

# PREFACE

## WOMEN AND SENTENCING

Judge Nancy Gertner\*

*In the spring of 2019, I gave the keynote speech at Georgetown Law for the American Criminal Law Review's symposium on Women's Rights in the Criminal Justice System. As highlighted throughout this Symposium Issue, speakers discussed some of the seemingly endless ways the criminal justice system disparately impacts women. The issue that stood out to me most during my time on the bench was the unfair and often illogical impact the now-advisory Sentencing Guidelines impose on women. As I write below, it is far past time for the Sentencing Commission and Congress to recognize that disparity in sentencing may not be unwarranted at all when it comes to male and female offenders. In fact, it may be critical to reflect the real differences between them—the drivers of their criminality, the triggers for their recidivism, and the mechanisms for their rehabilitation. But sentencing is not the only place in which there must be change. This Symposium Issue sets out to address many of the other issues that lead to inequality at nearly every stage of the criminal process.*

## INTRODUCTION

Recently, the United States Sentencing Commission issued a report entitled “Demographic Differences in Sentencing”<sup>1</sup> after the Supreme Court’s decision in *United States v. Booker*.<sup>2</sup> The Commission noted, apparently with alarm, that women receive shorter sentences than men, and judges are more lenient in dealing with them.<sup>3</sup> Less concerning to the Commission—at least in its report—was that for women offenders, the rate of imprisonment and the length of time served has increased dramatically.<sup>4</sup> In nearly a decade of declining crime rates, women are

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1. U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT (2017) [hereinafter U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN SENTENCING], [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114\\_Demographics.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf).

2. 543 U.S. 220 (2005) (making the Guidelines advisory).

3. U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN SENTENCING, *supra* note 1, at 2, 6–9.

4. See THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 4, <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> (last updated June 2018).

three times more likely to go to prison today than in 1986.<sup>5</sup> Sadly, the Commission is more focused on sentencing disparities, rather than any of the other purposes of sentencing, including fairness and proportionality.<sup>6</sup>

The disparity between men's and women's sentencing, if it exists, is only the beginning, not the end of the analysis. The real question—indeed, the only one—is whether these disparities are warranted.<sup>7</sup> Do we have a women's crime wave that would justify the increase in imprisonment of women in the first place? And if we do not, is the increase in imprisonment justified by any of the purposes of sentencing, or has it occurred solely because of political decisions the Commission and Congress have made—decisions reflected in mandatory minimum sentencing and in the Federal Sentencing Guidelines? Imprisonment lengths and rates increased with respect to women, as they have with respect to men, wholly out of proportion to the changes in the crime rate, indeed, even in the face of a crime decline.<sup>8</sup> And this has continued even though the Federal Guidelines are advisory. The Guidelines still anchor federal sentencing, far too much in my view.

The real issue is whether it is entirely appropriate to treat women offenders differently. Are the sources of women's crime different? Do different factors trigger their crime and affect their rehabilitation? The answer is yes, as I said nearly twenty years ago, when the Federal Sentencing Guidelines were mandatory. I wrote:

[W]omen's crime is different from men's crime. Women commit different crimes than men, generally nonviolent crimes. Their life circumstances are different from the life circumstances of men as are the factors that motivate them to break the law. Family ties play a more significant role in women's offenses, in the likelihood that they will recidivate, and in their chances of rehabilitation. Because family obligations fall disproportionately on women in this society, their imprisonment has a disproportionate impact on the children in their care.<sup>9</sup>

And women's relationships with their male codefendants are different. "It is not unusual to see women defendants who have been subject to coercion, abuse, and even battering. When they commit crimes, women are less likely to be in leadership roles, more likely the girlfriends or wives of the leaders."<sup>10</sup>

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5. See Myrna S. Raeder, *Gender-Related Issues in a Post Booker Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 693 (2006).

6. See generally The Honorable Nancy Gertner, *How to Talk About Sentencing Policy—And Not Disparity*, 46 LOY. U. CHI. L.J. 313 (2014) (describing sentencing disparities as "far less important than issues of sentencing fairness [and] proportionality").

7. See 18 U.S.C. §§ 3553(a)(2), (a)(6) (2018).

8. See NAT'L RESEARCH COUNCIL OF THE NAT'L ACAD. OF SCIENCES, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 3, 154 (2014).

9. The Honorable Nancy Gertner, *Women Offenders and the Sentencing Guidelines*, 14 YALE J.L. & FEMINISM 291, 293 (2002).

10. *Id.*

The Guidelines paid no attention to such issues in their overarching concern with “unwarranted sentencing disparities.”<sup>11</sup> The Commission was directed to develop guidelines and policy statements that are “entirely neutral as to race, sex, national origin, creed, and socioeconomic status of offenders.”<sup>12</sup> The Commission took that directive and promulgated § 5H1.10, which says that these factors, including sex, are “not relevant in the determination of a sentence.”<sup>13</sup> But being “neutral” about gender and saying gender is “not relevant” is not the same thing. Congress was addressing the judge who explicitly took gender into account, who wrongly generalized about women, who used outdated paternalistic stereotypes.<sup>14</sup> Nothing in the Sentencing Reform Act or its legislative history suggests that the Commission was to turn a blind eye to the disproportionate impact of ostensibly neutral rules on women. Cassidy Kesler, a student in one of my classes, put it best:

[Gender-based] disparity describes a situation where a judge makes a more or less harsh sentencing determination because of an offender’s gender. In contrast, gender-related sentencing disparity describes a situation where a judge makes a more or less harsh sentencing determination because of other factors that happen to correlate with gender. While gender-based sentencing disparity is a highly charged issue that relates to conceptions and expectations of equality, gender-related sentencing disparity can be explained and even justified in gender-neutral terms.<sup>15</sup>

The Commission has ignored all the lessons about real differences between men and women of the second wave of feminism and, more recently, the #MeToo movement. In the 1970s and 1980s, “feminist litigators recognized the limitation of formal equality.”<sup>16</sup> Rules that were “equal on paper were . . . unfair if they had a disproportionate impact on women for a host of social and cultural reasons.”<sup>17</sup>

A sentencing system that fails to consider real differences between male offenders and female offenders, differences that may correlate with the sources of their crime and provide a basis for their rehabilitation, is an unequal one. As Bruce Western has written, “[W]omen’s incarceration throws the injustices of imprisonment into sharp relief. Most clearly for women, punishment is not just the outcome of a crime, but also of lifetimes of mental illness, drug addiction, and

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11. 18 U.S.C. § 3553(a)(6).

12. 28 U.S.C. § 994(d) (2018).

13. U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (U.S. SENTENCING COMM’N 2018) [hereinafter U.S.S.G.].

14. See Symposium, *Equality Versus Discretion in Sentencing*, 26 AM. CRIM. L. REV. 1813, 1815 (1989) (statement of Commissioner Ilene Nagel).

15. Gertner, *supra* note 9, at 296 (quoting Cassidy Kesler, *Where Women Fit: Gender and the Federal Sentencing Guidelines* (November 8, 2002) (unpublished manuscript) (on file with the Yale Journal of Law and Feminism)).

16. Gertner, *supra* note 9, at 305.

17. *Id.* at 305.

victimization.”<sup>18</sup> Women, in short, “chart a distinctive path into prison, and a distinctive path out.”<sup>19</sup>

## I. TWO CASES

Notwithstanding the Commission’s statistics and the academic literature, the best way to illustrate the differences between women offenders and male offenders is with two concrete examples in cases before me.

### A. *Flor Jurado-Lopez*

Flor Jurado-Lopez was convicted for her role in a heroin trafficking conspiracy.<sup>20</sup> Customs found heroin in her bag, and she admitted to inserting twenty-three pellets of heroin into her rectum.<sup>21</sup> Her crime was being a drug “mule,” acting as a “human container for drugs, as well as carrying them in the false linings of her luggage.”<sup>22</sup> The facts further revealed that:

Before boarding a plane bound for Boston, [Jurado-Lopez], a 29-year-old Guatemalan woman, was locked in a room and forced to insert heroin pellets inside her, under the threat that, otherwise, the men guarding her would do the inserting against her will. This episode took place against a backdrop of extortion, and the shootings of her parents and her husband in Guatemala.<sup>23</sup>

Jurado-Lopez’s parents were shot in drive-by shootings in 1996 and 1997.<sup>24</sup> Her sister Wendy, as well as Wendy’s in-laws, were politicians in Guatemala.<sup>25</sup> Wendy frequently borrowed her father’s car; she believed that the shots were intended for her.<sup>26</sup> In 1998, Jurado-Lopez’s husband was shot eight times.<sup>27</sup> He also had government ties; he was the chief of security for the city of Misco, where Wendy’s in-laws were politicians.<sup>28</sup> He incurred a substantial hospital debt.<sup>29</sup> They had no insurance; Jurado-Lopez entered into a payment plan with the hospital and fell behind in January 2002.<sup>30</sup> An acquaintance introduced her to “Mauro” for a loan.<sup>31</sup> She borrowed money from Mauro, after which he began threatening her and telling her she had to take “clothes” to the United States or she and her family would be in

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18. BRUCE WESTERN, *HOMeward: LIFE IN THE YEAR AFTER PRISON* 140 (2018).

19. *Id.* at 141.

20. *United States v. Jurado-Lopez*, 338 F. Supp. 2d 246, 247 (D. Mass. 2004).

21. *Id.* at 248.

22. *Id.* at 247.

23. *Id.* at 246–47.

24. *Id.* at 249.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 250.

31. *Id.*

danger.<sup>32</sup> The threats continued, she said, even after U.S. authorities took her into custody.<sup>33</sup> Shortly after that, she told the authorities what she was carrying and how it happened.<sup>34</sup>

Jurado-Lopez found out she was pregnant while in custody.<sup>35</sup> Before she was X-rayed to see the drugs she was carrying, officials asked her if she might be pregnant; she told them that she might be.<sup>36</sup> While detained pre-trial, Flor gave birth to Alexa.<sup>37</sup> The administrator at the women's prison reported that "when an inmate is at the hospital, she is usually handcuffed to the bed with one hand, but only when she is not in labor."<sup>38</sup> Alexa was her first child after an eight-year marriage and years of fertility treatments.<sup>39</sup> She was taken from Flor at three days old and placed into the custody of a family friend.<sup>40</sup> As a non-citizen, Jurado-Lopez was not eligible for Houston House, a program that allows new mothers to be with their children.<sup>41</sup>

The government called for a seventy-month sentence followed by deportation.<sup>42</sup> That was the Guideline sentence. The government rejected any reduction in the sentence because of her "minimal" or "minor" role.<sup>43</sup> Moreover, it argued that none of the other grounds for a downward departure applied here, even coercion or duress.<sup>44</sup>

Presiding over the case, I disagreed on both fronts. "Individuals willing to swallow pellets of heroin, or insert them into their rectum, could not be any lower [on the drug hierarchy]."<sup>45</sup> And plainly, she did what she did, putting her own life in considerable jeopardy, because she was coerced to do so.<sup>46</sup> The threats against her by the men who hired her as a mule, especially in the light of the previous life threatening attacks against her family, were surely sufficient. But I could not depart from the Guidelines sentencing range based on her family obligations. Under the Guidelines, family ties were not "ordinarily relevant."<sup>47</sup> As I said: "the case law is,

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32. *Id.*

33. *Id.*

34. *Id.* at 248.

35. *Id.* at 247.

36. Defendant's Sentencing Memorandum, *United States v. Jurado-Lopez*, 338 F. Supp. 2d 246 (D. Mass. 2004) (on file with author).

37. *Jurado-Lopez*, 338 F. Supp. 2d at 247.

38. *Id.* at 251 n.10.

39. *Id.* at 247.

40. *Id.*

41. *Id.* at 251 n.10.

42. *Id.* at 247.

43. *Id.*; see also U.S.S.G. § 3B1.2 (allowing sentencing reduction based on a defendant's minimal or minor in an offense).

44. *Jurado-Lopez*, 338 F. Supp. 2d at 247 n.1.

45. *Id.* at 252.

46. *Id.* at 254 (citing U.S.S.G. § 5K2.12 (allowing for downward departures "because of serious coercion, blackmail, or duress")).

47. U.S.S.G. § 5H1.6.

in a word, cruel. It does not recognize the pain a mother feels for her newborn. The fact that a child has another caregiver . . . is all that matters.”<sup>48</sup>

I departed twelve levels, a reduction of four years, to a sentence that would enable her to be immediately released. I could barely contain my rage: “The idea that strictly punishing Jurado-Lopez would somehow send a message to the drug dealers that debased her, as the government suggested, seemed absurd. To the Guatemalan dealers, this woman was obviously expendable.”<sup>49</sup>

### B. *Santa Negron*

Santa Negron was charged with making two deliveries of crack cocaine.<sup>50</sup> The crack amounts attributable (between 150 and 500 grams of cocaine base) triggered a mandatory minimum sentence of ten years.<sup>51</sup> She made \$50 on the first delivery and would have made \$80 on the second but for her arrest.<sup>52</sup> She maintained that she only participated in these two deliveries and did not know what was in the packages, but police found cocaine residue and \$6,000 in her apartment.<sup>53</sup>

Negron was born in the Dominican Republic.<sup>54</sup> Her mother died when she was seven, after which she was physically and psychologically abused and neglected by her stepmother.<sup>55</sup> She got married at age fourteen to escape her home life.<sup>56</sup> After her children were born, her husband became abusive, and Negron illegally entered Puerto Rico both to escape him and to find work to support her children.<sup>57</sup> She then discovered that another woman was living with her husband and filed for divorce.<sup>58</sup> Her second husband, whom she married in the United States, began to abuse her after about a year, and stopped giving her money to send to her children; she left him as well.<sup>59</sup> A man to whom her husband had previously introduced her offered to help.<sup>60</sup> She thought he meant finding a job, but he asked her to make the deliveries that resulted in her arrest.<sup>61</sup>

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48. *Jurado-Lopez*, 338 F. Supp. 2d at 254 n.17.

49. *Id.* at 248.

50. Indictment, *United States v. Castro*, No. 1:96-CR-10139 (D. Mass. 1996) (on file with author).

51. Superseding Indictment, *United States v. Castro*, No. 1:96-CR-10139 (D. Mass. 1996) (on file with author); 21 U.S.C. § 841(b)(1)(A) (2018).

52. Sentencing Notes of The Honorable Judge Nancy Gertner, *United States v. Castro*, No. 1:96-CR-10139 (D. Mass. 1996) (from sentencing on Aug. 6, 1997) (on file with author).

53. *Id.*

54. The following information comes from a psychological evaluation of defendant by Dr. Ann Burgess, ordered pursuant to 18 U.S.C. § 3552(b) (2018) and read in part during defendant’s sentencing hearing dated August 6, 1997. Sentencing Transcript, *United States v. Castro*, No. 1:96-CR-10139 (D. Mass. 1996) (on file with author).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Sentencing Notes of The Honorable Judge Nancy Gertner, *United States v. Castro*, No. 1:96-CR-10139 (D. Mass. 1996) (from sentencing on Aug. 6, 1997) (on file with author).

I refused to sentence her without evaluating her mental state. The description of the offense did not begin to explain her behavior. I ordered a psychiatric examination interview with a specialist in domestic violence to see if there was evidence of diminished capacity, duress, or coercion, and to understand the significance of years of abuse.<sup>62</sup> Her psychiatric evaluation reflected a diagnosis consistent with diminished capacity: “Her behavior was a learned response from previous relationships of abuse and her focused goal to provide for her children.”<sup>63</sup> I found that the mandatory minimum ten year sentence did not apply because Negron met the requirements of the statutory “safety valve,” which allows the defendant to avoid the statutory minimum penalties.<sup>64</sup> I departed substantially from the Guideline sentence, sentencing her to twenty-seven months.<sup>65</sup>

## II. LESSONS LEARNED

In neither case did I depart because of stereotypes about women, improper generalizations, or the usual discriminatory tropes about leniency for women. I departed downward because of the facts of the case, facts that were relevant to each women’s criminality, facts that the Guidelines barely considered or trivialized. As a former federal prosecutor noted:

I find it reasonable to believe that societal differences in the treatment of women (often referred to as socialization) account for women’s (generally) lower propensity to commit crimes and that these same differences, rather than system bias, explain why when women break the law, they often engage in less culpable activities with fewer aggravating circumstances than their male counterparts. . . . [W]omen rarely serve as organizers or supervisors of criminal activity. They also tend to fall victim to pressure from other criminal actors, often husbands or lovers. Because many women, who find themselves defendants in the federal criminal justice system, exhibit these mitigating characteristics, prosecutors and judges naturally and, in my analysis, appropriately treat these women more favorably than they treat men who commit the same crime but demonstrate more culpability and more dangerousness and are less amenable to rehabilitation.<sup>66</sup>

In fact, one could say that in the Guidelines framework, women’s sentences are considerably higher than they should be “given women’s lower recidivism rates

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62. Order of Psychological Study, *United States v. Castro*, No. 1:96-CR-10139 (D. Mass. 1996) (on file with author).

63. Sentencing Notes of The Honorable Judge Nancy Gertner, *United States v. Castro*, No. 1:96-CR-10139 (D. Mass. 1996) (from sentencing on Aug. 6, 1997) (on file with author).

64. See U.S.S.G. § 5C1.2 (stating that prosecutions under 21 U.S.C. § 841 (2018) can avoid the statutory minimum penalties under certain circumstances); see also 18 U.S.C. § 3553(f) (same).

65. Sentencing Order, *United States v. Castro*, No. 1:96-CR-10139 (D. Mass. 1996) (entered on Aug. 26, 1997) (on file with author).

66. Melanie D. Wilson, *Sentencing Inequality Versus Sentencing Injustice*, 61 *FED. LAW.* 58, 60 (2014).

and relative culpability for their roles in their offenses.”<sup>67</sup> To the extent the statistics reflect that pattern, they demonstrate not an unwarranted disparity, but an appropriate sentence. It is the Guidelines that fail to reflect the reality of women’s experiences and the patterns of their offending.

First, the Guidelines devalue family circumstances. Because women offenders are more likely than men to be single parents, the Guidelines provision that family circumstances are “not ordinarily relevant” has a disproportionate impact on them, without any penal justification.<sup>68</sup> And if they are the principal caretaker, the possibility that they may lose their children, or that they will be estranged from them, has a more substantial impact than they might on a father, whose relationship is more attenuated. “The result of discouraging departures for family responsibilities of both men and women, for example, is like the famous critique of legal equality—rich and poor can both sleep under the bridge. It is an empty equality.”<sup>69</sup>

Second, the Guidelines underestimate role in the offense. The sentencing adjustment for “role in the offense” under the Guidelines is minor relative to other factors, such as the quantity of drugs involved. As with Jurado-Lopez, one could not get any lower in the drug hierarchy than the mule willing to turn her body into a vessel to transport drugs.

Third, the Guidelines underestimate the relationship between the female offenders and their male bosses, often a relationship characterized by coercion, intimidation, battering, and threat. “[F]emale offenders report very high instances of physical and sexual abuse, totaling more than 40% of federal inmates,” with state prisoners reporting at a 60% rate.<sup>70</sup> As one scholar noted: “Given the reduced role in the offenses of many women in multi-defendant cases—women who play subordinating roles to their partners or other coconspirators—one should question whether in fact the courts do not over-penalize rather than under-penalize these women.”<sup>71</sup>

The Guidelines also overstate a woman’s criminal record. “Female defendants are significantly more likely than their male counterparts to appear at sentencing with no arrests or prior criminal record,”<sup>72</sup> but the Guidelines grouped defendants with one and zero criminal history points together.<sup>73</sup> The woman who has had no

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67. Margareth Etienne, *Sentencing Women: Reassessing the Claims of Disparity*, 14 J. GENDER RACE & JUST. 73, 82 (2010).

68. Gertner, *supra* note 9, at 298.

69. *Id.* at 295.

70. Raeder, *supra* note 5, at 696 (citing CAROLINE WOLF HARLOW, U.S. DEP’T OF JUST. BUREAU OF JUST. STATISTICS, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS 1–2 (1999), <https://www.bjs.gov/content/pub/pdf/parip.pdf>).

71. Etienne, *supra* note 67, at 82.

72. *Id.*; see also Michael Edmund O’Neill, *Re-Conceptualizing Criminal History for First Time Offenders*, 17 FED. SENT’G REP. 191, 192 (2005) (finding nearly 40% of the individuals with no prior arrests were women); Raeder, *supra* note 5, at 735 (noting “many more women than men have no prior criminal history”).

73. Criminal history is ranked from I (the lowest) to VI (the highest). See U.S.S.G. ch. 5, pt. A, Sentencing Table.

encounters with the criminal justice system at all will be in the same category as a man with multiple arrests, but no convictions.<sup>74</sup>

The Guidelines understate the nature of a woman's cooperation. Precisely because women like Jurado-Lopez fall so low on the criminal hierarchy, they have little or no information to give the government and thus no way to cooperate and get the benefit of that cooperation through a reduced sentence.

The Guidelines fail to take into account the extent to which female offenders do not recidivate. A recent study of probationers suggests that gender has a statistically significant effect on recidivism, in that women may well be overclassified in terms of risk.<sup>75</sup> Indeed, the recent American Law Institute Model Penal Code § 6B.06(4)(b) provides that a sentencing "commission may include an offender's gender as a factor in guideline provisions designed to assess the risks of future criminality . . . provided there is a reasonable basis in research or experience for doing so."<sup>76</sup> Commentary to the Code suggests that there is "powerful statistical and social-science evidence that gender is a robust predictive factor, at least in some settings, of the future criminality of persons who have a prior record of offending."<sup>77</sup>

Finally, the Guidelines devalue substance abuse. Addiction, it concludes, is not relevant to sentencing.<sup>78</sup> At the same time, women have high rates of drug and alcohol dependence; indeed, a correlation exists between victimization and high-risk behaviors like drug abuse.<sup>79</sup>

These distortions persist even in an advisory Guideline regime.<sup>80</sup> Most appellate courts require trial courts to determine the correct Guideline range first before imposing any sentence. And that calculation surely affects the Court's final decision. As Myrna Raeder describes, and I experienced when I was on the bench, requiring the courts to calculate the Guidelines "atomize[s] the sentencing decision," keeping counsel from focusing on an "overall narrative of the defendant that supports a lower sentence."<sup>81</sup> The result is that few judges take advantage of the discretion *Booker* gave them in cases involving women defendants, or indeed, any others. And within-Guideline sentences—even within deeply flawed Guidelines—typically survive review.<sup>82</sup> In fact, few circuits have engaged in meaningful

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74. See Etienne, *supra* note 67, at 82–83.

75. See Raeder, *supra* note 5, at 694–95.

76. MODEL PENAL CODE: SENTENCING § 6B.06(4)(b) (AM. LAW INST., Proposed Final Draft 2017).

77. *Id.* at cmt. d.

78. U.S.S.G. § 5H1.4 ("Drug or alcohol dependence or abuse ordinarily is not a reason for a downward departure.").

79. See Raeder, *supra* note 5, at 697–98.

80. See, e.g., *United States v. McBride*, 434 F.3d 470, 476 (6th Cir. 2006) (noting that district courts are still "required to consider the appropriate Guideline sentencing range").

81. Raeder, *supra* note 5, at 709.

82. See Paul Hofer, *Federal Sentencing After Booker*, 48 CRIME & JUST. 137, 140, 144 (2019).

substantive review of within-Guidelines sentences.<sup>83</sup> Thus, even in an advisory regime, the Guidelines—imperfect and ill-considered as they are—still hold sway. While Guideline sentences are surely easier to administer (following rules without examination always is), the result is unfair and disproportionate—especially when it comes to women offenders.

#### CONCLUSION

As long as the Guidelines hold sway over sentencing decisions, judges are more likely to sentence women to the same—or perhaps slightly lower—thoughtless and disproportionate sentences as men. In our fixation about unwarranted disparity in sentencing, we have enforced an unwarranted uniformity: treating women and men alike when they are not, ignoring criminogenic differences between men and women, and trivializing the factors that define women's crimes and predict women's recidivism.

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83. See Paul Hofer, *After Ten Years of Advisory Guidelines, and Thirty Years of Mandatory Minimums, Federal Sentencing Still Needs Reform*, 47 U. TOL. L. REV. 649, 676 (2016) ("It is noteworthy that not a single appellate court has unambiguously held that sentences *within* an unsound guideline are presumptively unreasonable."); see also Scott Michelman & Jay Rorty, *Doing Kimbrough Justice: Implementing Policy Disagreements with the Federal Sentencing Guidelines*, 45 SUFFOLK U. L. REV. 1083, 1106 (2012); Note, *More Than a Formality: The Case for Meaningful Substantive Reasonableness Review*, 127 HARV. L. REV. 951 (2014).