Women lawbreakers constructed in terms of traditional definitions of femininity: The sentencing of women in conflict with the law.

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University of Windsor

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Canada
Women Lawbreakers Constructed in Terms of Traditional Definitions of Femininity:

The Sentencing of Women in Conflict with the Law

Catherine Elizabeth Kaukinen
1995

A Thesis
Submitted to the Faculty of Graduate Studies and Research through the Department of Sociology and Anthropology in Partial Fulfillment of the Requirements for the Degree of Master of Arts at the University of Windsor

Windsor, Ontario, Canada
1995

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Abstract

This research examines the considerations judges include in the sentencing of women offenders. In particular, I look at the way the sentencing of women lawbreakers incorporates traditional constructions of femininity.

Using a feminist criminological approach, various sentencing strategies were identified in terms of the way in which judges explain women's criminal behaviour and construct motherhood relative to women lawbreakers. These sentencing strategies or judge types are: traditional judges, judges who construct criminal women as "bad" mothers, judges who view motherhood as a non-factor and the "new judges," who attempt to sensitize sentencing to the experiences of women. This research finds the majority of judges as incorporating traditional standards of femininity into sentencing decisions. These social constructions place women offenders in jeopardy of being judged on their failure to conform to a "female ideal." Women who are viewed as conforming to these definitions may receive leniency within the court. Sentencing from this perspective fails to account for the experiences of the majority of women lawbreakers.

This research was conducted within three cities in Ontario. The methodology consisted of interviews with twenty sentencing judges and court observations. Absent in the existing literature is a qualitative analysis of the considerations incorporated into the sentencing of women and descriptions of the ways in which motherhood shapes sentencing decisions. Also absent is the recognition of a variation in sentencing strategies among sentencing judges. This study thereby provides a more in-depth look into the sentencing of women lawbreakers. Data analysis focuses specifically on examining judicial explanations of women's criminal behaviour and the way motherhood is incorporated into sentencing decisions. These will be shown to be the most important considerations in the sentencing of women in conflict with the law.
Acknowledgments

There are several people I would like to mention for helping to make this thesis possible.

First, I would like to acknowledge the important contributions of my chairperson, Dr. Mary Lou Dietz. She spent many hours helping me make this thesis something of which I am truly proud. Her knowledge in this area of research helped in the completion of this project. I would like to especially thank her for convincing me to present this research at the CSAA conference and her confidence in my abilities.

I am extremely grateful to Suzan Ilean for reading my thesis, making helpful suggestions and devoting part of her summer to my project. In particular, I would like to extend my appreciation to her for helping me select my future path. I am also thankful to Leigh West for her time and interest in my research.

I am indebted to my mom for reading this thesis and my father who helped me gain access to my sample of judges and often organized my interview schedule. I would also like to extend my gratitude to my family and friends for encouraging me while I was researching and writing, and in particular my parents for putting up with me while I was researching and writing. Special thanks to my sister for exchanging stories and gripes of life as a graduate student. To the many people who allowed me to “bounce ideas off their heads” I am extremely grateful.

Finally, to the judges who I interviewed and observed in court, my appreciation is extended for their participation and overwhelming interest in this research.
This thesis is dedicated to my best friend
James Wilson

His encouragement and enthusiasm in my education continually refueled my dedication to this research
Take away the women's prisons from the judges and the magistrates, deal with each abnormally serious crime as it comes along, and for the rest of the women work at feasible sentences combining denunciation of the crime with inventory work on its causes (whether those causes are personal or social or both).

(Pat Carlen, 1990)
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Chapter 1

Introduction

Women represent a relatively small number of the adults charged under the Criminal Code. In 1992, women accounted for only 18 per cent of all persons accused. Women represented an even smaller proportion for crimes of violence at 11 per cent.¹ Female criminality is expressed primarily in minor property offenses, including theft under $1000 and shoplifting.² One other area where women are over-represented is abductions contravening a custody order. Women who commit these types of offenses do not represent a serious danger to society. It is the social economic situations peculiar to women that influence the types of offenses that they are most likely to commit. As noted by Johnson and Rodger:

Women’s participation in property offenses is consistent with their traditional roles as consumers and, increasingly, as low-income, semi-skilled, sole-support providers for their families. In keeping with the rapid increase in female-headed households and the stresses associated with poverty, greater numbers of women are being charged with shoplifting, cheque forgery, and welfare fraud.³

The circumstances that characterize the lives of the majority of women offenders and the types of offenses they commit bring into question a system of sentencing and corrections that was designed to deal with male offenders. Sentencing guidelines based on the lives of male offenders often do not incorporate the experiences of women offenders. It is crucial to look at considerations and influences in the sentencing of women offenders and how these in turn shape sentencing decisions. It is important to examine how judges view women’s criminality and which issues shape their sentencing decisions. This includes understanding the types of sentences women receive and the effects of these sentences on their lives.

Women's life situations, their lack of education and employment skills, as well as their role as primary child care givers are all considerations that suggest the need to examine the sentencing of women offenders. There are significant differences between male and female criminality in frequency and type of offense. These differences are equally apparent in corrections and custody provisions. Far fewer women than men receive a federal sentence in Canada. The population of federally sentenced women is 350 women compared to 12,000 for men. Women account for two per cent of the entire federal offender population. Women are likely to serve very short custody sentences. As primary care-givers for their children, even short sentences greatly alter a woman's life as well as her children's lives. Women undergo total disruption of their lives for usually short but significant periods of time with little attempt made to address the issues that brought them into conflict with the law in the first place. The use of sentencing options and considerations incorporated into the sentencing of women offenders are issues in need of investigation.

The percentage of women in conflict with the law as well as the differences in offense type and sentences compared to men, place the use of many sentencing dispositions into question for women offenders. Many court dispositions may be of little benefit to the offender or the community. Worral (1989) points to the need for women to be empowered, and for providing women with the kind of environment in which they can actually achieve something for themselves. This would enable women to make some genuine choices. Perhaps, alternative sentences such as community-service would provide women with the skills and training to help themselves and the community. One alternative which would provide for control over the movements and actions of the offender is electronic monitoring. This would allow greater supervision than presently possible with

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other community alternatives (such as probation) while allowing for the woman offender to remain in her home. Community-based corrections, such as electronic monitoring, provide the opportunity for women offenders to avoid the deleterious impact of time spent in jail. The woman could maintain ties with her family and fulfill her obligations within the home and community.

Also important to the understanding of female offenders involved in the legal and correctional system is the examination of different groups of people within these systems. Aboriginal women, for example, are over-represented. Relative to percentages of aboriginals in the general population, there is a disproportionate number of aboriginal women in federal and provincial institutions. This proportion is even greater than that of aboriginal men, who are also over-represented. Carlen (1992) points to the need of a campaign "for the relief of women presently bearing the brunt of both gender-discrimination and racist gender-discrimination in the criminal and penal systems". This suggests the need to deal with the issues which bring women and Aboriginal offenders into conflict with the law.

An additional consideration is the over-representation of abused women within the criminal justice system. This is particularly true for Aboriginal women. Ninety per cent of incarcerated Aboriginal women interviewed (by The Task Force on Federally Sentenced Women) stated they had been physically abused during their lives. Sixty-one per cent indicated they had been subjected to sexual abuse, numbers which reveal the harsh reality

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Presently in British Columbia 5% of monitored offenders are women, 20% in northern British Columbia. The savings are extensive, $50 per day as compared to $100 to $150 (depending on the institution).


Advocates maintain that home confinement facilitates rehabilitation and reintegration into society because it allows offenders to participate in treatment programs, to attend school and to hold a job. This would allow women to maintain their ties in the community while expediting their rehabilitation.


of life for female aboriginal offenders. Similar studies for non-native female offenders also show high rates of abuse indicating the need to examine the life experiences of female offenders. These data raise an interesting question as to the concerns and evidence brought forward during the sentencing of female offenders. In the past, criminologists often assumed that definitions of crime and categories of offenses apply equally to all historical periods and to all cultural and social groups. Research by Faith and Hatch (1990) on female offenders suggests they should not be viewed in terms of male models. Sentencing should rather incorporate the special needs of female offenders. Carlen (1992) identifies the need for the recognition of women's social responsibilities and resources as different from men, indicating that they cannot be subsumed under the same system of corrections. The sentencing of women offenders requires an encompassing examination of the situations and circumstances specific to women and an exploration of the different effects sentencing dispositions have on women offenders.

Other considerations may also play an important role in the sentencing of female offenders. These include the appropriateness of certain sentencing dispositions, particularly the use of custody sentences. Two-thirds of women in prison have children and up to two-thirds of these mothers are likely to be single parents and the sole caregivers of children. Women generally have fewer supports in the community than fathers in prison who are often still married. The differential responsibilities of parenting for women offenders may create difficulties in women's ability to serve certain dispositions. The possible loss of custody is a particularly threatening consequence for female offenders. Because of this, women may be discriminated against if there are not

In Ontario 71% of women in institutions had children, of these 53% had been living with their children prior to their sentence, 81% said they had been a single parent for part of their child's life.
reasonable and adequate options within the community. Other considerations include the large numbers of women who are without job training, skills and qualifications. Most women in prison are unable to earn an adequate living.14 The experiences of the women offenders importantly influence women's criminal behaviour and the ability of female offenders to successfully complete some sentencing dispositions. The justifications and rationales underlying the sentencing of women must be examined, considering the larger social and economic conditions peculiar to the lives of female lawbreakers.

This research examines the rationale given by judges in the sentencing of female offenders. In particular my research looks at the way in which judges' explanations and understanding of female criminality influence sentencing decisions. In addition, this study examines the way in which motherhood becomes an issue which influence the sentencing of women offenders. Judicial notions of motherhood will be shown to be the most important consideration in the sentencing process. Yet, it is the way in which motherhood is constructed by sentencing judges that determines the type of sentence a woman offender will receive. The social construction of motherhood, by the majority of judges interviewed, reflects traditional expectations of women which define them within stereotypical care giving roles. Through the analysis of the interviews, sentencing strategies or judge typologies have been constructed in order to outline the ways in which judges sentence women offenders. The qualitative approach utilized in this research is the most appropriate in assessing the way in which the judiciary sentences women offenders. Past quantitative studies (Daly 1987, 1989; Kruttschnitt 1982, 1984, 1985) have failed to provide an adequate examination of the phenomena of the sentencing of women offenders. The method utilized in this research has the ability to capture and describe the considerations which interact to structure sentencing decisions.

14Vachon, 1994, p.16. Only about one third of federally sentenced women had good work experience prior to their offence.
Using a feminist criminological approach, the explanations for women's criminality and the considerations incorporated into sentencing decisions by the judiciary are examined. A feminist approach questions the assumption that women can be simply added to existing theories and be perpetually included with the male subjects on whom the theories were constructed. This perspective attempts to uncover the material conditions and power relations which entrap some women in both victimization and criminalization processes. Consequently, this research is an attempt to demonstrate the need for a change in the power imbalances which act to construct and define the lives and experiences of women, particularly those in conflict with the law.

In the following chapter I will conceptualize the issue of sentencing and women offenders. By examining the literature on the sentencing of women offenders, the treatment of women within the courts may be addressed. The literature related to the sentencing of women offenders points to the ways in which sentencing judges often construct women in terms of traditional and stereotypical definitions of womanhood. Absent from the literature is the examination of the way in which these constructions are incorporated into sentencing decisions and consequently shape sentencing dispositions. By conceptualizing the problem of the sentencing of women offenders, this research attempts to demonstrate the way in which social constructions of femininity, in terms of stereotypical definitions of women, pervade the sentencing process. In particular this involves looking at the way the judiciary incorporates explanations of women's criminality into traditional standards of womanhood, which view women as fragile, passive, inept and lacking responsibility for their own actions.

Chapter two will also outline the feminist criminological approach used to examine the way in which judicial decision making is grounded in the maintenance and reinforcement of social constructions of womanhood. Specifically the research examines:

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1) the judiciary's explanation for female criminality; 2) the way in which judges incorporated motherhood into sentencing decisions; and 3) the explanations for the use of various sentencing dispositions in the sentencing of female offenders. Patterns of judicial decision making in which women's criminality is constructed in relation to stereotypical definitions of femininity are identified. This includes examining the way in which women lawbreakers are viewed as failing to conform to a femininity model which includes idealized gender standards of women as passive, submissive and obedient. Typologies have been developed to identify the explanations put forth by sentencing judges in their sentencing of women offenders.

Chapter three outlines the methodology used in this research. The qualitative approach used in this research attempts to explore the attitudes of sentencing judges and how these in turn shape sentencing decisions. Interviews provide the opportunity for a detailed and exploratory examination of the research phenomena. Through the use of qualitative methods such as interviewing and participant observation, an exploration of the strategies incorporated by judges into sentencing decisions may be uncovered. Participant observation within the courtroom allows for the experiences of women lawbreakers to be captured and described. Interviewing provides the opportunity for an interactive exploration of the judicial attitudes which are included in sentencing decisions. The following two chapters outline the data analysis.

Chapter four examines the way in which judicial explanations of women's criminality are included in sentencing decisions. Within this chapter, two judge types are identified within the research. The first type identifies "traditional judges", who construct women's lawbreaking behaviour in terms of traditional stereotypes. The assumption of women as non-criminal allows for many women who come into conflict with the law to be defined or viewed as mentally ill or suffering from some physical pathology. These judges consequently identify women's criminal behaviour which defines women as irrational and

\[16\text{Karlene Faith, 1993, p. 60.}\]
in need of "protection." Yet, in reality these constructions act to maintain the dominant power relations which in turn subordinate women. A second group of judges were also identified with the research. These "new judges" attempt to develop an increased sensitivity or awareness of the experiences of women into sentencing. Rather than perceiving all women as irrational or mentally ill, there is an inclusion of the variety of circumstances and situations which may involve women within the criminal justice system. These judges identify the need for a more encompassing examination of women offenders. In addition, they recognize that many of the circumstances used to mitigate and aggravate sentencing for men do not describe the lives and experiences of women offenders. The next chapter identifies the most important consideration in the sentencing of women in conflict with the law.

Chapter five looks at the ways motherhood is incorporated into sentencing. The research identifies four strategies which are utilized by judges. Each of these differs in the way motherhood is conceptualized and defined. The first sentencing strategy identifies the way some judges incorporate traditional motherhood roles in their sentencing decisions. These include stereotypical definitions of women's behaviour, responsibilities and role. Women are assumed to be mothers and consequently women receive leniency based on this assumption. The existence of these strict expectations for women's behaviour create the possibility of many women being placed in jeopardy. The second strategy was constructions of women lawbreakers as "good" and "bad" mothers. These judges consequently sentence women according to their perceptions of who is a "good" or "bad" mother. Rather than these two sentencing strategies being viewed as opposite approaches to women offenders, they are identified as corollary. The third group of judges attempt to develop a gender-neutral approach to sentencing. These judges thereby ignore the differential effects parenting and child care responsibilities may have for women offenders. The final sentencing strategy identified is used by those judges who strive to sensitize themselves to the various experiences and situations in which many women in conflict with
the law share. Rather than assuming that all women are mothers and that all women parent and care for their children in the same way, these judges identify the need to look at the variety of circumstances which bring women into conflict with the law and which may consequently influence sentencing. As well, these judges point to the need to incorporate the differential effects a sentence may have on women offenders, particularly women who are mothers. Sentencing strategies utilized by sentencing judges may thereby be seen as the result of the way in which judges identify and construct motherhood for women offenders. The sentencing of women lawbreakers consequently depends on the way in which women's criminal behaviour and motherhood are socially constructed by the judiciary.

Chapter six summarizes the findings made within the research. The majority of judges sentence women according to traditional definitions of femininity. These social constructions fail to incorporate the experiences of the majority of women in conflict with the law. The contribution of this research to the existing knowledge on the sentencing of women offenders is highlighted. Finally, recommendations are made for the direction of future research in examining the treatment of women within the courts and the sentencing of female offenders.
Chapter 2

Conceptual and Theoretical Orientation

The following chapter outlines the research problem under examination and details the theoretical framework which will be used to examine the issue of the sentencing of women offenders. This includes a review of the literature on the treatment of women within the criminal justice system which will be used to conceptualize the issue of the sentencing and treatment of women lawbreakers. A feminist criminological approach is undertaken to look at the ways judicial sentencing practices reinforce traditional stereotypes of women.

Conceptualizing and Introducing the Problem

The literature on women and their involvement in the criminal justice system (Hatch and Faith, 1989; Graydon, 1992; Johnson and Rodgers, 1993; Adelberg and Currie, 1993; Shaw, 1994) points to the need to look at the circumstances and experiences peculiar to women lawbreakers. Yet, judicial sentencing decisions more often perpetuate stereotypical definitions of femininity and do not adequately describe the lives of women offenders. Unemployment, poverty and abuse characterize the lives of women who find themselves involved in the legal system. The reality for many female offenders includes physical and sexual abuse, economic disadvantage, and racial discrimination. These require gender specific attention.\textsuperscript{17} The criminal justice system, as defined and controlled primarily by men, is in need of review. The decisions made within the present system do little to advance an understanding of women lawbreakers. Women who commit crimes often do not conform to criminal stereotypes and consequently can not be subsumed under the larger category of criminal.\textsuperscript{18} According to Hatch and Faith (1989) women in conflict with the law have more in common with other women than they do with male prison


inmates, especially in terms of their socio-economic situations. The present system of justice should be examined with respect to its inability to incorporate the needs and voices of women. Given the characteristics and situations of many women offenders, the use of certain dispositions, particularly custody sentences, is accordingly brought into question. Hence, it is important to look at the research which has examined the treatment of women within the criminal justice system.

*Leniency for women offenders: Fact or fiction*

The treatment of female offenders within the criminal justice system has been viewed by researchers and the public in varying ways. There exists a debate as to whether women receive more lenient treatment by the courts in comparison to men. Boritch (1992) suggests that some of the less severe treatment of women is attributable to the fact that women usually have committed less serious offenses than men. She concludes that studies which control for legally relevant variables, such as case seriousness and prior record, tend to show less evidence of differential leniency in sanction severity.Leniency towards women is not seen as a constant for all offenses and all women offenders. Gender-based disparity is identified and found more often in sentencing and pre-trial decisions for women charged with less serious offenses or those who are economically dependent with children. Boritch suggests that it is not all women who receive lenient treatment within the entire criminal justice system, but rather some women at particular stages of the process who may receive more lenient treatment. She attributes this to variability in gender role attitudes reproduced at the judicial level. This presents the need to examine the attitudes the judiciary has towards female offenders, the considerations incorporated into the sentencing of women, and the explanations for the use of various sentencing dispositions.

Harris (1992) points to the problems in identifying the courts' differential treatment of women offenders. This is because of the difficulty in separating this from the earlier decisions which brought women there in the first place. These earlier decisions
include; the discretion of the police to arrest and charge, that are also influenced by gender assumptions. An additional point is the importance in distinguishing the dispositional behaviour of the sentencer from the strategy of the advocate. Often defense lawyers will present their female clients in terms which promote a chivalrous response from the sentencer. Yet, Harris identifies an interesting point. Although women are less likely to be sent to prison by the courts, the women actually in prison are less serious offenders than men. He identifies that the issue of gender-based sentencing is a legitimate sentencing question. The problem is that it is difficult to compare and look at the data on the existence of gender-based sentencing disparities. Much of the research on gender based sentencing has focused on a quantitative examination of sentencing at a single location. My study provides the opportunity to augment the existing literature on the sentencing of women offenders through a qualitative examination of the circumstances and considerations that influence the sentencing of women offenders.

There has been a perceived notion of leniency towards female offenders, producing less harsh treatment within the criminal justice system. Kruttschnitt (1984) demonstrated the need to examine other variables in the determination of a relationship between gender and deviance processing decisions.\textsuperscript{19} Kruttschnitt explored the concept of multiple variables acting to determine the legal outcomes for female offenses, including the offense attributes such as a woman's role as an accomplice or planner. She hypothesized that a prior criminal record and past time spent in prison increased the likelihood of a jail sentence. Employment status and family composition may also be considerations which are included in sentencing as mitigating or explanatory factors. Kruttschnitt concluded that women were more likely than men to remain free prior to legal outcome and after conviction. She also found that controlling for gender-related status does mediate the length of probation sentences.\textsuperscript{20} The treatment of female offenders within the correctional

\textsuperscript{20}Kruttschnitt, 1984, p.228.
system and the sentencing process should be seen as the result of a multitude of considerations and influences, rather than based on conclusions of leniency in correctional statistics.

Kruttschnitt (1984) further found that women with household responsibilities and men who hold down jobs both appear to be given special consideration to help in the continuation of these duties. Both are likely to remain free prior to adjudication. The existence of these considerations is based on gender-specific expectations with regard to the family. This element is grounded in a paternalistic and chivalrous view of women, which stereotypes them as mothers and care-givers. Dominelli (1984) came to a different conclusion. She found that men's bread winning role is accorded a higher social status than women's domestic role. Men's 'family' responsibilities were more likely to operate as mitigating circumstances providing leniency for male offenders than for female offenders. She further concluded that women's domestic roles block their access to community service dispositions. Women were considered poor risks for this type of sentencing option. Women may be missing out on some sentencing options because of the existence of gender-specific roles which characterize women as mothers within the home.

In a later study by Kruttschnitt (1985), she set out to explore the relevance of a processing agent's gender to the sex-sanctioning controversy. The results of her examination found that the paternalistic response toward women offenders is not limited to male processing agents, such as probation officers and judges. One possible explanation for the persistence of a pattern of paternalism is the difference in the types and severity of crimes between men and women. Kruttschnitt concluded that gender-specific leniency may be the result of a perceived difference in men and women's criminality. Women who appear to deviate from the expected 'feminine crimes' may not be processed in the same way. This is similar to findings by Russell (1989) who suggests that a woman's gender role is at the heart of the treatment she receives. Lenient sentences are
available only to those women who appear to be subscribing to a white middle-class value system.

Daly (1987) similarly found that rather than gender, sex-typed characteristics of women produced more lenient sentences. Women with dependents, whether single or married, were more likely than non-familied women to receive the most lenient sentence. The sex-family interaction showed that familied women are treated more leniently than familied men.21 A further study by Daly (1989) looked at the considerations involved in pretrial release and bail decisions. She found that variability in sentencing and release was related to a woman's family situation. Lenient sentences for women, particularly in the case of a defendant's loss of liberty, could be explained by a higher value placed on maintaining the family ties of women than men. A woman's family situation was a consideration which would determine a degree of leniency with regard to custody decisions. This leniency response to familied women compared to men was the greatest for black defendants. Daly concluded by stressing the important differences between male and female offenders in terms of their responsibilities in the home and the reasons which involve women in the criminal justice system.

Daly stated that the assertion that women are treated more leniently than men in the criminal courts is misleading. She rather suggested that "some women receive more lenient treatment than some men."22 It is only when women fit into the socially constructed roles of femininity and womanhood that they may in fact receive more lenient sentences. It is not necessarily an issue that all women receive leniency as it is only women who conform to society's expectations of role and behaviour. She went further in identifying the consequences of the existence of this type of gender-based leniency. While many women may benefit from these types of defenses, their existence places many

21Kathleen Daly, "Discrimination in the Criminal Courts: Family, Gender and the Problem of Equal Treatment", Social Forces, (1987) vol.66 no.1, p.165. Daly demonstrates that differences in the response to men and women is based on familial situation, together with the stronger mitigating influence of being familied for women than men, explain the initial sex effect.
22Daly, 1987, p.169.
women in jeopardy. Women are more at risk than men to be judged on their ability to parent as well as their criminal behaviour. Women who do not appear to be fulfilling the stereotypical gender role may, in fact, be a risk of being viewed as "bad" mothers and being seen as hiding behind their children. It is only women who perform their role as parent and appear to be committing typical 'feminine crimes' who may in fact receive leniency within the courts.

The two opposing views of the treatment of women offenders is what Mair and Brockington (1988) refer to in the "Evil Woman Theory." This evil woman thesis is not contrary to the chivalry/paternalism thesis but rather its corollary. Thus, it may be that women are preferentially treated compared with men until such time when preferential treatment is rendered inappropriate.23 As women appear to deviate from the traditional female patterns of behaviour, as evident by their criminal activity and behaviour, there is a lessening in this preferential treatment. Mair and Brockington use their conclusions to explain the high percentage of women who receive probation as a sentencing disposition. Women's offending is more likely to be seen as providing evidence of greater problems which lead them into crime. Women are seen to need the kind of help offered by the probation order, supervision and social work. These women may be viewed in need of greater social control and more likely to respond positively to it than are their male counterparts. The harsher treatment some women are given is likely to depend on the degree to which they are perceived to be deviating from a socially constructed "norm".

Zingraff and Thomson (1984) also found a combination of what they refer to as a "harshness of penalty" which may be due to interaction between gender and type of offense. They found that women received favourable sentence lengths relative to men for four felony offenses: second degree murder, manslaughter, larceny (theft) and forgery. In all offenses except forgery, sex contributes more to the determination of sentence length

than any other legal or extra-legal variable investigated. However, their results found that this did not hold true for misdemeanor offenses. Women received similar sentence lengths to men in three of the four misdemeanors (concealment, check fraud and assault). Yet, women received longer sentence lengths than men in cases of child abandonment. Women are more likely to receive harsh treatment the more they deviate from their gendered role construction. Child abandonment seems to directly contradict gender role expectations for females. Cheque fraud and concealment of merchandise appear to be consistent with the stereotype for women offenders. It is fair to conclude that the punishment for women is harsher when they deviate the most from their socially sanctioned roles of mothers and care takers. Zingraff and Thomson conclude that a woman who leaves her child is more likely to receive a harsher penalty than her male counterpart. The disparity in sentencing between men and women is grounded in social expectations of men and women which stereotype women as mothers and care givers.

Specific sentencing dispositions and the variation between men and women

Various researchers have identified differences in the rates at which men and women are sentenced to various dispositions. Although much of this disparity may be explained through an examination of the differences in offense type and criminal record, some researchers point to the over-representation of women within certain sentencing options. Graydon (1992) has found evidence to demonstrate that the proportion of women ordered to pay fines doubled between 1960 and 1972. The fine is now the sentence most female offenders receive. She points to the need to examine the use of fines as the preferred non-custodial sentencing option for female offenders. An important concern is the problem of women being incarcerated for failure to pay fines. Three in ten women admitted to provincial jails in Canada were admitted for failure to pay fines.24 This is particularly true for Aboriginal women who are more likely than non-Aboriginal women

to be arrested and to serve time for defaulting on payment of fines. Carlen (1990) found similar statistics in the United Kingdom where thirty percent of adult female incarcerations are a consequence of fine default. Graydon suggests that little attention is paid to the sentencing reality of either the imposition of sentence or the management of sentences. Women’s greatest "crime" is the fact that they are living in poverty. There is a need to examine the ability of women to fulfill sentencing dispositions and the consequences of many sentences on the woman offender.

Research by Frazier, Brock and Henretta (1983) suggests that a substantial proportion of the gender effect occurs through the probation officer’s pre-sentence recommendations. When looked at independently, being female increased the likelihood of non-custodial recommendations. Incorporating the effects of the probation officer’s recommendations reduced the observed effect of gender on court dispositions. The researchers suggest that probation personnel are trained and encouraged to consider social variables within their reports. Another possible explanation for the influence of gender in probation recommendations includes the awareness of the lack of facilities and quality custodial options for women offenders. Probation officers may consequently be responding to organizational constraints in their sentencing recommendations for female offenders. Consequently, it is important to look at the effects pre-sentence recommendations have on the judges within my sample. The use of the unstructured interview allow the judges to discuss how they incorporate these variables into their sentencing decisions.

Hence, it is important to identify the influences which act to determine the way in which female offenders are sentenced and treated within the criminal justice system. It is not enough to merely look at the numbers of individuals who are in prison, on probation, or serving community service. Through looking at the explanations put forward by

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judges, it is possible to examine the issues which act to structure and influence sentencing decisions. By identifying judges' philosophy of sentencing and their view of female offenders, one can examine the characteristics which determine sentence severity. Court observations provide for the opportunity to discover the dynamics within which sentencing decisions occur. This will allow for the possibility of discovering the issues which appear relevant to the participants and which may act to influence the resulting sentence. Through the identification of issues which come forth in the sentencing of female offenders, it may be possible to demonstrate how larger social constructions of femininity are reproduced in the courtroom. The inclusion of several research methods will be the best approach to deal with the issue of the sentencing of women offenders. The lack of qualitative research into sentencing disparity and gender-based sentencing presents the need to examine the attitudes and explanations put forward by the judiciary. The following section will examine the theoretical orientation to be utilized in the present study.

Theoretical Orientation

Feminist criminologists now must do more than denounce mainstream criminology for its failure to acknowledge the significance of female crime. It is not enough simply to resurrect the neglected female offender. We must transcend the traditional boundaries of criminology and examine the role of the state and the law in reinforcing the position of women in contemporary society.\textsuperscript{26}

A feminist approach to criminology points to the need to look at the ways in which mainstream criminological theory fails to incorporate the experiences and circumstances of women lawbreakers which are often very different from those of men. At the same time a feminist criminological approach works toward the elimination of certain sexist myths concerning women's lawbreaking and calls into question the more discriminatory and oppressive forms of social control and regulation of women. This approach consequently suggests the need for a deconstructionist approach to law, one which constantly calls into

\textsuperscript{26} Gavigan, 1993, p. 216.
question law’s claims to "truths". As identified by Cain (1990), a strategy of
deconstruction is one which attempts to recognize the way a legal discourse is only one
aspect of reality. This is the recognition that the system presently used to process all
lawbreakers was not designed to deal with women’s lawbreaking behaviour. A feminist
 criminology thereby recognizes that the law and the agents within the legal system work
within a discourse which often fails to recognize the experiences and reality of women.
Sentencing, as designed to deal with male offenders, identifies the causes of men’s criminal
behaviour and attempts to deal with these through the imposition of certain sentencing
decisions. This system is consequently inadequate in its ability to deal with women
lawbreakers.

This feminist perspective includes the recognition that definitions of femininity and
womanhood are social constructs which are used to maintain the social, political and
economic order. Gender is recognized, not as a natural fact, but as a complex social,
historical and cultural product. Gender is related to, but not simply derived from,
biological sex difference and reproductive capacities. The social construction of
womanhood is consequently a product of the social and cultural environment rather than
reflecting reality for all women.

Second, this perspective acknowledges that there are real rewards for conventional
living, and real penalties for eschewing it. Hence, it is necessary for researchers to
recognize these realities and the sexual discourses which express and constitute these
realities. Sexualized typifications of femininity shape all aspects of women’s lives and are
the foundation of a number of institutions, including the criminal justice system.

Consequently, women who are perceived as conforming to these socially constructed roles

27 Pat Carlen, "Women, Crime, Feminism and Realism", in Realist Criminology: Crime Control, and
Policing in the 1990’s. John Lowman and Brian Maclean, eds., (Toronto: University of Toronto Press.
1993) p. 204.
no.4, p.504.
29 Maureen Cain, "Towards Transgression: New Direction in Feminist Criminology", International
are rewarded for doing so and within the criminal justice system receive special consideration in sentencing. This includes "protection" or extra care and consideration by the judiciary and consequently more lenient sentences for women lawbreakers. Yet, this "protection" actually acts to maintain and reinforce gender-specific characteristics and further subordinate women. Women on the fringe of these constructions or who appear to deviate from these stereotypes are placed in jeopardy and risk more severe sanctions. The existence of these social constructions of femininity act to the detriment of all women.

Finally a feminist criminological researcher strives to identify the way sentencing decisions are shaped by and act to perpetuate traditional constructions of femininity. Women's lives are judged by these constructs and the sentences they receive are the result of how they are viewed to fit these stereotypes. The use of gender-specific constructions within sentencing reinforce a particular "truth" about all women. Consequently, these constructions are carried into other aspects of the criminal justice system, particularly the corrections system.

*The need for a feminist approach to women's criminality*

Court decisions regarding female offenders reflect the historical and social construction of women and femininity, particularly female criminality. Gavigan (1993) suggests that an understanding of women and crime must be broadened to include the general position of women within a given social context. The decisions made by sentencing judges as well as the defenses and explanations used by defense attorneys must be examined in relation to the way in which femininity and femaleness has been constructed, both historically and socially and within criminal theory. The legal apparatus, laws, courts and prisons are a continuation of the ways in which women are socially controlled across a whole range of institutions and settings. Cain points out that what happens to women in courts and prisons directly relates to what happens in the family and
at work." Through the adoption of a feminist criminological model it is possible to identify the thinking involved in the sentencing of female offenders. This will help to demonstrate the way in which constructions of femininity are carried into the courtroom setting and act to reconstruct ideas of womanhood which influence the way in which female offenders are treated.

**The social construction of femininity**

Some researchers have reasserted similar claims to those of dominant criminal theories, and have gone even further to suggest that female criminality and criminal theories of women's deviance are merely reproductions of the assumed nature of women:

Two criminological issues merit attention. First, women's crime has been explained in terms of sexuality and psychology, and invariably in reference to "real" (male) crime. Given this, it is necessary to consider what image of women is reinforced by various theoretical perspectives. In other words, does criminological literature reproduce conventional wisdom about the inherent nature of women and their proper sphere?

The ways in which women are identified and constructed within criminological theory and the ideologies that underpin the criminal justice system are reflective of the larger social construction of women and ideals of femininity. Smart has attempted to "identify and explore how legal, medical and early social scientific discourses intertwine to produce a woman who is a fundamentally problematic and unruly body; whose sexual and reproductive capacities need constant surveillance and regulation because of the threat that this supposedly 'natural' woman would otherwise pose to the moral and social order."

The way women are viewed in society has allowed for the construction and maintenance of criminal theory which identifies women in terms of what is biologically "female" or mentally ill. Morris and Wilczynski point out:

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Explanations for women's criminality are sought within the discourse of the 'pathological' and the 'irrational': menstruation, mental illness, poor socialization broken home and so on. The crimes of men, on the other hand, are explained "within" the discourse of 'normality' and 'rationality' in terms of factors like "boredom, greed, peer-group pressure or simple wickedness".33 This social construction of femininity has thus created inconsistencies and contradictions concerning the nature and images of women and female criminality. Women's crime has often been explained in physiological terms, as resulting from raging female hormones (as in cases of theories based on PMS, pregnancy, postpartum depression and menopause). In contrast, the very lack of "female" qualities and the "masculinization" of women is blamed for women's involvement in crimes.34 Rather than seeking explanations of female criminality in economic and social terms, studies have focused on deeper psychological and pathological explanations. Smart suggests a focus on the wider moral, political, economic and sexual spheres which influence women's status and position in society.35 It is important to look at the way in which sentencing decisions are determined by the existing attitudes toward women within a variety of social settings. What happens to women within the courts is influenced by the way in which women's behaviours and actions are viewed within the larger society.

The decisions made by sentencing judges may be viewed as being rooted in the dominant social and moral expectations for women's behaviour. Yet, this is problematic, especially for those women who do not easily fit into these strict definitions. Female offenders has been portrayed as "poor and unfortunate" on the one hand, and "lazy and worthless" on the other. A woman may be seen as needing protection, but also as a very destructive and scheming temptress. She has been said to require special and more delicate care, and yet she has also been considered far more difficult to confine than her

34Gavigan, 1993, p. 216.
male counterparts.\textsuperscript{36} It is important to note how the existence of these constructions forces many women to conform to them or face more harsh treatment.

Female offenders may be treated leniently in cases in which they fit 'typical' explanations of female criminality and more harshly when they appear to be acting 'masculine'. According to Boritch (1992) the variability in the relation of gender to case outcome is seen to reflect different dimensions of gender role attitudes, reproduced at the level of judicial sanctioning decisions. This would suggest focusing on changes in gender roles, gender-based social control policies and levels of official female criminality.\textsuperscript{37} She concluded that informal community controls regulating women's lives in the past has produced a change in the judicial treatment of different types of female offenders.

Female criminality has been demonstrated by many researchers to consist of typical "feminine" crimes such as "those crimes committed mainly if not exclusively by women, such as infanticide, abortion and prostitution".\textsuperscript{38} Much of women's "criminal" behaviour may be viewed as existing primarily due to the economic and social position of women. It is particular to those who may not be aware of other options, associated with the escape from violence and abuse. The criminal law relies on the moral judgments of the majority and the social position of women within society in engaging women in the criminal justice system. Women's criminalization relate to the construction of female criminality rather than to women posing a true threat to society.

\textit{Past explanations of women's criminality}

Past explanations of female criminality have relied on stereotypical ideas of women's roles within society. Female offenders were often viewed in "terms of sexuality

\textsuperscript{37}Helen Boritch, "Gender and Criminal Court Outcomes: An Historical Analysis", Criminology (1992) vol.27, no.3, p.294.
\textsuperscript{38}The Honourable Madame Justice B.M. McLachlin, "Crime and women: Feminine Equality and the Criminal Law", University of British Columbia Law Review, (1991) vol.25, p. 1. McLachlin points to how female crime often represents attempts to enforce moral rules through criminalization of conduct. She feels that often women are treated in ways which cloak the real social and moral issues
and psychology and invariably in reference to "real" male crime." Women's crime had often been described in terms of women's bodies, the hormones controlling menstruation and childbirth as somehow being involved in determining the types of crimes women commit. In explaining women committing "male crime", it has been in terms of the lack of female qualities--female offenders were often masculinized and seen to be like men. These sexist explanations of female criminality act to deny the social and economic realities of all women, particularly those who lack education and vocational skills. These theories on female crime seek explanation in the realm of the irrational and psychological, rather than in terms of the economic theories which often prevail in explanations of male crime. Since most "normal" women are assumed to be non-criminal, when they do commit crime it is assumed that there must be something wrong with them. Women's biological nature is consequently viewed as pathological and as the cause of women's failure to conform to socially constructed models of behaviour. Consequently, many of women's natural biological functions are viewed in terms of dysfunction. This idea is included in explanations of female criminality which rely on pathologizing menopause and menstruation. In the absence of these explanations, women's criminal activity often is used to provide evidence of mental illness within women.

Some researchers point to the responsibility of the Women's Movement for increases in female criminality. This explanation suggests that as women gain more freedoms and equality, the rate of female crime will also increase. Increases in female criminality are thus explained in terms of a woman's striving for "equality in both the world of legitimate work and the world of crime". Gavagan, 1993 has questioned these

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40Ronald Berger, "Female Delinquency in the Emancipation Era: A Review of the Literature", Sex Roles, (1989) vol.21, no.5-6, p.379. Berger points to a book by Adler who offered a "masculinity theory" of female misconduct. This theory suggests that technological advances free females from unwanted pregnancies and home responsibilities. The ideology of women's liberation is consequently viewed as masculinizing female behaviour.
conclusions both in terms of theoretical and methodological soundness. Taken at face value these conclusions appear to be nothing more than explaining female behaviour in terms of established male criminological theory and sexist ideas of how women should behave. This simple causal relationship between the Women's Movement and increases in reported female criminality fails to recognize the complexities of the criminal justice system, such as crime reporting, recording, definitions of deviant behaviour\(^4\) and the selective criminalization of particular behaviours as well as their selective and often discriminatory enforcement. This is particularly true of the selective enforcement of prostitution which acts to criminalize female sex workers, particularly those in public view.

Female crime must be expanded to take into account the general position of women within a given social, economic and cultural context. Gavigan (1993) asserts that many theories attempt to reduce behaviour to simplistic causal relationships. These theories deny and ignore the gendered role of women within society. Such theories include social control, attachment and strain theories of unrealized goals and ambitions. A more encompassing examination of women's crime would provide for the more equitable treatment of women in sentencing. In examining female criminality, the social, political and economic status is too often ignored. The social constructions of what is considered criminal within our society and those laws which are selectively and differentially enforced also play a role in the criminalization of women.

Steffensmeier, Allan and Streifel (1989) examined the relationship between national economic and technical developments and increased female criminality, with particular interest in the way this relation or correlation is mediated through greater formalization of social control. Differences in arrest rates may be the result of greater crime opportunity in those areas of crime that involve a higher proportion of women and

through the greater formalization of social control that enhances the likelihood of official sanctioning of female offenders.\textsuperscript{42} This examination points to the need to look at the types of crimes women are committing and the ones they are being charged with as well as the changes in police discretion and policy which are increasing the numbers of women brought into the criminal justice system.

\textit{Social Constructions and the sentencing of female offenders}

Various considerations within the sentencing process determine both the length and type of sentencing disposition. In the case of women offenders the most important sentencing consideration is whether the female accused is a mother. Edwards (1989) points out that it is not sex or being female per se but the perceptions and evaluations of gender-linked characteristics and behaviour (especially with respect to motherhood) made by judicial personnel and their conceptions of what is normal and responsible that shape decision-making when dealing with female defendants. The way judges construct motherhood and in turn how a female accused fulfills this socially constructed role will greatly influence both sentence type and length. The manner in which a woman is perceived to carry out her role as mother, rather than merely the fact she is a mother is the important aspect within sentencing decisions for female offenders. Motherhood, particularly single-parent care-giving responsibilities, is the most important consideration in the sentencing of female offenders, as identified by various researchers (Dominelli, 1984; Daly, 1987 Roberts, 1994). Consequently, it is primarily the way in which motherhood is conceptualized by the judiciary which will act to influence their determination of sentence. Women who are perceived to be good parents who take care of their children according to their proper role and, who appear to be committing typical "feminine crimes" may in fact receive differential treatment by the judiciary.

\textsuperscript{42}Darrell Steffensmeier, Emilie Allan and Cathy Streifel, "Development and Female Crime: A Cross-National Test of Alternative Explanations", \textit{Social Forces}, (1989) vol.68 no.1, p. 279. The authors stress an approach which uses a multi-variate model, all other approaches emphasizing only one factor or theory at the expense of another are misleading.
According to Daly, within sentencing, the role of motherhood is highly influenced by conceptions of femininity. Within the ideological construction of femininity are three key elements: sexuality, domesticity and pathology. Domesticity (and the proper standard of mothering) is a consideration in the sentencing of women by criminal courts.\(^4\) Parenting roles and expectations are seen as gender specific by the judiciary. The treatment of women by the courts is one which acts to reinforce and maintain the conventional "female" role within marriage and the family. It is when women are seen to conform to this role that they may receive a form of chivalrous based leniency. It is the women who do not fit into these roles who may in fact suffer in the sentencing process. This type of social regulation may place some women in double jeopardy for failing to be "good" mothers as well as failing to obey the law.

Dominelli (1984) also recognized the way in which female offenders as mothers are identified within a stereotypical domestic role. The way in which women satisfy the constructed role of motherhood is what allows for gender-based sentencing. It is important to note the way in which offender characteristics utilized within the sentencing process act to maintain and preserve a dominant ideology of women. Roberts (1994) pointed out that the way women's sentences are mitigated is grounded in paternalistic attitudes:

Another issue is the meaning of gender equality in sentencing of offenders. Mitigating women's sentences based on family responsibilities may be paternalistic and may perpetuate female stereotypes. There is sound historical support for this concern. Until recently women's role in the family determined the criminal sentence a court imposed upon her. Sentencing of female offenders evinced social image of women as mothers or potential mothers and enforced appropriate gender roles.\(^4\)

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Women's motherhood role can be viewed as a mechanism of social control. Recognizing women's roles as care-takers crucial to the welfare of children acts to maintain women's social status and position.\(^\text{45}\) Consequently, the categorizing of women as care-givers may be an automatic reaction and classification by the court, rather than a consideration which is sought out in the sentencing process and legitimated. Explanations of female criminality have also relied on constructing women within a particular realm.

My research looks at the treatment of women offenders by sentencing judges. It specifically examines the way in which the judiciary constructs explanations of women's criminality and motherhood and how these are incorporated into sentencing decisions. It is particularly important to look at the issues and considerations which are incorporated into the sentencing of female offenders. From the literature there is evidence that these include: motherhood, mental illness (depression) and type of offense (shoplifting). It is important to examine these influences in terms of their similarity to the social construction of womanhood, which shape perceptions of femininity. The following chapter will outline the qualitative research methodology utilized in the study. This will include a thorough description of the various methods used to study the issue of the sentencing of women and how this method is best suited to the feminist criminological perspective taken in the study.

\(^{45}\)Roberts, 1994, p.12.
Chapter 3

Methodology

The following chapter outlines the methodology utilized in the examination of the sentencing of women offenders. This research employs a qualitative research approach which is best suited to its feminist orientation. The analysis of the circumstances and situations which judges incorporate into sentencing decisions will be uncovered through an interactive, dynamic method which utilizes both interviewing and participant observation.

Research, which so far has been largely the instrument of dominance and legitimation of power elites, must be brought to serve the interests of dominated, exploited and oppressed groups.\(^{46}\)

Kirby and McKenna (1989) identify researching from the margins as a continuous process that begins with a concern that is rooted in experience. The research process consists of planning to gather information, actually gathering it and making sense of it. At the same time the researcher engages in a process of self-reflection as one of the participants in the process of creating knowledge.\(^{47}\) Feminist research is a challenge to ways in which dominant knowledge is produced. It provides a way to represent women’s views and experiences.

Triangulation and Multiple Research Methods

The examination of the sentencing of female offenders was made through several different research methods. In exploring the way in which female criminality is presented within the court process during sentencing required an examination of judge typologies, court dynamics and alternatives within the community to incarceration. Denzin suggests that “no single method will ever meet the requirements of interaction theory. He recommends that a combination of data gathering methods be used to examine a single


\(^{47}\) Sandra Kirby and Kate McKenna. Experience, Research, Social Change: Methods from the Margins. (Toronto: Garamond Press.1989) p.44.
research focus; this approach is referred to as triangulation. Kirby and McKenna propose participant observation as a flexible method which allows for the combination of survey methods (such as interviewing with actual participation and direct observation by the researcher). An interpretive approach provides the opportunity to illuminate the phenomenon, in a thickly contextualized manner, so as to reveal the historical and interactional features of the experience under study. Interpretation must engulf what is learned about the phenomenon and incorporate prior understandings while always remaining incomplete and unfinished. The incorporation of several research methods will provide checks and balances within the research. It will also provide the opportunity to contextualize the phenomenon within the larger social setting. For the present research three research methods are utilized. These include qualitative interviewing, direct observation, and an investigative examination of corrections data and statistics.

The Research Instruments

Interviewing

Face-to-face interviews with sentencing judges provided the primary source of information in the examination of the influences which act in the sentencing of female offenders. This qualitative research method is between researcher and informants directed toward understanding informants’ perspectives on their lives, experiences or situations as expressed in their own words. Interviews were chosen because they are a special form of interaction between people, the purpose of which is to elicit information by asking questions. The interviewer interacts with those whose lives are being researched, and records her/his own commentary. Through this interviewing process an examination of

49. Sandra Kirby and Kate McKenna, Experience, Research and Social Change: Methods from the Margin. (Toronto: Garamond Press. 1989) p.81.
52. Ibid., 1989, p.66.
the sentencing philosophy will be discovered. It will also provide the opportunity to
describe the considerations involved in the sentencing of female offenders and explore the
reasons for the over-utilization of short jail sentences. This method allowed for the judges
to relate their explanations from their experiences and their observations of other judges in
the sentencing of female offenders.

An interview schedule or guide was constructed. The questions at the beginning
of the schedule were general and became more specific closer to the end of the interview.
This interview guide is attached as Schedule One. Through asking questions related to
male and female offending, the issues which act to influence variation in sentencing
between gender were discovered. Questions focused on the particular forms of
corrections which are considered to best deal with each offender.

The interviews were recorded on audio tapes where possible. In the case where
individual judges refused, written, thorough notes were taken. According to Jorgensen,
audio recordings are invaluable as either a method of recording actual field conversations
and events or as a means of keeping notes. In some settings, the presence of the tape
recorder may be normalized. People commonly forget the recorder is running after a brief
period, or come to take it for granted.51 Many of the interviewed judges preferred the
taping of the interview to guarantee that they would not be misquoted. The recorder
allowed for the ease of the interview and for the conversation to flow at a natural pace,
without interruptions for clarification and repetition. The tapes were later transcribed into
note form on the computer for ease of analysis. This helped in the organization and
analysis of the data, while maintaining the entire interview within one file.

Court observation

The second method to be utilized was court observation. Attempts were made to
observe each sentencing judge within the courtroom setting. Comparisons were noted in

51Danny Jorgensen, Participant Observation: A Methodology for Human Studies. (Newbury Park: Sage
the differences in the processing of women and men offenders. Notes were taken to record all information regarding the particular cases of interest, particularly the explanations put forth by the sentencing judges and the defenses used. The contents of the pre-sentence report, when read in court were also of interest and the way in which these were incorporated into the sentencing process. This research method allowed for "personal experience derived from direct participation in the insiders' world, which is an extremely valuable source of information, especially if the researcher has performed membership roles and otherwise experienced life as an insider".\textsuperscript{54}

The courtroom observations made use of a technique and method outlined by Denzin (1989):

The interpretive interactionist attempts to live his or her way into the lives of those being investigated. He or she attempts to see the world and its problems as they are seen by the people who live inside them. As a strategy, this method throws the researcher directly into the social world under investigation. It requires the careful recording through field notes of the problematic and routine features of that world. Recurring structural, interactional and meaning patterns are sought.\textsuperscript{55}

After the courtroom observation, notes were transcribed into files on the computer. Notes were also taken on the particular themes and observations which were viewed. This was particularly important in contrasting and comparing judges. These additional thoughts and observations dealt with the perceptions made of the participant observation regarding sentencing philosophies and patterns.

It was important to seek alternative sources of information on the sentencing of female offenders. Court observation provided the opportunity for a check of the statements made by judges in the sentencing of women offenders. It also provided the opportunity to determine the sources which act to reinforce and maintain dominant perceptions of women and femininity. In addition it afforded the opportunity to identify how these constructions relate to women's criminality and the dynamics of the courtroom.

\textsuperscript{54}Jorgenson, 1989, p. 93.
\textsuperscript{55}Denzin, 1989, p. 42.
setting. Rather than viewing sentencing as a static approach, sentencing was identified within the dynamics of the litigation process. Issues which act to reinforce ideas of womanhood and femininity may be the outcome of defense tactics or elements contained in the pre-sentence report.

Utilizing Existing corrections data

An exploration of correctional data on female lawbreakers and a description of female criminality was made. This helped in the construction of the interview guide as well as the observation within the court. It is important to understand all aspects of female criminality including type, frequency, offender characteristics to properly frame and conceptualize the phenomena of the sentencing of women offenders. Correctional data will be used to frame the explanations of sentencing judges within a larger social examination of women offenders. Juristat and Canadian Correctional data is readily available. Limitations may be incurred in the ability to tie particular sentences to particular crimes or offenses.

Examination of the correctional facilities available within the sample area

Each city in which interviews were undertaken was assessed as to the alternatives as well as types of custody available to sentencing judges. This assessment included examining the money put forward to community corrections, the various non-profit agencies involved, as well as the type of support and training programs available. The evaluation will also include the examination and evaluation of the differences ethnic origin may play in determining the effects of incarceration as well as consequences. The lack of viable and quality alternatives to incarceration may make the sentencing of women offenders a difficult process and provide short-term incarceration as the only available option. Correctional options are dependent upon the way in which female criminality is viewed. A lack of community alternatives reflects the construction of female criminality as well limits the options for sentencing judges.
Accessing the Research Setting

Access to the sentencing judges was gained through the use of informants. The informants played a key role in ensuring participation in the chosen locations as well as providing the opportunity to explore the field in ways which would otherwise be impossible. One judge in each city has acted as a go-between with the other participants. Choosing to use informants was based on the fact that "unless access to the setting and cooperation of the people therein can be maintained, participant observation obviously is unlikely to be successful". The informants also provided for the possibility of further explanation and discovery. The role of the informant was further developed after their participation in the interviewing process, providing invaluable information into the sentencing process. In one case, after a key informant was interviewed I was able to gain further knowledge into court procedure and the use of other informal methods of dispute resolution. Key informants often turn out to be competent native observers. Once they understand what you are after, they are able and willing to assist in the data collection. Sometimes researchers cultivate these relationships explicitly in order to turn these people into field assistants. The informants also played a key role in solving the problem of "researching up". For quality interviewing there must exist a sense of equality between the person gathering the information and the person whose knowledge is sought. This creates space so the input of the research participant can help guide and shape the research interaction. With the input and teachings from the informant, it helped to create a more equal relationship with the judges being interviewed. Each judge was asked to sign a consent form which outlined the purpose of the research and provided a guarantee of confidentiality. The interviewed judges were also allowed to keep a consent form for their own records, as a further guarantee of confidentiality.

57 Jorgensen, 1989, p.91.
58 Kirby and McKenna, 1989, p.67.
Access to the courtroom setting was gained through personal requests with the judges sitting in those courts. Each courtroom observation was in a court in which the sentencing judge had been previously interviewed and consented to being observed. The observation sample consisted of 40 days of courtroom observation.

The Sample

The sample of judges was drawn from three cities within Ontario. The use of three cities was chosen for two reasons: the first being to provide an adequate sized sample and the second as a means of further validating the findings within Ontario. The three cities were of various sizes and dynamics. This also provided the opportunity for comparisons between cities.

The first city (City A) is relatively isolated compared to the other two. The population is approximately 120,000 and the judges also serve the surrounding, outlying communities. There is a lack of community alternatives for women due to its relative size. Women serving longer sentences, greater than ninety days are forced to serve them outside of the community. The second city (City B) has a population of approximately 200,000. It is an industry city which is close to the international border. There is a definite lack of community options for women offenders which is a concern for Probation and Parole as well as many of the judges. The third city (City C) is a much larger metropolitan center, the judges in this area reside over a population of approximately 500,000. There are a multitude of sentencing options for female offenders, including a variety of community options and non-profit organizations. Within each sampling area the sample of Criminal Division judges is almost complete, with the exception of one or two judges who could not be accessed for interviews. The interviews represent the views of the judges within each sampled area.

The interviewed research sample consisted of twenty sentencing judges. The sample contained nine judges from City A, four judges from City B and seven judges from City C. Within the study six of the interviewed judges were women. The sample included
judges from both the Provincial courts, Criminal and Family divisions as well as General division. Informants within each city provided for the opportunity to access the remaining judges. The court observations were done mostly in the two smaller areas. This was chosen primarily for ease of observation. The larger center has a relatively specialized system of processing offenders, whereas the smaller cities operate according to the time a case will require in court. The cases of interest for the research study (minor offenses, not likely to receive more than 30 days incarceration) were available for observation in the smaller communities at the beginning of each court session. The larger center separated out cases according to offense type, requiring more time to observe the same number of cases.

Data Collection

Data was collected from the respondents during interviews which averaged 30-45 minutes, with the aid of electronic tape recording in most cases. The court observation data was collected by way of notes. Each case was numbered (for example Female offender #4 or Male offender #2) and various descriptive data was recorded, relative age, ethnic background. Careful notes were taken of all observations within the court and each speaker's statements were labeled. For example, statements by the crown, defense or the judge were labeled as such. The sentence was fully recorded and any other statements made to the defendant such as a lecture or warning. Observations were made of all cases viewed within an observation day.

Data Analysis

Prior to formal data analysis, the researcher entered all of the interviews and court observations onto a word processing program. Each interview was labeled with a name and all of the interviews were placed within a file. The same was done for the court observations. Each interview was printed and placed within a binder for analysis.

Each interview was read several times. Notes were taken on the various themes which emerged in the readings of the data. After several themes had been identified, the
researcher re-read each interview with a particular theme in mind. The interviews were then tagged with a colour coding system. For example, explanations for women's criminality was one of the patterns which was identified within the research. Each explanation was given a colour coding to relate to a particular theme. Those statements made by judges mentioning depression may have been coded yellow, those statements referring to PMS coded orange, those referring to the coercion by a male partner coded blue. Within the theme of judges' explanations for female criminality, the interviews could then be re-organized to group the judges into types. The court observations were also tagged in a similar manner to correspond to the interview data. This type of analysis was done for the other patterns which were discovered within the data.

This qualitative research design utilizes a multiple methodological approach which is the most appropriate for undertaking a feminist criminological examination of the sentencing of women offenders. Qualitative approaches allow for the experiences of the subjects to be exposed in their true form rather than being distorted, degraded and even hidden by potentially arbitrary and abstract categories used for data collection and analysis. By exposing the misleading nature of traditional explanations of women's law breaking, this approach provides the opportunity to illuminate the way judges incorporate traditional constructions of women into sentencing. The use of semi-structured interviews provides the opportunity for the judges to speak freely using their own concepts and terminology. The ability to capture the considerations which judges include in sentencing and particularly the way in which they construct them is only possible through this chosen research method. The use of surveys and quantitative research tools would have lost the ability to describe the ways in which judges construct women's criminal behaviour and in particular the words the judges themselves use in this description.

The phenomenon being studied requires a thorough examination of the various aspects which shape the decisions made by sentencing judges. Through courtroom

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observation and interviews an examination of the sentencing of female offenders was made possible. These methods provide the opportunity to uncover the dynamic interactions of judicial explanations of women's law breaking and the influences which shape sentencing decisions. The qualitative approach allows for a rich description of the ways in which motherhood is constructed and incorporated into judicial decision making. This method of study thereby allows for the capturing of the judges' explanations. The possibility of comparing these explanations to the reality of sentencing was made possible through the observations made in the courtroom. The court observation may be seen as important for two reasons. The first is that it provided an opportunity for comparison with the explanations given by sentencing judges. Second, it allowed for the discovery of other relevant issues which act in the sentencing of female offenders.

The chapters that follow discuss the findings from this qualitative approach. Chapter four outlines the ways in which sentencing judges construct explanations for female criminality and in turn how these have an impact on sentencing decisions. Sentencing strategies or judge typologies have been developed to identify the various ways sentencing judges explain women's criminal law breaking.
Chapter 4

Judges' Explanations for Women's Law Breaking

Explanations of female criminality by sentencing judges are often based on perceptions of women as irrational. These include explanations of women's crimes in terms of mental illness or the pathology of a woman's physiology. These explanations provide understandings of women's criminal behaviour in relation to a woman's biology and mental health. Reliance on the socially constructed meaning of women's physiology persists in more recent research on female crime which has focused on a variety of considerations: parental deprivation and an inability to adjust to "feminine roles", psychiatric and familial disorders and impaired physical health, sexual corruption, conduct disorders and premenstrual and menstrual syndromes.\(^{60}\) The continued persistence of the belief in women's non-participation in criminal activity and their commission of only "feminine crimes" can claim partial responsibility for the persistence of irrationality as an explanation for women's criminality. Females who become delinquent appear to deviate more significantly from the socially constructed norm than their male counterparts due to the cultural restraints on women's behaviour. Thus women who engage in crime must traverse a greater moral and psychological distance than men.\(^{61}\) Since women are not expected to commit crime and explanations for such behaviour often describe women in terms of irrationality, women may be viewed as more deviant.

In this research a variety of judges' explanations for female criminality were examined. Judges' explanations were looked at with particular emphasis as to the ways in which they influence sentencing decisions. Women commit fewer and less serious crimes than men and are consequently seen to require a different approach by sentencing judges. The very lack of women within the criminal justice system is seen as a rationale for differential treatment by the courts. Explanations of criminal activity, particularly property

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\(^{61}\) Denno, 1994, p.92.
offenses are often explained in terms of a woman's non-clinical mental illness: both in the research and by sentencing judges. Rather than identifying the economic, educational and skills disparity which exists between women and men and which would logically explain why a woman might choose to steal to supplement an inadequate income, female crime explanations are found in psychology and physiology. Relying on views of women as pitiful and inept acts to perpetuate a gendered stereotype of women criminals. Judges view women as less responsible for their criminal behaviour than men when judges seek explanations in terms of the ways in which men coerce or involve women in crime.

An alternative view of the sentencing of female offenders is one which attempts to include an increased sensitivity to the issues and experiences of women in conflict with the law. This new approach to women offenders represents a change in sentencing by judges. This new way of sentencing women offenders is the result of shifting attitudes in dominant society as well as more women, ethnic minorities and family diversified individuals being called to the bench. The inclusion of women's social and economic realities provides for an all encompassing approach to sentencing. This approach to sentencing attempts to incorporate all of the influences which may be relevant to female offenders. The acknowledgment of differences in the lives of female offenders is not viewed as leniency but rather a way of ensuring equality of sentencing.

The following chapter will outline the explanations put forward to describe women's criminality. Within this study, the interviewed judges are divided into two

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62 Non-clinical mental illness refers to descriptions of criminality based on judicial assumptions about depression and distraction as well as suggestions of the influence of Pre-menstrual syndrome and menopause on shoplifting. There is no scientific or medical evidence cited to support these conclusions.

63 Family diversity represents individuals who are not from a family with a mother and father with children: it refers to people who are single parents, with or without custody; lesbian and gay couples, with or without children.

64 Elizabeth White and Marg Welch, "Women's Voices, Women's Choices", Report of the Women's Issues Task Force. (1995). Ministry of the Solicitor General and Correctional Services. Women are more likely to be living in conditions of poverty, to be single parents and economically dependent, to have left school earlier and to have fewer jobs skills or training than men. They are also more likely to have experienced physical and sexual abuse at some stage in their lives than men. Much of the research identifies female offenders as mothers and primary care-givers. (page 5)
groups according to the way in which they viewed female criminality. The majority of the judges relied on understanding women's criminality in terms of mental illness and arising out of abnormalities in women's physiology. These judges have been described as traditional judges, in that their sentencing strategy incorporates traditional and stereotypical definitions of femininity. A small number of judges attempted to frame women's criminality in terms of the unique experiences of women including their social and economic status. A change in sentencing patterns appears for those judges who acknowledge conditions peculiar to women. These judges have been identified as the new judges. Their approach to women offenders reflects an increased sensitivity to the experiences and conditions unique to women in conflict with the law. This may be a reflection of a change in the composition of the bench and changing attitudes towards women. Each sentencing perspective, whether traditional or "new" reflects the way in which judges explain and interpret female criminal behaviour. Each approach or perspective regarding women offenders has important implications on the sentencing of women.

Traditional Judges

The traditional approach to sentencing incorporates stereotypical and gender specific role expectations of women offenders. Sentencing judges attempt to isolate women's offending and place it within the context of nuisance or irrational behaviour. Within this research judges in many instances described women's participation in property offenses as arising out of the attributed physical and mental health of women. The majority of judge's characterized women's offending in terms of illness, as to maintain their social and economic position rather than identifying what feminists would contend are the true explanations for female criminality. The identification of "logical" or "rational" explanations of women's crimes are not proposed by many sentencing judges. Shoplifting, for example, was often seen as a way for women to get attention which is required by their physical condition as women. Defining ordinary female experiences,
such as menstruation and menopause as pathological, acts to justify and maintain women's subordinate position and the wide scale medical management of women." Women do not benefit by the existence of these stereotypes, rather they are forced to accept them in order to receive leniency.

**Female Criminality: The nuisance of "feminine crimes"**

A consideration brought into sentencing decisions by some judges is the perception that women offenders and their criminal activities are very different from male offenders and offenses. Women are seen to commit different crimes from men and to commit them for vastly different reasons. One judge identified the tremendous difference between male and female offenders.

*Quite frankly women do not commit crimes, not the social control crimes that our criminal law is based on, that [it] is oriented towards. That is a fact of life... You have shoplifting at one end and the stabbing at the other end [of the spectrum of female criminal behaviour]. And what do you have in between? Just the nuisance things like street walking and what not. And women up until now, you [the court] hasn't needed to thump them like the males and you haven't had the recidivism like you do with the males. Like the first offender [who] is treated far different than the second and third and fourth offender. And women just tend not to be in that category.*

(Interviewed Judge)

Women offenders who are seen to be quite different from the rest of the criminal class, require a special approach. This judge identifies women's criminal behaviour as little more than a nuisance. There appears to be a construction of the types of crime all women commit and consequently the type of sentencing approach which is appropriate for all women. The consequence of this gender specific approach to sentencing is that women who do not fit into these categories of criminal behaviour appear to deviate from the "norm" that has been constructed for women.

Judges recognize some women as professional criminals. These criminal women are viewed with a more harsh attitude, than the majority of women who commit crimes.

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One judge mentioned the difference between most female shoplifters and the professional booster:

*If a woman is a professional booster and there are some of those, they go on a shopping spree and get a whole basket full of stuff. And they know what they are doing. And I can recognize what they steal and how they go about it in the store that these people are professional boosters and they are taking it and flogging it in the bars and selling it to their friends. And they are making a living doing it. And they are going to jail.*

(Interviewed Judge)

This woman is viewed very differently than other women who shoplift. Jail is the judge's automatic reaction to this type of criminal. The woman who deviates from gender role expectations is going to jail in this judge's court. Women are not only being judged on their criminal activity but the degree to which they fit the social constructions for their gender. Women who deviate from the gender specific expectations, may be treated more harshly by the judiciary than those women who were seen to fit the gender stereotype. The use of jail sentences for theft are highly dependent on the way a particular female lawbreaker is constructed by the sentencing judge.

Leniency consequently depends on how women fit into constructed models of criminality. Women may be treated with greater leniency than men when they are found to have committed the typical "feminine crimes" and fit into the constructed model of the female criminal. Those women who fail to conform to these social expectations may be viewed more harshly than their male counterparts. Zingraff and Randall (1984) found that women whose crimes directly contradicted the gender role expectations for women tended to receive longer sentences than men. Russell also suggests that lenient sentences may be seen as the result of women fulfilling the expectations held by the judiciary.66 These gender based criminal explanations do begin to help in explaining the majority of crime committed by women. In many cases women's crimes which are identified as little more

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than a nuisance are explained in terms of women's physical and mental state. Women are consequently viewed as pathological and in need of treatment when they commit crime.

**Female Criminality: Menopause, Pre-menstrual syndrome and Depression**

Most judges within this study understood women's criminality in terms of the expectation that the majority of women are non-criminal. Criminal women were seen as mentally ill and the exception to the rule. There appears to be a denial of a middle group--those women who steal for a lack of money, education, employment opportunities, the ability to stretch a welfare check or any number of other reasons. The majority of judges fail to undertake a more encompassing view of women offenders, hence they do not take into account the varied experiences among criminal women. Women are rendered incredible through a definition of an accused woman as ill--the raging hormones theory--rather than giving attention to the real economic, political and social position of many women. Women's experiences in criminal activity are not acknowledged and do not play a role in the sentencing process. There is a lack of sensitivity by the majority of judges in the situations and circumstances which characterize the lives of many women offenders.

Within the larger culture the natural state of menopause is often associated with a woman's loss of beauty and sexuality. This is a cultural construction in which women are seen as entering into a new phase of life, one which is wrought with sorrow over the loss of attractiveness. These constructions are often incorporated into explanations of women's criminality and the sentencing process. Sentencing judges see women as unable to deal with this biological change in life. A woman's need for attention and self-affirmation is given as the explanation for why women commit property offenses, shoplifting in particular. One judge identified the role menopause plays in women's shoplifting, demonstrating the way a pattern may develop if she is not helped or treated for the problems associated with menopause:

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But the largest category is menopausal women. Women who feel their usefulness is gone because their kids have grown up and left and their husbands are ignoring them. Their attractiveness is leaving them, they become in effect kleptomaniacs, although that term is not in vogue. The fact is they steal for the attention that they get. And they do not steal anything they need, they don't steal anything they couldn't afford out of their pockets when they are stealing. Many women when they are alone at home do not receive any attention. When they steal they get the attention of a police officer, they get the attention of a lawyer, a crown attorney, a judge, a probation officer, a psychologist. All of these people are paying attention. And a few months later all of this dies down. And [that is why they steal]. . . women don't think of it this way [a way of getting attention]. But all of a sudden they are lonely again, nobody is paying attention.

(Interviewed Judge)

The above judge constructs the entire life of the "typical woman offender." This judge identifies that women's criminal behaviour may be described in terms of these types of patterns of behaviours. There is an assumption made as to the woman's need for attention and the role she plays within her home. Women are viewed as defining their whole lives in terms of their looks, children and husbands. This pattern of behaviour is easily proven to the judge by the fact a woman has the money or ability to pay for the items she has stolen.

Women offenders are viewed as fitting certain types and patterns. This allows for their criminal behaviour to be easily explained and dealt with. Rather than attempting to examine other possible explanations which may be involved, the judge assumes that women are constantly seeking attention and affirmation. This type of explanation is highly dependent upon a woman's age, social position and items stolen. This approach to women offenders fails to deal with the individual situations and experiences which bring women into the criminal justice system. The result is that these women may be seen to require treatment rather than punishment, while the situations and circumstances which brought the women within the criminal justice system are not addressed.

One judge identified the differences which mitigate sentences between men and women giving particular reference to mental illness:

Absolutely. You know the PMS syndrome and all that. All of these things may
Women's criminality is seen as beyond explanation. A "normal" woman is expected not to commit crime, assuming that something must be wrong with her when she does. This judge does not recognize that women may have some of the same 'normal' reasons to commit crime as male offenders. There is a complete disregard of the economic stresses which may influence women offenders to commit theft, check fraud or minor welfare fraud. Any time a woman steps outside of her gender specific role and the socially confining boundaries that role creates she enters the realm of the pathological. This judge has constructed what he/she defines as "normal" for women, criminal behaviour is not included in this definition. Explanations for women's criminality, according to this judge, must be sought in terms of irrational explanations. Men's criminality is viewed within the realm of "normal" male behaviour. Explanations of male criminal behaviour consequently do not depend on viewing men as mentally ill, but part of men's regular stock of behaviours. Criminal behaviour in men is viewed as the result of men having testosterone and acting like men. Male criminality is identified in terms such as, "boys will be boys." Women's behaviour is explained in terms of what is deemed "acceptable" and "appropriate" for women. Women's criminal behaviour consequently defines female offenders in terms of the irrational. Women defendants are at times forced to portray themselves as insane, because the law fails to recognize the stifling social conditions that contribute to their criminal acts. Women do not benefit from a form of leniency which categorically denies the circumstances of their social situation. This approach to women
offenders based on the need to protect women does nothing to seek to improve or alleviate their conditions. These explanations of women's criminality deny women responsibility for their actions and fail to examine the experiences and conditions which lead to their criminal behaviour. Consequently, they do not help women. Legal defenses grounded in the perceived irrational nature of women result in women being dominated and dependent on others for their fate. In fact this approach to women offenders is a way in which women's concerns are further marginalized and ignored. Legal defenses which force women to rely on describing themselves in terms of irrationality and less responsible do not afford women protection but rather act to further subordinate women.

One judge pointed to the need to examine the effects of PMS for those women suffering from a change in behaviour uncharacteristic of their otherwise "normal" behaviour.

If this woman is truly suffering from PMS... [and] as a result of the monthly cycle and a number of factors has acted in a manner that is totally out of character for her and is receiving treatment, then I'm sympathetic. In those circumstances. I will treat it as I would any other offender who came before me with a problem... and [has] taken responsibility for it and has started treatment. To me that is an exceedingly mitigating factor. Usually it would have to be documented.

(Interviewed Judge)

This judge has outlined the circumstances which produce sympathy within his/her court. Behaviour which is seen to be the result of a woman's biology is identified as deserving special attention and consideration. Although this judge attempts to include all aspects of a woman's experience into sentencing decisions, many researchers have questioned the merit of defenses based on a woman's biology. Graydon (1992), for example questions whether the benefits to individual offenders from the use of PMS offset the drawbacks PMS presents with respect to the treatment of all female offenders in general. To gain sympathy from the courts women are often forced to describe themselves in terms of pathology or sickness. Female offenders are then viewed by sentencing judges as sick or
mentally ill and are treated rather than punished. Recognition of a PMS defense is simply another example of the pervasive tendency to medicalise deviance in women rather than to attempt to understand the economic and social reasons for why females turn to crime.\(^6\)

These models and explanations utilized by many judges in sentencing decisions fail to recognize and acknowledge the variety of circumstances and situations surrounding women's criminal behaviours. Women are defined by explanations of criminality which leave them at the mercy of their own physiology and considered in need of treatment.

Shoplifting has also been identified as related to a woman's mental health. The identification of non-clinical depression within women shoplifters acts to separate their crimes from those of men. Women's shoplifting is often identified by the judiciary as a cry for help. The types of thefts women commit are often identified as evidence of their "mental illness". Women who are arrested and prosecuted for minor shoplifting offenses, such as theft under $20, are viewed as mentally ill by the very fact that they have stolen such a small amount. This separate understanding of female criminality has often meant that women's theft behaviour is not explained in terms of concrete reasoning like men's. Within the study men's shoplifting is seen as the result of economic necessity, women's theft offenses are identified with a pattern of depression. One judge outlined the differences between male and female shoplifting offenses and the types of patterns which are evident in female offenders:

> There seem to be patterns of shoplifting that you just see in women. The profile of the shoplifter will often be reflected among women but you don't get it among men. Sort of depressed and distracted and that kind of thing. I don't hear those kind of histories so much with men. It may be that those kinds of circumstances are more mitigating for women than they are for men. And so I would support a longer period of non-incarceration for [women's] theft offenses... The male pattern of shoplifter I see has to do with homelessness and drug problems. And those cases are the ones that I'm thinking of and those are the people who are basically asking to go to jail, some of them because it is terrible weather outside. And those kinds of cases I see more with men. In terms of small

shoplifting.
(Interviewed Judge)

This judge identifies patterns of shoplifting behaviours which are different for men and women. Rather than recognizing that these patterns are a result of differences between all offenders in terms of mental illness, drug addiction and economic hardship, they are seen as the result of gender-specific behaviour. The patterns in men are grounded in observable, tangible circumstances, whereas women's criminal behaviour is viewed in terms of a form of depression or distraction. Women's offending is not constituted as a rational, if socially unacceptable response to the situations and circumstances they are living in. Women shoplifters, according to the above judge, do not steal due to a financial need but rather because they are easily distracted. This judge sees women to be like children who require special care and consideration. Men's theft behaviour is described in terms of a lack of financial resources or related to substance abuse. Alternatively, women's theft behaviour is perceived as due to a form of distraction, depression or attention seeking.

The penal and legal systems often view female offenders as weak and "sick" and in need of treatment. Men are viewed as turning to crime as a result of personal economic tragedies whereas women's economic situation is often not identified. Another judge identified differences between male and female shoplifters. Women are identified as more susceptible to "mental illness" and more likely to demonstrate this in court.

["Mental illness] is more evident with female offenders I would say than it is with male offenders. Major psychological illnesses are usually very easily detectable with respect to male offenders and you can see it easily in court. But the... shall we call them neurotic or lower psychotic diseases are usually more prevalent [with women] or [women] seem to show... it more. More evident, that they are in an emotional state that you should look into. Where[as] it is much more hard to detect it in a male. If it is a minor thing. I think males everywhere are able to mask a lot of that whereas I don't think females mask nearly as well. (Interviewed Judge)

The judge points to the way these histories of mental illness, seemingly peculiar to women, are not evident in men. These explanations which label and construct women as "neurotic" without medical documentation and evidence. Women are viewed as more emotional than male offenders and their criminal behaviour as a manifestation of these emotions and a way to seek attention. These are similar to explanations of young offenders' crimes which are viewed to be the result of family breakdown and the need to seek attention.

The reliance on psychological and mental illness explanations for women's criminal behaviour is often supported by nothing more than the actual offense itself. There exists a circular form of logic which is the source for examining women's property offenses in terms of mental illness. The woman steals, therefore she is mentally ill but the only evidence that she is mentally ill is the theft. One judge pointed to the evidence of mental illness in the amount a woman had stolen. The very fact that she had not take a large quantity of merchandise was a suggestion of underlying mental illness:

*But always look at the circumstances of the offense. With the theft under $1000, such as those individuals who are stealing $8 or $10 worth of merchandise. In this case you have to look at the underlying problems. You need to look at the psychological problems, those which underlie the behaviour.*

(Interviewed Judge)

The fact that stolen item was of such a small amount appears to be sufficient evidence that there is something wrong with the woman. The implication is that a larger amount of stolen merchandise would suggest a more rational reason for theft. There is a form of tautology which this judges utilizes to support the conclusion that mental illness is the cause of the criminal behaviour. The judge quoted above is attempting to construct a rationale for this particular type of theft behaviour. It is interesting to note that the construction itself is one in which women are seen to commit typically "feminine" crimes. Other reasons for the behaviour may exist, such as impulse or economic necessity, including a fear of taking more. Women who fit into this category of theft receive lenient
treatment on sentencing, particularly if they are thought to need psychiatric care. These women are identified with the type of criminality which is peculiar to women.

Explanations by the judiciary for property offenses demonstrate the greatest perceived difference in male and female offending. Men's property offenses are viewed as the result of financial need. Shoplifting by men is associated with substance abuse. Women's shoplifting is more frequently related to the woman's mental state. Men are seen as stealing to support a drug habit. One judge identified the difference between men's and women's shoplifting offenses and demonstrated how women's offenses paralleled that of the young offender. This judge identified how women's shoplifting offenses are evidence of a form of mental illness, in which women are seeking attention.

_There may be serious emotional problems within the home. Many shoplift for attention. For young offenders and women it is not necessarily that they don't have the money, they may have it. They are not addicts. There is something else there and the shoplifting programs do not address this and this is important. . . . Men's shoplifting is more often related to their drug addiction, stealing to support a drug habit._

(Interviewed Judge)

This judge has identified women and children within a framework of attention seeking and emotional problems. The identification of women as similar to children, however, denies women a responsibility for their actions and behaviour. These differences in men and women's property offenses are seen as requiring a different treatment or consideration in the sentencing decisions. Differential treatment of women based on these types of defenses make women less responsible, thus a tangible solution is often more difficult to find. Also, the sentencing of women may not be addressing the specific needs of female offenders. McLachlin (1991) suggests the need to guard against the paternalistic stereotypes which view women as less than fully responsible solely on the grounds of sex. Such stereotypes, far from furthering the cause of feminine equality, perpetuate the sort of thinking that has so long resulted in the unequal and unfair treatment of women. All
women offenders are subsumed under the same category which often fails to acknowledge the individual influences associated with each female offender.

A number of judges identified women's lawbreaking in terms of "abnormalities" in their physiology. In an absence of evidence to the responsibility of women's biology, women's poor mental health is then often viewed as the cause of women's criminality. Feminine stereotypes of women as docile, soft, passive, masochistic, and domestic produce assumptions that women are not capable of "real" criminal behaviour. These constructions produce particular kinds of views of women and crime and often fail in recognizing the role women's economic and social situation may play in their criminal behaviour. Women who do not conform to this stereotype present difficulties for sentencing judges. Female offenders who present an opposition to these social constructions are consequently viewed as mentally ill. In acknowledging the experiences of many women with true physical ailments Scutt (1992) points to the danger of research which purports to attribute every antisocial or criminal act of women as arising out of their hormonal nature or character. The consequences of these types of legal defenses include women's lack of control for their actions and risk of being labeled incompetent. The sentencing of women offenders by judges who incorporate these views of women acts to reinforce dominant cultural stereotypes of women as passive and emotional. Explaining women's criminal behaviour in terms of the physical and mental health of women not only denies women responsibility for their own behaviour but acts to diminish and disqualify the forces peculiar to many women which may be responsible for women's crimes. A similar consideration pointed to by the judiciary is the role men play in forcing and engaging women in criminal activity. The identification of men who coerce women into committing crime acts to sustain women as helpless and inept and unable to take control of their own lives.

Female Criminality and the Man Behind the Scene

An additional explanation for women’s criminality identified within the traditional sentencing strategy points to the responsibility of men engaging women in crime. Within this study, several judges identified the way in which women are less responsible for their criminal behaviour due to the coercion by a man "behind the scenes". While it is important to acknowledge the way many women are abused both physically and mentally by their partners, it is not an accurate assumption to label men as the cause of women’s criminal activity. The denial of women’s responsibility for their own actions also poses the problem of women being unable to take control of their own lives in order to make changes. An additional concern is the fate of women who may not fit into these understandings of criminality. These social constructions of women’s ability to choose and take responsibility pose great difficulties for the women who do not easily fit into these constructions. Graydon (1992) points out:

The need to confront gender construction, from which standards of conformity and non-conformity are measured, is central to any attempt to address effectively the matter of sentencing the female offender. Criminological theories must be scrutinized to determine whether they reinforce unfair characterizations of female offenders based on patriarchal models of gender division.71

Judicial explanations of women’s criminality which rely on women as passive participants, coerced by controlling men act to further reinforce submissive characterizations of women. These act to marginalize the conditions of abused women and deny many women the ability to take control of their lives. The imposition of strict definitions of women’s behaviour creates difficulties for women who do not properly fit into these delineations.

The understanding of female criminality which construct women as helpless and inept do little to improve conditions for all women and may in fact place many other women in jeopardy. Working women, racial minorities and lesbian women who do not subscribe to or fit the expected model of womanhood, may face an "unsympathetic, even

alien, environment designed by white males to address the agenda of white males." It is important to identify the way in which explanations of female criminality fail to consider the women who do not easily fit into the models of criminality upon which all women are judged.

Judges often identify women as needing protection and care because they are women, rather than in light of the individual characteristics peculiar to each woman offender. One judge identified the way in which women are coerced by men into criminal behaviour and consequently are viewed differently.

_Economic background, if the man is stealing and work is available that is different to me than the woman who is stealing who has two or three young children in the home. Welfare fraud is quite often situational, where a man is behind the scenes twisting the female into making applications on the premise that the court will go lighter on her is she is caught._

(Interviewed Judge)

This judge has identified a situation which he/she feels is characteristic of female offenders. This judge constructs situations in which he/she can visualize a woman committing criminal activities. Women are seen as welfare recipients and mothers. The only way in which they would steal from welfare would be because a man had forced them into it. The judge fails to realize the economic hardships faced by women in their attempt to provide for their children while on welfare. This above quote implies a different understanding of women's criminality. Rather than affording women protection under the law, this approach to women offenders acts to further marginalize their position and ignore the circumstances which bring women into conflict with the law. It is embedded with traditional roles for women that explain and "justify" to the judiciary why a woman would commit a criminal offense. Women may deserve the sentencing benefits derived from this type of gender based leniency. As Cain (1990) points out, the problem becomes one of an operative ideology which reinforces and enforces conventionally gendered roles in conventionally structured familial units. It is not necessarily that women receive more

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lenient treatment because of their sex but rather the degree to which they conform to their
gendered social role.

Women's criminal behaviour may also be perceived as directly related to their
relationships with men. Men are seen as responsible for women's criminal activity. Men
are often identified as the cause for a woman's entrance into or the intensification of a
deviant or criminal lifestyle. Women are viewed as misled and misguided by male parties
to commit a criminal offense. Women's criminality is also seen to occur in patterns.
Women may be seen as committing more crime after they have begun a relationship with
an abusive partner or someone who has involved them in substance abuse. One judge
pointed out the patterns of female criminality which are associated with a male influence.

You can see patterns, [such as] a drug habit that wasn't there before.
What good is jail in this case. Women in particular. They may have taken up with
an addict and as the result of their new boyfriend, their offending has increased. In
this case there is a need for social intervention. And a different approach is taken... 
There may be serious emotional problems within the home. Many shoplift for attention.
For young offenders and women [it] is not necessarily that they do not have the money.
They may have it... There is something else there and the shoplifting programs do
not address this and this is important. Problems may be arising and there are new
strains.
(Interviewed Judge)

The judge has identified a man as responsible for a woman's drug use and criminal
behaviour. A woman's offending is assumed to be directly related to her relationship with
a man. Women are consequently identified as needing social intervention and in need of
being saved, from themselves and men. There is an assumption that this is a frequent
pattern in women's offending, one which is easily observed. Women are consequently
constructed in terms of types of offenders rather than assessing each woman offender
given the individual circumstances of her offense. While the point of sentencing is to
examine the individual characteristics and situations peculiar to the accused, women's
criminality is often identified in terms of classes of behaviours. All women are seen to fit
into particular groups of offenders. There are established patterns of rationalizations used
to explain these behaviours. The existence of these constructions create difficulties for women who fail to fit them. The assumption of a woman's lack of responsibility for her behaviour and seeing her as needing treatment is common. A woman's criminal behaviour from this perspective identifies women as needing help from a social worker rather than focussing on the harshness of the sentence. A woman's shoplifting behaviour is viewed as arising out of some type of strain. Women may also be seen as more easily reformed than men and a different approach is deemed necessary by this particular judge.

Some judges also institute a form of chivalrous leniency based on a perceived need to "protect" women. Judges frequently perceive women as the gentler sex, in need of shelter from criminal men who may lead them into a life of crime. One judge stated that:

[Women], because of their personal circumstances and their vulnerability and many times the circumstances of the offense—they have been lead into it by other offenders, particularly male offenders. In certain cases [this situation] is given weight on their behalf. And needless to say if they have children that is given special weight.
(Interviewed Judge)

This judge has outlined the way in which women are more vulnerable than male offenders and hence less responsible for their own actions. Weight is given to conditions surrounding female offenders which construct women as helpless. An examination of women's criminality from this patriarchal and protective stance does not recognize the way some circumstances are peculiar to women. This attitude further marginalizes women's voices and concerns.

Graydon (1992) indicates the need to examine women offenders' realities regarding physical and sexual abuse, economic disadvantage and racial discrimination all of which demand gender specific attention. The importance of such a review is further illustrated by the fact that the criminal justice system is both defined and maintained largely by men.71 It is important to note that a change in the thinking of the judiciary may produce a transformation in the sentencing of women, incorporating the effects of sentencing.

dispositions on women and the situations and circumstances which act to differentiate female offenders.

Rather than identifying the increase in a woman's offending in terms of the circumstances of the offender and addressing these, the removal of boyfriends and social intervention appear to be the solution. Often women are seen as "more easily reformed than men and that men didn't want to help themselves or even that females are easier to intimidate". This type of approach is highly dependent on the way in which a woman fits into the gender-based role of "victim-criminal". Within my study, several judges identified women's diminished responsibility for their criminal behaviour because of the influence or coercion of a man. Similar to the use of mental illness explanations for female criminality, blaming dominant males indicates a lack of recognition of the tangible reasons for women's commission of criminal acts. Not holding women responsible for their own actions within the criminal realm is an extension of the dominant culture and a view held by the majority of the interviewed judges. Some judges are now however, attempting to understand women offenders in terms of the harsh economic realities faced by many women, particularly those in conflict with the law. A changing judiciary may echo a new approach to female offenders.

The "New Judges"

A change in the judiciary, particularly the appointment of women to the bench, has resulted in a new approach to the sentencing of female offenders. These "new judges" incorporate a sensitivity to the circumstances and situations of women offenders. Rather than assuming that there is a single "type of woman offender", these judges recognize that a variety of conditions and situations may be experienced by women offenders. These judges also recognize the importance of incorporating an examination of the differential effects some sentencing judges have on women offenders. This new sentencing strategy represents a changing attitude in the judiciary to one sympathetic to the issues relevant to

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\(^{24}\text{Daly, 1987, p. 286.}\)
all women. At the same time these judges recognize that women offenders have been unfairly treated by a sentencing strategy which was not designed to deal with the issues of women.

A small number of judges in this study pointed to the need for a more broadly encompassing approach to understanding women in conflict with the law. Female criminality has often been understood in terms of the 'crimes of the powerless'. Women's criminality is frequently described as the result of women's victimization. Economic powerlessness, that is, poverty or being victims of chronic battering, and other situational determinants may be the key to understanding many forms of violent acts committed by women. Yet, women's crimes of violence make up only a small proportion of all female criminality. It is important to examine the potential of a victim-based approach to sentencing which denies women responsibility for their actions and further marginalizes their situation. Many other explanations for female criminality have reinforced women's gendered social roles. An examination which concedes the economic and social reality of many women offenders is a more appropriate approach because it is able to acknowledge that a variety of circumstances are not recognized in the present system of sentencing. It is important to acknowledge the ways in which some judges are now incorporating the social and economic circumstances of women offenders which is resulting in a better understanding of the criminal activity of these women.

Within this study five judges identified and acknowledged the conditions and situations in which many women live. The recognition of this social and economic reality is a more equitable way to approach and sentence female offenders. Between men and women offenders sentencing is seen to differ for some judges because of the acknowledgment and consideration of these influences on women offenders. One judge acknowledged the way a woman's life situation could influence a decision in his/her court:

\[ ^{75} \text{Hatch and Faith, 1990. p. 436.} \]
I think women generally get an easier ride. Saying easier ride is an unfortunate colloquialism. We don't get as many women. Most often the women we get [in court] is clearly because of economic circumstances. [they] have never had a break. . . And most of the time the women are here for a pretty pathetic fact situation. And what am I going to do with a mum and three or four kids and no community support? I mean that is a really serious factor, if you send her to jail what is going to happen to those kids. And we are told not to be concerned with those kinds of things but as human beings you are concerned. So we are generally getting them for offenses where they are the victim. You get the hooker who is being victimized by a pimp and god knows what has taken away their self image so they can do this.

[Many times] there are no other options. The mum on the minor welfare fraud, and I am talking about a one time thing. She says the check was stolen but really it wasn't enough. Well what are you going to do? Everybody knows welfare isn't enough to survive [on] anyway. So I think generally women are given more breaks and are less regularly incarcerated than men, even for a very similar offense.

(Interviewed Judge)

This judge has recognized that the economic circumstances of female offenders and past encounters with abuse and violence influence the types of criminal offenses women commit. These conditions are seen to play a role in women's entrance into criminal activity. The interplay of many circumstances and situations are seen as affecting the self-image of the woman offender. The economic hardships of many female offenders are also acknowledged as presenting women offenders with few options besides theft or cheque fraud. Women's situations and experiences are therefore recognized as important influences in the sentencing process by this judge. Rather than maintaining gendered stereotypes, this judge strives for understanding of the situations and experiences that are created by the existence of gendered roles and opportunities. By placing women's criminality within the context of women's economic reality, the differences between men and women's criminality may be acknowledged. Shaw (1994) notes that:

The backgrounds and circumstances of women who end up in court differ in a number of ways from those of men. They are more likely to be living in conditions of poverty, to be single parents and economically dependent, to have left school earlier, and to have fewer job skills or training than men. They are also more likely to have experienced both physical and sexual abuse at some stage in their lives than men. They present different problems in relation to substance abuse and its
By acknowledging the economic, physical and social realities of female offenders, judges are able to individualize the sentencing of all lawbreakers, particularly women. Women's criminal behaviour is thus seen within more rational explanations. Women's situations are consequently given merit within the sentencing process.

As the backgrounds and make-up of the bench change there may be a push to look at female offenders in terms of the influences and situations peculiar to women. In the past women have been sentenced according to a patriarchal construction of womanhood, which provided women with protection when they appeared to ascribe to gender-specific expectations. A change toward examining women offenders in terms of the circumstances of their life situation sensitizes the sentencing process to the experiences of women. One judge in the sample acknowledged that there are a multitude of circumstances at work which may underlie the reasons for women's criminality.

"Usually the explanation for repeat shoplifting for example, or those that sign NSF checks is some underlying cause. [It may be] drug... or alcohol addiction, sometimes stress due to economic pressures or various others [stresses], sometimes culturalization pressures. [For example], a recent immigrant to the country who doesn't speak the language, who doesn't have an income, frequently the women... a whole bunch of factors [may] underlie the behaviour. I like to see that those have been addressed through probation, because I think that is ultimately more productive for the public and the individual."

(Interviewed Judge)

Sentencing for this judge is tailored to the needs of the offender and the type of offense they have committed. The judge quoted above points to the need to look at the underlying reasons and causes which may have lead to the criminal behaviour. The inclusion of these possible explanations for the behaviour are viewed as key in the sentencing process, particularly the sentencing of women offenders. In addressing the underlying reasons for criminal behaviour, changes in the inequities between men and

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women both in the larger community and within sentencing may occur. Individual offenders with unique situations, particularly women, are identified as not fitting the dominant sentencing patterns of male offenders. This judge recognizes that there are numerous reasons and influences in the lives of women offenders and these must be incorporated into the sentencing of female offenders.

In an informal discussion with the judge quoted above, he/she commented on the importance of examining the effect a sentence will have on an accused. This judge pointed out that women who are experiencing difficulties due to cultural differences and economic hardships, for example, may be differentially influenced by many sentencing dispositions. These circumstances are seen as an important consideration in adjusting the sentences of particular women offenders. Other judges in the sample acknowledged that many women's situations and experiences with the criminal justice system differ greatly from those of men. The effects of a sentencing disposition on women offenders are viewed as important differences in the way in which male and female offenders should be treated.

Women's shoplifting offenses, although minor in terms of monetary amounts, are not always assumed to be predictors of mental illness. Within this research, several judges mentioned how they attempt to identify and explore the many reasons why a woman may steal something perceived to be not needed or financially required. One judge mentioned there are many reasons why a woman may commit minor shoplifting offenses.

*A lot of minor offenses of women are either NSF checks or shoplifting of items*—I've heard some judges say "but she stole a steak", but I say so what- what's the big deal between that and a can of beans, it's a desire for that little bit of luxury for her and her family. . . .

Shoplifting *(in 50% of the cases)* is because they can't make ends meet. Or they are poor budgetary planners. But so what. That's a problem of those who are not on social welfare. I am a poor budgetary planner. We [as judges] have to have tremendously flexible [in sentencing] and we do that for male and female [offenders]. (Interviewed Judge)

This judge pointed out a variety of other reasons why women offenders may steal. The judge acknowledged the difficulties 'in making ends meet', particularly for families on
welfare. The judge also recognized that women may be attempting to provide their children and family with the little extras which are not available otherwise. In comparison to other approaches this approach does not automatically explain criminality from a mental illness perspective. Rather this sentencing strategy attempts to incorporate an understanding of the social and economic situations peculiar to women, particularly women's responsibility for caring for children and shopping for their family. This judge is attempting to be sensitive to the variety of circumstances which may bring a woman into conflict with the law. Rather than incorporating assumptions based on stereotypical definitions of women into sentencing, this judge recognizes the need to look at the various situations which may be the cause of a woman's criminal behaviour. This judge does not assume that every female offender can be described and sentenced in the same way, rather it is important to acknowledge the circumstances which may separate women offenders from their male counterparts.

Several judges that were interviewed have recognized that there are many situations and experiences peculiar to female offenders which distinguish them from male offenders. This is an important step towards equity in sentencing decisions. This being the recognition and merit given to circumstances which may characterize the lives of many women offenders. While employment status is an important consideration within the sentencing process, many situations and circumstances which are more relevant to women offenders have been marginalized. These new judges are creating a sentencing process to more sensitive to considerations which in the past have been marginalized. The recognition of situations which play a role in criminality and consequently influence the ability of women to serve certain sentencing dispositions represent a move toward a more equitable approach to sentencing. This new approach to sentencing includes the incorporation of circumstances which may have a differential impact on women and become acknowledged within the courts. This type of approach allows for the
understanding of criminal behaviour of all accused women, in reference to their life circumstances.

Among the judges interviewed there existed a variation in the way in which women's crimes are explained and this influenced their sentencing of female offenders. This difference is reflected in the way women are treated and the types of sentencing dispositions they receive. The way in which women's criminality is being understood by sentencing judges is changing and hence the way in which women are treated within the criminal justice system will also change. The change from explanations of criminality grounded in the social constructions of women's biology and physiology toward a fuller examination of women's life experience may be the result of a change in the judiciary. This change represents an increased sensitivity to the variety of women who come into conflict with the law. The inclusion of a multitude of situations and experiences of all offenders would mean that the life situations of women offenders would not be marginalized or subsumed under the existing sentencing procedures designed to only deal with male offenders. One judge identified the way in which a change in the bench will result in a dramatic shift in women's treatment.

*Back in the old days—[the judges were] white, male and Anglo-Saxon... You could see in the cases, the reflection of the fact that the judges that were in they were affluent, middle-class males, where mothers stayed at home. They were not single parent families, so to them the single parent before the court was seen as scant. Send[ing] a mother to jail, and leave the children at home alone, was not a [possibility]. [There was an] assumption that the father was not a care-giver. [You] could see it in cases [before the court], the background of the judge was reflective in the sentence and out-come... [It is] not in the [official court] record. It was there and cannot [be] ignore it.*
(Interviewed Judge)

Leniency based on profound stereotypes of women may disappear as the bench becomes more diversified. As more women, ethnic and racial minorities and family diversified individuals are called to the bench, a change in the way in which women's crimes are viewed will occur. The inclusion of women's social and economic circumstances will act
to better describe and create an understanding of the criminal actions of women. The disparity in employment, poverty, abuse and family situations which characterize the lives of women issue a summons to reform the sentencing of female offenders. It is no longer sufficient to assume a need for the "protection" of women within the criminal justice system. There is a need rather to examine the role in which the social and economic reality of female offenders plays in women's offending.

At present in the courts gender-based leniency categorically describes women in terms of the social constructions based on their biology or psychology. Within this sample, the majority of judges (seventy-five percent), explained women's criminality and framed sentencing decisions based on these constructions. Women were seen to need of protection and care by the judiciary. These views act to prevent punishment, while prescribing treatment. Women are also seen as more readily amenable to reform and rehabilitation. Although the sentencing decisions between judges may not differ greatly, the degree of focus on the offender does differ greatly. Sentencing judges may give very similar sentences and avoid incarcerating women offenders but the reasons behind those decisions varies among the judiciary. Differences in the approach of judges are important in understanding the sentencing of female offenders. Stereotypical definitions of womanhood held by judges place many women in jeopardy. Social constructions of women offenders as mentally ill or suffering from PMS, force women to accept these definitions themselves or suffer harsher sentences. Even more at risk are multitude of women who are unable to fit into the established constructions of femininity and not able to benefit from this type of gender based leniency.

**Summary**

The explanation and understanding of female criminality by the judiciary is important in understanding the sentencing of women offenders. The majority of sentencing judges, seventy-five percent, construct women offenders as 'irrational',

mentally ill’ or ‘sick’. Women offenders who appear to fit these constructions may benefit from them and receive more lenient sentencing dispositions. The existence of these constructions however, forces most women to describe themselves in terms which make them less responsible or to risk harsher treatment. Women’s criminality as defined in terms of illness, has resulted in the perceived need to treat women offenders rather than punish them. The result of this treatment approach has been the lack of adequate and quality sentencing dispositions for female offenders. Although some women may benefit from a chivalrous sentencing modality, the majority of women suffer. The negative consequences are in terms of the punishments women receive and the failure to recognize and change the circumstances and situations which brought them into conflict with the law in the first place. The changing composition in the bench and the inclusion of more women within the judiciary has sparked a changing view of female offenders. The recognition of the various situations, both social and economic which often engage women in the criminal justice system allows for an increased sensitivity in the sentencing of women offenders. By examining women’s offending in terms of women’s economic, social and cultural situation, sentencing decisions may better deal with the circumstances and experiences of the women most frequently in conflict with the law.

Chapter Six will examine what, for judges, is the most important consideration in the sentencing of women offenders. Although all judges point to the importance of a woman’s care giving responsibilities, the way in which judges include motherhood in sentencing varies. Motherhood constructed in terms of social and cultural expectations of women as care-givers and nurturers are incorporated into sentencing decisions by traditional judges. Motherhood is understood in terms of stereotypical definitions of women as married and providing twenty-four hour care for children. This strict definition of motherhood fails to incorporate the experiences of women who may be single, lesbian and working outside of the home. A wider understanding of the experiences of all women who are parents, particularly those who come into conflict with the law is being made by
some judges. These judges are attempting to be sensitive to the experiences and conditions of all women and how these are involved in women's criminality. The majority of judges view motherhood in terms of gender specific expectations for women. The social construction of women as care givers has produced leniency for some women, but these constructs cause great difficulties for other women. A change in the bench has resulted in more realistic examinations of the differential effects of parenting on women offenders, but these judges informed by knowledge of women's varied issues and experiences are in the minority.
Chapter 5

The Role of Motherhood in the Sentencing of Women Lawbreakers

Whether or not a woman offender is a mother is the single most important consideration for sentencing judges. Related to this, and perhaps, inseparable is the way in which the convicted mother cares for her children. The way in which motherhood is deployed by judges produces certain kinds of sentencing strategies. The judges in this study exhibit four general views on motherhood that influence their sentencing decisions. These judge types have been identified as using sentencing strategies. First, some judges simply give some women, those who are mothers, more lenient sentences. These judges incorporate strict definitions of motherhood, which reinforces stereotypical definitions of women's role within the family. Second, another group of judges give women more lenient or harsh sentences based on their evaluations of women offenders as good or bad mothers. Third, there is a group of judges who attempt to apply a gender neutral approach to sentencing and consequently deny the differential effects of sentencing. The experiences of many women lawbreakers, particularly parenting responsibilities have been marginalized and ignored. Finally, there is a group of judges who attempt to examine the practical implications of dealing with women offenders by sensitizing the sentencing process to the differential effects of parenting on women offenders.

The variation in the way in which each group of judges constructs and deploys motherhood within sentencing decisions varied significantly. Although motherhood may in fact produce very similar sentencing results for many judges, the way it is incorporated into a larger understanding of the accused's behaviour and thereby translated into a consideration in sentencing does vary. The sentencing strategies identified within this research varied in the way in which motherhood was constructed. The first group of judges incorporate traditional definitions of motherhood. At the very heart of this construction is the maintenance of the traditional family. This includes specific roles for men and women and in particular certain expectations as to the way women should care
for their children. Women are assumed to be firstly mothers and secondly the parent who provides care for their children. Women are viewed as care-givers and nurturers. Motherhood is assumed to be a normal process within the life of all women. Real women are viewed to have children. This narrow definition of motherhood identifies women as married, heterosexual and often working within the home. All women who are mothers are consequently provided with leniency within the courts. The second group of judges construct motherhood in terms of "good" and "bad" mothers. Motherhood is often viewed as an aggravating factor when women appear to deviate from strict definitions of women's roles. These judges consequently determine whether a woman is a "good" or "bad" mother, these judgments often act to marginalize the conditions and experiences of many women. These include the experiences of women who are lesbian, single, working outside the home or deviating in other ways. These women may be viewed as using their children in court to improve their legal situations. The third group of judges deny the differential experiences of women offenders, particularly the unique experiences of mothers. Motherhood and the responsibilities associated with parenting are ignored. The fourth group of judges attempt to sensitize themselves to the way in which parenting differentially affects women offenders. These judges incorporate a larger examination of the lives of women offenders in an attempt to identify the way many sentencing dispositions may differentially affect women offenders who are mothers. As identified by Roberts (1994) gender equality of sentencing requires taking gender into account to include the actual effects of incarceration on women offenders. The lives of female offenders reflect the gender disparity in child care that exists in the broader society. Roberts points to the need to examine motherhood realistically as to the ways in which women may be differentially affected by sentencing decisions.

Within this study the majority of judges incorporated motherhood into sentencing through stereotypical definitions of femininity. These constructions of femininity include traditional definitions of women's role within the family. These are often reflective of
larger social constructions which identify women within a strict care-giving and nurturing role. Women who appear to fulfill the role of mother are given careful consideration. This construction based on stereotypical definitions of women and motherhood which places many women in jeopardy who do not appear to fulfill those definitions. Many female offenders may be at risk of being judged "bad" mothers and be perceived to be using their children. These women are viewed as deviating the ideals of womanhood which define women as passive, nurturing and understanding. These women are consequently being judged on their "mothering" abilities. Hence, the incorporation of motherhood in terms of traditional constructions of womanhood and the construction of some criminal women as "bad" mothers are corollary approaches to the sentencing of women offenders. The way in which motherhood is constructed by the judiciary will be shown to be crucial to the understanding of the sentencing of female offenders.

Sentencing Strategy/Judge Typology 1

Traditional Judges-Motherhood as a consideration in sentencing rooted in Chivalry

All of the judges within the present study identified the importance of considering the role of motherhood in the sentencing of female offenders. For the majority of the judges this consideration is grounded in a paternalistic and stereotypical definition of women's roles. Daly (1987) found that women are identified by the court to be more likely to have dependent children than men. Women are often assumed to be mothers and along with this assumption includes expectations as to their role as care-giver. Women offenders who are mothers are consequently afforded protection by the judiciary in their ability to fulfill the expected role of mother. Women are expected to fulfill their familial obligations, in which for them child care should be more important that wage earning. The special consideration given to women who are in mothering situations acts to reinforce the role of women as care-givers and nurturers. The weight that child care is given over wage earning for women is evident in the responses given by judges when
questioned of the difference between male and female offenders. In terms of motherhood
one judge identified it as:

*A definite factor and that is a reasonable consideration. But you could
argue that if you are sentencing the man it [the sentence] could impact on
the family as well [if he was working]. But especially if you have a young person,
sole support of her three children and, you know, what I am going to do?
Put her in jail and the children are taken by Children's Aid Society. That is not an
alternative that I like... Who is going to take care of the children? If it is a single mom with two or
three children, I can't just disregard that and say I am the court and you will do
this and too bad. Again the offender herself may be very resentful of that
and there would be a greater impact on the children than I would want.*
(Interviewed Judge)

Motherhood and care-giving responsibilities are identified by this judge as more important
considerations than a man's role as a breadwinner. Yet, the gender expectations are clear
in the way the judge assigned these "parenting" roles to the man and woman. The judge
outlined which roles are specific for each gender. Women are seen to be the care-givers
and leniency is based on this given consideration. This judge has established the roles
men and women have within the family, which includes assumptions about child care
responsibilities. Within this construction, women's roles are determined by traditional
expectations which define women as nurturers and care givers. This limited range of
experiences for women offenders fails to realize the diverse situations of all women.
Sentencing decisions consequently act to reinforce traditional attitudes of child care
responsibilities. The use of gender-specific attributes may benefit some women within
sentencing decisions, but the majority of women who do not fit these stereotypes suffer
because of their existence. The lack of recognition of the difficulties of single parents and
working mothers acts to further marginalize the majority of offending women within the
criminal justice system. This judge's attitude toward child care is evident in the selection
of options perceived to be available for the offender's children. This judge assumes that
the mother will take care of the children or the only other alternative is Children's Aid.
Many attitudes among the judiciary which construct women offenders in terms of
traditional definitions of womanhood and motherhood are shared among other court officials.

**Shared assumptions by court officials**

There appears to be an assumption that women are the only available source of care for children. One judge identified the way defense lawyers use motherhood for their female clients:

>Of course, [for defense lawyers], submissions is violin time whether it is female or a male before you. If it is a female they have an extra string in their bow to play.

(Interviewed Judge)

This judge acknowledges the fact that many defense lawyers rely on motherhood as a defense or explanation for their female client's criminal behaviour. There is an assumption that this type of defense is available for all women defendants. In this statement the judge is acknowledging that a gender-based difference in sentencing exists for women offenders. Yet, many female offenders do not fit these constructions and may consequently suffer more harsh treatment. Motherhood is considered an influence which is applied to all women indiscriminately. Submissions for male clients rarely speak to the man's role in care-giving, but rather remains within the role anticipated by the court, that of provider and breadwinner. Within the court, many defense lawyers mention the role men play in providing financially for their families but rarely speak to the care-giving responsibilities of their male clients. The following are court observations of statements made by defense lawyers upon submissions which are reflective of many of the submissions put forward for male clients:

*He is 32 years old, steadily employed. I think he supports his son who lives with his ex-wife.*

(Defense Lawyer, Court observation)

*He [has stable] employ[ment], he pays support to his kids.*

(Defense Lawyer, Court observation)
The existence of gender specific parenting roles is ever present in the courts. There is an assumption that traditional parenting roles will gain favour within sentencing. Defense lawyers consequently rely on defining women as nurturers and care givers and men as working fathers who support the family. These defenses are responded to and maintained by court officials in attempts to gain consideration by the judge. The reliance by court officials on gender specific defenses do not question the merit of the submissions, but merely help to maintain the roles peculiar to men and women with regard to children. Defense lawyers rely on the knowledge that motherhood will mitigate sentences for their female clients. Assumptions regarding women before the courts are shared. In the following submission put forth by a defense lawyer, opening statements include a women's status as mother, the number of children she has and their ages. The submission by one defense lawyer stated that his/her client:

She was pregnant at the time of the offense and original court date. This is somewhat mitigating. She is married with two daughters. She is a full-time housewife and her husband is working as a baker.
(Defense Lawyer, Court observation)

Within the courtroom, attorneys rely on the belief that women as mothers will mitigate sentence. Women are presented in a way that demonstrates they are accepting their role within the family and may be viewed as a good parents. These shared expectations of women shape all aspects of the sentencing of women offenders. Defense lawyers depend on the impact these constructions will have on sentencing judges. The judges then incorporate them into their determination of a sentencing disposition. The very possibility that a woman may become a mother has been identified as mitigating. A judge identified the way in which defense lawyers push the motherhood defense.

The counsel would stand up and say "my client is pregnant", she could be two weeks pregnant, but she was pregnant. Or say "I think my client is pregnant"
It got to the point where counsel could say "She is in her fertile years". I have had the parent taking care of their child argument—but it is more likely to spring to their lips when it is a female client.
(Interviewed Judge)
Within the court assumptions are shared by the judiciary, crowns and defense lawyers. These include the expectation that women are mothers and primary care givers. These presumptions result in a sentencing process which differentially influences women offenders. Women who meet these expectations are likely to receive gender based leniency, those who don't often receive more harsh treatment and sentencing dispositions.

Motherhood as an expected role for all women

Many judges interviewed often assumed that the woman before the court was a mother with care-giving responsibilities. Motherhood is viewed as the woman's central role and identity. One judge identified the ever present dimension of sentencing female offenders:

*But there is the added dimension that often these women have young kids. And how do you sentence them? What do you do? You're sentencing the mom and kids to deprivation—different and ever present factors in the sentencing of women. If [she] still has the kids, then she must be a positive aspect on their lives, otherwise they would not still be with her. Social services would have taken the kids already.*

(Interviewed Judge)

The judge is determining whether or not the female offender before the court are "good" mothers and a positive influences on their children. Female offenders are at risk of being judged on the basis of their ability to care for their children. The assumption that women are mothers not only differentiates the sentencing of male and female offenders but is based on a paternalistic definition of women. Also included in this case are assumptions as to the role women play in their children's lives. The only possible options for caring for the children are the woman offenders or social services. When asking one judge about the differences between men and women and the impact on sentencing, he/she responded by stating that you "must look at the economics [and] fines relate to the ability to pay. For those on welfare you reduce the fine. [And] ladies have kids." It was also assumed that women before the courts who have children, are likely to be on welfare and that this is the
difference between men and women. These considerations are not circumstances discovered in the sentencing process or in the pre-sentence report but rather assumptions of all female offenders.

While employment and financial obligations peculiar to male accused are weighted based on maintaining a male offender's lifestyle, women's experiences of motherhood are not identified in this manner. One judge identified the source of the different treatment of women with regard to parenting:

Well, I think chivalry was a factor. But I will tell you something, when you have a lady come in, with one or two toddlers, plead guilty to stealing some meat from a Dominion store, it takes a pretty hard-hearted judge to put her in jail. But her husband with two kids, if he had enough of a record you might (Laughter)
(Interviewed Judge)

This particular judge constructed a social history for women offenders as mothers and committing minor theft offenses. Women offenders are identified as married, with children and committing only specific "feminine crimes". Women offenders are viewed as caregivers and their criminality is seen to arise out of their role as a parent. This is the type of woman the judge most closely identifies as a female offender, a woman who is stealing to feed to her family. This judge does not mention or acknowledge the variety of offenses that women commit. It is assumed that women, particularly mothers would only steal to provide for their family. The consideration of motherhood in the sentencing of female offenders arises from a chivalrous attitude which expects the court to protect women. This approach to women offenders disguises itself as a way in which women are protected by the courts, but in reality this "protection" acts to maintain women in a position of submission. Women become reliant on others for representation in a court system which fails to acknowledge the life experiences of all women. If this occurs, the judiciary fails to identify motherhood as a legitimate consideration in sentencing. The courts are seen as doing women a favour by including these types of defenses for women offenders. The maintenance of a sentencing protocol based on strict definitions of "proper" behaviour in
women does not benefit all women rather it acts to the detriment of many women offenders. Another judge responded to a situation where a female shoplifter who was a mother received probation on the sixth offense in terms of the way in which judges view women.

_You see, your bench is primarily male and they tend to be gentlemen. And the old code with respect to women is quite different._

(Interviewed Judge)

This judge points to the sentencing of women in terms of a code which protects women and provides them with gender-based leniency. The existence of a code in the treatment of women offenders is grounded in a protectionist stance towards women. This judge approaches women according to preconceived notions and fails to look at the variety of circumstances which may influence women's involvement within the criminal justice system. The existence of such an approach denies the variations in women's offending and confines women to strict definitions of behaviour. Those women who do not fit these constructions are viewed as deviating greatly from what is expected from women, particularly mothers. Motherhood and the variety of experiences peculiar to female offenders are not identified, but are part of a chivalrous view of female criminality and women.

Shaw (1994) identified how the backgrounds and circumstances of women who end up in the court differ in a number of ways from those of men. According to Shaw, motherhood rather than being identified as a legitimate consideration in the sentencing of women, is subsumed under a larger social construction that identifies women as weak and in need of paternalistic protection. Women are assessed less with regard to the circumstances peculiar to their offense than because of an established form of leniency which assumes all women are in need of protection and guidance. This protectionist position relies on identifying women as inept and incapable of making decisions which will
have an impact on their lives and those of their families. One judge in my study stated that:

*I think that the female may get one or two extra bites at the apple before jail kicks in.* [A male shoplifter on the third or fourth offense] gets the short sharp. *While* the female will be the fourth or fifth. You say, well, *maybe one more chance.*

(Interviewed Judge)

Women, from this perspective, are treated differently because they are women. Women are viewed with pity, rather than an examination of the circumstances which brought them into the court system. The maintenance of these paternalistic attitudes marginalizes women offenders while failing to examine the circumstances and situations which may have lead to women's criminality. This judge acknowledges that women offenders are given extra chances before a jail sentence would be given. Yet, the avoidance of custody dispositions is only available to women whose lives resemble that which has be set up as the ideal for women. This appears to be the result of a form of protection or leniency for women, but in actuality it is another way in which women are dominated. Women are denied the opportunity to voice the circumstances which have involved them in crime. The existence of leniency based on traditional expectations of women furthers the marginalization of the voices of women offenders.

Considerations which mitigate the sentences of women offenders are often characteristic of the larger role and social expectations of all women. This is particularly true of the differences which exist between male and female accused with regards to child care responsibilities. Daly (1987) pointed to the way court officials view the differences in the sentencing of men and women as balancing out in the end. If a man is working, an attempt is made to maintain his employment. If women provide home care for children, attempts are made to preserve their situations within the home. This supposed balancing out is based upon presumed divisions and stereotypical identifications of women's roles and are not grounded in the reality of women's lives. As pointed out by Roberts (1994),
judges who mitigate sentences based on child care responsibilities may incorporate biased images of motherhood in sentencing decisions. Although sentencing decisions may not ultimately vary from those judges who consider motherhood in terms of the unique experiences of women, they do act to reinforce dominant constructions of womanhood. As pointed out by Russell, when women are accused of crime, it is their gender-role that is at the heart of the treatment they receive. The mythology of lenient sentences for women is exposed as a sexist distortion.\textsuperscript{76} It is not the case that all women receive leniency, but women who are perceived to fit into the constructed category of motherhood may receive special consideration. Those who deviate from this construction may in fact suffer from its existence. Women's status as mother also provides an explanation for the possible reasons why a woman would steal or commit crime. Women's criminality has been explained in terms of women's attempts to care for and provide for their families. In addition to granting women consideration within the courts, judges often explain women's criminality on the basis of their role as mother. These women are rewarded by the judiciary for fulfilling their expected role as care givers and nurturers.

\textit{Motherhood constructed as the cause of female criminality by the judiciary}

Within the sentencing process motherhood has also been used by sentencing judges to describe and explain the reasons why women commit crime, particularly property offenses. Women's parenting responsibilities are often utilized to provide a rationale for why women shoplift and steal. Women are viewed as providing for their families, within their traditional role as care givers. Criminal behaviour in women is often defined as something arising out of the woman's role as a mother. Within the present study judges often speculated as to why a woman would come to steal or shoplift. Worral (1989) points to the problems of assumptions about femininity which come to define the experiences of all women. Yet the material conditions of many women allow them to

resist the consequences of those definitions more successfully than others. Rather than attempting to find explanations grounded in the social and economic conditions experienced by many women, some of the judges in the present research viewed female criminality in terms of the pressures of child care responsibilities. Women's crimes were often normalized which is evident in the use of such terms as shoplifted and "picked up a few things". Women are not identified as stealing but rather providing those things necessary for their children. Through the high value placed on the maintenance of the traditional family, judges are able to rationalize why women steal. This notion of the traditional family outlines the proper place of women and their role as mother within the family. This includes women being married and fulfilling proper parenting responsibilities.

Among the judiciary exists an ideology of "familialism" resulting in particular expectations, values and assumptions of women which are imbedded in society's definition of womanhood. Carlen (1992) suggests that women in the criminal justice system may be discriminated against by a judicial logic shaped by outdated typifications of both femininity and women's proper place in an idealized nuclear family. It is possible to see that women who do not fit into this particular role and do not appear to be stealing food for their children may in fact be subject to a more harsh approach. It is for those women who do not fit into the expectations of women as mothers that the existence of these stereotypes may be detrimental. Carol Smart (1992) points to the existence of a compulsory motherhood, which does not simply mean the imposition of pregnancy and birth, but also entry into a nexus of meanings and behaviours which are deemed to constitute proper mothering. Women's criminality was recognized by many judges in this study to be within the realm of women's proper role as mothers and care takers. Sentencing from this perspective fails to recognize the ways in which parenting responsibilities are differentially carried out by women. These judges outline and

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incorporate into sentencing only one experience rather than the multiple realities of most women lawbreakers.

Motherhood provides an explanation for why some women come to violate the norms generally accepted within our society. One judge in the study pointed out the difference in the sentencing of women offenders. These "ladies have kids. What are they stealing, baby food?" Women offenders are assumed to be parents and their theft offenses are constructed in terms of their role as mothers providing care for their families. Women's property offenses are identified as arising out of the pressures of motherhood. This judge has identified only one type of female offender, the mother struggling to feed her children. This construction does not describe the majority of women who are involved with the criminal justice system. Motherhood is identified and rationalized as the cause of women committing crime. This rationalization ignores the economic reality of many single parents, with limited education and skills struggling to provide for their families in absence of a second income. This view of women offenders is only capable of providing limited understanding of typical "feminine crimes", rather than the other offenses women may commit.

The submissions put forth by defense lawyers often act to associate a woman's crime with the responsibilities she has for raising children. As identified by one defense lawyer, women's crimes are often related to their role as mothers.

*She is 40 years old. With five kids, ages 11 to 21. Three live at home with her and depend on her, which is related to this charge. She is under a great deal of stress due to past abuse and the difficulties with the kids and therefore has not worked.*

(Defense Lawyer, Court observation)

The pressures of child rearing are seen as causing women to commit crime. However, when a woman steals items which are not necessities this is viewed quite differently. The defense lawyer fails to point to economic hardships the woman may be experiencing due to her lack of employment. This judge identifies stress related to the above mentioned
woman offender, but there is little examination to the sources of this stress. This is similar to the views of women as weak and "mentally ill" to mitigate sentence. The problem with the existence of socially constructed expectations of women as care givers and nurturers is the difficulties they create for women who are seen to deviate from this "norm". There exists a 'gender contract' which routinely describes or represents women in terms of their domestic, sexual and pathological dimensions. Each of these spheres are socially constructed rather than accurate representations of the lives and experiences of all women offenders. Female offenders neutralize the effects of their lawbreaking activity by allowing others to describe and invent their "true" nature. Women whose circumstances and attitudes place them on the margins of those categories may in subtle ways be placing their liberty in jeopardy.\footnote{Anne Worrall, "Working with Female Offenders: Beyond Alternatives to Custody", \textit{British Journal of Social Work} (1989) vol.19, p. 79.} Motherhood and care giving are the primary concerns in the sentencing of female offenders. The maintenance of the family, with the woman as the nurturer is the primary consideration in sentencing decisions.

The existence of expectations for women's role within the home and family have serious implications within the sentencing process. Some judges identify the importance by providing sentencing dispositions which help to maintain a woman's home life. Sentencing dispositions are tailored for dealing with women offenders. One judge pointed to the benefits of using the short sharp sentence for female offenders.

\begin{quote}
I like it. Particularly the one day in jail. To experience what it is like to be in jail. It is the deterrence effect. And otherwise it has not changed their life too drastically. I would like to think it has some benefit. Even two days may be too long. Especially for women with kids and expectations for dinner to be prepared. It doesn't effect their life too much. . . And frankly one day is as sharp as three. (Interviewed Judge)
\end{quote}

The short sentence is viewed as a way to deal with the criminal behaviour without disrupting a woman's life within the home. At the heart of this sentencing decision is the judge's assumption that women are responsible for caring for and feeding the family.
Although this judge accords leniency, it is only for those women who are viewed as fulfilling their role within the home. Consequently, many women are placed in jeopardy and risk as they are judged by standards which do not parallel their own experiences. Sentencing decisions made from this approach do not take into account the variety of situations and circumstances in which women raise their children.

Explanations of women's criminality, which in turn maintain traditional gender roles, place women at risk of being judged in terms of their parenting abilities. The existence of leniency grounded in a chivalrous definition of motherhood creates the possibility of motherhood being viewed as an aggravating factor in sentencing. This is particularly true for those women who deviate from strict, stereotypical expectations of women's proper role within the home and family. Rather than considering possible explanations for why a woman on social assistance may steal, the majority of judges in the present research place the stealing within the context of motherhood. Traditional definitions and constructions of women based on an assumed role as mother, care giver and nurturer has resulted in many women being judged according to this strict definition. Women who appear to deviate from this norm consequently risk being judged more harshly. The following sentencing strategy is a corollary approach, as opposed to an opposite. The existence of strict definitions of the expected role of women creates the possibility of many women being judged according to a traditional standard of femininity. These marginalize the experiences of many women within the criminal justice system.

**Sentencing Strategy/Judge Typology 2**

**Judges who construct the "good" and the "bad" mother**

Because of their engagement with the criminal justice system, often women offenders are judged on their capabilities to parent and care for their children. Women's role as parent are likely to aggravate their positions within the courts. The fact that a woman is a mother may be viewed as aggravating her situation. Within the criminal justice system, women who commit crime may come to be defined as "bad" mothers,
depending upon the way in which the judge defines the woman's criminality. Denying the experiences of offending mothers has resulted in many female offenders who are mothers being viewed with harsh criticism. This is evident in the conclusions made by the court as identified by Allen. (1987):

From my study of the report, especially that of [the social workers in the hostel where she is now living], it would appear that Mary is a good mother to her children and it would, in my view, be cruel to deprive them of her.\textsuperscript{81}

Sentencing is highly dependent on the regard judges give to the issue of child care as well the way in which they identify and define the motherhood role. Criminal women may be viewed as less responsible for their children and less able to care for them. The sentencing of women offenders which relies on female stereotypes may emphasize a woman's marriage stability, record of parenting and "mothering" abilities.\textsuperscript{82} This places many women in jeopardy of being judged on their criminal behaviour and their perceived ability to care for their children. This may be particularly true for women who are single, working, lesbian or disabled.

The type of criminal activity may also influence the way in which parenting may be viewed within sentencing decisions. Those women committing "feminine crimes" may be less likely to be judged as lacking parenting capacities. Daly (1987) found that more leniency was given to those who commit crime intended to help family members, than those seen as motivated by self-interest or greed. Women stealing food for their family may conform to the judiciary's definition or construction of the "good" mother. But those who commit crime outside of this realm or bring their children to court risk being defined as an inadequate or "bad" parents. One judge in the study revealed the way he/she felt towards women who commit crime. This judge discussed how women with children are viewed within his/her court.

\textsuperscript{81} Hilary Allen, "Psychiatric report: the logic of gender", The Psychology of Sentencing: Approaches to Consistency and disparity, Donald Pennington and Sally Lloyd-Bostock. eds. (Oxford: Centre for Socio-Legal Studies. 1987) p.109
\textsuperscript{82} Graydon, 1992. p.124.
They say “my client is a single mother and she has to provide 24 hour care for her children” and I say, “she had no trouble being out on the road at 3 am with a blood alcohol reading of 160. Did she drink all that at home and then go for a drive while being with her kids 24 hours a day?”... I have had the parent taking care of their child argument—but it is more likely to spring to their lips when it is a female offender/client. And she never gets a baby-sitter and she was at a bar—so who was watching her kids?

(Interviewed Judge)

This judge has constructed what he/she felt surrounded the events of the woman's offense.

This woman was scrutinized by the judge on the basis of her behaviour and the perceived impact on her ability to parent. Women are at greater risk of being judged by their ability to parent and care for children as a result of their criminal behaviour. Women who commit crimes are often identified as "bad" parents who lack responsibility. Men, on the other hand, who do not often have these primary care giving responsibilities are not in jeopardy of being judged in a similar way. Women who generally have the greater responsibility for child care are more likely to be identified as bad influences on their children. Men, who are not likely to share primary care giving roles, are not seen to negatively influence their children in the same way. One judge identified the way in which offending women are a negative influence on their children.

I'll treat them the same as any other offender, male or female. If the family or having a family is somehow positive on them, that's fine. If however, they are what they are, I sometimes think it is worse. A woman... is usually in charge of the children... bringing up the children to a great extent. ... [But] because of the influence it has on the children [which is] negative, And no question that it does, so what if there are children at home.

I say, "well what are you going to do when they find out their mother is a thief or your mother is whatever? Do you really think that you should be brought back to those children? Are you a real good role model for them? ... Maybe you are only a biological mother and have done nothing for those kids since they were born." So really, no, that does not effect me, at all. It might have the opposite effect... I might even ask Children's Aid to investigate [for] cases of abuse or if there is a suggestion of abuse.

(Interviewed Judge)

This judge has determined that criminality in women is worse than for men because women have the primary responsibility for child care. Rather than attempting to include
the difficulties a woman may experience in providing for her children in sentencing decisions, her failure to be a "good" parent aggravates her situation. This judge has determined that criminal women are poor role models who may in fact be abusing their children. This is all determined by the fact that she was found to be committing a criminal offense.

Women's criminality is more closely identified with a woman's ability to parent. This is similar to findings by Russell (1990). She discovered that when women are accused of a crime, it is their gender role that is at the heart of the treatment they receive. Judicial expectations of women as "good wives and mothers" based on a white middle-class value system lie behind the myth. Women are expected to be the care-givers. When they commit crime their ability to fulfill this social expectation is then placed in question. In the court a woman's child care responsibilities may also be placed in question. In one case, where the offense was not related to a woman's child, an observed judge reminded her of her child care duties, "don't forget you have a child to consider".

Women are often reminded by the judiciary of their obligation to fulfill their expected role as a "good" mother and care giver. When women commit crime they may be regarded as failing to live up to their role as mother. Women are seen as deserving of leniency when they do fulfill this expected role. When they do not, they suffer the consequences. One judge identified the role motherhood plays in his/her courtroom.

_I think that child care is a factor that does give women an edge if you are considering whether they are going to jail or not. If I and I can only speak for myself, if I think she is a care giver [she may not go to jail]. Of course, there is a lot of bad little girls running around doing drugs and everything else who are mothers and having kids._

(Interviewed Judge)

This judge has taken it upon himself/herself to determine who is and is not a good parent. If this judge determines the defendant is a good parent and mother she may receive special consideration. This judge likens the behaviour of women in conflict with the law to that of

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children. Women within the court are more likely than their male counterparts to be judged on their parenting skills. Some women are seen as requiring special consideration in sentencing. It is only those women who are living up to these expectations of the "good" mother who benefit. Women who deviate may receive more harsh treatment. Additionally criminal women who are mothers may be identified as using their children to gain favour with the court and within sentencing. These women who have been constructed as "bad" mothers may be viewed as using their children or hiding behind them.

The "bad" mother hiding behind and using her children

Women who bring their children to court are often perceived as using their children to acquire some type of leniency. Rather than acknowledging the difficulties women from a lower economic status may have in obtaining child care, these women may be seen as using and manipulating their own children. One judge identified the way in which he/she perceives children are used within the court in helping to mitigate sentence.

Children are a great tool to use. Well, first of all, a courthouse is not a place for a child to be. First of all, the number of serious offenders here exhibiting some of their anti-social attitudes, it just doesn't cut it. Not only that, but that child may be sitting around here for 2, 3, 4, 5 hours before their matter comes forward. [Additionally] there is no one to take care of that child, because we do not provide baby-sitting facilities here. . . But you have to have a certain degree of flexibility because maybe the person didn't have anyone. It think that there is the other aspect of it, bring the child and we can use this. It is even better than saying they have a child, here it is. You know some of the shoplifting charges, [the accused says] "I was preoccupied with this child bouncing all over the place. I kind of forgot [and] walked out of the store." And if you see the child going bananas in court, you sort of think maybe she has a point. But again I think that children are not usually brought to court because there are no other alternatives. That is my suspicion. They are being used but now that is not true in all cases. But I just do not think this is a place for children regardless of why they may be here.

(Interviewed Judge)

This judge has determined that women who bring their children to court in many ways are using them to gain favour with the judge. There is acknowledgment of the difficulties of obtaining child care, particularly for women with several children; still, these women are
seen as manipulating the court. A woman's care giving abilities are then at the fore front of sentencing decisions.

Women are seen to use motherhood to help their situation. Circumstances which may help to mitigate a man's sentence are not seen that way by the judiciary. Any other accused could use whatever circumstance possible to mitigate a sentence, such as, employment, education and training, economic situation or substance abuse. "Men's excuses are accepted by the Crown and the courts as highly relevant to the crime the man has committed, and to the sentence. The reality of women's lives is given short shrift". It is interesting to see the way in which parenting is identified in the context of something to be manipulated, more so than the need to maintain employment or the responsibility of a drug addiction for a criminal behaviour. Criminal women who are mothers are consequently constructed as "bad" mothers. These constructions influence the way many women, who are unable to find day care and are forced to bring their children to court, may be treated.

Women who bring their children to court are perceived by some judges to be hiding behind their kids. Rather than identifying child care among the multitude of influences which are relevant to the sentencing of women offenders, motherhood aggravates a woman's position in sentencing. Women, according to one judge in the sample, use their children to help their situation in court.

*Quite often women will hide behind their kids. Unfortunate but true. They will bring their kids to court and dare me to send them to jail. Basically saying, "look I got a kid, you can't send me to jail"... Other women who have brought their kids, that are looking at a jail sentence potentially, I say, "are you planning to take your kids to jail with you when you go?" And when they say "no", I say, "well the alternative is Children's Aid. But I will give you until tomorrow to put them with your mother or sister or whatever."
*(Interviewed Judge)

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Problems in finding and affording child care are questioned by the court, instead children's presence is viewed as a way in which women manipulate the court. These women who bring their children to court are constructed as challenging the court, "daring" the judge to send them to jail. There is little recognition of practical considerations of caring for children, particularly those women on a fixed income. When women bring their children to court, for whatever reason, it is assumed most often to be for the purpose of using them. The court may threaten with Children's Aid or investigating the home life. The courts have the discretion to have women's children taken from them. For many female offenders sentencing is a form of double jeopardy. They are being penalized for failing to live up to society's image of women as law-abiding, respectable and competent socialisers of society's future citizens as well as having committed punishable offenses.85 Women are judged both on their own criminal behaviour and the ways in which they have failed to be "good" mothers to their children. An opposing approach to dealing with women offenders, identified within this research, includes the attempts made by some judges to deny the experiences of women offenders. These judges attempt to develop a gender-neutral approach to sentencing which views motherhood as a "non-factor" in sentencing.

Sentencing Strategy/Judge Typology 3

Judges who view Motherhood as a "non-factor"

With a growing expectation for women to be treated equally within the criminal justice system at all levels, from arrest rates to sentencing decisions, there has resulted in a tendency to neutralize and ignore differences between men and women. For some judges86 motherhood and child care responsibilities are given very little consideration. For some of the judges within this study there is an attempt to neutralize the differences which exist

86 Within the present study four of the judges (20%) discussed the way they ignore differences between male and female offenders.
between men and women, particularly the differential effects parenting has for women offenders.

In attempting to apply blind justice to all accused, several judges in this research deny the way in which parenting has a differential impact on women. This gender neutral approach fails to acknowledge the economic stresses women have in caring and providing for children. Their criminal behaviour is still identified as more offensive than a man's because of the fact she is in the charge of children. One judge voiced the way he/she felt towards mothers who steal.

*If... a person comes to me and says I'm stealing because I am poor and have no money for clothes, I give them a blast and tell them it is not necessary. They are just lazy, all you have to do is go down to this place or that place and they will give you food, they will give you clothes, they will give you stuff. You know that, don't be telling me you have to steal. You are insulting all those other hard working people who struggle and struggle through the lean years. You are insulting all of them when you tell them you have to steal when you are poor, it is not true.*

(Interviewed Judge)

It is evident from the statement that as well as denying the merit of considering child care in sentencing decisions, the economic situation related to this role is also not acknowledged. Those women who do steal to provide extras for their children, not available through welfare or donation, may be viewed in a very harsh manner. Women may be stealing to provide their children with the things they need to fit in at school. There also exists an assumption of the availability of resources which may not exist for all women, particularly those isolated physically and socially. Many women do not have the time or physical means to get to the shelters and food banks to obtain these necessities. These judges may also be ignoring the embarrassment and time consuming nature of lining up to obtain the donations of food and clothing. Judges approaching these women from an upper middle class value have no first hand knowledge of the struggles of working class women.
Often judges will attempt to ignore motherhood, but consequently deny the merit and value of child care responsibilities within sentencing decisions. One judge identified the role motherhood plays in sentencing decisions in his/her court and how the defense attorneys attempt to push this factor.

_So if they [defense lawyers] think it will have an impact [they will use it]. As a crown- we were doing a plea negotiation. The defense said "my client is a single mother with two children." I said, "so what I am a single mother with two children," and he said "right, okay", and left... In respect to keeping women out of jail [the defense attorneys] know what to say. The difficulty they are having with me is—a lot of what they are saying is effective with other judges isn't being effective with me._

(Interviewed Judge)

This judge compares being a woman with two children with care-giving responsibilities and a high income to the majority of women before the court in judging it is not an important consideration within sentencing decisions. While acknowledging how some judges take motherhood into consideration, this judge identifies the way she is attempting to utilize a gender neutral approach to sentencing. This judge feels that the use of gender neutral sentencing is the best way of achieving equality of sentencing.

From the point of view of some judges, motherhood has gone from being a way in which women obtained leniency in front of some judges to being completely ignored by others. The treatment of women based on paternalistic attitudes has been replaced by some judges with an attempt to move towards a gender neutral approach to sentencing. This has meant that the circumstances surrounding women's criminality are often denied. This move towards a polar opposite approach to sentencing may in fact mean that women's life circumstances are never be fully explored, particularly the way in which women are differentially affected by many sentencing dispositions. One judge identified the way in which this paternalistic attitude is disappearing.

_There is always a paternalistic attitude you have to guard against. I think that it is pretty well gone. Women have rebelled against the paternalistic attitude and that is one of the things [reasons for its elimination]. I think that women's views have been accepted by the bench for obvious reasons. It is the right attitude. With that_
goes the leniency that sometimes was seen when they did come to court.
Paternalistic attitudes that women were complaining about is not the one about
why you gave a lighter sentence because of a woman (was before you). It is the
other paternalistic attitudes that you are aware of.
(Interviewed Judge)

The elimination of this attitude may be the appropriate approach by the courts, but the
failure to recognize the difficulties experienced by women offenders may be the
consequence. While this judge has attempted to apply a blind eye to gender, the failure to
recognize the differential effects of sentencing decisions may in fact produce more harsh
sentences for many female offenders. One judge identified the way women in the past
received leniency and the changes that have taken place since then:

I think nowadays, nobody differentiates. The only time it comes into play,
of course, is (and they [defense lawyers] play it on the court all of the time)
and it's like, "Your honour my client has two children at home, who she cares
for, she's on welfare and she has no one to take care of the kids". Now that
doesn't work, any more. No, that doesn't work.
(Interviewed Judge)

While recognizing that this was a consideration in the past, some judges now attempt to
ignore the role motherhood may play on female accused. It appears that there is a move
being made to recognize only those circumstances which apply to both male and female
offenders. Another judge identified how in the past women were able to use their
children. This is seen to be diminishing. Children and child care responsibilities are not
identified as circumstances which differentially apply to men and women but rather
parenting responsibilities are seen as a way in which people attempt to justify their own
criminal behaviour. The judges told of how they regard children with sentencing
decisions.

I don't let people hide behind their kids. As used to be the case. It used
to be [the case], ...when I was a lawyer. The prospect of sending a woman to jail
was much less. But I bend over backward to ignore people's gender.
(Interviewed Judge)

Often women offenders with children are identified no differently than male
offenders, who in many cases, are not the primary care givers for children. The role
motherhood plays in sentencing decisions may in fact be very small. One judge identified how he/she may give a woman time to arrange care for her children:

*And I say, "well, I'll delay sentencing to such time that Children's Aid can step in, take the children for temporary custody or put them in a foster home until [you have] completed [your] term".*

(Interviewed Judge)

This approach ignores differences between men and women in child care duties. Women's role as care-giver, in many cases in addition to breadwinner, is being denied. This judge is punishing the woman before the court in two ways. The first being the imposition of sentence and the second the loss of parenting and custodial rights to her children. Women may be at greater risk of losing their custody rights than men, who do not provide the primary child care. Suggesting a solution such as Children's Aid, does not take into account the maintenance of the family for a woman which is usually not at risk when a man is being sentenced. The option of Children's Aid as alternative is suggestive of the way in which many judges view offending women. Women's role as mother is placed at the forefront, whereas men's parenting roles are not placed in jeopardy in the same way. Male accused are less likely to lose their custodial rights as parents due to sentencing decisions since their parenting role is not as large an issue as it is for women. A change from this gender neutral approach to women offenders is taking place as more women, ethnic minorities and family-diverse individuals are called to the bench. This change has meant an increased awareness to the experiences of women offenders before the court.

**Sentencing Strategy/Judge Typology 4**

**The New Judges: Incorporating the differential effects of parenting on women offenders into sentencing**

The changing characteristics and background of the members of the judiciary and shifting attitudes within dominant society with regard to women, has changed the way motherhood is incorporated into sentencing decisions. Several judges within this research pointed to the unique situation many women experience due to child care responsibilities.
Rather than placing motherhood within the context of an expected social role, women's care giving responsibilities have been identified within the socio-economic reality of women. Through recognizing the economic reality which exists for many women who come into conflict with the law, these judges legitimize motherhood itself as requiring careful consideration in much the same way as employment, age and record are viewed.

White and Welch (1995) believe a woman's total life experience must be kept at the forefront of all decisions throughout her involvement with the criminal justice system. This acknowledges the differential effects some dispositions may have on women who are responsible for the care of children. In reality few men in prison are the primary caretakers of children; most women in prison are primary caretakers.87 A realistic approach to motherhood within sentencing decisions would not act to reinforce stereotypical definitions of women, but rather acknowledge the way in which parenting may differentially affect men and women. An examination of the circumstances relevant to women promotes sentencing based on an individual approach rather than purely a way in which all female offenders may be processed. This addresses the needs of all women within a variety of settings and situations. As pointed out by Worral, (1989) there needs to be an individual approach in sentencing which recognizes the fact that many female offenders are not in the same circumstances as their male counterparts.

*Motherhood: A practical consideration in the sentencing of female offenders*

Several judges interviewed acknowledged a need to incorporate the individual circumstances of the offender within sentencing decisions. An important aspect to this is the way in which some judges are now identifying and exploring the way parenthood may be used to differentiate between male and female accused. Rather than adopting an ideology which accepts motherhood and care-giving responsibilities as a given, some judges are recognizing the way many dispositions may unfairly treat women. For instance

women responsible for the care of several children may not be able to fulfill community service requirements and custody dispositions may differentially affect the lives of women.

Along with this "new" way of thinking is the realization that sentencing options are not the same for both male and female offenders. Lack of resources for female offenders due their low numbers may in fact mean that the treatment of women within the correctional system is far different than that which men receive. Those judges who acknowledge these differences point to the realistic ways female offenders should be treated. To deny the reality of correctional options for female offenders is to sentence women to harsher treatment.

In asking judges how parenting relates to sentencing, some acknowledge the difference which exists between men and women. One judge identified the reality parenting has for female offenders.

*Yes it is true. And I don't think that it is paternalistic. I think it is realistic. In most studies, even in the higher educated classes, up to 80% of the women do most of the child care duties. But most of the people we are dealing with are not highly educated and the job opportunities are limited. Often there is no viable care-giver other than the spouse or the single mother. Quite often we are dealing with a single mother.*

(Interviewed Judge)

This judge recognizes the differences which exist in care giving between men and women and includes these within sentencing decisions. The inclusion of the offender's education, skills and family responsibilities provides for the most accurate assessment of the ability to successfully complete a sentencing disposition. This judge is able to identify the inequity which exists for many women, including those not involved in the criminal justice system.

In pointing out the economic and social conditions which exist for all women, particularly those who are involved in a conflict with the law, motherhood is more likely to be recognized as a valid consideration in sentencing. Rather than assuming care giving roles, the influences of female accused are individualized and recognized as unique among female offenders.
Another judge was asked if he/she perceived forms of leniency towards women. An example was given whereby a woman on a sixth time shoplifting offense was not given a jail sentence. The judge described the elements which may have prevented a jail sentence and created what was perceived to be leniency.

*It might be leniency for women*. But I don't personally perceive it [as such]. I treat everybody the same, as much as I can in the circumstances of any given case. I really don't see it as leniency towards women. If there is a single mother with three or four children, I might tend to find a disposition other than a term of imprisonment. But it all depends on the offense, the circumstances surrounding it, the background of the accused. Predominantly it is the women who are the single parents.

(Interviewed Judge)

The recognition of the differential effects of parenthood on women offenders is part of an all encompassing assessment of female offenders to this judge. Including the responsibilities of many women into sentencing decisions, is similar to the incorporation of other considerations such as prior record and the circumstances of the offense. Motherhood is viewed as one of the many constituents important in the sentencing process. Judges who are sensitive to and incorporate in the experiences of women create more equitable treatment within their courts. This is in opposition to a form of equality defined as equal treatment of men and women, especially when men's experiences and behaviour are taken as the norm, forestalling fundamental changes and in some instances worsening women's circumstances. The role of motherhood may only be identified as a legitimate consideration in sentencing when judges concede that care giving responsibilities are more often characteristic of women offenders than men.

Several judges in the sample acknowledged that women cannot be subsumed under the established mode of sentencing which was designed to deal with male offenders. In examining the circumstances which mitigate sentences which are available for all accused, women are seen to have added responsibilities which outweigh their male counterparts.

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One judge identified that "child care responsibilities often distinguish the position of the male and female offenders." Another judge pointed to the reality of child care responsibilities which often reside with women.

Women tend to be care-givers. They take care of the kids and this affects sentencing. Women experience more problems with community service, unable to complete the amount of service due to their responsibilities in the home. Women often cannot pay fines, they are more likely to be on Family Benefits, so sometimes fines are a problem. Women with young children experience difficulty with community service. On minor offenses there is some leniency for women, they usually are the prime child care workers. But more men are caring for their children now. Not necessarily true just [for] women. This equals [things out] a bit more. There are some different considerations.

This judge continued to explain how these differences may in fact differentiate the male and female offender and recognized the differential effect of sentencing dispositions. The judge pointed out the problems of some of the sentencing dispositions for female offenders.

On minor offenses there is some leniency for women, they usually are the prime child care workers. You can't deprive a family of the mother. And therefore there is some variance there. You find alternative measures to jail. Women's emotional needs are higher because of the added responsibility. But there is the possibility of a man with children too.

(Interviewed Judge)

Rather than an assumption of a need for leniency due to a woman's gender, judges are undertaking an examination of the effects of a particular sentence. There appears to be a growing recognition of the responsibilities which differentiate women's position, particularly in terms of child care. Rather than assuming all women are mothers with these responsibilities there is an investigation into the influences which affect the individual accused. While some judges within the research admit many women receive breaks, some demonstrate that there is a realistic basis in the decision to treat a woman with children differently. One judge pointed to the importance of realistically sentencing women offenders according to the circumstances of the case and offense. This judge also stressed the importance of not assuming this to be a form of chivalrous treatment of women.
You see it is not simply paternalism. There is a really practical implication. What is going to happen to those children? And sometimes I have made a point of putting sentencing over until she can make arrangements. But I am also aware of the practical implications.

(Interviewed Judge)

This judge does not view these considerations for women with children a form of gender based leniency, but one of the many practical considerations which much be taken into account in sentencing decisions. Along with this increased concern into the effects various sentences may have on women who have parenting demands, there is also an increased focus on the way in which women's criminality is closely related to their personal circumstances.

The differential effects of sentencing dispositions on women offenders

An examination of the correctional options and the way they may differentially influence male and female offenders is an important aspect to consider in sentencing. To fairly treat women within the justice system is to realize the circumstances which may have a differential impact on male and female accused. Once judge discussed the difference in sentencing between male and female offenders demonstrating the importance of an individualized approach.

For me what I'm looking for is, what can I do to prevent this person from coming back. Or help this person out so they don't come in front of me again. [Female offenders are treated the same as men] if they are similarly situated. . . For fines, how I differentiate with the women and the lower socio-economic groups is to give them tremendously long periods of time to pay, extend the time and keep extending the time.

(Interviewed Judge)

This judge has stressed the need to take an individual approach to all accused before the court. From his/her point of view, it is no longer sufficient to apply the same considerations to all accused. This approach means tailoring sentencing dispositions to the individual offender and realizing that not all accused can be dealt with the same way. This has also meant the inclusion of the differential effects a sentence may have on an accused, such as a fine on someone with limited resources. Several judges are now
acknowledging and incorporating an individual and specific approach into the way in
which women are treated in their courts. Graydon (1992) points to the problems of
sentencing women, particularly mothers and those in tight financial situations.

Sentences currently imposed on female offenders may have an unduly harsh impact
on the offender. Non-custodial penalties such as fines, probation and community
service orders, although often seen as lenient sentencing alternatives, may have
a disproportionately harsh impact on many female offenders as a result either of
the offender's impecuniosity or inability to comply with the Court's direction as a
result of competing child care duties.85

This approach to women offenders accepts motherhood as a valid consideration within the
sentencing process. By acknowledging the effects a sentence may have on these aspects,
the courts help to maintain the positive influences and bonds of the offender. The
Women's Issues Task Force has found that incarcerated mothers are very concerned about
their families and deeply affected by the separation from their children. The Task force
identified the impact on children can be equally damaging. Other research has shown that
the children of imprisoned mothers suffer from family disruption and social stigmatization,
and are five time more likely than their peers to be labeled and processed as delinquents.90
By examining motherhood within sentencing the positive aspects in a woman's life may be
maintained, which is not only beneficial to the individual woman and her family but the
community as well.

One judge pointed to the difficulties some women experience in serving some
sentencing dispositions. Some women who have been caught shoplifting may want to hide
this from their family and husbands. These women experience particular difficulty in
serving certain sentences, particularly fines. This judge outlined the problem many women
may be having.

If it is a culturalization problem, those cases pose the greatest difficulty to me.
[These women] by and large only associate with family... Their money is doled

90Elizabeth White and Marg Welch, "Women's Voices, Women's Choices: Report of the Women's Issues
out by the husband... Often times... that money would seem inadequate and...
[the] woman goes to the store and shoplifts. [for] the special pair of running
shoes the child wants because everyone else has them at school... And the
dilemma is [that] if this offense and involvement before the court becomes
known to the male... she is likely to receive much more severe punishment at
the hands of that male than at the hands of the court... Probation
becomes difficult because contact [with the offender] poses problems with
disclosure. Fines are simply out of the question, they have no economic means
to pay... And those, of course, pose trouble for me.
(Interviewed Judge)

This judge has identified that often these women do not have the ability to fulfill their
sentencing obligations. The lack of financial resources may have been the cause for their
initial involvement with the court and this eliminates the possibility of paying a fine. The
logistical problems in completing a sentencing disposition pose real problems for many
women offenders.

An additional concern in sentencing which is finally being recognized is the
realization of the lack of facilities and alternatives for women offenders. Of the judges in
the survey by Brodeur (1988), 81% thought that there existed a variation in correctional
options between communities. This, in turn, resulted in discrepancy in sentencing.\(^9\) In my
study, the accessibility of community alternatives and custodial dispositions, the
availability of programming and the distance to the offender’s home town, are
incorporated into the sentencing by judges. The inclusion of these “facts” in sentencing
allows for judges to acknowledge the practical realities of dealing with female offenders.
The lack of custodial facilities and programming for women in jail is also taken into
account during sentencing. As one judge acknowledged “custody is not as available for
female offenders and not as varied. For example, a third time offender is likely to receive
a jail sentence [short sentence]. Female offenders are not as likely”. The lack of

\(^9\) Jean-Paul Brodeur, Renate Mohr, Julian Roberts and Karen Markham, "Views of Sentencing: A Survey
of Judges in Canada.", Research Reports of the Canadian Sentencing Commission, (1988). Department of
Justice. p. 19

Question: Does the variation that exists from community to community of custodial and non-custodial
programs create variation in sentencing across communities that should not occur?
21% Definitely yes: 60% Probably yes: 15% Probably not: 4% Definitely not.
community resource centers, which would allow a woman to serve her custodial sentence within the community, decrease the likelihood of a woman receiving a jail sentence, particularly a lengthy sentence. One judge discussed how the lack of a halfway house facility for women offenders would result in a lighter sentence for women.

Yes. I've put it [the lack of facilities] on the record, I think it is discriminatory. If Provincial Corrections... are not going to provide the services to women they... [corrections and] the crowns can not expect me to... follow through. If there is a halfway house for men that allows them to keep working, there should be one for women. If there isn't, then, what I will do is tighten the probation order, so that it is almost like house arrest. The female would be operating almost under the same conditions as the male. When you are through work you go home. You can effectively achieve jail through probation if you make the order tight enough. Then the female gets to live at home too, which is better than a halfway house, especially if she has children.
(Interviewed Judge)

The inclusion of the availability of resources within a given community is an important aspect in the fair and equitable sentencing of female offenders. Disparity in the actual facilities for women to serve their jail sentences represents a practical concern for the sentencing and correctional management of women, particularly those who are mothers.

The inclusion of the practical implications of sentencing women with children, particularly those with small infants is viewed as an important consideration is the sentencing of many women. Those judges, who incorporate the logistics of sentencing female offenders, attempt to create equitable dispositions for women.

In one of the cities in the study there exists a problem for women being sentenced to intermittent sentences. The numbers of women serving jail time are small, consequently, when they are sentenced to weekend jail time they will serve this time. For male offenders a weekend sentence will often mean checking in and heading back home. The realistic examination of the way in which sentencing affects women is an important aspect to the fair treatment of women within the criminal justice system. It is especially important for the many women who are mothers. The weekend sentence may mean
arranging for child care. The following statement identifies the way in which many judges feel towards the use of some dispositions for female offenders:

*Well, let me tell you the type of thing that was happening. The area jails are unbelievably over-crowded. We therefore know as a practical matter that if we give someone a weekend sentence, they are not going to serve it if they are a man. However, the women were doing their time. And a couple of us were really upset, saying this is really unfair.*

(Interviewed Judge)

This type of discrepancy in actual results of a sentencing disposition has serious consequences for women offenders, particularly if they have responsibilities for child care and employment. Another judge supported this statement and further pointed to the way in which women are discriminated against in terms of sentencing alternatives. The correctional alternatives for women and the effects of sentencing options are seen as an important consideration in the sentencing of female offenders according to one judge:

*The real concern here is the intermittent sentence for women. It was found that more women were doing their intermittent time. Since there are fewer women [offenders], [there is more space available for them when they are sentenced to jail time], [consequently women were] actually [doing] their time. Due to overcrowding, many men weren't doing the time. They were often showing up and being given credit and then let go. There are new programs for women, so they can do their sentence in the community [in order] to make up for the disparity. But it really depends on the circumstances. And therefore I sometimes decrease the time given [that] the disparity exists.*

(Interviewed Judge)

For many judges the practical concern for the costs of a sentence to each individual accused is as important as the circumstances which would be considered in the sentencing process. The determination of the length of a woman's custodial sentence may take into account the differential effect of the disposition. Hence, some judges sentence women according to the actual difference a particular sentence will mean to the offender. The inclusion of these considerations consequently allows for a more equitable approach to women offenders. By incorporating the practical implications of dealing with women
offenders within corrections, these judges are better able to account for the experiences of all women who come into conflict with the law.

The judges in the sample who take into account the social and economic situation of women offenders and the practical implications of dealing with women in corrections into sentencing decisions are in the minority. Child-care responsibilities, economic hardship and lack of community supports are all situations which peculiar to the majority of female offenders and are important considerations in the sentencing of women. The differential effects certain sentencing dispositions have on women offenders are dependent on the various life experiences of all women offenders. Sentencing decisions which include all of these considerations consequently provide a more equitable approach to dealing with female offenders. By incorporating these into sentencing decisions judges are not only able to identify the way in which a sentence may affect a woman, but allow for predictions of the success of sentencing dispositions.

Summary

The way in which judges in the present research incorporated motherhood into sentencing decisions was not standardized. Although all of the judges interviewed considered motherhood an important consideration in the sentencing of female offenders, the way in which motherhood is deployed in sentencing varies. The implications of these applications are important.

The first set of judges incorporated motherhood into sentencing in terms of a set of socially constructed gender roles which allowed for a form of gender-based leniency. The majority of judges within the research viewed motherhood in terms of the patriarchal protection of women which places a high value on the maintenance of the family and women as care givers. Although these "chivalrous" judges may in fact reduce sentences, gender-based leniency will not help all women. The expectations people have of women's capabilities, the values and assumptions imbedded in society's definition of womanhood which in theory were established to 'protect' women and thought to offer them leniency in
the courts, operate to the detriment of women. The act to reinforce and maintain the role of women as care-givers, further ingraining the gender roles and stereotypes which women are forced to fulfill. Roberts (1994) sees judges who mitigate sentences based on child care responsibilities as incorporating biased images of motherhood in their decision making. Women's criminality is consequently not identified within the realm of the rational, related to the various social and economic situations peculiar to all women, but rather associated with women's role as mothers. Although women may benefit from the existence of paternalistic attitudes in the criminal justice system, there is also a cost. As long as paternalism exists in any form, women remain subjected to the ideology that they are less responsible than men. Their dependency upon men for protection and guidance is perpetuated. Yet, upon a closer examination it is evident that this approach to women offenders is really a form of domination cloaked in a guise of protection and care of women which acts to further subordinate and control the actions of all women within the criminal justice system. The reliance of these types of gender constructed roles and identities act to perpetuate a myth of female criminality in which women either must conform to or be judged against.

The existence of strict definitions of femininity based on stereotypical roles for women create the possibility of many women being judged as "bad" mothers by the courts. The second sentencing strategy identified in this research is corollary to the first, in that women who deviate from social expectations will be treated more harshly by the courts. Women are more likely to be judged "bad" mothers as the result of criminality, particularly those who commit criminal offenses which do not fit into the constructed set of "feminine crimes". Women are often identified as using and hiding behind their children. The consequences of these types of constructions place women in double jeopardy as they are

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judged on the basis of their criminality and ability to parent. This second group of judges are not contrary to the first group but are rather the corollary to them. The existence of specific definitions and constructions of motherhood allow for many women to be labeled and judged "bad" mothers. Social constructions which act to create gender specific expectations place many women in jeopardy. Women do not benefit from the existence of gender-based leniency but rather suffer because of its existence. Women are either forced to live according to those definitions or face more severe treatment for the failure to do so.

The third group of judges identified in the research attempted to approach sentencing with a blind eye, consequently applying a form of equality of sentencing. Motherhood and child care responsibilities were not viewed as valid considerations within sentencing decisions. These judges do not recognize the differential impact of sentencing on women who have child care responsibilities. By treating female offenders the same as male offenders results in inequality in the actual consequences of many punishments.95 Those judges who deny the differential effects parenting have on women offenders marginalize the experience of all women within the criminal justice system, particularly those who are perceived to be deviating from socially constructed expectations which dictate the lives of all women.

The fourth group of judges represent a change in the judiciary. Like their fellow judges, they view motherhood as an important consideration in sentencing, but the implications of this varies. These judges attempt to incorporate an increased sensitivity to the experiences of women engaged in the criminal justice system. Motherhood and child care responsibilities are identified as a realistic circumstance in the lives of many women offenders. Sentencing by these judges attempts to include a thorough examination of the economic and social reality of offending women who may have children to care for.

95Roberts, 1994. p. 12. Women tend to be the primary child caretakers and sentencing dispositions should reflect
this reality. Whereas many sentencing dispositions do not risk the relationship between a father and his children, these do indeed influence the relationship between a mother and child. Rather than assuming a female-based form of leniency, situations peculiar to women are incorporated into sentencing. Sentencing based on established considerations peculiar and applicable to men may not in fact work well in the processing of female offenders. Roberts (1994) identifies the impact of a gender-neutral approach which categorically denies the experiences of women.

The harsh impact of gender-neutral sentencing on most female offenders, however is distinctly invidious, because it results from the unequal social distribution of child care. Moreover, the aim of eliminating preferential treatment of women wrongly assumes that the sentencing system is basically fair. Uniform sentencing is not fair, however, if embedded in sentencing schemes of a male-based model that presumes a potentially violent criminal is not the primary caretaker of children. Including child care responsibilities into sentencing decisions is a step towards acknowledging the gendered nature of parenting responsibilities and realizing the way in which some sentencing decisions may in fact differentially affect female offenders.

It is evident that the way in which motherhood is incorporated into sentencing decisions varies. The inclusion of motherhood may in fact reduce jail sentences for female offenders. Yet, the way in which motherhood is constructed is the important consideration, not just that it is included. Women’s roles and the social expectations of women are at the forefront of sentencing decisions. These make up the basis for understanding why women commit crime as well as the circumstances and situations which are important in their sentencing and the sentences they receive, particularly the use of short-term incarceration. The inclusion and interpretation of child care responsibilities into the sentencing of women is an important issue. It may determine whether leniency is given at all or whether women may in fact be treated with a form of gender neutral

sentencing which judges women in terms of their criminal activity and their ability to parent.
Chapter 6

Conclusions

This research was undertaken to examine the rationale given by judges in the sentencing of women offenders. In particular, the study looked at the explanations for women's law breaking behaviour by judges and how these are incorporated into sentencing decisions. Next, the research identified the way in which sentencing judges construct and incorporate motherhood into sentencing decisions. Through the use of a feminist criminological approach, the phenomena under study is examined in terms of the way traditional models of femininity are incorporated into sentencing decisions by judges. By demonstrating that the majority of judges incorporate traditional explanations of women's criminal behaviour into sentencing, the research attempts to show how the courts and judiciary act to maintain typical definitions of women. This consequently produces a sentencing process which is gender-role specific in its treatment of women. Through the examination of the judicial constructs of motherhood an analysis was made of the ways in which women's experiences are marginalized by sentencing considerations which fail to consider the realities of women.

The existing literature outlines the difficulties many women experience within the criminal justice system. The lack of concern for the effects of women's sentences and the consequences on their lives has been demonstrated by various researchers. Much of the research has also attempted to outline the differential treatment of women within the courts and the effects this has had upon sentencing. However, there exists a lack of examination of the attitudes of sentencing judges toward women offenders. In particular, there is not a qualitative examination of the judiciary's attitudes toward female criminality and the circumstances which characterize the lives of women offenders. While much research has demonstrated the differential use of a variety of sentencing options, this has primarily arisen from a quantitative examination of the women and men offenders
sentenced to different dispositions. There has not been an examination of the explanations for those sentencing differences by the judiciary.

This research represents an exploration of the sentencing of women offenders in terms of the explanations by the judiciary and the incorporation of court observations. The majority of research in the area of women's criminality has assumed that there exists only one way in which women offenders are treated and processed. This present study identifies that there are a variety of approaches and strategies which shape sentencing decisions by the judiciary. The basis of these strategies is reflective of the way in which judges construct women's criminality and incorporate motherhood into sentencing decisions.

Within the research two judge types were identified in the way judges explain or construct women's lawbreaking behaviour. The first being that of the traditional judges. These judges incorporate traditional models of femininity into explanations of women's criminality. By examining women's criminal behaviour in terms of gender-specific typifications, characterizing women as inept, passive and submissive, women's criminality is seen as a form of irrational behaviour. These explanations of women's law breaking include the reliance on pathologizing natural conditions or occurrences in women. Judges consequently include explanations such as PMS, menopause, depression and mental illness for women's criminal behaviour. These explanations are thereby incorporated into sentencing in way of leniency for women offenders who appear to be suffering from these "disorders". This "protection" of women, rather than affording women leniency within the courts, forces women to describe themselves in terms of dysfunction or risk more harsh treatment in sentencing. Rather than protecting women, these constructions constrain women within narrow definitions of femininity. They consequently act to marginalize the experiences of the majority of women who come in conflict with the law. Women who are perceived by judges not to conform to these expectations risk being judged more harshly and face more severe punishments. This thereby places many women lawbreakers
in jeopardy, particularly those who are lesbian, single mothers, disabled and/or working outside of the home.

The second type identified is referred to as the "new judges". These judges attempt to sensitize themselves to the experiences of women offenders, in particular to the social, economic and cultural conditions which are relevant to women's situations. Hence, there is an acknowledgment of the ways in which traditional sentencing considerations do not speak to the issues and concerns of women in conflict with the law. Within sentencing decisions these judges attempt to deal with the differential effects a sentence may have on women offenders and the influences which brought the woman within the criminal justice system. These judges consequently acknowledge that the sentencing procedures often do not consider the variety of situations and experiences of women offenders.

Sentencing strategies were developed to demonstrate the way in which sentencing judges incorporate motherhood into sentencing decisions. The first sentencing strategy incorporates standards of motherhood which define women within strict traditional roles. These judges consequently assume that the status of motherhood is a situation characteristic of all women offenders. Rather than identifying the ways in which parenting responsibilities are peculiar to women offenders, the majority of judges simply give women who are mothers more lenient treatment within the courts. The construction of motherhood in terms of gender-specific expectations for women, which define women as married, care givers and working within the home, reinforces traditional gender roles. The existence of leniency based on women's conformity to typical modes of behaviour place many women in jeopardy, particularly those who are viewed as failing to conform to these expectations.

The second sentencing strategy is a corollary approach to the first. The incorporation of gender-specific expectations for women as mothers places women who are viewed as failing to conform to those expectations in jeopardy. Consequently, many women may be judged on their ability to parent and care for their children in addition to
being judged on their law breaking activities. The construction of "good" and "bad" mothers by judges has serious implications for sentencing. Those women who are viewed as "bad" mothers are viewed more harshly by the courts and risk facing more serious sentencing dispositions. Women who are lesbian, working outside of the home, single parents, disabled or a member of a minority group may be viewed as failing to conform to a socially constructed expectation of motherhood. Additionally, these women may be viewed by sentencing judges as using their children to gain favour within sentencing decisions. The existence of these constructions of motherhood fail to take into account the experiences of the majority of women in conflict with the law.

The third strategy identified in the judicial construction of motherhood are those judges who attempt to create a gender-neutral approach to sentencing. They consequently deny the ways in which parenting differentially affects women offenders. These judges are attempting to create a protocol to sentencing which ignores and neutralizes the effects of gender. These judges fail to acknowledge or sensitize the sentencing process to the experiences of women law breakers. They thereby do not look to the variety of circumstances which are peculiar to women offenders which may help to understand women's criminal behaviour and especially the ways in which many sentencing dispositions may have a differential impact on women. These judges fail to look at the practical implications and considerations of sentencing women offenders. In an attempt to define the considerations which should mitigate and aggravate sentencing for all offenders, these judges fail to incorporate those which reflect the lives of women offenders.

The fourth judge type identified within the research is that of the "new judges". For these judges, the sentencing process attempts to include a more encompassing look into the lives of women offenders, particularly those women who are mothers. Rather than assuming that all women offenders are mothers or care for their children in a particular way, these judges sensitize the sentencing process to the variety of experiences of women in conflict with the law. This includes looking at the variety of social,
economic, cultural and personal circumstances that have an influence on women's criminal behaviour and may determine a woman's ability to complete a particular sentencing disposition. These judges recognize that the existing system of sentencing often fails to acknowledge the reality and experiences of women in conflict with the law. Sentencing decisions thereby reflect the influences which are peculiar to women and include an examination of the ways in which many sentencing dispositions have a differential influence on women offenders.

Although some of the existing literature has attempted to examine the differences which may exist between individual judges, much of this research has looked at these differences in terms of the gender of the sentencing judge. There has been a failure in the existing literature to examine the way in which judges incorporate explanations of female criminality and constructions of motherhood into sentencing decisions. The present research represents an exploration of the judicial attitudes toward women's offending, motherhood and sentencing of female offenders. This qualitative approach has provided the opportunity to develop typologies and strategies which are shared among some judges, while demonstrating the differences between others. It has provided for outlining how various considerations within the sentencing process are given merit and attention.

This research has made a contribution to the feminist literature within the area of criminology. While identifying that the majority of judges continue to incorporate traditional conceptions of femininity into sentencing decisions, this research has outlined that some judges acknowledge that the present sentencing procedures often marginalize and fail to incorporate the experiences of women in conflict with the law. This research, in its description of judicial attitudes, points to the need for the circumstances and experiences of women's lives to be validated within sentencing procedures. In recognizing that judicial decisions often act to reinforce particular "truths" about women offenders, this research has added to the literature which questions the objectivity of law. The identification of judicial sentencing strategies which privilege women who are deemed to
conform to traditional standards of femininity explicitly demonstrates the biased nature of sentencing and how it fails to take into account for the variety of experiences of women lawbreakers. This research is therefore an attempt to demonstrate the way the criminal justice and penal systems might become more women-wise.97 That is, to become more sensitive to the situations which act to explain and describe the circumstances of women's lawbreaking behaviour.

In addition my research has also made notable additions by way of the research design and methodology. Within the existing literature, the majority of research has included quantitative examinations which identify the differences in the sentencing of male and female offenders. Past studies by Daly (1987), Kruttschnitt (1984, 1985), and Mair and Brockington (1988) have failed to incorporate a variety of qualitative methods to provide a dynamic examination of the sentencing of women offenders. Within the Canadian context the majority of research on sentencing judges includes survey work. This research represents the first comprehensive examination of the considerations included in the sentencing of women lawbreakers. Interviews with sentencing judges represents the opportunity to open up the sentencing process to examination. The legal system, with its own language and set of procedures, is not readily open to investigation and examination. The opportunity to investigate and describe the judicial philosophies and explanations for women's lawbreaking behaviour is unique. This method provided for discovering the explanations by the judiciary for the sentencing of women offenders to be described by the individual judges and in their own words. Past survey research has failed to identify the considerations which judges value within sentencing decisions. This study is thereby an important part of the literature on the sentencing of women offenders.

The circumstances of female offenders have been largely marginalized. The majority of judges incorporate traditional constructions of womanhood. These act to provide women with leniency when they fit these gender specific expectations. Yet, their

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existence represents a measuring stick by which all women are judged that fails to account for the circumstances of the majority of women offenders. The approach to sentencing which neutralizes the differences between men and women offenders also fails to examine the woman offender in terms which are specific to women, particularly those who come into conflict with the law. There is a need to examine the reasons why a majority of judges continue to ignore the realities of women offenders. Future research should attempt to uncover the reasons for the failure of the judiciary to include the consequences of sentencing and the limitations of corrections in dealing with women offenders. This should include an outline of the issues which are relevant to women offenders and the reasons why they are marginalized within the criminal justice system. By recognizing the circumstances of women who come into conflict with the law, is to realize the ways in which the courts act to ignore women and attempt to subsume them within a system designed to deal with men. Women offenders have circumstances and situations which are specific and related to their offending. By acknowledging these circumstances and recognizing the way in which they are ignored by the judiciary is to come closer to an understanding of women's offending and an analysis of the treatment they receive within the courts.

Directions for future research should include an examination of the various other influences which may play a role in judicial decision making. This would include an assessment of the role the pre-sentence reports and pre-trials have in sentencing decisions. This would provide the opportunity to examine the role of other legal agents within the criminal justice system and how they may also act to maintain traditional standards of femininity. Additionally, a larger sample that would include judges from a variety of areas and locations would allow for the opportunity of a more expansive comparison of sentencing judges. Third, an interesting area of future study could include an examination of the characteristics of judges within each sentencing strategy to identify the reasons for such variation in sentencing approaches. This could include looking at the decision
making among judges based on gender, ethnic background and family diversity. This would provide the opportunity to investigate if differences are related to heightened sensitivities to the variety of experiences of women offenders. The most important addition that could be made in the future is the inclusion of women within this type of research. Interviewing women would provide for the most accurate and thorough examination, thereby identifying and describing the experiences of those women in conflict with the law.
Schedule 1

Interview Guide- For Judges

1. Do most judges have a general philosophy regarding sentencing and punishment? How does your philosophy differ?

2. How does incarceration fit the model/philosophy of sentencing and punishment? For most judges? For you? If differs, why?

3. How do most judges feel regarding sentences for male and female offenders, who commit the same crime, Should they be the same? Why? How do you differ from this? Why?

3. Do most judges generally give the same sentences for both men and women? Do you? WHY/WHY NOT?

4. What factors do most judges find important in sentencing of offenders? Do these vary between men and women? Do you feel these differ between men and women?

1.E. JOINT SUBMISSIONS
    PRE-SENTENCE REPORT
    DEFENDANT'S STATEMENT
    SENTENCING GUIDELINES
    AVAILABLE COMMUNITY ALTERNATIVES
    RESTITUTION PROGRAMS
    DIVERSION PROGRAMS

5. For most judges, do the use of any of these sentencing options differ for men or women? How do you feel?

1.E. COMMUNITY-SERVICE ALTERNATIVES
    ALTERNATIVE MEASURES
    FINES
    INCARCERATION
    PROBATION
    CONDITIONS OF PROBATION

6. I am going to mention some concepts that researchers have suggested affect sentencing decisions, how do most judges feel regarding these? Do they differ for male or female offenders?
7. Do you think judges take into account certain concepts in relation to the use of incarceration (especially the use of short-term incarceration)?
SPECIFIC DETERRENCE
SHORT SHARP SHOCK
LACK OF ALTERNATIVES
NOTHING ELSE HAS WORKED
COOLING OFF PERIOD
- Are these the same for both male and female offenders?

8. How effective do most judges feel short-term incarceration is?
   How do you feel?
   For males and females?

9. If short-term incarceration has been utilized in the past, would it be a good sentencing option again?
   Or do the stakes increase if the offender reappears?
   Is this the same for male and female offenders?
Schedule 2

Written Consent Form- For Judges

Participant,

Thank you for agreeing to participate in the following interview. The purpose of the present research is to examine the factors involved in the sentencing of individuals who commit minor offenses. This research is being undertaken by Catherine Kaukinen, a graduate student at the University of Windsor. The faculty advisor to the project is Dr. M.L. Dietz. The project has been approved by the Department of Sociology and Anthropology Ethics Committee.

Your participation in the interview is completely voluntary. At any time you may withdraw from the study. You may also refrain from answering any questions you choose to. Your participation in the project is extremely important and greatly appreciated. A tape recorder will be used to record the interview. The tape will later be destroyed. If you prefer not to have your voice recorded, notes may be taken as an alternative. Every effort will be made to ensure that the data will preserve confidentiality, including the presentation of any cases or details which may be identified in the interview. Your name will not be mentioned in the research.

If you would like to be informed of the results of the research project you may contact the Department of Sociology at The University of Windsor. These will be made available to you. As well, any concerns regarding the project may be addressed to the departmental Ethics Committee, Dr. Suzan Ilean or Dr. Alan Hall.

I would like to thank you once again for your time.

"Having read the above information, I the undersigned agreed to consent to participate in the study".

________________________________________
Participant

________________________________________
Date
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Vita Auctoris

Catherine Elizabeth Kaukinen was born and raised in Thunder Bay, Ontario. She received her Ontario Secondary School Honours Graduation Diploma from Hillcrest High School in 1988.

In 1992 Catherine received her Honours Bachelor of Science in Biology at Lakehead University. In the spring of 1995 she received her Honours Bachelor of Arts in Criminology at The University of Windsor.

In 1995 Catherine received her Master of Arts in Sociology at The University of Windsor. She is now beginning her Ph.D. in Sociology at the University of Toronto. She hopes to continue working within the area of "Women in conflict with the law."