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# Putting Women First

Mary I. Coombs

*University of Miami School of Law*, [mcoombs@law.miami.edu](mailto:mcoombs@law.miami.edu)

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# PUTTING WOMEN FIRST

Mary Coombs\*

GENDER, CRIME, AND PUNISHMENT. By *Kathleen Daly*. New Haven: Yale University Press. 1994. Pp. xi, 338. \$37.50.

Mattie Lou Thomas was the sole support and caretaker for two mentally disabled adult children and the guardian and caretaker for her four-year-old grandchild. When a U.S. district court judge sentenced her for possession of four kilos of heroin, he thought he should take these family responsibilities into account: As a result, he sentenced her to probation rather than the six years that the prosecution had recommended per 21 U.S.C. § 841(b)<sup>1</sup> and that the Federal Sentencing Guidelines seemed to call for.<sup>2</sup> The Seventh Circuit reversed.<sup>3</sup> The Guidelines, it held, did not permit judges to impose probation rather than incarceration on the basis of even extraordinary family responsibilities.<sup>4</sup> Although other courts have rejected the Seventh Circuit's position that family responsibilities *never* justify a downward departure from incarceration to probation,<sup>5</sup> all have recognized that the Guidelines at least narrowly constrain judges' discretion to take such factors into account.<sup>6</sup> According to the Guidelines, "Family ties and responsibilities . . .

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\* Professor of Law, University of Miami. B.A. 1965, J.D. 1978, University of Michigan. — Ed. The comments of Patrick Gudridge, Kathleen Daly, Jonathan Simon, and Tony Alfieri are much appreciated; any remaining errors are the result of my foolish rejection of their wise advice.

1. 21 U.S.C. § 841(b) (1988).

2. United States Sentencing Commission, *Guideline Manual*, § 2D1.1 (Nov. 1994) [hereinafter U.S.S.G.].

3. *United States v. Thomas*, 930 F.2d 526 (7th Cir.), *cert. denied*, 502 U.S. 857 (1991).

4. *Thomas*, 930 F.2d at 528.

5. *See, e.g., United States v. Johnson*, 964 F.2d 124 (2d Cir. 1992). Ms. Johnson was the sole support and caretaker for four young children. The Second Circuit affirmed a substantial downward departure from the Guideline sentence for conspiracy and bribery to a sentence that would not take her from the home. It rejected the argument "that family circumstances warranting departure must include something beyond extraordinary parental responsibilities." *Johnson*, 964 F.2d at 129.

6. *See, e.g., United States v. Mogel*, 956 F.2d 1555 (11th Cir. 1992); *United States v. Brewer*, 899 F.2d 503 (6th Cir.), *cert. denied*, 498 U.S. 844 (1990) (both denying departure); *see Myrna S. Raeder, Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905 (1993); Karen R. Smith, Note, *U.S. v. Johnson: The Second Circuit Overcomes the Sentencing Guidelines' Myopic View of "Not Ordinarily Relevant" Family Responsibilities of the Criminal Offender*, 59 BROOK. L. REV. 573 (1993).

are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."<sup>7</sup>

The Guidelines — like much of criminal law, criminal law policy analyses, and academic criminology — seem to have been designed around a paradigm of the criminal as male.<sup>8</sup> The Commissioners who drafted the Guidelines thought that including family responsibilities as a factor in sentencing would advantage largely white middle-class criminals, who could present themselves as responsible and loving husbands and fathers, to the relative disadvantage of lower-class, minority federal felons.<sup>9</sup> They apparently did not consider the impact of the rule on female federal felons and the single-parent families disrupted by their loss.<sup>10</sup>

Traditional criminology has followed a similar pattern.<sup>11</sup> Criminologists study criminal men, though they rarely discuss the maleness of the criminal population.<sup>12</sup> Studies of women criminals have been marginalized and ghettoized.<sup>13</sup> Even as feminist concerns and methodologies have become part of the normal discourse of law and of other aspects of sociology, criminology "remains essentially

7. U.S.S.G. § 5H1.6.

8. This is not literally true; the enacting legislation indicates that the Guidelines are to be "entirely neutral" as to sex, race, national origin, creed, and socioeconomic factors. 28 U.S.C. § 994(d) (1988).

9. See Myrna S. Raeder, *Gender Issues in the Federal Sentencing Guidelines and Mandatory Minimum Sentences*, CRIM. JUST., Fall 1993, at 20, 21.

10. One of the original Commissioners has said that there was extensive debate over the appropriate relevance of offender characteristics, with some Commissioners arguing that considerations such as family ties should be treated as mitigating factors. The Commission decided to follow the criteria of the Parole Commission, which do not consider most offender characteristics. They concluded that "[C]ongress suggested that the Commission should, but was not required to, consider" these factors, citing § 994(d). Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 20 (1988).

11. By criminology, I refer to the study of both the etiology of crime and of the activities of the criminal justice system.

12. See, e.g., RESEARCH ON SENTENCING: THE SEARCH FOR REFORM (Alfred Blumstein et al. eds., 1983) (containing, within a two volume work, extensive analysis of sentencing and race but only two pages examining sentencing and sex). Those criminologists — largely feminists — who have noted the correlation between sex and criminality and the failure of traditional criminology to focus upon it, let alone explain it, refer to the correlation as the "gender ratio problem." Kathleen Daly & Meda Chesney-Lind, *Feminism and Criminology*, 5 JUST. Q. 497, 508 (1988).

In this review, I focus predominantly upon the issues of gender and criminology that Daly raises in her book. The book itself though its title and structure deal with gender, also looks deeply and critically at the effects of race and, to a lesser extent, class, and the interactions among these variables in its substantive analysis of crime and sentencing.

13. Although studies of women criminals exist, they have tended either to provide explanations that are gender-specific, such as Lombroso's physiological theories of female criminology, CESARE LOMBRISO, *THE FEMALE OFFENDER* (1915), or to attribute increased female crime to women becoming more like men, FREDA ADLER, *SISTERS IN CRIME* (1975) (suggesting links between women's liberation and the increase in the rate of crime among women); RITA JAMES SIMON, *WOMEN AND CRIME* (1975) (same).

untouched."<sup>14</sup> Yet gender is the most accurate single predictor of criminal record,<sup>15</sup> and prisons are perhaps the most gender-segregated American institutions.<sup>16</sup>

Kathleen Daly's<sup>17</sup> new book, *Gender, Crime, and Punishment*, promises to make a major contribution to the de-masculinization of criminology. There have been other excellent and insightful feminist studies of both criminals and the criminal justice system in recent years.<sup>18</sup> Daly, however, applies her feminist insights to the analysis of the criminal justice system and its responses to both male and female or, perhaps more accurately, to both female and male criminals. The book puts women first and then uses the insights thus obtained in its parallel analysis of men.

In this review, I want to focus on and explore the implications of Daly's insights about the relationship between gender and sentencing. Statistics in previous studies indicate that judges treat women defendants more leniently at sentencing;<sup>19</sup> the authors of those studies set out a variety of theses to explain the apparent differences. Women, or at least some women, they suggest, are treated with chivalry and thus given lesser sentences than similarly situated men.<sup>20</sup> Women are also generally seen as embedded in familial relationships that provide informal social controls and thus as less in need of the formal social controls of the criminal justice system.

14. Daly & Chesney-Lind, *supra* note 12, at 498.

15. See FEDERAL BUREAU OF INVESTIGATION, 1993 UNIFORM CRIME REPORTS 217, 234 (1994); see also Judith Allen, *Men, Crime and Criminology: Recasting the Questions*, 17 INTL. J. SOC. L. 19, 19 (1989).

16. Cf. *Klinger v. Nebraska Dept. of Corrections*, 31 F.3d 727 (8th Cir. 1994) (rejecting a challenge to a lack of programs and facilities for women inmates at a women's prison on the ground that the different characteristics of women and men inmates mean that they are not similarly situated for purposes of the Equal Protection Clause). See generally NICOLE HAHN RAFTER, *PARTIAL JUSTICE: WOMEN, PRISONS, AND SOCIAL CONTROL* (2d ed. 1990) (studying women's prisons).

17. Kathleen Daly is a Visiting Associate Professor of Sociology at the University of Michigan.

18. See, e.g., PAT CARLEN, *WOMEN'S IMPRISONMENT: A STUDY IN SOCIAL CONTROL* (1983); ELEANOR M. MILLER, *STREET WOMAN* (1986); Mary E. Gilfus, *From Victims to Survivors to Offenders: Women's Routes of Entry and Immersion into Street Crimes*, 4 WOMEN & CRIM. JUST. 63 (1992).

19. See Nicolette Parisi, *Are Females Treated Differently? A Review of the Theories and Evidence on Sentencing and Parole Decisions*, in JUDGE, LAWYER, VICTIM, THIEF 205 (Nicole Hahn Rafter & Elizabeth Anne Stanko eds., 1982); Darrell J. Steffensmeier, *Assessing the Impact of the Women's Movement on Sex-Based Differences in the Handling of Adult Criminal Defendants*, 26 CRIME & DELINQ. 344 (1980).

20. See CARLEN, *supra* note 18, at 63; Kathleen Daly, *Rethinking Judicial Paternalism: Gender, Work-family Relations, and Sentencing*, 3 GENDER & SOC'Y. 9, 17 (1989) [hereinafter Daly, *Rethinking Judicial Paternalism*].

Girls are expected to live within the confines of a strictly delineated social role. They are thus more harshly treated than similarly situated boys when they deviate from those roles. See Meda Chesney-Lind, *Girl's Crime and Woman's Place: Toward a Feminist Model of Female Delinquency*, 35 CRIME & DELINQ. 5 (1989); Parisi, *supra* note 19.

Daly's narratives indicate that life is not so simple. Apparent gender disparities almost all evaporate when one examines the richer data of the narratives. Men and women are sentenced differently. Those differences in sentencing, however, seem to reflect differences between the crimes committed. A man kills an intimate as an expression of rage or jealousy. A woman kills an intimate to protect herself from potential future abuse. These differences in criminal activity may be real, or they may be characteristics that probation officers and judges recognize more readily in the women defendants because they, like the rest of us, *expect* to see certain characteristics in women but not in men. What is clear is that the differences are not the reflection of gender as such; rather, they are *gendered*.

As Daly suggests and as I explore here, once we see the gendered nature of sentencing differences, our normative response becomes complicated. Women should not receive leniency simply because they are women. They should receive leniency, however, for legitimate differences. Statistical evidence that women do receive lower sentences may be either the legitimate effect of real gender differences or the less legitimate effect of gendered preconceptions. It is difficult at best to disentangle these forces. Are the differences in punishment between men and women attributable to something essentially distinctive about men and women? To actual though socially created differences? To different treatment of women and men who are relevantly similar? The justice of taking difference into account turns, we become aware, on whether differences are real or perceptual, natural or constructed. Yet none of our methodological tools allows us to determine with certainty which characterization is correct.

Daly's innovation of first studying women's crimes and sentences and then men's, though it does not directly answer these questions, helps us to move beyond the approach of prior statistical studies, which had judged gender disparities against simplistic norms rooted in notions of formal gender equality. Through Daly's analysis, we can see the gendered nature of both crime and punishment and begin to examine the implications of those practices for achieving justice.

The Daly book has two significant, and interrelated, innovations. In addition to the substantive, gendered approach described above, the book embodies a new methodological approach. Daly consciously uses both statistical, logico-scientific methods and narrative methods in her study. She provides an argument and, more importantly, an illustration of how we can develop and test knowl-

edge most productively by an oscillation between the two methodologies, sensitive to the benefits and inadequacies of each.<sup>21</sup>

In the remainder of this review, I first briefly summarize the structure of the book. I then examine and assess the validity and significance of Daly's findings. Finally, I consider the possible implications for both scholarship and public policy if we apply Daly's methodology and the insights of her findings.

## I. THE BOOK — A SUMMARY

Daly bases her book on data from her study of sentencing patterns in the New Haven, Connecticut felony court between 1981-1986. Her statistical base is a wide sample of all women, 163, and a random sample of men, 154, convicted during the time period (pp. 26-27 tbl. 2.1). Her narrative materials use a matched deep sample of forty women and forty men, selected from the wide sample cases.<sup>22</sup> She compares sentences for defendants across gender lines, examining both the percentages of men and women in various categories who received a sentence of incarceration — the "in-out decision" — and sentence length. In addition to analyzing the actual sentences received, Daly uses the transcripts of the sentencing colloquies to examine the process of sentencing and the judge's rationale for the sentence imposed.<sup>23</sup> Her narratives for the eighty deep sample cases depend primarily on the presentence investigative report (PSI) prepared for each defendant and, to a lesser extent, on these colloquies.<sup>24</sup>

After a brief discussion of her research questions and methodology and a summary of the statistical profile of her wide sample, Daly provides information on the backgrounds of her deep sample felons. Her data allow the reader to compare the male and female felons in her samples on such characteristics as race stresses in family of origin (for example, single parent, financial difficulties, abuse or neglect) educational achievement, substance abuse, job status, and current family status.<sup>25</sup> Both groups had troubled backgrounds and current stresses, but significant differences between the genders

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21. See *infra* text accompanying notes 31-37.

22. She matches the deep sample cases first by statutory charge at arraignment and conviction and then, as much as possible, by the following criteria in this order: prior record, age, race, and pretrial release status. Pp. 22-23.

23. P. vii. Unfortunately, only 48 of the 80 sentencing colloquies were available for analysis because the stenographer for the remainder, who had used a form of shorthand no one could read and translate, was unavailable. Pp. 283-84.

24. All but one of the cases was plea bargained, and the bargains frequently included an agreement relating to sentence. P. 23. Because the PSI was not generally prepared until after the plea agreement, the information therein can be correlated with sentence but not linked causally. P. 21.

25. See, e.g., p. 58 tbl. 3.2 (describing the racial breakdown of women among various pathways).

are also apparent. According to the PSI reports, more of the women suffered abuse as children or ran away from home or a detention facility. More women suffered from substance addictions, or psychological problems, or both, but fewer had significant prior criminal records (pp. 43-45, 63-65). The statistically most striking difference was that two-thirds of the women said they had children, and one-third said that they were currently caring for a child; only just over a third of the men said they were fathers, and none bore current responsibility for a child (pp. 44, 64).

Using PSI reports as the data source on the defendant's characteristics presents a complex problem, however. There may in fact be such a striking difference in parenting rates among male and female felons, or the data may instead reflect a difference in questions asked or answers given. If, for example, probation officers considered parenthood status more important in developing an accurate picture of female defendants, they might be more sure to ask about it. Conversely, men might, as Daly notes, be inclined to hide their parenthood status from authority figures if they were not paying support (p. 81 n.3). Such data problems may be even more intractable for factors more difficult or delicate to determine, such as patterns of sexual abuse.

Daly also provides, with considerable depth and subtlety, a richer description of the biographies of her deep sample felons. She divides the women into five typologies. Most common are "street women" and "harmed and harming women," who together comprise twenty-five out of the group of forty women sampled. Other "pathways to felony court" include "battered women," "drug-connected women," and a residual "other" (pp. 47-48 tbl. 3.1). Daly then uses these typologies, together with the PSI data, to construct pathways for the male felons, including "street men" and "harmed and harming men" who together comprise twenty-three of the group of men sampled, as well as "drug-connected men" and "costs and excesses of masculinity." She subdivides this last category into "explosively violent men," "bad luck men," and "masculine gaming" (pp. 67-68 tbl. 4.1). In her development of categories, Daly continually takes into account the patterning of race and class and the similarities and differences across these various demographic divides. Interestingly, the "harmed and harming" category acknowledges the ways in which abuse and neglect suffered when the defendants were younger is recognizably reproduced in the aggressive behavior of both male and female felons. In contrast, "battered women" have no parallel in the male biographies. Rather, they may be matched to the explosively violent men, whose violence, often while drunk, is most frequently directed toward intimates and family members (pp. 74-76).

The heart of the book consists of a series of chapters organized by type of crime. In each chapter — robbery (pp. 93-110), larceny (pp. 111-23), interpersonal violence (pp. 124-50), and drug offenses (pp. 151-63) — Daly begins by setting out the statistical patterns of sentencing. These patterns consistently indicate what appears to be greater leniency toward female felons.<sup>26</sup> She then does pair-wise comparisons of her deep sample felons, creating narratives of their crimes and biographies based on the PSI and sentencing data. The more closely she examines the material, the more the gender differences become explicable; she ultimately concludes that only one of the forty pairs presents a difference in sentencing that cannot be explained by differences in the crimes or the biographies of the criminals.<sup>27</sup>

Daly next examines the question of justifications for punishment. She finds that the New Haven judges, like the federal judges studied by Wheeler, Mann, and Sarat,<sup>28</sup> tend to apply a rather pragmatic blend of the various justifications for punishment set out in the academic literature. She discerns relatively little difference between the judges' sentencing processes or the justifications they provide in the cases of male and female felons.<sup>29</sup> This is perhaps the least satisfactory part of the book. The sentencing colloquies are generally short, and almost all are constrained by the preceding plea bargain. Daly notes that she had to read over the colloquies several times before a pattern began to emerge (p. 183). Even in the excerpts she provides, the language reflecting deterrence or retribution seems too fragmentary to serve as a framework for much analysis. Wheeler and his coauthors developed a much richer picture of judges' sentencing by interviewing judges. Although it would be desirable to know what judges do, as well as what they say they do, the transcripts, as presented here, seem too formal and

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26. If one compares the most general statistics — the in-out decision and sentence length — across gender for the wide sample and for the deep sample for each of the four crime types, there are sixteen different comparison points, for example, wide sample robbery in-out or deep sample interpersonal violence sentence length. The sentence severity is significantly higher for women for two of those sixteen comparisons and approximately the same for two others; in all the rest men fare worse. P. 94 tbl. 5.1; p. 112 tbl. 6.1; p. 127 tbl. 7.1; p. 153 tbl. 8.1.

27. See *infra* text accompanying notes 39-45 for a more detailed discussion of some of the comparisons. Daly herself recognizes that the differences in crime or biography that "explain" the sentencing differences are themselves frequently associated with gender in our society and may reflect gendered preconceptions about these felons. Pp. 260-62.

28. STANTON WHEELER ET AL., *SITTING IN JUDGMENT* (1988). Wheeler and his coauthors discovered that federal judges sentence based on a mix of three principles: the harm caused; the defendant's *blameworthiness*; and the *consequences* for the defendant, his immediate circle, and the broader public of the sentence imposed. *Id.* at 19-22.

29. There was some difference in the process by which the sentencing hearing occurred. For example, judges were silent in 35% of the men's sentencing colloquies but only 14% of the women's. P. 203. The significance of such processual differences is unclear.



ceremonial to inform us well about the process by which the judges made their sentencing decisions.<sup>30</sup>

Daly concludes the book with a brief discussion of the problem of justice. She suggests that justice has multiple aspects and reminds us, first, that discrimination is only one aspect of injustice. For example, a death sentence for every felon would be unjust, though not, on its face, discriminatory. She also problematizes the notion of discrimination. If women and men have different biographies and play different roles in committing different crimes, though they are charged with violating the same statute, how can we determine what gendered pattern of sentences is just?

## II. ANALYSIS AND CRITIQUE

Daly's work makes contributions on two levels. First, she furthers our substantive understanding of criminological issues, in part by using feminist concerns as a lens for examining the criminal pathways and judicial responses of male criminals. Second, in a methodological parallel, she uses narrative — often associated with feminist scholarship<sup>31</sup> — to enlarge the otherwise too-limited understandings available from traditional logico-scientific methodologies.<sup>32</sup> She does not reject the latter as wrong, as some more radical

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30. Daly also operated under a structural disadvantage compared to Wheeler and his colleagues, who studied pre-Guideline federal sentencing practices. In those white-collar cases, judges had much smaller case loads and more time to consider and articulate sentencing theories, and private defense attorneys likely had more time to devote to the sentencing process. See COURT STATISTICS PROJECT, NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1990, at 42 tbl. I.17 (1992) (federal district courts' criminal filings were 85 per judge together with 379 civil cases in 1990; for state courts' criminal filings were 474 per judge with 667 civil cases).

Such formalized rituals of justice are, of course, a rich source for other forms of socio-legal studies. Cf., e.g., CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973) (using thick description to unpack the socio-cultural meanings of Balinese rituals); GREGORY M. MATOESIAN, *REPRODUCING RAPE: DOMINATION THROUGH TALK IN THE COURTROOM* (1993) (using socio-linguistics to analyze the violence inherent in patterns of discourse during rape trials). I suggest only that the transcripts do not provide a very clear window into a judge's reasoning about sentencing choices.

31. See, e.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 COLO. L. REV. 683 (1992).

32. Daly's book is also unusual in another way. In contrast to the magisterial, abstract tone of most academic literature, Daly frequently makes herself vividly present in her book. In discussing one man's sentencing, she said, "I wondered why no court official offered a negative word to Wade." P. 204. She summarized the results of two other cases and continued, "I wavered between seeing the outcome as a different response and seeing it as a disparate response." P. 246. Finally, in commenting on a prior study of crime in New Haven, she concluded, "As a sociologist, I was troubled by the implications of Finnegan's journalistic method." P. 17. Her rejection of passive-voiced certitude is of a piece with her including as appendices generous excerpts of the materials from which she worked. Both allow the reader to engage the materials and the author actively and creatively.

feminist critics have done.<sup>33</sup> Nor does she suggest, in a methodological parallel to the "add-women-and-stir" substantive response to feminist critique, that one can simply "add narrative and stir" to obtain a coherent unified methodology. Rather, and much more usefully, she proposes that neither logico-positivism nor narrative provide a complete understanding of any interesting problem. Each answers to an internal, but somewhat distinct, logic. Logico-positive analysis focuses on abstract and universal truth conditions; narrative focuses on context and particularity. Each, as Daly acknowledges throughout the book, can reveal the limits of the other. Rather than concluding that either approach is so inherently inadequate that we should abandon it, however,<sup>34</sup> she pragmatically uses both approaches to develop a better, though still imperfect, picture of the world than either alone could provide. Social science scholarship, she proposes, proceeds best through an oscillation between these two useful, but not wholly compatible, modes: "The work of oscillation means a commitment to a nonadversarial, nonhierarchical stance about the superiority of logico-science or narrative . . . ."<sup>35</sup>

This book demonstrates the value of such an oscillation approach. Repeatedly, Daly presents a statistical picture that raises questions about the impact of gender and then uses specific narratives to provide at least tentative answers to such questions. Those answers, in turn, raise further questions, particularly about the role of notions of justice as a means of assessing what courts do in sentencing men and women.<sup>36</sup> A first approach to these questions might call for the larger sample size and the more formalized and abstract approach of logico-science;<sup>37</sup> the insights thus developed

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33. See, e.g., Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); cf. SANDRA HARDING, *WHOSE SCIENCE? WHOSE KNOWLEDGE? THINKING FROM WOMEN'S LIVES* 143-49 (1991) (rejecting the value-free objectivity generally associated with logico-science).

34. Cf. Keith Hawkins, *On Legal Decision-Making*, 43 WASH. & LEE L. REV. 1161, 1181 (1986). Hawkins criticizes logico-scientists as seeking "to portray the jungle of human decision-making by removing all the undergrowth, scrub and saplings, leaving a broad landscape over which are dotted a number of large and important trees." *Id.* Daly would, I think, agree but point out that it is equally impossible wholly to understand a jungle through a thorough and deep understanding of a few particular leaves and roots.

35. P. 264. She refers to this stance as oscillation; one might use the more materialist metaphor of building a bridge between two camps. That bridge, or collection of fragile and swaying bridges, may provide a way to avoid, if not solve, the dead end of epistemological doubt.

36. For narrative scholars, "An evaluation of justice system practices is bracketed." P. 267. Cf. CARLEN, *supra* note 18, at 2 ("[T]he case-study method can, at its best, provoke questions which go beyond the particular case to a theoretical consideration of wider issues.").

37. Justice norms rooted in concepts of discrimination and disparity would seem to require, at least at some stage of the analysis, a consideration of what was done across a large number of cases, even if that consideration necessarily entails a simplified set of criteria. Cf.

would likely raise questions that would send us back to narrative to understand how concepts of justice are applied to concrete cases. Daly persuaded me that this oscillation between logico-science and narrative was highly useful, less by her theoretical argument than by the example of the use of the oscillation methodology throughout the book, which may reveal my tilt toward the concreteness of narrative.

The achievements of the oscillation approach are most evident in the book's analysis of the use of gender in punishment. Daly uses the pathways to criminal court and pair-wise crime narratives to develop a multi-leveled construction of gender in punishment. She also examines the effects of race and class. Next, she scrutinizes the rationales for sentencing. Then she examines the subtle bias of gender in role perceptions between criminals and victims. Finally, Daly looks at other factors in the sentencing process. Ultimately, she offers no particular solution, but she highlights issues in the current debate.

While Daly's other observations on criminal behavior will help further studies on the gendered etiology of crime, I introduce such material only to examine the construction of gender within the punishment process. Daly bases both the description of pathways to criminal court and the pair-wise crime narratives predominantly on the presentence investigations. This data, as she reminds us, is likely to be partial in ways that reflect gendered assumptions both by the probation officers in asking questions and by the defendants in revealing it. For example, though the data appear to indicate that more women have histories of abuse, they may reflect instead, or in part, that women more often and effectively articulate such histories<sup>38</sup> or that probation officers are more likely to probe for such information when dealing with female defendants (pp. 83-84). Furthermore, women's experiences of the "same" abuse may be different or may differentially affect their choice to engage in criminal behavior. These issues of the truth and relevance of gendered dif-

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Richard J. Light & David B. Pillemer, *Numbers and Narrative: Combining Their Strengths in Research Reviews*, 52 HARV. EDUC. REV. 1, 18 (1982) (suggesting that formal procedures are generally better than informal intuitions at detecting subtle but significant effects of different treatment modalities, but that explanations of these differences require a qualitative, contextualized study).

38. This is not to say that the women who come into criminal court readily articulate their biographies in ways consonant with the expectations of legal professionals. See, e.g., Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990). I suggest only that women felons, on average, may do so better than their male counterparts. This would be consistent with suggestions in the literature that women are more likely to speak in the language of care, perhaps because it is the more useful and natural language for those who are disempowered. See generally Isabel Marcus et al., *Feminist Discourse, Moral Values, and the Law — A Conversation*, 34 BUFF. L. REV. 11 (1985).

ferences are central to what the book reveals yet simultaneously and inevitably problematize much of the book's argument.

Two particular comparisons — Casey and Toni, and Andrew and Latasha — illustrate the multiple levels at which gender operates.<sup>39</sup> Casey, a black man whose story opens the book, struck a female store clerk in the head with a blunt instrument and then took money from the cash register. Toni, a white woman, demanded money from a female jewelry store clerk at gunpoint but left in frustration when the clerk refused. Casey was sentenced to ten years; Toni received three years probation (pp. 3-4, 96-97). Daly says that the difference, though it might appear to raise a question of gender discrimination,<sup>40</sup> is explicable on closer examination. The substantial difference in prior records and the existence of victim injury in only Casey's case provide two gender-neutral reasons for the differential in sentencing. But Daly also says that Casey's act was "far more serious" (p. 96), not just because of the injury but because of "the greater threat he posed to [the female clerk] than did Toni . . ." (p. 97). "Toni posed little threat . . . the clerk did not believe she would shoot, because, as the clerk reported, Toni 'didn't look like the type of person' to commit a robbery" (p. 97). Was Toni really less dangerous? Or just perceived as less dangerous? Perceived as less dangerous because she was a young white female? If the jewelry store clerk was less afraid of Toni than she would have been of a black man like Casey who acted in exactly the same way, is this a valid reason for punishing Toni less?<sup>41</sup> Daly suggests that Toni was only an amateur and not really dangerous, but the materials she presents do not persuade me that the clerk was necessarily right in discounting the risk Toni created.

In the comparison of Andrew and Latasha, Daly is much more critical of the gender presumptions underlying their different sentences. Andrew and Latasha each assaulted police officers; Latasha had a prior record, and Andrew did not. Andrew received four years; Latasha received a suspended sentence and \$1,000 restitution (p. 136). In the struggle with Andrew and his companion, the officers suffered abrasions and contusions, a damaged ear, and broken teeth (p. 136). The injuries inflicted by Latasha were not

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39. Note that while Andrew and Latasha are a matched deep sample pair, Casey and Toni are not. Daly discusses their cases together, however, because they look similar in regard to such facts as acting alone, robbing a commercial establishment, and using a weapon. P. 96.

40. Daly distinguishes between discrimination — the correlation of a characteristic like race or sex with sentencing after controlling for relevant variables — and disparity, inconsistency in sentencing relative to agreed-upon criteria. Pp. 237-38.

41. On the corrosive impact on African-American men of being perceived as dangerous, see, for example, Stephen L. Carter, *When Victims Happen To Be Black*, 97 YALE L.J. 420 (1988).

detailed, but she struck two officers with a baseball bat, one across the nose (p. 136). The different sentences appear to be based on a highly gendered construction of Latasha's actions. The court discounted her crime by constructing her as "acting crazy" and "in need of psychiatric help" (p. 250). That narrative fits historic patterns of defining women as crazy rather than deliberately bad;<sup>42</sup> it also reduces police embarrassment at being unable to prevent an attack by a woman (p. 250).

The Andrew-Latasha pair is the single one of her forty matched pairs in which Daly could find no nongendered explanation for the discrimination. In general, she found that close examination of the narratives explained what appeared to be gender disparities in sentencing.<sup>43</sup> If Daly's narrative analysis is correct, prior studies emphasizing the gender disparity in sentencing are wrong: there is no significant gender disparity in sentencing in need of explanation. Men generally received higher sentences, but the men's cases were generally more serious.<sup>44</sup> Among the interpersonal violence cases, for example, Daly found only one pair in which the woman's crime was more serious, and seven pairs in which the man's was (p. 145). In reaching those conclusions, however, she occasionally seemed to accept as legitimate the judges' use of such gendered factors as the criminal's perceived role in the crime or prior relationship with the victim.<sup>45</sup>

Some factors other than gender seem to have independent explanatory power, even in the context of the rich complexity of the narratives. Race and class each appear to correlate strongly with adjudged criminality — both the wide and deep samples have many more poor people and people of color than a random sample of the New Haven population.<sup>46</sup> Most interesting for this essay is the sig-

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42. Cf. Hilary Allen, *Rendering Them Harmless: The Professional Portrayal of Women Charged With Serious Violent Crimes*, in *GENDER, CRIME AND JUSTICE* 81, 88 (Pat Carlen & Anne Worrall eds., 1987) (suggesting that a woman's status as wife and mother seems "fundamentally incompatible with the perception of her as a dangerous criminal"); Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 Nw. U.L. REV. 1271, 1312-13 (1994) (discussing how women victims are constructed as crazy).

43. See also Darrell J. Steffensmeier et al., *Gender and Imprisonment Decisions*, 31 *CRIMINOLOGY* 411, 416 (1993) ("[F]emale offenders tend to commit the less serious form of crime within the broad offense categories.").

44. Pp. 240-41. Other researchers have similarly concluded that much of the apparent gender discrimination in sentencing evaporates on closer examination. See, e.g., Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 L. & SOC'Y. REV. 367 (1991); Steffensmeier, *supra* note 19.

45. See *infra* text accompanying notes 52-54.

46. Daly's study thus confirms Miller's claims that women's criminality, like men's, takes place primarily among the least advantaged. It is not a result of feminist gains and new ambitions; it is the result of economic disadvantage. See MILLER, *supra* note 18, at 5. Because Daly does not focus on the race- or class-linked nature of other factors, it is impossible to tell to what extent race or class in and of themselves explain sentencing patterns. Compare p. 16 with p. 26 *tbl. I*.

nificance of the race-gender intersection. The statistical data generally indicate that both race and gender affected sentencing. After looking at the more qualitative narrative data, Daly suggests that the effect is interactional: African-American men are at the top of the punishment hierarchy.<sup>47</sup> "Their biographies were least likely to be *constructed* with the blurred boundaries theme of victimization and criminalization, they were most likely to be *categorized* as troublemakers or committed to street life, and they were least likely *seen* as reformable" (p. 263; emphasis added). Note again the impossibility, on the information available to Daly or the reader, of disentangling the effect of real differences, relevant to the justifications for punishment, and of perceptions of difference colored by race and gender.

In addition to examining and assessing the gendered differences in sentencing, Daly examines the rationales provided for sentencing. She then attempts to assess the sentences imposed for internal consistency and for coherence with broader notions of just sentencing. She recognizes that there are numerous possible sources for such criteria. One could assess the sentences against any of a number of rationales for punishment set forth by various academic philosophers of sentencing. Classically, these rationales have included retribution, deterrence, incapacitation, reformation, and various combinations thereof.<sup>48</sup> Daly largely eschews such an external critique. Rather, she accepts as her basis for judgment the criteria that judges apply or claim to be applying — harm, blameworthiness, and consequences (p. 173). Although at this level of abstraction the state judges' concerns parallel those of federal judges sentencing white collar criminals,<sup>49</sup> the concrete applications are often quite distinct. By examining the sentences as well as the reasons provided, Daly constructs a list of particular factors that appear to influence sentencing. Sentences, she notes, were less severe when the defendant had a less substantial prior record, led a more conventional life, and when the crime could be linked to a contemporary or prior victimization of the defendant. All these factors influenced the assessment of blameworthiness and reformability; all are at least correlated with gender (p. 227).

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47. P. 235-36. Her data show that the judges viewed only 3 of 18 black men as reformable or not dangerous, compared to 4 of 5 white men. P. 224. This conclusion differs from that of Steffensmeier and his coauthors who studied a large sample of sentences in Pennsylvania and found that judges treated black and white men relatively similarly, but that they gave black women harsher sentences than white women. Steffensmeier et al., *supra* note 43, at 430.

48. See, e.g., P. 171 tbl. IV.1; JEREMY BENTHAM, *THE RATIONALE OF PUNISHMENT* (1830); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* (1968); HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

49. See WHEELER ET AL., *supra* note 28.

The narratives suggest that gender simpliciter is not a good predictor of sentencing. Thus there is no empirical basis for the thesis that judges are engaging in chivalry and being lenient with women simply because they are women. Nonetheless, factors that correlate with gender do appear to explain much of sentencing.<sup>50</sup> Although the factors she highlights, such as differences in the seriousness of the particular crime,<sup>51</sup> or the extent of prior victimization provide an explanation, they are not necessarily the only or the best explanation.

In reading through the book, I saw simple gender prejudice potentially at work more often than Daly herself, perhaps because I became suspicious of its invisible workings within a system in which it occasionally surfaced quite openly. I also am more explicitly concerned with the effects on the justice system and on feminist goals when the courts take into account gendered, though arguably legitimate, factors. Consider, for example, the judicial responses to Edie and George, which Daly highlights, as evidence of gendered images of defendants. Edie killed her stepmother, a woman with Alzheimer's disease for whom she was the overburdened primary caretaker. The judge gave her a long sentence because he viewed Edie as "a serious threat to other persons," given her statement in a psychiatric evaluation that "I murdered the wrong person . . . I should have killed my husband" (p. 138). The sentencing judge discounted future dangerousness, however, in the case of George, who had fired a gun at his wife and daughter. George said, "My daughter, she got nothing else against me. She's not mad at me because I did that"; this somehow showed that he was no longer a threat to anyone (p. 221). My instincts, like Daly's, are that these episodes reflect illegitimate gender stereotypes of a woman's crazy danger-

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50. Daly is sensitive to the limits of such a narrative. As she asks, "At what point do we register a sense that, although one offense was more serious than another, the penalty difference seems too large?" P. 247. I stress this point in the text, not because Daly is unaware of it, but because it is so central to both the weaknesses and, in a deeper sense, the strengths of her work.

51. Even the seriousness-of-crime factor — a major determinant of sentence severity in both Guideline and non-Guideline jurisdictions — may not be gender-free. The idea of what "larceny" or "drug possession" means is generally built around an image of a typically male crime and might look different if we thought about the context and motive of a female lawbreaker. One may contrast the invisibility of women here with the law's over-sensitivity to race; the law views crimes seen as typically black, such as the sale and use of crack, as more serious than perhaps quite similar crimes committed by whites, such as the sale and use of powder cocaine. See Knoll D. Lowney, *Smoked Not Snorted: Is Racism Inherent In Our Crack Cocaine Laws?*, 45 WASH. U. J. URB. & CONTEMP. L. 121 (1994); cf. *U.S. Sentencing Commission: Materials Concerning Sentencing for Crack Cocaine Offenses*, 57 Crim. L. Rep. (BNA) No. 9, at 2127 (May 31, 1995) (statement of the majority of the Sentencing Commission recognizing the disproportionate effect of the 100-1 powder-crack ratio on African-Americans and recommending amendments to Guideline § 2D1.1 to eliminate the ratio). But cf. *United States v. Clary*, 34 F.3d 709 (8th Cir. 1994) (rejecting the argument that U.S.S.G. § 2D1.1 evinced unconscious racism and violated the Equal Protection Clause).

ousness and a middle class man's aberrational behavior brought about by marital troubles. Yet the different outcomes are also wholly explicable by the harm of killing versus that of assault without injuries. These specific examples of fairly blatant gender stereotyping raise for me a concern about pervasive though unarticulated gender biases.

One can see a similar mix of factors, making definitive conclusions impossible, in the comparison of Charles and Bell (pp. 104-06). Each had committed a robbery; she was sentenced to four months plus restitution; he received a suspended sentence and a \$1,000 fine. She had eight prior convictions; he had none. Her accomplice hit the victim hard enough to send him to the hospital; he used a handgun to take his victim's purse but did not hit her. She obtained \$825; he got a purse containing \$10 and a checkbook. While these factors might suggest that Bell deserved greater punishment, Bell's victim, who knew Bell, did not report the crime immediately and seemed unconcerned that she might seek revenge; in contrast, Charles's victim said that she had been more fearful since the incident. Daly "judged Charles's offenses as being more serious" (p. 106). I am inclined to disagree. The richer context of the narratives frequently allows for such disagreement, depending on one's weighing and measuring of various factors. With the narratives, one can problematize, but not resolve, the apparent gender discrimination of the statistical data. In theory, but probably not practicably, one could incorporate more of these factors into a large enough data set to provide statistically valid conclusions. Even theoretically, this is insufficient, however, for, as Daly stresses, what one learns from the narratives is a gestalt of the crime, not simply a longer list of potentially relevant factors that could be accounted for by a more refined logico-scientific analysis.

Thus, one frequently can provide an explanation other than gender, but one cannot be sure of the extent to which gender itself still played a role, directly or by coloring one's perception of the existence or significance of the alternative explanations for the seriousness of the crime. At the beginning of her discussion of the crimes committed by the men and women in her sample, Daly provides another list of factors that have been used in prior literature as indicia of the seriousness of the offense: "the degree of the injury, the value of the property taken, the presence of weapons, the defendant's role in the offense, and victim-offender relations" (p. 90). At least two of these readily suggest a gendered view.

All things being equal, the judge will treat a defendant with less severity if her role in the offense is minor. As Daly notes, when a group commits a crime, it is usually an all-male or a mixed-gender group; few of her women felons acted with other women. Our



gendered images lead us to see the male as the leader and the female as the follower in such groups.<sup>52</sup> Even Daly, when discussing a woman convicted of dealing drugs in what was apparently a family operation, does not challenge the presumption, reflected in their sentences, that the family's teenage son was the main operator; yet she indicates that the mother's role could not be determined (p. 155).

The effect on the sentence imposed of a prior relationship between victim and defendant is somewhat more complex. As Daly indicates, it usually serves to lessen the perceived seriousness of the crime — what is sometimes referred to as the “domestic discount.”<sup>53</sup> Given existing patterns of criminality, the effect is that crimes by women, though also crimes against women, will be judged less severely. The latter effect has led many feminists working on domestic violence issues to deem this factor illegitimate.<sup>54</sup> Daly, at one point, seems to accept the validity of this factor — she deems women's robberies less serious in part because the women “know[ ] their victims” (p. 107). At another point, she highlights the complex character of the victim-offender relationship: “When women harm adults they know, their acts can be perceived as more serious if they betray vulnerable victims, or as less serious when the victims are not credible” (p. 122).

One often can recharacterize a prior relationship between victim and offender as indicative of a blurred boundary between offender and victim status. When it is unclear which of the parties to an encounter is really the victim, the sentence is appropriately less. This is most apparent in those crimes of interpersonal violence in which the defendant, though not legally justified, acted against someone who had previously victimized him or her (pp. 129-30). Similar ambiguities may arise when a woman robs someone she knows. “[D]id she set the victim up, or did her accomplice take advantage of a situation? If the former is true, a woman's robbery might be viewed as more serious because a trust has been trans-

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52. The most extreme form of this presumption is the ancient rule presuming that a wife who committed a crime acted under the coercion of her husband. See generally ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 1018-27 (3d ed. 1982).

53. The effect is clearest in the situation of interpersonal violence. The criminal law traditionally has viewed assaults between intimates as “private” and thus outside its scope. See, e.g., Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1, 11 (1992); Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, in FEMINIST JURISPRUDENCE 188, 197-99 (Patricia Smith ed., 1993). The discount applies even to homicide: “Our law reveals a disposition to regard killing a stranger for gain as more heinous than killing a spouse or child in anger.” Rapaport, *supra* note 44, at 378.

54. See, e.g., ANN JONES, *NEXT TIME SHE'LL BE DEAD: BATTERY AND HOW TO STOP IT* 18-24 (1994); Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 76-77 (1992).

gressed. If the latter, the woman's role may be cast in a less serious light" (p. 103), as a somewhat-willing accomplice of the man who exploits her access to the victim.

Whether the defendant's crime is a response to earlier behavior by the victim and thus mitigated is not easy to determine, however. Moreover, our gendered expectations may color our perceptions of how readily men and women resort to violence. Daly recognizes this ambiguity. "Previous research . . . prepares us to see women's acts as spawned by victimized circumstances, and thus as less heinous and more defensible than men's. *And perhaps they are.*"<sup>55</sup>

Other factors, too, seem both gendered in some complex way and explanatory of sentencing. For example, Daly notes that several of the women expressed remorse during the sentencing colloquies, but almost no men did (pp. 180, 201). Remorse would seem appropriate to consider as an aspect of blameworthiness. The difference may reflect genuine, gendered differences in the willingness to accept responsibility for one's harmful acts.<sup>56</sup> It may, however, result from the fact that women "are better able to negotiate their subordinated, deviant status with state officials than are minority group men, who more often contest their deviant status and thus seem recalcitrant."<sup>57</sup>

It seems appropriate to consider factors such as remorse in sentencing, even if they are gendered. It is clearly unjust and creates unwarranted disparities, however, if the gender link is an artifact of the way we see defendants through our gendered preconceptions. Yet, even with effort and commitment, it is extraordinarily difficult not to view defendants as men and women. Daly eloquently describes the problem:

I found myself seeing more self-defensive elements in the women's violence, filling in gender asymmetries in physical strength and threats of violence. *Only after several readings could I see the self-defensive elements in the men's acts.* These were buried in the narrative, as in

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55. P. 126. That "perhaps" sums up the dilemma of both what we know and what we should do based on Daly's findings. If women are indeed different in ways relevant to just sentencing, then gender disparities are acceptable. If women are merely seen, for example, as quasi-victims because of gender stereotyping, then gender disparities suggest a need for reform. While in any single case we might be able to choose accurately between reality or stereotype, at the level of generality on which policy must be made, they are hopelessly entangled.

56. See, e.g., Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1 (1990) (discussing women's greater recognition of human interconnectedness).

57. P. 264. There is a rich developing literature on the issues of race, class, and gender and their effect on subordinated people's ability and willingness to present themselves to the legal system in ways that that system will recognize and reward. See, e.g., Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); White, *supra* note 38.

Earl's case, where I initially overlooked the victim's coming at him with a pair of scissors." [p. 131; emphasis added]

Daly encourages us consciously to look for patterns that challenge our gender stereotypes. We can scarcely hope, however, to eliminate stereotyping in the way we — or judges — see the world.

This epistemological dilemma goes hand-in-hand with a political dilemma. Even insofar as gendered differences on relevant criteria are "real," it may nonetheless be inappropriate to take them into account, perhaps precisely *because* they are so thoroughly gendered. If a defendant's behavior is the product of deeply gendered socialization and expectations, is it fully subject to our moral condemnation? As Daly recognizes, her book, in part, recapitulates long-standing and perhaps irresolvable debates in feminist theory and politics over the sources of gender differences and the appropriate legal response to real differences, whether biological or socially constructed — what is sometimes loosely referred to as the "sameness-difference" dilemma.<sup>58</sup> The Daly book gives extra poignancy to the debate by shifting it to a context in which the women most directly affected — women defendants — seem generally to benefit from the application of gendered criteria.<sup>59</sup>

### III. WIDER IMPLICATIONS

The relationship between gender and punishment is one in which the gendered differences, however deep and pervasive, do not generally seem to be biological or essential. Perhaps, then, the dilemma here does have a reasonably satisfactory solution. Decisionmakers should take into account the ways in which women appear to be deserving of lesser punishments, but they should do everything possible to ensure that men also benefit from the acknowledgment of these apparently gendered and relevant criteria. In the remainder of this review, I want to explore the implications, in a variety of criminal justice settings, of using gendered criteria in this manner. In effect, I propose replacing both traditional an-

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58. See, e.g., Kathryn Abrams, *Social Construction, Roving Biologism, and Reasonable Women: A Response to Professor Epstein*, 41 DEPAUL L. REV. 1021 (1992); Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296; Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-85).

59. Cf., e.g., Mary Coombs, *Agency and Partnership: A Study of Breach of Promise Plaintiffs*, 2 YALE J.L. & FEMINISM 1 (1989) (discussing the historical value of breach of marriage actions to "traditional" women); Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit'": *A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374 (1993) (discussing the benefit for certain vulnerable women of a cause of action for seduction).

drocentric criminology and gender neutrality with Daly's woman-normed approach.<sup>60</sup>

Let us consider the difference a woman-normed approach might make in three interrelated contexts: existing sentencing practices, the study of the sources of crime, and the public policy debates over sentencing. In each context, the gender ratio problem — the fact that the vast majority of criminals are men — is a necessary background fact, but not the focus of our approach. Rather, we must consider the question of discrimination: Does the field treat similarly situated men and women equally? If it does not, is there some explanation, consistent with genuine knowledge or just outcomes, for the difference? Equality as such is not the goal. Rather, justice as equality may require the acceptance of apparent discrimination in criminological studies and penological practice insofar as it reflects real and relevant differences in men's and women's lives.<sup>61</sup>

### A. Sentencing Practices

Perhaps the best example of the way in which a woman-normed approach allows us better to understand the use of a gender-related factor in sentencing involves a factor only touched on in this book — family status. As Daly pointed out in two earlier works, judges frequently practice "familial paternalism."<sup>62</sup> Criminals seen as having substantial responsibilities for families are given lighter sentences; that group is predominantly female.<sup>63</sup> In cases in which the defendant has no perceived familial responsibilities, paternalism disappears, and men and women receive similar sentences.<sup>64</sup>

Taking familial responsibilities into account is consistent with general sentencing principles of assessing the consequences of a sentence for the defendant and others.<sup>65</sup> Thus far, it would seem

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60. By woman-normed, I mean beginning our analysis with women, but extending the study to men as well so that the insights gained by studying female criminals can be applied, as appropriate, to males as well. Such a process serves to disrupt the androcentrism that inattention to gender creates.

61. See MARY EATON, *JUSTICE FOR WOMEN?* 11 (1986). Daly quotes Blumstein and his coauthors that discrimination only exists when an illegitimate factor like race or sex is associated with case outcomes after controlling adequately for all relevant variables. P. 237; emphasis added (citing RESEARCH ON SENTENCING: THE SEARCH FOR REFORM, *supra* note 12, at 72-73). The heart of the problem, of course, is when and whether factors associated with such illegitimate criteria as race and sex are nonetheless relevant and worth the cost in apparent discrimination.

62. Daly, *Rethinking Judicial Paternalism*, *supra* note 20, at 9; Kathleen Daly, *Structure and Practice of Familial-Based Justice in a Criminal Court*, 21 L. & Socy. REV. 267, 268 (1987) [hereinafter Daly, *Structure and Practice*].

63. Daly, *Rethinking Judicial Paternalism*, *supra* note 20, at 27; Daly, *Structure and Practice*, *supra* note 62, at 282.

64. Daly, *Rethinking Judicial Paternalism*, *supra* note 20, at 18.

65. Cf. CARLEN, *supra* note 18, at 63 (stating that magistrates are reluctant to jail mothers, in part because of the effect on their children).

that we have explained much of apparent gender discrimination in sentencing by a nonproblematic, relevant variable. As Parisi argues, if women in fact do most of the child care, the courts should take this into account and not blindly impose "equal treatment for parents, defined simply by genetic reproduction."<sup>66</sup> But we must consider both whether the factor, as applied, truly is relevant to just sentencing and whether inappropriately gendered perceptions distort its application.

First, even when judges see men's family responsibilities, they do not always treat them as seriously as women's family responsibilities. Judges do not consider breadwinning — the traditional male contribution to the family — to be as important to the maintenance of the family as child care.<sup>67</sup> While this disparate treatment is presumptively discriminatory in effect, it may nonetheless be defensible. For example, one might conclude that, from the children's perspective, replacing the father's income with welfare is less traumatic than replacing the mother's caregiving with a stranger as foster parent.<sup>68</sup> For men, though not, apparently, for women, perceived family responsibilities are correlated with class. A white-collar defendant's contribution to his family has more positive effect than those contributions of other male defendants.<sup>69</sup>

Moreover, the gendered differences in familial responsibilities may sometimes be perceived rather than real. Women are seen fundamentally as familial and judged according to their success in that role. This would suggest that women who are perceived as bad parents are punished for it in a way that men are not.<sup>70</sup> Men, on the other hand, are not seen primarily as fathers, and thus courts may fail to see when a man is familial.<sup>71</sup>

These gendered perceptions create potential injustices in the application of familial paternalism in sentencing. If family responsi-

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66. Parisi, *supra* note 19, at 216; cf. Smith, *supra* note 6, at 601 (noting that "[i]ncarceration appears to wreak greater destructive consequences upon inmate mothers than upon inmate fathers . . . . [I]ncarcerated mothers, as opposed to fathers, rarely have the option of leaving their children with the other parent for caretaking").

67. Daly, *Structure and Practice*, *supra* note 62, at 279. When men have "mother-like" domestic responsibilities, however, they also receive lenient sentence recommendations. EATON, *supra* note 61, at 63.

68. See *infra* text accompanying notes 97-100 (discussing Sentencing Guidelines).

69. See Daly, *Structure and Practice*, *supra* note 62, at 280.

70. See EATON, *supra* note 61, at 61; cf. ANNE WORRALL, OFFENDING WOMEN 31 (1990). Daly, however, concludes that this was not a significant problem in her sample. "Such women are rendered deviant more by their previous and current lawbreaking and less so by how they care for children." P. 197.

Further, though theory might suggest that unfamilied women would be punished more severely than unfamilied men, Daly's study indicates that unfamilied men and unfamilied women are in fact treated equally. See Daly, *Structure and Practice*, *supra* note 62.

71. Daly, *Structure and Practice*, *supra* note 62, at 279 (It can be "difficult . . . to persuade the court that familial men do care for their children").

bilities are genuinely part of the calculus of harm, blameworthiness, and consequence, however, it would be unjust to ignore them merely because they create the opportunity for gender discrimination. The injustice of ignoring these concerns, furthermore, would disproportionately fall on women. Instead, analysts and decisionmakers should use woman-based norms in dealing with familial status. Having observed the importance of this factor by studying women offenders, we should seek to see it and take it into account in the lives of both men and women.

Men and women also differ, or are seen to differ, in the extent to which they are ambiguously victim or offender. This blurring of boundaries can occur in the context of the particular criminal event and can mitigate punishment. There may also be elements of victimization, such as childhood abuse, in the defendant's history, which partially explain the sources of the defendant's criminal behavior and thus reduce his or her blameworthiness. Both broadly and narrowly framed, blurred boundaries seem more typical of female defendants. Those who have studied street women have noted ways in which survival strategies for women who have fled abuse become the basis for criminalization.<sup>72</sup> Scholars who have focused on female offenders have recognized and made visible these linkages between abuse and criminality.<sup>73</sup>

Daly leads us beyond the rejection of androcentrism to a deeper, woman-normed analysis of victimization and offending. By putting women first, we see victimization. But victimization exists for men as well. Daly's typology of women's pathways to criminal court includes "harmed and harming women" (pp. 51-54). She then discovers male biographies that fit the pattern of "harmed and harming men" (pp. 71-73). She finds at least one case of a male defendant who acted in the kind of imperfect self-defense generally associated with female defendants.<sup>74</sup>

Although blurred boundaries exist for some male defendants, others in the criminal justice system are less likely to notice them. The men's defense attorneys rarely sought to describe their clients as victims or pawns (p. 201), and even Daly herself noted the greater difficulty in recognizing self-defense elements in their stories (p. 131). By putting women's stories first, we may make it eas-

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72. Gilfus, *supra* note 18, at 65.

73. Chesney-Lind, *supra* note 20, at 11.

74. P. 129. Shane, a model high school student who responded to threats by gang members, was perceived as the victim by the judge and received a suspended sentence for shooting and injuring one of the gang members. Shane's case is clearly unusual. What is unclear is whether it is the self-defense element or the ability of others to perceive it that distinguishes his case from those of all the other men. The system was less sympathetic when a male sought to assist his friend who was being attacked because the attackers in that case were police officers. P. 136.

ier to see the elements of victimization in men's offenses and in men's biographies. Feminism has revealed the significance of familial abuse in the development of women offenders. Male felons' biographies may include similar physical and sexual abuse within the family.<sup>75</sup> Eyes sensitized by studying women first may also more readily perceive the variant forms of abuse that occur within the negative environments men must navigate as men. These are most visible in the biographies Daly labels "excesses of masculinity."<sup>76</sup> "More such links [between victimization and criminalization] could be made for the men if the sites of the masculinist domination of boys and men [in male peer group practices and juvenile and adult institutions] were recognized" (p. 260). Given that crime is predominantly a male occupation, the criminological enterprise needs to examine these criminogenic aspects of men's lives.<sup>77</sup>

### B. *Roots of Lawbreaking*

Daly's book is predominantly about gender and punishment. It suggests, however, the value that a parallel woman-normed project might have for a study of gender and lawbreaking. Criminology's study of criminals, like its study of criminal justice systems, has traditionally been unconsciously androcentric. That is, it has taken men as its subject but obscured the significance of their gender.<sup>78</sup> One scholar noted, "Men as males have never been the object of the criminological gaze."<sup>79</sup> More recently some scholars, most no-

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75. See, e.g., Cathy Spatz Widom, *Child Abuse, Neglect, and Violent Criminal Behavior*, 27 CRIMINOLOGY 251 (1989) (finding that both men and women who had suffered abuse as children had more extensive criminal records as adults).

76. P. 259. One thought inspired by Daly's method suggests a fruitful area for research. Men who live in certain urban ghettos are likely to spend time in prison. They may adopt a persona of extreme violence, aggression, and dominance — what Daly calls the "excesses of masculinity" biography — in response to prison conditions or in preparation for the prison time they see in their future. The alternative, given prison conditions, is to be at serious risk of being raped, of being another man's "woman." The excesses of masculinity biography may reflect an effect of such treatment or a preemptive response to the possibility of such treatment in prison. Jack Katz's hard men may have sensible reason to be so perceived by their future fellow inmates. See JACK KATZ, *SEDUCTIONS OF CRIME* (1988).

77. Hilary Allen highlights the costs of excluding the factors used to understand female felons from an analysis of male criminology:

If anything, one might argue that there is greater oppression in the general exclusion of such considerations from the deliberations concerning males — who may also be subject to personal frailties, family pressures and external disadvantages, even though in male cases the prevailing images of criminality make it more difficult for such factors to be acceptably or effectively emphasized.

Hilary Allen, *supra* note 42, at 81, 93.

78. See Daly & Chesney-Lind, *supra* note 12, at 508 (discussing traditional criminology's failure to explicate either the generalizability problem — that purportedly general explanations of crime do not work for women — or the gender ratio problem).

79. Maureen Cain, *Towards Transgression: New Directions in Feminist Criminology*, 18 INTL. J. SOC. OF L. 1, 11 (1990).

tably Jack Katz, have recognized the maleness of male criminals.<sup>80</sup> But these explanations are limited in their own terms and almost useless in understanding female offenders.<sup>81</sup> The explanation is almost tautological: "[M]en commit crimes because crime is masculine and women do not because crime is masculine."<sup>82</sup>

A woman-normed approach may provide a tool for understanding why crime is predominantly a male activity without making the study of women criminals a mere sidelight to "real" criminology.<sup>83</sup> It is too early to predict what such a woman-normed criminology might look like, though it is likely that the requisite methodology will, like Daly's book, involve a blend of logico-science and narrative methodologies.<sup>84</sup>

One example of a woman-normed approach to criminology draws upon the work of John Braithwaite.<sup>85</sup> Braithwaite suggests that people are less likely to commit crimes if they are integrated into networks in which noncriminal behavior is expected and deviations are subject to a shaming that maintains bonds of respect and concern. Women, because of family structures, are more likely to remain in such networks, moving from family of origin to family of affiliation.<sup>86</sup> Men, who more often move away into living situations less characterized by sharing a household with those for whom they feel responsible or who feel responsible for them, are less constrained by these informal social controls. The theory, beginning with an insight about women as well as men, responds to the gender ratio problem. It also allows for generalizations across the gender divide. It predicts that those women who are less embedded in

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80. KATZ, *supra* note 76. For example, Katz explains male robbers as extending a particular version of being male through doing a stickup. *Id.* at 238.

81. See Nancy C. Jurik & Peter Gregware, *A Method for Murder: The Study of Homicides by Women*, in 4 PERSPECTIVES ON SOCIAL PROBLEMS 179 (Gale Miller & James A. Holstein eds., 1992) (arguing that the theory of homicide as a strategy for impression management is of limited usefulness in explaining female homicides).

82. Allen, *supra* note 15, at 28-29.

83. See Cain, *supra* note 79, at 11; Carol Smart, *Feminist Approaches to Criminology or Postmodern Woman Meets Atavistic Man*, in FEMINIST PERSPECTIVES IN CRIMINOLOGY 70, 78 (Loraine Gelsthorpe & Allison Morris eds., 1990). By studying both men and women, we can begin to answer the question "what it is about men . . . as men that induces them to commit crimes." Allen, *supra* note 15, at 36 (quoting Elizabeth Grosz, *Feminism and Social Theory* (Oct. 30, 1987) (unpublished manuscript, presented to the Department of Anthropology and Sociology, University of Queensland)).

84. Daly, together with Chesney-Lind, laid out a blueprint for such future research. "[W]e think that the most pressing need today is . . . to get our hands dirty, and to plunge more deeply into the social worlds of girls and women. The same holds true for boys and men. . . ." Daly & Chesney-Lind, *supra* note 12, at 519.

85. BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989).

86. *Id.* at 92.



these reintegrative networks will be more likely to commit crimes, and this is borne out by Braithwaite's data and that of others.<sup>87</sup>

If Braithwaite is correct, women are far more likely to be embedded in reintegrative networks, but this difference is not linked to anything essentially true about men or women. The task of criminology as social policy, then, is to reverse Professor Higgins' famous question in *My Fair Lady*<sup>88</sup> and ask: "Why can't a man be more like a woman?" There is, of course, the risk that Braithwaite's theory, if used as a basis for sentencing policy, may be read as more essentially gendered than the facts of the cases would warrant. Women will be *seen* as subject to informal social controls and thus in less need of punishment even when they are not; men will be seen as anomic and socially isolated even when they are not. A variant of this perceptual problem may lie behind the differing assessment Daly's judges make of male and female defendants' relationships: "[W]here girlfriends or future wives were mentioned, the women are typically assumed to be positive forces for the men's reformation . . . [but] boyfriends or husbands were assumed to be negative forces, leading them toward lawbreaking" (pp. 216-17). The judges may usually be right, but they are likely to be overgeneralizing. Such stereotypes unfairly disadvantage female defendants because they make it difficult to see that some male companions may provide a positive force toward law-abidingness. These stereotypes also disadvantage gay and lesbian defendants because they may be unwilling even to reveal the existence of companions who might provide such a reintegrative community and, if they did so, the judges would be less likely to see the positive aspects of such relationships.<sup>89</sup>

### C. Criminal Justice Policymaking

A woman-normed approach may also provide better policy guidance for criminal justice issues than either traditional androcentrism or prescriptions for formal gender equality. When women are incarcerated, for example, the conditions under which they live are often radically different than those in men's prisons. Women's demands for better treatment articulated as discrimination claims sometimes succeed.<sup>90</sup> But these claims are a classic form of ac-

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87. *Id.*; RAFTER, *supra* note 16; Gilfus, *supra* note 18, at 70; Coramae Richey Mann, *Race and Sentencing of Female Felons: A Field Study*, 7 INT'L. J. WOMEN'S STUD. 160, 164-65 (1984).

88. ALAN J. LERNER & FREDRICK LOEWE, *MY FAIR LADY*.

89. *Cf. Bottoms v. Bottoms*, No. 94-1166, 1995 WL 234222, at \*7 (Va. Apr. 21, 1995) (finding lesbian mother unfit in part because child will be exposed to the "social condemnation" attached to a lesbian household).

90. *See, e.g., West v. Virginia Dept. of Corrections*, 847 F. Supp. 402 (W.D. Va. 1994); *McCoy v. Nevada Dept. of Prisons*, 776 F. Supp. 521 (D. Nev. 1991); *Bukhari v. Hutto*, 487 F.

cepting the male model, even when it is inapt.<sup>91</sup> Women are disadvantaged by having fewer vocational training programs than male inmates.<sup>92</sup> They are also disadvantaged by lack of attention to their own needs, such as effective access to their children.<sup>93</sup> Furthermore, if we examine the needs of women inmates, we may learn something about how to treat male inmates, some of whom might also benefit from policies that encourage and facilitate continued contact with family and intimates.

The advantages of putting women first are even clearer in examining sentencing policies. Family paternalism allows judges to consider the defendant's role in her or his family; recognition of blurred boundaries allows the judge to assess fully the defendant's blameworthiness in general or in the particular encounter. Judges most readily perceive these factors when the defendant is female. They have, however, sometimes applied them to the benefit of men who are quasi-victims or familial. A sentencing jurisprudence that encouraged judges to articulate the reasons underlying their decisions would facilitate the development and clarification of the relevance of such facts to the harm-blameworthiness-consequences metric, reducing both discrimination and disparity.<sup>94</sup>

Increasingly, however, jurisdictions are adopting sentencing guidelines.<sup>95</sup> These guidelines consistently and properly reject the relevance of gender to their formula.<sup>96</sup> Most go further, however. They reject the relevance of numerous criteria, such as family responsibilities, that judges have traditionally taken into account, criteria that disproportionately benefited women.<sup>97</sup> In effect — if not by design — these guidelines harm women.<sup>98</sup> They would seem to

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Supp. 1162 (E.D. Va. 1980). *But see* *Klinger v. Dept. of Corrections*, 31 F.3d 727 (8th Cir. 1994).

91. For example, women inmates might want training in jobs equally likely to allow them to be self-supporting, but not the same training to be auto mechanics or appliance repairers that the best men's prisons provide, given the obstacles to women in those occupations. "Women are once again an afterthought in a correctional process that is again punitive rather than corrective." Meda Chesney-Lind, *Patriarchy and Prisons: A Critical Look at Trends in Women's Incarceration*, in *PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON WOMEN, LAW AND SOCIAL CONTROL* 17 (Marie-Andree Bertran et al. eds., 1992).

92. *See* Merry Morash et al., *A Comparison of Programming for Women and Men in U.S. Prisons in the 1980s*, 40 *CRIME & DELINQ.* 197 (1994).

93. Daly & Chesney-Lind, *supra* note 12, at 525.

94. *See* WHEELER ET AL., *supra* note 28, at 25.

95. *See, e.g.*, 28 U.S.C. § 994(a)(1) (1988); Kay A. Knapp, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 *U.C. DAVIS L. REV.* 679, 679 (1992).

96. *See, e.g.*, U.S.S.G. § 5H1.10; FLA. STAT. ANN. ch. 921.001(4)(a)(1) (Harrison Supp. 1994).

97. *See* U.S.S.G. § 5H1.6 ("Family ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."); Raeder, *supra* note 6, at 906.

98. *See, e.g.*, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM, *supra* note 12, at 213-14 (describing the effect of the California sentencing guidelines); *cf.* WHEELER ET AL.,

forbid judges from considering the consequences of sentencing a Mattie Lou Thomas to prison and leaving her dependent children and grandchild without a caretaker. If we both begin with women's lives and recognize that the drafters of these guidelines did not do so, we may be more willing to read creatively and find room to take into account such gendered factors as "extraordinary family circumstances."<sup>99</sup> Such a reading will benefit women but not only women. If men are — and can successfully present themselves as — extraordinarily responsible for families, they too should be able to call for leniency.<sup>100</sup>

In a variety of contexts, then, Daly's woman-normed approach is more promising than either the unconscious androcentrism of traditional criminology or the simplistic formal gender equality of many sentencing guidelines.<sup>101</sup> At a minimum, both scholarship and policy prescriptions should assess on their own merits the significance of factors associated with gender. Having decided that, for example, judges should justly consider a biography characterized by victimization, we should work to ensure that such history is noticed and considered when it appears in the biographies of both female and male offenders. This approach is not free of the risks of reaffirming gender ideologies.<sup>102</sup> As Daly self-reflectively points out, "As readers and observers of personal violence, we fill in the gaps in stories of harm. There is a readiness to see women as less culpable than men for their acts, or at least, to see women's acts as

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*supra* note 28, at 184, 187 n.26 (noting the elimination of life history factors in the Minnesota and federal guidelines).

99. *United States v. Johnson*, 964 F.2d 124, 128-29 (2d Cir. 1992); cf. U.S.S.G. § 5K2.0 (authorizing departures from applicable Guideline sentences for "unusual circumstances").

100. This call for a return to a more contextual sentencing policy, sensitive to offenders' life histories may be, at least in the short run, spitting in the wind. The current politics of crime seems to require dehumanizing all offenders, recategorizing them as "criminals" who are different from us and who deserve only to be locked away forever. Consider the increased move toward mandatory minimum sentences and, more recently, "three strikes and you're out." See Chesney-Lind, *supra* note 91, at 16 (discussing effect of minimum mandatory sentencing on women offenders); Stephen Labaton, *President Urges Law Officers to Press for an Anticrime Bill*, N.Y. TIMES, Apr. 12, 1994, at A14 (discussing the meaning of the "three-strikes-and-out" rule).

101. The ultimate example, hopefully ironic, of a formal equality approach may be the statement that "women are deprived of their rightful place in the masculine setting of the prison, just as they have been deprived of their rightful place in the male-dominated world of business executives." DAVID WEISBURD ET AL., *CRIMES OF THE MIDDLE CLASSES: WHITE-COLLAR OFFENDERS IN THE FEDERAL COURTS* 145 n.18 (1991).

102. See, e.g., WORRALL, *supra* note 70. As Hilary Allen notes, the images of women as less culpable are often conceptually contrary to women's interests, but "in relation to the particular women concerned, the avoidance or reduction of punitive sanctions cannot easily be seen as anything but advantageous." Allen, *supra* note 42, at 92. Daly makes a related point regarding the recognition of women's role in the family: "If such arguments affirm a woman's labor for others and may serve to mitigate incarceration, then how is it that women suffer gender subordination?" P. 263.

more likely to have arisen from experiences of victimization."<sup>103</sup> Such risks are unavoidable, however, unless we insist on the greater injustice of ignoring all factors that correlate with gender. A woman-normed approach minimizes the risk of such injustices and allocates them in a way that most benefits women, while holding out hope of also recognizing the harms suffered by men. In a world of imperfect choices, it is surely one worth trying.

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103. P. 133. The danger we must most guard against is the potential harm to black male defendants. Given both the prejudices of criminal justice personnel and the swaggering or sullen style such defendants may self-protectively adopt, it may be especially difficult to see the elements of victimization or the availability of reintegrative networks in their life stories. See generally Symposium, *Criminal Law, Criminal Justice, and Race*, 67 TUL. L. REV. 1725 (1993) (discussing relationship between race and criminal justice).