special consequences for the family unit. I'm afraid to continue the defendant's problems if children are there.

The most succinct statement about what influences sentencing was made by another probation officer, who said simply, "Prior record and the intangibles." If, as all court officials

ried, with or without children; whereas a familial woman has children, with or without a spouse. These differing connotations reveal a specific gender structure of presumed dependencies in family life.

said, prior record and the nature of the offense strongly inform their sentencing decisions, “the intangibles” hinge on how much informal social control features in defendants’ lives, whether defendants are responsible for the welfare of others, and whether society or families can or should pay the costs that result from removing the sources of the families’ economic support or care.

B. Family and Social Control

The general proposition of an inverse relationship between informal and formal social control rings true in the way Springfield court personnel describe their decision making. A defendant’s particular familial situation is a diagnostic tool that allows the court officials to weigh an appropriate sanction. However, positing this informal-formal social control relation begs the question, *Why* and *how* is this diagnosis made?

For example, why is “being embedded in a family” or having “strong family ties” salient to the court? Although a complete answer to this question is beyond the scope of this paper,⁸ I highlight two related causes. First, the state does not have the resources to impose penal sanctions or intensive probation on all those found guilty; second, the state must therefore rely on others—family members or perhaps employers—to inculcate law-abiding behavior. Using the family to do the state’s work can be rationalized as a more humane method of rehabilitation; as a defense attorney stated, “There is no way a state can do what a family can do better.” This rationalization, however, stems from the inability of the state to implement prescribed sanctions or, perhaps alternatively, to devise less punitive sanctions.

How court officials apply social control reasoning is contingent on the nature of a defendant’s familial situation. The strength and locus of informal social control vary depending upon whether the defendant has dependents or is dependent on others. As one prosecutor said:

The characteristics that are important are: Responsibilities—who are the people dependent on the defendant? Family contact—do they have concern from parents or siblings? If concern is shown, then the defendant will be on double probation. . . . The responsibilities of family is what is important for female defendants: Will the children be the victims? Other family ties are very important, and family support is

⁸ This would require a historical analysis of family-state relations and their articulation with psychological theory, penal philosophies, and the economics of institutionalization.

important: Will someone be at home to keep an eye on the defendant?

For familial defendants, the locus of social control comes from family members who are dependent on the defendant; but for nonfamilial defendants, social control emanates from those upon whom the defendant is dependent, or as the prosecutor suggests, “someone [who will] be at home to keep an eye on the defendant.”

1. Nonfamilial defendants. Judges spoke of the positive impression created by the presence of “concerned” family members of defendants in the courtroom. They felt it was easier to be lenient toward such defendants because of the expectation that kin could provide daily supervision and rehabilitation (in essence, “familial probation”) that the state could not. As one judge expressed, “Many kids feel parents give worse punishment than the court.” Another judge was quite specific in describing the kind of family relation he could count on to provide informal social control for the nonfamilial man: “Sometimes you see him with his mother present, and you may say to yourself that he has been conning her for 25 years and *this* is a con. The family I like to see for men is their father or uncle, an older responsible male.” In a string of characteristics describing a “17 year old male in need of maximum [rather than minimum or moderate] probation supervision,” a probation officer recited the following: “10th grader, unemployed, from a broken home, living with an elderly grandma, no means of support” Thus, mothers and “elderly grandmas” may not be considered effective sources of informal social control in the lives of nonfamilial men. Whether the same notion obtains for nonfamilial women is uncertain because court officials rarely spoke of differences in informal social controls between nonfamilial men and women.

The salient factors that may differentiate treatment among the nonfamilial men and women are the presence of an active familial authority figure in the household and the defendant’s employment-job training-educational situation. I say “*may* differentiate” because court personnel routinely learn that nonfamilial men and women are “living with parents” or “trying to get a job,” but they are not convinced this translates into informal social control. Indeed, one judge said:

Such things as, “He has a part-time job and lives at home with his mother and father, and he’s 19 years old, etc., etc.,” doesn’t interest me. But if you tell me that this guy works for a children’s group or other sort of helping group, that would have an effect.

What would impress this judge is whether the nonfamilied defendant is helping others. With familied defendants, however, it is evident that they are in some way helping others via their economic support or caretaking labor.

2. Familied defendants. It is assumed by court officials that familied defendants have greater informal social control in their lives than nonfamilied defendants. In the words of one judge, familied defendants are “already conforming” and “showing some responsibility”:

I am more loathe to incarcerate the family man and woman. It is harder to send someone off to jail who has family responsibilities. They are already conforming to society and the norms that we have at this time in society. They are showing some responsibility.

In their summations before sentencing, defense attorneys said they like to impress upon the court that their clients “have a lot of family support” or “care for others.”⁹ Recalling the pre-trial advice given to a male client, a defense attorney said:

I told my guy to get married, have a kid, settle down. You usually know what the judges want. I could say to the judge, “Look, this kid has been trying, so give him a break.” If he were single and unemployed, he’d be in jail now.

If getting married and settling down is “what the judges want,” does this imply that the court is rewarding familied defendants for conforming to norms of social adulthood—for being “good” fathers, husbands, wives, or mothers? In part, yes. However, court officials gave another set of reasons for being lenient to familied defendants: They pointed to the differing social and economic consequences of jailing familied and nonfamilied defendants, which I call the social costs of punishment.

C. Familied Defendants and Social Costs of Punishment

The following comments reveal judicial concern with the consequences of sentencing for families and society. Note how each judge wants to learn what the defendant is doing for others; once they obtain this information, they try to predict the impact of their sentences.

⁹ In some situations defense attorneys will not introduce information about their clients’ familial relations. For example, they will not say that a male client is providing economic support to families when that man’s family is receiving Aid to Families with Dependent Children (AFDC), nor will they emphasize that a woman charged with prostitution has children since this may jeopardize her custody of the children.

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

Now you look at the record, Is this the first time? What were the circumstances? What are the defendant's living conditions? Is the defendant supporting children or family members? What effect will the disposition have on other family members? Are they a breadwinner? Are you taking a father or a mother away from a family? Are you punishing a victim? Is the society in danger?

Judges are concerned with fitting the punishment not only to the crime and the defendant's background but also to those to whom the defendant might be tied. The second judge above asks if the sentence might be "punishing a victim" and if jail is necessary because "society [is] in danger." The first judge above is not impressed by the mere fact that a woman has children but whether she is caring for them. This judge also said, "If [the sentence] has a side effect on innocent people, you have to take it into account. If it's not a violent crime, then leniency is called for. You don't hurt a group because of just one guy." Court officials face a set of constraints in sanctioning familial defendants that are not present for nonfamilial defendants. By removing economic or caretaking responsibilities from families, they may cause the dissolution of these fragile units of social order. Moreover, they may punish victims or other innocents—those dependent on the defendant—in the process.

1. Family and gender divisions. Court personnel assume gender divisions in the work and family responsibilities of familial men and women. In fact, such assumptions are so ingrained that one judge, when asked about these differing responsibilities, replied impatiently:

Male and female, mother and father. Are you following through on that responsibility? There are different responsibilities depending on whether you are male or female. . . . The responsibilities they assume when they bring children into the world are different. Are they fulfilling those responsibilities? For men, I want to know: Is he holding the home together as best he can? Does he contribute to the support of the family? A woman has a different function. Is she fulfilling her obligations as a mother?

Differences in the expected responsibilities of familial men and women, combined with the family profiles of defendants, foster

discrepancies in the treatment of *familied* men and *familied* women. As one probation officer said, "The treatment of males and females balances out. If the guy is working, you try to help him keep his job; and with a female, you try to keep her with the kids." Although this official believes that the treatment of male and female defendants "balances out," note his asymmetrical reasoning: Being a male is qualified by "if the guy is working," while being a female contains the unqualified assumption that she has children.

The presumed gender divisions in work and family life can make it difficult, one lawyer said, to persuade the court that *familied* men do care for their children. Coming directly from bail arguments to the interview, this lawyer recounted with exasperation his inability to secure pretrial release of his client, who was caring for his children while his wife was about to be hospitalized:

The man was charged with A & B [assault and battery]. He has a wife going into the hospital, and he has two kids. They wanted \$1,000 bail. There is no prior, and there doesn't seem to be any reason for the high bail. There is a presumption that he is going to leave town. How can he leave, with a wife and two children? He's not going anywhere. If it were a woman, she would have been ROR'd [released on recognizance].

2. Familied men and women. Three features of the differential response to men and women can be analytically distinguished, although they overlap in the minds of court personnel:

1. Women are more likely to have dependent children than men.
2. *Familied* women fulfill their familial obligations more responsibly than *familied* men.
3. Child care is more important than breadwinning in the maintenance of families.

With respect to the first, more *familied* women than *familied* men appear in court; indeed, court officials characterized most female defendants as having children. Although this typification is not wholly inaccurate, it activates a reasoning pattern, exemplified by the above statement from the probation officer, that conceptualizes the differential treatment of men and women as the response to *all* men and *familied* women.

Among the *familied* men and women, court officials see more "good" mothers than "good" fathers. Although many *familied* men are biological fathers, they may not be providing economically for families. Furthermore, from the court's viewpoint, men's affective support for families is not sufficient to

define social fatherhood, which rests on being a breadwinner. Familied women, in contrast, are viewed as fulfilling their familial responsibilities more often, as a probation officer expressed,

If a female is a mother of a child, we overlook certain weaknesses she may have in a lot of areas. A lot of girls get jammed up in serious offenses, but if she is a good mother of small children, this is very, very important. It has a neutralizing effect on seriousness. You do more harm to the community by locking them up. A lot of female defendants are good mothers, but not many male defendants are good fathers. For male defendants, we see them after they have failed in school and in the marketplace. In every area, including family, he is a total failure. You check probate, and you know he is not doing his duty as a father—though they often cry about how they have to support kids.

Note the officer's concern that greater harm will accrue to the community by jailing mothers. Mann *et al.* (1980) discovered similar concerns in their analysis of judicial considerations in sentencing male white-collar offenders; but unlike these defendants, male common crime defendants have "failed in school and in the marketplace" and are less likely to be "good" fathers. Indeed, some court officials acknowledged that minority group men may have more difficulty presenting themselves as "good family men" because this status is contingent on having a job; according to a judge, "A person with a job and supporting a family is less likely to go to jail than someone who isn't. Having a job is a negative factor to putting someone in jail. Of course, this works against minority groups who have more difficulty getting employed."

Finally, differences emerge in the treatment of familied men and women because child care is considered more essential than economic support in maintaining families. This attitude is revealed by a defense attorney's description of how a defendant's familial relations evoke the "same reaction" but has a "different impact" for the familied man and woman: "The [court's] reaction is the same if the man has a family. It helps, but the impact is different than if it's a mother." Judges do have difficulty jailing a woman with children, and they also find this more difficult than jailing a familied man. When I asked judges if they considered different factors when sentencing men and women, they replied that women may have an advantage not as a consequence of sex but of differences in men's and women's work for families:

Family responsibility is something you have to recognize. It weighs against incarceration or the difference between a long versus a short incarceration. Women are more likely to have kids and dependents than men. It is more difficult to send a woman with a kid to prison than a man. But if the man was taking care of a child, it would be the same thing, but this has never happened to me in the court.

As this and other judges report, familiated men would be treated like the familiated women, if they were caring for children.

Women's care for children is often cited in the literature as a reason for their more lenient sentences (e.g., Simon, 1975; Steffensmeier, 1980). However, it is not self-evident why judges and other court officials believe that child care is more important than economic support for maintaining families. Without this distinction, familiated men and women might be treated equally. Like gender divisions in work and family life, the privileging of child care over economic support is simply assumed by court officials, and few tried to explain the basis of this presupposition. One judge, however, provides a clue:

For [the woman with children], it is a two-fold consideration. First, financial, by putting the mother in jail, are we going to throw the children on society as a burden? No, we're not going to do that. Second, for the female defendants, how much do the children need the mother, or the aunt, or the grandmother?

The judicial reference to financial reasons suggests that there are different economic consequences to the state of removing breadwinning and child-care responsibilities from families. Father surrogates exist in the form of welfare benefits and other state supports (for example, Aid to Families with Dependent Children, housing allowances, and foodstamps), but mother surrogates in the form of foster or institutional care of children are more rare and expensive.¹⁰ Thus, the loss of breadwinning is more easily replaced by state supports than is the loss of parental care. This asymmetry is at the heart of the "practicality problem": Extending on Harris (1977), both men's and the state's interests are jeopardized by removing women's familial labor.

The consequences of gender divisions in work and family life take an ironic twist in the criminal courts. The differential value placed on men's and women's labor in the wider society, where women's unpaid familial labor has "no price" and is not

¹⁰ In addition to the emerging ideology of personalized motherhood, "economic efficiency" was cited by advocates of mothers' pensions when, during the early twentieth century in the United States, public and private provision for the care of children shifted from institutional care to "mothers' subsidies," the forerunner of AFDC (Vandepol, 1982).

socially recognized as work, is reversed in the context of contemplating its removal from families. Parental labor, based on a model of personalized motherhood, becomes socially recognized as invaluable, priceless, and nonreplaceable while breadwinning does not.

D. Female versus Familial Paternalism

The interviews show that although a form of paternalism exists in the court, it does not center on the protection of women. Rather, its ideological emphasis is on protecting the social institution of the family, specifically: (1) keeping families together, (2) maintaining familial defendants' labor for families, and especially women's caretaking labor, and (3) protecting those dependent on a defendant's economic support or care. These results challenge the commonly held notion that the court protects women (female paternalism), and reveal instead that the real object of court protection is families (familial paternalism). This distinction between female and familial paternalism is illustrated by the following judicial discussion of whether a woman who cared for children should be jailed:

A lot will depend on what will happen to the children. Chances are that if there is no one to take care of the children, I won't punish the children. I feel no sympathy toward her, but I do feel that the children are entitled to sympathy.

In extending sympathy toward children and in trying to keep families together, court officials respond to both men and women using a familial paternalistic logic.¹¹ While familial defendants are generally thought to deserve greater leniency than nonfamilial defendants, familial women may be treated more leniently than familial men for two reasons: (1) gender divisions of labor define women, not men, as the primary caregivers; and (2) the court attaches more importance to caregiving than breadwinning in maintaining family life. Thus, those engaged in caregiving (predominantly women) are thought to be most deserving of leniency.¹²

¹¹ The concept of familial paternalism can be applied to other criminal justice practices, such as the reaction to domestic violence (Vera Institute of Justice, 1977; Stanko, 1982; New York Task Force, 1986), and it may help to reconcile competing interpretations of the effect of paternalism on the treatment of females in juvenile and criminal courts (see, e.g., Chesney-Lind, 1977, 1978, 1986).

¹² Some might argue that the caregiving/breadwinning hierarchy exists because women, not men, are the primary caregivers and thus this reflects female paternalism. I would say that this hierarchy is a consequence of the distinctive qualities of caregiving and wage earning in industrialized societies. The personalized, nonreplaceable nature of parental care in comparison to the

Although court officials' reasoning is infused with familial paternalism, they frequently conflate "female" and "being familial" by assuming that all women have children. This conflation may explain a contradiction that emerges from the interviews of the nonjudicial court workers. On the one hand, they make their decisions along familial paternalistic lines, but on the other, they say that women are sentenced more leniently than men because of judicial female paternalism.

I asked the twenty-four prosecutors, defense lawyers, and probation officers, "Do you think that judges are more lenient to women than men?" and twenty replied "yes." The most frequent set of reasons they gave for judicial leniency was "sexism," "paternalistic attitudes," or a view of women as "the weaker sex" ($N = 14$).¹³ Thus, the courthouse lore is that judges engage in female paternalism.

Do judges actually use female paternalistic reasoning, or are the nonjudicial court workers' characterizations simply inaccurate? The interviews suggest that judges, like the other court workers, invariably employ familial paternalism to justify leniency for some defendants. To examine female paternalism further, I asked judges if a certain statement from the literature, which was the paternalism thesis but was not identified as such, applied to their decision making.¹⁴ The judicial reaction to the statement was mixed. Although most judges said it did not apply to them, three believed it might have some applicability to their decision making. Thus, although judicial thinking is not completely devoid of female paternalism, the processes structuring an apparent judicial leniency toward women are rooted in a family-based paternalism that is practiced by all court workers.

depersonalized, more replaceable nature of economic support for families makes it more difficult for court officials to remove caregivers from families. This asymmetry is in turn built into and reinforced by state policies in the support of families.

¹³ Additional or other reasons they gave were judges find it hard to think of women as evil or bad ($N = 7$), women's child-care responsibilities ($N = 6$), and women are thought to be more easily reformed than men ($N = 4$).

¹⁴ The statement was as follows (modified from Simon, 1975: 49) "Judges treat female defendants more kindly or protectively than they do male defendants because female defendants remind them of their daughters, or wives and sisters—women close to them. Or just in general, judges find it hard to be as tough on a woman as a man." Not surprisingly, all the female judges prefaced their responses by pointing out the male bias of the statement. Note that Simon's definition of judicial paternalism also includes "the practicality problem" of jailing women with young children. Because I distinguish the notion of protecting *women* (female paternalism) from the concern of maintaining women's *labor* for families (familial paternalism), the "practicality problem" was excluded in the statement.

E. Qualifying Concerns

Some caveats about familial paternalistic practices are in order to present a balanced and fair view of its expression and impact.

1. **“Hiding behind the children” and “bad mothers”.** Women’s caregiving may mitigate against but certainly does not prevent incarceration.¹⁵ Both the quality and indispensability of women’s parental care were considered by Springfield court personnel in a manner similar to the diagnosis of men as “good” or “bad” fathers. Of all court officials, prosecutors were most likely to question whether familial women were “good” mothers. They were skeptical of defense attorneys who “used the mother situation,” criticizing it as a means for female defendants to “hide behind the children”:

Women can use children as an excuse. There are a lot of women who are not good mothers. If I could prove that she was a lousy mother, then I would prove it. You have to think of the welfare of the children.

Defense lawyers do use the tactic of women with children to prevent incarceration of the defendant or holding before trial. But in some cases, it is really just a tactic. For example, I saw a woman brought in for stealing hubcaps at 3 AM with her boyfriend. Her lawyer said she needed to care for a 1-month old baby at home. Well, I really wondered why she was out at 3 AM if she had to care for an infant.

The standards for being classified as a “good” mother were never made explicit but rather couched in vague terms of “taking responsibility” for the welfare of children, much in the same way that the criteria for being a “good” father rested on notions of “taking responsibility” for the economic welfare of the family unit. Thus, having children is necessary but not sufficient for social motherhood for female defendants in the same way that having a family is not sufficient for social fatherhood for male defendants.

2. **Gender, family responsibilities, and offenses charged.** The interviews reveal that gender, family responsibilities, and of-

¹⁵ Baunach (1982) shows that 40% to 50% of women in American jails and prisons had children at home at the time of arrest and that care for children of incarcerated mothers is normally provided by relatives (75%) rather than foster care (10%). Court officials often want to know if there are female kin to care for children in a mother’s absence, and thus, defense attorneys will emphasize the indispensability of a familial woman’s parental care by “never mentioning that there is an aunt or grandma also in the household,” as one such lawyer explained.

fenses charged interact in different ways. First, the offense and the defendant's prior record can eclipse both gender and familial relations in determining sentencing (or pretrial release) decisions. Court personnel said that familial defendants were as likely to be jailed as nonfamilial defendants if previously convicted of serious or violent offenses (e.g., murder, sexual assault, major drug dealing, and robbery). However, sentence length and type (e.g., weekend sentences) may vary by the familial situation of those incarcerated.

Second, some offenses themselves indicate that familial men and women may be "bad" parents and thus not deserving of court mercy. The offense provoking the strongest reaction against familial men and women was sexual abuse of children. Concern was frequently voiced for this type of familial violence but not for spouse abuse—a predictable (Vera Institute of Justice, 1977; McNulty, 1980; Stanko, 1982) but no less troubling finding.

Familial women charged with prostitution are *a priori* considered "bad" mothers as prosecutors rhetorically ask, "Who's taking care of the children while she's out at night?" These women are as likely to be jailed as nonfamilial women. Springfield court personnel disagreed, however, over how these cases should be handled. A probation officer and defense lawyer described the visceral reaction of judges by saying, respectively, "Some judges hate prostitutes," and "They treat prostitutes ridiculously." Three judges said they thought of prostitutes more as victims than offenders, and they stressed that they did not consider prostitution to be as serious as other judges did.

Finally, a defendant's familial situation can interact with the motivation for criminal involvement and affect the degree of blameworthiness attributed to a defendant's behavior. For example, in the sentencing vignette given to judges, which involved a person convicted of larceny, one judge wanted to know, "Was there a need for the family or not?" while another said, "If it's stealing milk for the children, I wouldn't send the person to jail." Their responses suggest that more leniency may be given to those who commit crimes intended to help family members, that is, those motivated by need rather than self-interest or greed.¹⁶ Familial defendants may more often conform to this "Robin Hood" image, particularly for property-related offenses.

¹⁶ Mann *et al.* (1980) and Eaton (1985) also discuss this phenomenon.

3. Punishment and potential for reform. Perceptions of the reform potential of men and women, independent of their familial situation, may be another basis for differential treatment. Some probation officers thought that women—both familial and nonfamilial—were “more easily reformed than men” and that men didn’t “want to help themselves,” one even saying that “females are easier to intimidate. I guarantee her jail if she is not clean. Females are impressed with this more than males.” Thus, Steffensmeier’s (1980) ideas on the reform potential of men and women receive some support from these interviews, although this “potential” is related to job segregation by sex. For example, when describing the relative success of men and women on probation, a probation officer reported, “It’s easier for women to find jobs,” adding that the reason is that men have a “masculine image” to protect and thus “are hesitant to go into the Skills Center if they can’t get a masculine job. They will drive a regular bus, but not a school bus.” It is in fact no easier for women to find paid jobs, but so-called feminine jobs, which often pay less, are not acceptable to men.

In contrast to the three other groups of court workers, probation officers more often spoke of a gender-based substantive justice that was independent of a woman’s familial situation. The logic of this substantive justice is that the “equal punishment” of men and women is not necessary to achieve “equal outcomes” (i.e., identical rehabilitation or deterrent effects). We need additional research to determine the distribution and extent of this reasoning pattern; perhaps this type of thinking is more common among court workers and jurisdictions taking a forward-looking (rehabilitation) rather than backward-looking (retribution or “just deserts”) stance in sanctioning (see, e.g., von Hirsch, 1985).

V. SUMMARY

Family-based conceptions of justice dominate the reasoning of Springfield court officials when they describe and justify their sanctioning decisions. The court’s interest in protecting family life and those dependent on the defendant promote two axes of variation in treatment—between familial and nonfamilial defendants and between familial men and familial women. Court officials think of this differential treatment not as discrimination but rather as legitimate and pragmatic justice. Because of their concern with the *consequences* of their sanctioning decisions for families and society, they rationalize leniency for familial defendants in the following ways: If familial

men or women are jailed, social disorder may increase, bonds of economic and affective responsibilities to others may be severed, and victims, particularly children, may be punished. Differences in the treatment of familial men and women arise because familial women are thought to be "more responsible" than familial men and child care is considered more important than economic support to maintain family life.

The ideological emphasis given to defendants' familial relations by Springfield court officials has also been documented by Eaton (1983, 1984, 1985) for an English lower court. While I agree with Eaton that traditional and gendered conceptions of work and family life are reproduced in criminal court decision making, I would add that this ideological stance also appears to be structured by economic considerations. The state pays both economically and socially for imposing equal punishments on defendants whose obligations for the care and economic support of others are unequal and differ by gender. For example, more families may be placed on welfare (see Maynard, 1982) and foster care for children may be required (see Daly, 1986). These economic costs form part of the decision-making calculus in court workers' conceptions of justice.

Based on the interviews, Kruttschnitt's (1982, 1984) and Kruttschnitt and Green's (1984) social control arguments need to be modified. With respect to the locus of social control, the presence of dependents is what court officials consider, for as a prosecutor said, "As long as there are dependents in the picture, they will help men as well as women." Being dependent on others is less important to court workers and primarily affects the treatment of nonfamilial defendants. In jailing familial men and women, the differing social costs arising from separating them from their families seems to be more significant than differences in informal social control.

I have described the kinds of decision-making processes that promote gender differences in criminal court outcomes, but the skeptical reader may require more statistical evidence. I have conducted multivariate analyses of court outcomes in two other states—a lower court in New York City and an upper court in Seattle—to test hypotheses on the differential treatment of familial and nonfamilial defendants and of familial men and women in sentencing and other court decisions (Daly, 1983; 1987). Both analyses showed strong family effects mitigating against pretrial detention and jail sentences. In addition, I found family effects in nonjail sentencing outcomes, suggesting that familial paternalism may spill over to other court decision-making contexts. Thus, although the familial paternalistic logic

is most vividly revealed in the in-out decision, it may also be applied in other, less dramatic contexts. Future research might investigate this possibility and, more generally, whether the kinds of family-based reasoning patterns employed by Springfield court officials exist elsewhere. The statistical analyses suggest that such patterns are not confined to just one medium-sized city courthouse in one state.¹⁷

For too long theories of gender differences in the criminal court sanctioning process have suffered from a lack of empirical attention to the ways in which court officials construct justice and rationalize their decisions. Rather than continuing to speculate and make inferences about their reasoning processes from analyses of large court datasets, we may do better by observing and interpreting these processes firsthand.

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¹⁷ The racial minority representation in the Seattle sample (32%) was similar to that for Springfield; however, the New York City sample was almost entirely composed of black (48%) and Hispanic (40%) defendants. The statistical studies show that family-based justice is applied across race and ethnic groups, although more research is needed to explore how gender, familial relations, and race/ethnicity interact.

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