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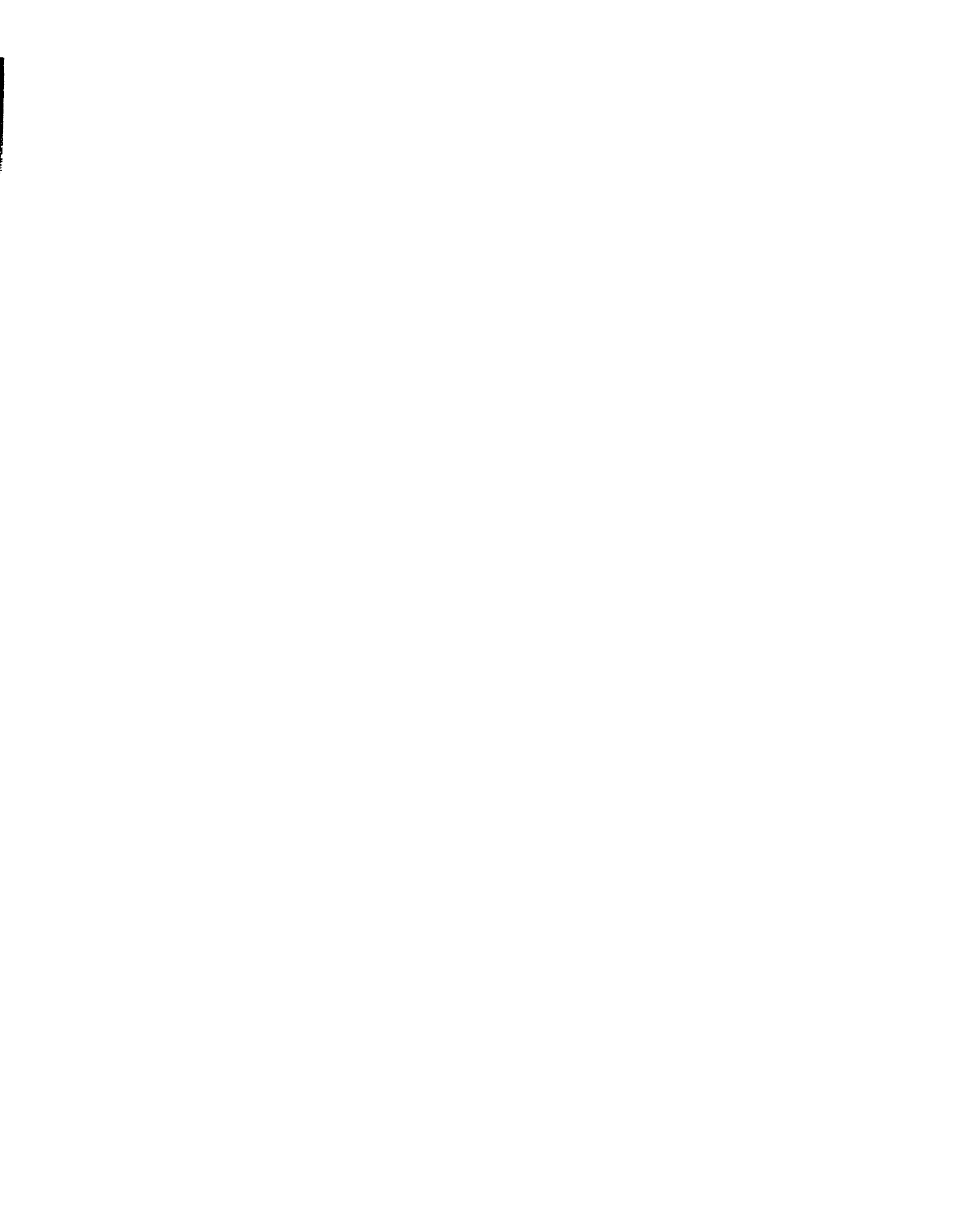
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**ASSESSING THE DIFFERENTIAL TREATMENT OF MALES
AND FEMALES IN THE CRIMINAL JUSTICE PROCESS:
A CRITICAL ANALYSIS**

by

Jodi-Anne Massicotte

**Thesis submitted to the Department of Criminology,
University of Ottawa, in partial fulfilment of the
requirements for the degree of Master of Arts (M.A.)**

September, 1996

Jodi-Anne Massicotte, 1996.



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**To my parents,
George and Suzanne Massicotte
and to the memory of Gaston Heon,
who was always an academic and personal inspiration.**

Abstract

This study focuses on the assessment of differential treatment within the criminal justice system and begins with an examination of the law. Although law has a specific claim to neutrality and objectivity, it was created by males in the interests of males. The laws enacted by legislators set the tone for the inferior regard of women and essentialized and sexualized typifications of women were thus reflected in law. (For example, women were viewed as weaker, more dependent, more passive, etc.)

The 1960's saw feminists beginning to challenge and critique the law. Feminist legal theorists found that stereotypes about the roles of women resulted in their differential treatment within the legal system in a number of ways. Some examples include: allocating them fewer material resources, judging them by different and inappropriate standards, denying them equal opportunities or failing to recognize the harms done to women. Soon, it came to be recognized that the criminal justice system was not immune to the differential treatment of males and females.

The next section of the thesis undertakes a review of the empirical studies of the administration of differential justice for males and females. Quantitative and qualitative studies have reached many conclusions utilizing a myriad of variables, approaches and influences. Some have found harsher treatment for females, some have found more lenient treatment of women and others have found no significant differences. Researchers have also asserted the important dimensions which interact with gender to affect how an individual is treated within the criminal justice system. For example, race, age, socio-economic status, demeanor and family status are not single "variables" acting independently of other "variables" but interacting with one another and with gender, to make up a complex social, economic and cultural structure.

If one looks at the administration of criminal justice, overall, there seems to be a clear statement of tendencies toward "qualified" leniency for women. For example, a woman may receive a lighter sentence, but it is because of existing stereotypes of her as weaker, more dependent and more passive. The question is: Is this necessarily beneficial? It must be remembered that the administration of criminal justice is linked to deep seated assumptions about the roles of men and women.

The criminal justice system is not only an administrative process, but a moral and value system as well as a system of social control. Therefore, when women are treated with leniency, it is as a result of the assumption of their nature. This in turn, serves in the reinforcement of their subordination. As discussed, it is no longer a question of simple leniency or harshness, it is more about what differential treatment implies. For example, the medicalization of women often occurs when females commit crime. Due to the fact that criminal behaviour is less frequent in women and does not correspond with the female sex-role stereotype, when it does occur, this behaviour is labelled as irrational and the female is defined as mentally unstable. The woman is thus "sick" not "criminal".

The next section of the thesis explores the idea that laws and penal practices have been constructed in a biased fashion. It examines the concepts of sexism, bias and sexist ideology to understand the idea of the deep seated assumptions about the roles of men and women.

The thesis concludes with some feminist theories and their studies of differential treatment as well as the assertion that feminism is incongruent with the strict confines of the law. It also reviews the various definitions and interpretations of equality.

It is found that we must incorporate social, political, economic, cultural, ideological, familial and historical context with the study of differential treatment within the criminal justice system. For example, rape and pornography cases should also be analyzed within the confines of sexuality and power. It is asserted that as long as institutionalized stereotypes about the inferiority of women exist within the larger societal framework, they will continue to have an influence on the administration of justice.

Acknowledgements

I would like to express my sincerest thanks to my thesis supervisor, Dr. Maria Los, whose continual guidance, support and patience were central to the completion of this project.

I would also like to thank those who have been influential throughout the years. My parents, George and Suzanne and my sisters Nicki-Lynn and Michelle, who have continually supported me in all of my academic and personal pursuits. They have been a constant source of encouragement and comfort throughout my life.

There are also many individuals, who have, each in their own special way, contributed to the completion of this thesis. Tim Luciw, who has always listened and provided me with unconditional support and my roommate and friend Tina Asdrubolini, who has offered much insight through our many theoretical discussions.

Special thanks goes out to several friends including Lisa Hill, Steve Ahrens, Irwin Cohen, Derek Janhevich and Nancy Butcher who, while working on their own respective projects, have each had the time to provide me with inspiration. Finally, thanks to Joanna Wilde and Natalie Quesnel for their continual advice and understanding.

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Introduction

The differential treatment of males and females has, in recent years, been the center of a compelling debate among academics in many disciplines. Within the legal realm, criminologists have been seeking to uncover the existence, nature and manifestation of differential treatment in the criminal justice process.

For many years, it was assumed that differential treatment of males and females meant simply leniency or harshness. Now, although a definitive understanding of this issue has not yet been reached, researchers have found that there are several considerations to be weighed before claiming that members of one gender are treated more leniently or harshly than those of the other gender.

Drawing from a feminist theoretical perspective, this study will undertake a critical review¹ of qualitative and quantitative studies which have, in one way or another, examined differential treatment within the criminal justice process. Thus far, many research studies have attempted to explain differential treatment and sexism by examining specific aspects of the criminal justice process². Therefore, it is essential not only to review the studies of differential treatment, but also to undertake a comprehensive examination of this issue; one which will seek to include not only the

¹ Although it would have been preferable to limit this study to the Canadian context, the paucity of Canadian research and the significant contributions of British and American studies rendered it impossible to do so. Consequently, this study employs sources from Canada, Great-Britain and the United States in an effort to outline the most relevant contributions to the understanding of this issue.

² For example, a study which only examines differential police arrest procedures is unable to adequately explain the reasons for differential treatment throughout the criminal justice process.

specific processes of criminal justice, but also the socially constructed attitudes, stereotypes and practices within the larger society which have played a part in the shaping of our criminal justice system.

The principal research questions that this study seeks to answer are:

- 1) How has law's claim to neutrality affected the treatment of women within the realm of criminal justice?
- 2) If there are differences in treatment between males and females, do they reflect the interests of society in general and its perceptions of the roles and expectations of males and females?
- 3) How is equality defined? Should feminists seek "a theory of real and actual equality" to deal with differential treatment?

This thesis will be divided into five chapters. The first chapter will study androcentric law and one of its most significant challenges: feminist legal theory. It will then focus specifically on women and their experiences with criminal law and its application, providing examples to show that law's claim to neutrality is, in fact, a myth.

The second chapter will critically examine a number of empirical studies in an effort to discover whether a pattern of differential treatment within the criminal justice system exists. Following an overview of the strengths and weaknesses of qualitative and quantitative research, this examination will suggest that differential treatment of males and females must transcend traditional notions of simple leniency or harshness. Further, it will outline the unresolved dilemmas which continue to stifle the improvement of social theories and practices related to the issue of disparate treatment of the sexes.

III

The third chapter will explore the dangers of treating gender as an undifferentiated category. Some researchers have assumed that differential treatment originates solely in gender. Other writers point, however, to several dimensions which interact with gender to affect an individual's criminal justice outcome. Therefore an examination of the dimensions of race, age, socio-economic status, demeanor and the family status of women³ will clarify many of the misconceptions surrounding differential treatment.

Since the study of and penal response to female offenders has been different and considered less important than responses to males, it has been theorized that laws and penal practices have been constructed in a "biased" or "discriminatory" fashion. The fourth chapter will examine the concepts of "sexism", "bias" and "sexist ideology" to further inform the study of differential treatment.

The fifth and final chapter will explore the debates surrounding the idea of equality. It will outline the strengths and weaknesses of the various interpretations and applications of equality which will allow for a more comprehensive understanding of the differential treatment that males and females receive at the hands of criminal justice agencies.

³ It is important to note that males also experience differential treatment within their gender groups.

Chapter 1

Women and the Law in Canada

1.1 Introduction: Defining Law

Law can be viewed from many divergent perspectives. In simplistic terms, law can be seen as a set of rules and regulations designed to maintain social order. However, if one looks more closely at the concept of "The Law", one may discern that it encompasses much more. In their attempts to define law, social scientists from various disciplines have studied it in a more comprehensive and complicated manner.

In order to grasp the interplay of women and the law in Canada, it is first essential to understand the effects of law on individuals and society. Although law makes certain claims to truth, it can be argued that it is not inherently objective, neutral or universal. There exist power relations within a society and it is those who hold the most power within the public sphere whose values tend to be reflected in law (Boyd, 1986; Smart, 1989; Finley, 1989). Consequently, there are groups whose voices have been silenced or ignored in lawmaking.

Law ultimately shapes and is shaped by the dominant interests of a given society, is a strong determinant of social relations and affects people in radically different ways (Boyd, 1986; Thornton, 1986; Dawson (ed.), 1990; Finley, 1989; Comack and Brickey (eds.), 1991). In this chapter, I will outline the reality of androcentric law and the basic tenets of feminist legal theory along with some of the challenges faced by scholars who study the intersection of gender and the law. I will then focus specifically

on women and their experiences with the criminal law and its application.

1.2 Law as Tradition: The Guise of Neutrality

In Western societies, white, educated men historically had the power to control all institutions within the public sphere. Not only were laws shaped according to the values, views and understandings of men, they were obscured under the rhetoric of neutrality and objectivity. Male-based perspectives were constructed as the norm or standard to which all others were applied. Even in today's times, "privileged white men are the norm for equality law; they are the norm for assessing the reasonable person in tort law; the way men would react is the norm for self-defense law and the male worker is the prototype for labor law" (Finley, 1989: 889).

In recent times, feminists have questioned and criticized the institution of law in an effort to reveal and challenge its androcentrism (de Jong, 1985; Gavigan, 1986; Bottomley, 1987; Finley, 1989; Smart, 1989; Dawson (ed.), 1990; Bartlett and Kennedy (eds.), 1991). Through their endeavours, they have demonstrated the development and complexity not only of the law itself, but of the relationship between women and the law.

1.3 Feminism : A Struggle for Social Change

Feminism emerged with the first women's rights movements in the early nineteenth century. Feminists struggled to gain the right to vote, to gain access to birth control and to own property as married women. However, it was not until the 1960's,

with the entry of women into law schools and a number of legal victories on behalf of women, that a more thorough critique of law was developed. (Bartlett and Kennedy (eds.), 1991: 1).

Feminists have approached the scrutiny of law in several different ways. Some have criticized law for excluding women (Sachs and Wilson, 1978 as cited in Smart, 1989: 20). Others have criticized the legislation itself (Atkins and Hoggett, 1984 as cited in Smart, 1989: 20). Still others have criticized the specific practices of law (Adler, 1987 as cited in Smart, 1989:20). However, these approaches have been unable to effectuate the structural change that feminists see as crucial. More recently, what is termed as feminist legal theory has emerged, in an effort to undertake a more comprehensive critique of the institution of law.

1.3.1 Feminist Legal Theory

Feminist Legal Theory draws from the conditions of women's lives and from critical perspectives developed within other disciplines to offer powerful analyses of the relationship between law and gender and new understandings of the limits of and opportunities for legal reform (Bartlett and Kennedy (eds.), 1991; Dawson (ed.), 1990). This theory represents one of today's most significant challenges to contemporary law.

Critical legal feminists believe that the framework of law should grow to encompass women's differing experiences of life. They also believe that women have been evaluated against a standard that was not fashioned with them in mind and thus

does not reflect their experiences and capabilities (Finley, 1989).

Although feminist legal theorists are striving to enunciate law's weaknesses, they stress that working within the confines of traditional law reform can render it difficult to eradicate sexual subordination.

1.3.2 The Limits to Reform: The Precariousness of Feminist Achievements

Given the fact that women have been entirely excluded from a legal tradition which spans several millennia, it is ingenuous to imagine that a fully-fledged feminist jurisprudence is likely to spring forth from the feminist movement instantaneously. Such naivete also fails to acknowledge that the impenetrability of the carapace of autonomy which envelops the law and immunizes it against challenge is such that a transformed gynocentric jurisprudence must necessarily remain illusive at least for the time being (Thornton as cited in Dawson (ed.), 1990: 7).

There are several barriers that women and other minorities have faced in law reform and the attempt to render law more gynocentric and there are numerous reasons for such stagnation. Firstly, Anglo-Canadian law is based on precedent. By continually referring back to what has previously been defined and by building on precedent, legal language stabilizes and reflects the status quo rather than being able to progress and reach for new theoretical understandings (Dawson, 1987-88; Mossman, 1986). Existing precedents are decidedly androcentric, preserving a legal system which treats males far more favourably than it does females.

Secondly, legal reason can prevent change in the sense that if one does not articulate a problem within the parameters of the dominant discourse, such an

approach is labelled or defined as unrealistic or too radical. Mary Jane Mossman argues that: "legal method defines relevance and excludes some ideas while admitting others" . This is a process in which any alternative or critical suggestions are progressively excluded (Mossman, 1986: 45). Essentially, law sees the world from within a self-contained framework of discourse which constructs its own objects of analysis. Due to the fact that it ignores and/or fails to understand alternative approaches, this framework declares other discourses and their objects irrelevant (Dawson (ed.), 1989; Mossman, 1986; Smart, 1989).

As a result of the production and reproduction of social or power relations, feminists are, at times, left with no alternative but to work within the existing legal framework to attempt to effectuate change. This often results in a counter-intuitive endeavour. For example, feminists believe that the existing structure of the legal system is flawed, however, they are forced to utilize the intellectual approaches of the present system in order to make progress. In this sense, women must submit to the patriarchal status-quo. It is very difficult for feminist lawyers and feminist legal theorists who are obligated to work with two completely opposing mindsets. Mary Jane Mossman clarifies this dilemma:

Feminist legal scholars are expected to think and write using the approaches of legal method: defining the issues, analyzing relevant precedents, and recommending conclusions according to defined and accepted standards of legal method. A feminist scholar who chooses instead to ask different questions or to conceptualize the problem in different ways risks a reputation for incompetence in her legal method as well as lack of recognition

for her scholarly (feminist) accomplishment. Too often, it seems almost impossible to be both a good lawyer and a good feminist scholar. (Mossman, 1986: 48)

Consequently, when individual changes in law are made, they generally are not able to transform the existing social structures, ideologies and divisions of labour upon which structural change depends (Bartlett and Kennedy (eds.), 1991: 4). Feminist legal scholars have recently scrutinized the construction of legal discourse and tools of legal method and suggested reflexivity within the discipline of law (Mossman, 1986; Smart, 1989; Bottomley, 1987 as cited in Smart, 1989: 110). Undoubtedly, this suggestion has not been implemented due to the aforementioned claim of law as being objective and neutral.

Law's myth of neutrality and its value-laden, subjective and culturally determining presence within western society have undoubtedly assisted in the perpetuation of patriarchy and the stagnation of systemic reform. However, it is crucial to recognize that our legal system does not operate in a vacuum. In essence, it is impossible to understand the dynamics of the legal system without also taking into account the historical, economic, political and religious contexts surrounding it. It must then be recognized that law is not wholly responsible for the cause and/or remedy of androcentrism and oppression. Boyd asserts that :

law is neither the ultimate oppressor of women nor the ultimate means to resolve that oppression. Rather it is situated within the complex set of relations that we call society and state, and is implicated both directly and ideologically in women's oppression and in women's struggles against oppression...[I]t may only

become clear that particular legal developments, or legal struggles, are problematic for women when they are viewed as they operate in tandem with other social institutions that are also key ideological vehicles, such as the media, religion, and medicine (Boyd, 1994: 46).

The difficulties in reforming our legal system are evident within specific areas of law. For example, the issue of women and criminal law has been an area of significant debate, most notably among feminist academics and lawyers.

1.4 Women and Criminal Law

The power and authority that men have traditionally possessed within the public sphere was also evident in criminal justice agencies, where white, middle/upper-class men held the power and authority to establish criminal laws and policies. Lawmakers claimed that they were reflecting democracy and neutrality, yet traditional attitudes were reflected in law through essentialized and sexualized typifications of womanhood (Feinman, 1994: 7).

Lawmakers believe that equality is an integral part of our democratic society⁴. They have asserted and continue to assert that "criminal and penal laws should reflect the fundamental elements of the collective social conscience. The criminal law of a democratic country must protect the values shared by the majority of its citizens, of both sexes, of all ages, of all ethnic origins, and of all social, educational and economic backgrounds." (Boyle et al.(eds.), 1985: 1) The premises on which these points are

⁴ The problematic and debatable definition of equality will be fully addressed at a later time.

founded can be criticized on two fronts. Women were not traditionally involved in defining values and determining what constituted crime. Therefore, the experiences and contributions of "others" were not represented. Eventually, law legitimated the objectification of women by pronouncing formal equality, while systematically continuing to deprive them of real authority to create themselves and their world (Ann Scales, 1989: 33). Criminal law which was devised by male legislators with a view to controlling anti-social acts committed for the large part by men was being applied to women and minorities.

In criminalizing certain activities, (for example, prostitution) and in the manner in which women are treated in court trials (for example, in rape cases), the law has sought to preserve a patriarchal view of morality. Also, when feminists enter the legal sphere in order to instigate social change, they are forced to frame their arguments within the confines of either liberalism or conservatism (for example, in attempts to address pornography). Consequently, the substantive issues of women continue to be largely ignored.

1.4.1 Prostitution⁵: The Formalization of Oppression

Christine Boyle et al. believe that prostitution-related offenses are "Offenses against Women" rather than offenses committed by women. They assert that the subordinate role of women is revealed through prostitution and that prostitutes are

⁵ It is important to recognize that there are both male and female prostitutes, but for the purposes of this paper, focus will be placed on female prostitution.

exploited and victimized by the law and its application (Boyle et al., 1985: 54). It is crucial, then, to discuss some of the issues surrounding the above assertion.

Firstly, although both males and females actively participate in prostitution, it is largely categorized by legislators as a 'female' offense. As a result, a female prostitute's behaviour, respectability and legal status are treated as problematic. Historically, "the prostitute woman has almost totally borne the brunt of anti-prostitution and law enforcement efforts" (Millett et al., 1973 as cited in Schur, 1983: 169).

Secondly, in examining prostitution as a crime, one can see that it has been criminalized for the purpose of controlling a woman's sexuality and maintaining and enforcing the female sex-role stereotype; female prostitutes are deviating from the passive role which has traditionally been allocated to women in sexual matters (Doherty, 1988: 181). As within culture, within criminal law, there has been a pervasive differentiation made between 'prostitutes' and 'respectable women'. Since prostitutes have deviated from their sexually passive and stereotypical expectation of purity, their existence is worth less than that of someone deemed to be a 'respectable woman'.

Thirdly, at all levels and whether they are being subjected to customers' sexual demands, harassed by the police, or controlled by pimps - prostitutes directly and continuously experience male domination and oppression (Schur, 1983: 170). The mere fact that laws are aimed at controlling rather than eliminating it emphasizes this need for male domination. It seems logical therefore, that the emphasis and control has always centered around the female prostitute.

In Canada, there are several offences related to prostitution and there are varying feminist views as to how to deal with them. Janice Dickin McGinnis asserts that mainstream feminists have problems accepting that prostitution is a chosen occupation for some women. These problems stem from the desire to protect women from the victimization that often accompanies the trade and also from the fact that women have been traditionally denied their rights as a result of their sex and sexuality (McGinnis, 1994:106). Further, McGinnis argues that:

The central feminist argument is that prostitution remains morally undesirable, no matter what reforms are made, because it is one of the most graphic examples of men's domination over women. On a theoretical basis, it is arguable that such an argument represents a sexist attitude towards sex and sexuality, one which assumes that any changes to be made in bringing men and women closer together on sexual matters are to be made solely by men. On a practical basis, such an argument goes against what prostitutes' rights groups are trying to tell us - that, properly protected, it is the prostitute who is in power during the sale of sex and that, properly envisioned, sale of sex is just another service industry (McGinnis, 1994: 107).

Undoubtedly, the dilemma faced by feminists is one which cannot be easily resolved. It is not surprising, however, that this dilemma exists. Sex and sexuality are not simple topics for feminists. "We have, after all, been barred from many things solely because of our sex, forced into others because of our sex, thought less of and had more demanded of us because of our sex. We have been damned for being too sexy, for not being sexy enough" (McGinnis, 1994: 109). With the debate among feminists themselves, the prostitution issue has become more than a feminist critique of

the patriarchal status quo. It has translated into a breakdown in the solidarity of the feminists involved in the women's movement.

1.4.2 Rape: The De-Legitimization of Women's Experiences

Male power and dominance in law can be examined in the study of rape and the legal system's treatment of women who have been sexually assaulted. Carol Smart addresses this issue and believes that the courts consistently fail to fully recognize accounts of rape which do not fit within the traditional confines of the legally constructed definition of rape. Smart believes that this subject is worthy of consideration because of the impact of law on individual women as well as the fact that the law defines the parameters within which rape is addressed generally within society (Smart, 1989 : 26). Not only does law influence cultural values with regard to male and female sexuality, but the legal form through which women's accounts of rape are strained constitutes a disqualification of women and their sexuality. Catherine MacKinnon explores this dilemma: "The distance between most sexual violations of women and the legally perfect rape measures the imposition of someone else's definition upon women's experiences" (MacKinnon, 1983: 640).

Catharine MacKinnon examines the influence of rape law on culture and culture's influence on rape. MacKinnon asserts that many women believe that the law against rape is not enforceable in their case. In this sense, the violation that they have experienced is often de-legitimized. Women often conclude that:

we have not "really" been raped if we have ever seen or dated or

slept with or been married to the man, if we were fashionably dressed or are not provably virgin, if we are prostitutes, if we put up with it or tried to get it over with...if we probably couldn't prove it in court, it wasn't rape (MacKinnon, 1983: 640).

When women actually do press charges, they are further oppressed by the legal system. One only needs to look at Supreme Court of Canada decisions to realize that women are re-victimized within the formal court process. Although legislative amendments in 1975 limited the admissibility of evidence relating to the past sexual conduct of the complainant, in 1980, the Supreme Court, in *Forsythe v. the Queen* interpreted the amendments as permitting evidence of the past sexual history of the complainant to be used to attack her credibility (Los, 1994: 48). Then, the 1983 Criminal Code amendments introduced a "rape shield" section as a means of limiting defence lawyers' questioning of sexual assault complainants about their sex lives. This was a necessary measure in view of the devastating techniques utilized to discredit the victim in the eyes of the court. In 1991, the Supreme Court of Canada, in a landmark decision in *Seaboyer and Gayme*, struck down the rape-shield provision of the Criminal Code. The court said that it violated the right of those accused of sexual assault to get a fair trial. Addressing the rationale behind the decision, Justice Beverley McLachlin, who wrote the majority decision, emphasized that, in achieving its purpose— the abolition of the outmoded, sexist-based use of sexual conduct evidence —the rape shield law overshoots the mark and renders inadmissible evidence which may be essential to the presentation of legitimate defences and hence a fair trial (McLachlin,

1991 as cited in *National General News*, August 22, 1991: 6). This ruling placed the importance of the accused's rights at odds with those of the victim. Many feminists believed that due to this decision, not only would victims be hesitant to lay charges against their perpetrators, but once again, the complainants would be put on trial rather than the perpetrators.

In August 1992, the then minister of Justice Kim Campbell responded to this decision with new legislation. Bill C-49, " provides the legal parameters for determining the admissibility of a victim's past sexual history as evidence in sexual assault trials. It also provides - for the first time in Canadian legal history - a definition of the concept of 'consent' as it applies to sexual assault" (Mohr and Roberts, 1994: 10).

Further, in a 1995 decision, the Supreme Court, in *R v O'Connor*, decided that therapeutic records were to be allowed as evidence in sexual assault cases. This decision now allows defense counsel access to the private records of sexual assault victims and their therapists. These are examples of decisions that reinforce many of the problems that feminists have found and continue to battle with in relation to law. Carol Smart asserts that in cases such as these, "we find the problem of legal method, the problems of 'maleness of the law', the disqualification and disempowering of women, and the public celebration of all of these things" (Smart, 1989: 38).

Due to law's strict confines, women's concerns have often been de-legitimized or ignored in specific areas of criminal law. The study of pornography represents an example of this de-legitimization.

1.4.3 Pornography: Obscurities in Discourse

According to Deborah Cameron, the debate about pornography has primarily been conducted in terms of a series of dichotomies: freedom of speech versus censorship, representation versus reality, and private versus public (Cameron, 1991: 9). Within the liberal discourse, pornography is discussed as a special instance of the larger question of freedom of speech. Using pornography as an example, Nicola Lacey states that within the liberal discourse, pornography is discussed and protected in relation to both the public and private spheres. In the public realm, pornography is viewed as the quintessential right to freedom of expression, and when placed in the private sphere, pornography becomes construed as a matter of sexual choice, or private consumption, hence free from government intrusion (Lacey, 1993: 107). Although not all pornography is female and females can be consumers of pornography, within this liberal framework, it can be argued that the concerns of women are displaced and neglected. By focusing on the issues of public or private, freedom of speech and actual harm, the liberal discourse has ignored women's issues. These abstract terms have detrimental effects on the rights of women in terms of equality.

Beverly Brown makes interesting observations concerning the interplay of law and pornography, differentiating the liberal from the conservative viewpoint. According to Brown, to a liberal, pornography is about balancing the need for freedom against the threat of harm. In essence, the freedom to consume and create pornography signifies the victory of years of struggle: the struggle to secure freedom of speech and maintain

sufficient safeguards against repressive state measures (Brown, 1991: 75). On the other hand, in moving to the conservative realm, the debate about pornography centres around the value of community and the negative effect that the dissemination of pornography has on the community (Brown, 1991: 76). In this view, the law plays an integral role in shaping and maintaining community standards. It is these two discourses which have largely monopolized the debate about pornography.

Recently, however, a third voice has emerged and is beginning to break through the confines of the liberal and conservative discourse. Feminism offers a view of pornography from a different lens, one which focuses on the harm done to women as a class - a form of sex discrimination. At the forefront of the movement are feminists such as Catherine MacKinnon and Andrea Dworkin. Although their framework can be labelled as originating from a radical perspective, their views have been very influential. Basically, they state that all forms of women's subordination and oppression are defined in and set as reality in pornography (MacKinnon, 1987: 44). Pornography, within the feminist conception is not about sex, but sexism⁶ (Brown, 1991: 76) ; the portrayal of women in pornography is said to hinder the attainment of gender equality in other areas.

Essentially, when pornography is placed within the realm of state control, so is the argument about the meaning of pornography. The insidious use of abstract

⁶ It is important to note however, that not all feminists view pornography in the same fashion. In fact, there is extensive debate within feminism about the harms of pornography.

standards and principles which appear to be neutral are common within the parameters of legal discourse. However, they are designed to create and maintain male advantage (Mackinnon, 1987: 45). As stated earlier, throughout history, the discussion of pornography has been restricted within the rhetoric of conservatism and liberalism. Further, the regulation of obscenity laws either corresponds to the conservative view of depravity or the more recent libertarian conception of tangible harm, neither of which adequately articulates the concerns of women.

Yet, in recent years, there have been some changes in judicial patterns. In *R v Butler* (1992), there are some kindles of hope for feminist concerns. For the first time in more than 200 years of obscenity law, judges have verbally articulated legal arguments concerning obscenity provisions from a woman's point of view; that of the subordination of women to men. In the decision, Justice Sopinka states an object is obscene "not because it offends against morals, but because it is perceived by public opinion to be harmful to society, particularly women" (Moon, 1993: 367). However, one must be cautious of the words 'perceived by public opinion'.

Citing the recent *Butler* case as an example, Richard Moon states that feminist groups should not place too much trust in the new decision. Emphasizing the vagueness inherent in the community standards test, Moon states that :

the law's commitment to this understanding of the wrong of pornography is contingent. The law does not seek to prevent harm to women. It seeks to prohibit material that the community considers harmful and therefore not prepared to tolerate. It may be that at the moment the community is not prepared to tolerate 'degrading' or 'dehumanizing' representations because it thinks

that these are harmful to women. But in theory, at least, this could change (Moon, 1993: 369).

Although gains have been made to achieve formal equality, our justice system remains biased, with the regulation of pornography contingent upon community standards and a liberal conception of harm. Regardless of what changes are created legislatively, it is the police and the judiciary, who are required to interpret the vague terms of the obscenity provisions. One needs to remember that for the most part, the definition of obscenity has been controlled by men and has excluded the harm that pornography causes to women.

Throughout this paper, the underlying problems of women and the law have been portrayed to be as a result of a largely patriarchal legal system, based on extreme inequalities and power differentials between males and females. It is important to note, however, that women are not ultimately powerless. Women are in fact, powerful. Unfortunately, however, this power is sometimes obscured in the study of women and the law.

1.5 The Power of Women: Resolving Inconsistencies

Feminists do not have to deny the knowledge and values that have been built from women's specific experiences. In fact, if we do deny them, we cannot make a struggle for liberation, but only for assimilation. (Miles, 1985: 67)

The portrayal of women's power has changed over time. It is argued that in communal society, there was no distinction between the public world of men's work and

the private world of women's households. The large collective household was the community with which both sexes worked to produce goods necessary for livelihood (Currie, 1986: 238).

With industrialization, the public/private distinction was born and women were not only devalued, they were also seen as weak and powerless. Much early feminist research, which has focused on this idea of women as weak and powerless, has recently come under scrutiny⁷. Other research has ignored or overlooked the importance and extent of women's work⁸. Angela Miles asserts that although early research was important, it ultimately "devalued women's qualities and work in a way that unwittingly validated patriarchal and androcentric definitions of humanity and the world" (Miles, 1985: 55).

Eventually, however, feminists began to challenge the definition of women as weak and degraded (Miles, 1985; Finley, 1989). Although these feminists have recognized the ways in which patriarchy crippled women, they no longer characterized all female differences as deficiencies. They saw women's experience - within the private realm - of nurture, cooperation and mothering, as a source of particular strength and power. On this basis, they argued that women were not only capable of participating in public life as it existed, but that they were capable of transforming it for the better. Not only women's lack of rights, but the male world itself came in for

⁷ Wollstonecraft, 1792 and McClung, 1915 have been criticized for defining women as weak and powerless.

⁸ de Beauvoir, 1953; Firestone, 1970; Mitchell, 1966; Benston, 1969 as cited in Miles, 1985: 55, have been criticized for overlooking the importance and extent of women's work.

increasing criticism (Miles, 1985: 47).

Although feminists have made great strides in the advancement of their concerns, there have been and continue to be some obstacles in making structural changes that will ensure the acceptance of women's power. Firstly, to the seeming chagrin of their male counterparts, women are increasingly expressing vehement challenges to the social, economic and cultural power of men. In the words of Angela Miles: "when women assert their own needs and experiences, and insist on women's rights, they are threatening men's "rights" over women and men's sexual "freedom". ... [M]en's "freedom" has included sustaining power over women" (Miles, 1985: 51). As a result, however, claims of women are viewed within the male-defined framework as radical.

Secondly, feminists have attempted to resolve the dilemmas of our androcentric laws and their application through the fight for equality. The issue of equality will be expanded upon in Chapter 5, but it is crucial to recognize that the idea of equality has grown to be an area of extreme debate among feminists. Section 15 of the *Canadian Charter of Rights and Freedoms* has been formally enacted to provide for equality:

(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

There are, however, different interpretations of the notion of equality which require extensive consideration. Christine Boyle et al. set out the following interpretations of

the meaning of equality: "absolute gender neutrality; gender neutrality with exceptions based on real, as opposed to imagined, differences between the sexes; and the [non] subordination principle" (Boyle et al., 1985; 13).

"The first approach to equality is informed by the ostensibly clear, formalistic, and process-based idea that equality means sameness of treatment" (Sheppard, 1991: 83). Absolute gender neutrality connotes that men and women should be treated identically, rejecting any legal distinctions between the sexes. The main objective of the gender neutrality approach, therefore, is to ensure that gender cannot, in any case, be considered a reason or basis for differential treatment.

The second notion of equality concentrates on instances wherein exceptions to gender neutrality are acceptable, but they are strictly limited. "Thus, only biological exceptions may be contemplated, though a range of genuine (as opposed to stereotypical) social, psychological and economic differences could be added" (Boyle et al., 1985: 14). It is difficult, however, to separate "genuine" differences from cultural interpretations of differences.

The third notion of equality, the non-subordination principle, rejects the 'differences' approach on the basis that it treats women as inferior. Instead, it focuses on the issue of male supremacy and implies that to be equal is to be non-subordinated. "The [non]-subordination principle allows attention to be focused on prostitution and pornography, rather than making it theoretically possible for women to commit certain crimes, which seems to have been the crux of government policy so far" (Boyle et al.,

1985: 15), as exemplified in making the crime of rape (sexual assault) gender neutral. Essentially, the law must speak on the issues previously stated so as to ensure that women have equal benefit of the law.

Each of the above approaches to the definition of equality requires extensive study, but within the confines of this chapter, it is sufficient to say that linking feminism with the patriarchal discipline of law has been and continues to be the cause of much compelling debate.

1.6 Concluding Comments

Having reviewed the interplay of women and the law in Canada, it is now possible to explore the specific issue of the differential treatment of males and females in the criminal justice system. The following chapter will undertake a critical review of the relevant quantitative and qualitative studies.

Chapter 2

A Critical Review of Empirical Studies of Differential Treatment

2.1 Introduction

In 1975, Freda Adler described western criminal justice systems as follows:

It is almost always the case that the arresting officer is a man, the prosecuting attorney is a man, the presiding judge is a man, up until the mid-twentieth century the juries were almost exclusively male, and the legislators who enact the laws of the land are still usually men. No matter how fair-minded these men may try to be, it is difficult to conceive of a set up more likely to dispense unfairness than such a male-dominated superstructure (Adler, 1975: 241).

It has already been indicated that our legal system has been largely devised and regulated by males, for males, and that this androcentrism has affected women in countless ways. Increasingly, researchers have become aware of this reality and have empirically studied the effects of the processing of male and female criminal defendants (Baab and Furgeson, 1967; Nagel and Weitzman, 1971; Simon, 1975; Moulds, 1978; Visher, 1983; Kruttschnitt, 1982; Kruttschnitt and Green, 1986; Daly, 1987, 1989, 1994).

Much early research has concluded that female criminal defendants are either treated more leniently or more harshly than their male counterparts. There are, however, several factors to consider before accepting these conclusions. Research design, sample size and variable definitions all have an influence on the outcome of the research. It is not surprising, therefore, that results can be conflicting and confusing. In an effort to discern whether a distinctive pattern of differential treatment of the sexes

exists, this chapter will undertake a critical review of a number of these empirical studies. This analysis will suggest that the differential treatment of males and females within the criminal justice system must go beyond the traditional arguments of simple leniency or harshness. Before an examination of the empirical studies is undertaken, however, it is important to outline the differences between the two broad categories of quantitative and qualitative research.

2.2 Quantitative vs. Qualitative Research: The Lingering Debate

Quantitative methods try to establish generalizations that apply to large numbers of people. Qualitative methods explore smaller settings in depth with the goal of gaining insight that may subsequently form the basis for broader generalizations (Hale, 1990: 49).

Those researchers who choose a positivistic, quantitative approach believe that social reality can be measured or become objective through statistical analysis. Others strongly affirm that the goal of research should not only be to produce quantitative results, but rather, to explore social processes through qualitative measures. Still others see value in both approaches, taking into account their respective strengths and weaknesses.

Prior to the mid 1970's, social research relied primarily on quantitative, scientific methods. Qualitative methods, such as participant observation, were utilized but "the focus tended to be on the capacity of surveys to provide the framework in which the procedures associated with the scientific method could be followed..." (Bryman, 1988: 1). It was not until the mid 1970's that philosophical issues concerning research methods sparked controversy. Proponents of qualitative research felt that applying a

natural science model to the social sciences was inappropriate. "Increasingly, the terms 'quantitative research' and 'qualitative research' came to signify much more than ways of gathering data; they came to denote divergent assumptions about the nature and purposes of research in the social sciences" (Bryman, 1988: 3).

2.2.1 Quantitative/Positivistic Research

The basic point about positivism is that it is a philosophy which both proclaims the suitability of the scientific method to all forms of knowledge and gives an account of what that method entails, divergent versions notwithstanding (Bryman, 1988: 14).

Quantitative research, including such methods as the social survey, is derived from physical science which attempts to provide explanations based on impartial evidence. The positivist approach studies only the external, observable behaviour of human beings through a multi-staged process. First, a substantive question is selected, then a hypothesis is formulated, followed by the choice of research design and methodology and, finally, the write-up and publication (Bertaux, 1981: 32).

For a long time, the quantitative approach was treated as a superior way to conduct social science research for specific reasons. Firstly, the natural sciences have been extremely successful within the last century in providing a better understanding of the natural order. This has led many positivists to believe that the natural sciences should provide a standard against which the study of society should be evaluated. Secondly, governments have increasingly sought the assistance of social scientists to provide policy-relevant research. These researchers have had to present their findings in a scientific way in order to secure funding (Bryman, 1988: 13). It has been assumed that the quantitative approach results in impartial, scientific results. However, it has been

increasingly recognized that when this research strategy is applied to the social sciences, impartiality becomes particularly difficult "because people who are the subjects of research react to findings in a conscious way, and the theories themselves affect their behaviour" (Bertaux, 1981: 33). It is important to gain some understanding of statistical analysis and how useful it can be, but at the same time to avoid the trap of assuming that, just because evidence is presented in numerical form, it is somehow more scientific or rigorous or objectively true than any other form of presentation (Hale, 1990: 59). It is this assertion which has triggered an alternative way of undertaking social research and examining social reality; that of qualitative research.

2.2.2 Qualitative/Interpretive Research

The qualitative approach, including such methods as interviews and participant observation, was largely born out of the criticisms of quantitative research. Qualitative methods all have the following basic tenets as their guide: qualitative research is concerned with how people feel within themselves, their motivations and how they create meaning within their lives. A researcher is only able to achieve this by becoming familiar with the social world and seeing it from the point of view of those who are being studied. Our world is not comprised of scientific facts, rather meanings, feelings and understandings.

Qualitative research sees social life as a construction of human beings and a part of human consciousness. Social life is maintained by constant communication between social beings and we each have own ways of experiencing reality. Therefore, since specific social occurrences contain a large amount of flexibility and difference, it is far

more plausible to undertake qualitative research. Many behaviours and communications can have different meanings and interpretations for different people; therefore, it becomes extremely difficult to categorize and quantify such meanings in terms of a positivist framework. In a world which is comprised of values and meaning, it is impossible to expect to achieve a neutral, apolitical understanding of a biased, political and social world. Qualitative or interpretive research does not seek to achieve pure neutrality because it doubts the possibility of achieving it.

Carol Smart criticizes the positivistic approach and affirms that statistics "cannot be assumed to give an accurate impression of what occurs in the 'real' world because the individual judgement and bureaucratic structures through which they are mediated in the process of codification distort the 'facts' in question" (Smart, 1976: 150). She also examines the problems with so-called 'objective' quantitative research in the field of Psychology: "It is assumed that the official rates of mental breakdown in the general population are a 'true' reflection of the mental health of the population, rather than the result of differential diagnosis based upon such factors as socio-economic class, sex or ethnicity" (Smart, 1976: 150).

Daniel Bertaux believes that in quantifying social research, the purpose of social science is lost. He affirms that social research should "inquire about certain social processes; bearing in mind that after all, we live in societies where all social processes involve some form of domination (rich over poor, powerful over powerless, men over women, adults over youngsters, North over South, etc.)" (Bertaux, 1981: 33).

2.2.3 Coming to Terms with the Quantity/Quality Dilemma

Neither individual stories nor statistical aggregates alone offer a meaningful measure of justice (Daly, 1994: 5).

It seems that a logical solution to the problem of social research would be to draw from the strengths of each of the approaches, taking into account their respective weaknesses. However, as noted by Allan Bryman, there are certain problems with the integration of quantitative and qualitative research. Firstly, the fundamental epistemological positions of qualitative and quantitative research are incompatible. "The suggestion that they [quantitative research methods] derive from different views about how social reality ought to be studied has led some qualitative researchers to eschew survey procedures because of their positivist taint" (Bryman, 1988: 153). Also, the financial cost of undertaking research is substantial. Consequently, combining research methods would be even more costly. The fact that there are so many problems with quantitative research renders the approach of qualitative research more viable, however, it is important not to ignore the continuing presence of and reliance on statistical findings.

In the criminal justice context, there are difficulties with both qualitative and quantitative research. For instance, although the statistical method considers variables such as prior record and offence severity to measure differential treatment for males and females in the criminal justice system, it does not consider some important qualitative aspects of criminal cases. Qualitative research may focus on the most sensational cases to reach its conclusions. At times,

journalists and legal advocates draw from selected or celebrated cases to illustrate disparity ... No information is provided on how

the cases were selected nor on how typical they were. Instead, the method is to find the most egregious cases ... and to compare them. It is a deductive method whereby a conclusion is reached and then proved with selected examples (Daly, 1994: 6).

Kathleen Daly attempts to come to terms with the dilemma of quantity and quality by a method of oscillation between quantitative and qualitative research methods:

the most rigorous statistical study may still find a gender gap in the proportions incarcerated on the order of 10 percentage points. With more information about the cases or judicial reasons for departing from sentence guidelines, however, the gender gap grows smaller. Thus, I would caution policymakers and scholars against using statistical evidence alone in evaluating sentencing practices. If a study finds gender differences, apparently favoring women, the authors should have the additional burden of demonstrating, by case analysis or other means, that the statistical result is correct. Optimally, researchers should design studies that permit oscillation between logico-scientific and narrative modes of reasoning (Daly, 1994: 268).

Sylvia Hale reminds us that regardless of the research method chosen, there are three general principles which should always be adhered to. First, she advocates systematic and public accumulation of experience and observations. This involves searching for materials and incorporating the experiences of a variety of people. It is also critical for researchers to be clear about how their evidence was collected so that others can do similar research to check or challenge the results.

Secondly, Hale advocates comparative investigation, incorporating data on people in different situations or different societies. "A comparative focus is critically important in avoiding ethnocentrism, the tendency to assume that one's own group's way of doing things is more natural and proper than that of others" (Hale, 1990: 9).

The final principle which should be followed in research is that of systematic doubt.

"Whatever the evidence looks like, it could be false, or misleading, or biased, or badly collected. Key factors may have been overlooked. Assumptions on which the research was based may turn out to be wrong" (Hale, 1990: 9). Following these principles will allow for the most accurate results possible.

2.3 Quantitative Research Studies Pointing to Gender-Based Differential Treatment

Much of the early research indicates that women are treated more leniently than their male counterparts in the criminal justice process. Some have labelled this treatment as 'chivalry' and/or 'paternalism'. Many have erroneously utilized these terms interchangeably, resulting in significant confusion. It is important to clarify the meaning of the two concepts before examining the studies which employ these terms. Elizabeth Moulds believes that the concepts of chivalry and paternalism are not synonymous and should be distinguished. She defines judicial chivalry as "the superficial elements in male-female relationships, namely, the social amenities". Judicial paternalism, however, is seen as a set of power relations reflecting women's legal and social inferiority to men (Moulds, 1978: 417). Moulds believes that the practice of paternalism is detrimental for women in the sense that:

the laws enacted by legislatures and the decisions of courts have set the tone for the inferior regard of women held by much of society...It is important to be wary of a society which permits paternalism to color the perceptions of those who make and enforce the law. Those perceptions profoundly affect behavior of those in power and the behavior of those paternalized in a manner that is inconsistent with the operation of a democratic state. A basic denial of self-determination is what is taking place (Moulds, 1978: 419).

Researchers who do not make the distinctions between 'chivalry' and 'paternalism' understand paternalism as chivalrous attitudes and behaviors that reflect a degree of respect toward women (Curran, 1983; Nagel and Hagan, 1983 as cited in Daly, 1989(b): 10). Thus, it is important to remember that the term 'paternalism', depending on the researcher and his or her approach, can connote either positive or negative treatment of women.

2.3.1 Research Findings Pointing to the Lenient Treatment of Females

A large number of early studies of differential treatment have found that women are treated 'paternalistically' or more leniently than men in the criminal justice process (Nagel and Weitzman, 1971; Simon, 1975; Moulds, 1978). "This line of reasoning argues that criminal justice officials (predominantly men) try to protect women as the "weaker sex" from the harshness of any experience within the criminal justice system" (Erez, 1989: 309). For example, Stuart Nagel and Lenore Weitzman studied 11,258 male and female criminal defendants charged with grand larceny and felonious assault and found that women were treated "paternalistically" or more leniently than men. They found that fewer women than men were sentenced to prison, more women than men were held less than two months before trial and more women received suspended sentences or probation. They felt that, "there exists a paternalistic protectiveness ... that assumes they need sheltering from manly experiences such as jail and from subjection to the unfriendliness of overly formal proceedings in criminal or family law cases" (Nagel and Weitzman, 1971: 197). In 1975, using data from the state of California and from the United States Courts Annual Report, Rita James Simon, in her

study of the effects of gender in court processing, also found that women were being treated preferentially (Simon, 1975: 67).

Although the above studies were initially thought to shed light on the issue of differential treatment, it was discovered that they were fraught with significant methodological errors. Neither study controlled for previous convictions or gravity of offence; variables known to have an effect on judicial outcome.

Controlling for prior offence, seriousness of offence and race, Elizabeth Moulds (1978), conducted research on the differential treatment of males and females in sentencing patterns, extending upon Nagel's 1963 data analysis. Moulds found that there was still consistently more lenient treatment for women than their male counterparts (Moulds, 1978: 429). However, Moulds' research also had its limitations. Although she controlled for important variables, her research and that of others (for example, Nagel and Weitzman, 1971; Simon, 1975), examined only a small proportion of male and female offenders encountered by the police.

Studies of the chivalry hypothesis based on offenders at later stages exclude a large number of offenders who have been filtered out of the criminal justice system at earlier points. Consequently, little is known about the extent of sex bias at the initial decision point in the criminal justice system (Visher, 1983: 7).

With the realization that sentencing studies were too narrowly focused, researchers began to study differential treatment at the early stages of the criminal justice process. Christy Visher argued, for example, that "[r]esearch that directly examines the extent of chivalry during the initial police-suspect encounter can avoid the types of problems that exist in studies of chivalry within the courts" (Visher, 1983: 7).

The police play a vital role in the control of who comes into the criminal justice system. Allison Morris states: "Full enforcement of the law is clearly both impossible and undesirable and so the police have wide discretion in such matters as the allocation of resources and interpretation of the law as well as in encounters with individual suspects" (Morris, 1987: 80). This means that police may practice a certain degree of discretion in deciding who to arrest. Some researchers have examined gender-based differential treatment by police (Reiss, 1971 as cited in Morris, 1987: 80; Visher, 1983).

In 1983, Christy Visher examined the differential treatment of males and females during arrest. Using data collected in 1977 during police-suspect encounters with 785 males and females, she tested the hypothesis that female offenders were treated more leniently than their male counterparts. On the surface, male and female suspects seemed to receive similar treatment in police encounters, yet, upon examination of the multivariate model, she found that chivalry did exist at the stage of arrest, for those women who displayed 'appropriate' gender behaviour and characteristics. She also found that police utilized some different criteria in their arrest decisions for male and female suspects. Although police arrest decisions were influenced by race, demeanor, type of offence and victim input for both males and females, Visher found that there were some factors which affected the arrest of male suspects but were of no consequence to female suspects and vice versa.

The factors which significantly influenced the arrest of male suspects and not female suspects were situational characteristics such as whether the encounter took

place in a commercial or private location and the presence or absence of bystanders. This differential treatment is explained by the notion that "officers react primarily to the behavior of the female suspect and are not influenced by situational factors" (Visher, 1984: 19). Further, female suspects are often perceived as less dangerous or threatening to police authority, therefore the presence of bystanders does not influence the likelihood of arrest for females.

The likelihood of arrest for females was found to be influenced by the age variable while it had no effect on males. This was explained by different gender expectations for younger and older women. "Police officers adopt a more paternalistic and harsher attitude toward younger females to deter any further violation of appropriate sex-role behavior" (Visher, 1984: 15). Seemingly, the differences in treatment found by Visher indicate that the variables utilized to influence decisions are based on police officer's preconceived stereotypes about the "expected" behaviour of females vis-a-vis that of males.

The wider range of extralegal factors that influence arrest decisions for male suspects suggests that police respond to a variety of inputs in these encounters. In police encounters with female suspects, arrest decisions are made on the basis of individual factors, rather than a large group of situational cues. This may reflect the influence of police officers' gender expectations on arrest decisions of female suspects (Visher, 1983: 22).

Visher concluded that as long as men continue to dominate the criminal justice system as police officers, lawyers and judges, traditional attitudes about male and female roles will continue and ultimately influence the differential formal sanctioning of men and women. Some females will receive more lenient treatment than their male

counterparts if they display appropriate gender behaviours while others who violate traditional gender role expectations will be subject to more severe treatment.

2.3.2 Research Findings Pointing to the Harsher Treatment of Females: Adult and Juvenile Justice

There have been studies which have shown that females are treated more harshly than their male counterparts when they are charged with "non-traditional", male offences (Bernstein et al., 1977; Parisi, 1982; Nagel and Hagan, 1983). For example, Elene Bernstein et al. conducted a study on plea bargaining in a New York court between 1974 and 1975, utilizing a sample of 1435 males and females charged with robbery, burglary, larceny and assault. They found that gender had no effect on charge reduction once several variables known to affect judicial outcome were controlled for. Further, it was found that women were being treated more harshly than their male counterparts when they committed what were traditionally labelled as "male offences". They concluded that "women may be more severely responded to because they are violating expectations for appropriate sex-role behavior as well as appropriate law abiding behavior" (Bernstein et al., 1977: 379).

In her review of American studies on the effect of gender on sentencing, Nicolette Parisi concluded that problems with research designs, limitations due to broad offence categories, failures to consider prior record and other relevant factors have led many researchers to erroneously assume that women are treated "preferentially" in the criminal justice process. However, when proper controls are introduced, "it occasionally appears that negative (punitive) treatment is accorded females for "manly"

crimes" (Parisi, 1982: 215).

Harsher treatment for females has not been limited to adult offenders. Young female offenders have also been found to have been treated more severely than their male counterparts in the administration of criminal justice (Geller, 1987; Chesney-Lind, 1987; Reitsma-Street, 1993; Schissel, 1993). In Canada, it was originally thought that this harsh treatment was predominantly a result of the biased interpretation of the status offences under the Juvenile Delinquents Act (1908-1984), as well as the "parens patriae" philosophy which authorized the state to act as a substitute parent which ultimately promoted the perpetuation of patriarchy. Recent research has revealed that in spite of the removal of both of these factors in the Young Offenders Act (1984), sexist ideologies and practices have remained.

It is well documented that under the Juvenile Delinquents Act (JDA), young females were being subject to a double standard of patriarchal justice (Geller, 1987; Reitsma-Street, 1993; Schissel, 1993). Gloria Geller has compared official police data (which has shown that young women have been more frequently charged with status offences, such as truancy and immorality, than their male counterparts) to self-report studies of status offences. She found that young males reported more sexual activity than young females and that boys and girls were equally involved in alcohol and drug abuse, truancy and running away from home. However, official data indicated that girls were brought to court more frequently than boys for these offences (Geller, 1987: 114).

The recognition of this differential treatment became one of the catalysts in the initiation of legislative change. The Young Offenders Act (YOA) (1984), was enacted to

correct the disparities associated with the JDA, as well as to balance the needs of society for protection with the special needs of youth, in a way which ensured due process. Under the YOA, status offences were decriminalized which meant that young people could only be charged with offences for which adults could also be charged. It was assumed that the removal of status offences would bridge the gap of the differential treatment of the sexes, yet, it has been found that "stereotyped views in the criminal justice system are strongly entrenched" (Geller, 1987: 114).

Recent statistical research conducted by Bernard Schissel indicates that regardless of formal initiatives to provide for equal treatment, harsher treatment for young females still persists. For example, males are more likely to be found not guilty than their female counterparts (Schissel, 1993: 38). According to national data on the cases heard in youth courts in 1991-92:

Crime rates are partly reflective of selective policing; given that youth misconduct is universal, it is plausible that females are dealt with more harshly than males at earlier ages. Specifically, the police tend to react more legalistically to young female offenders than to young male offenders (Schissel, 1993: 33).

Schissel also found that the age, as well as the sex of the young offender had an effect on judicial outcome. It was found that the most common age for males in open or closed custody is sixteen or seventeen, while for females is fourteen or fifteen. Younger female youths are also more likely than their male counterparts to receive other dispositions such as probation and community service orders. Schissel concluded that overall, females are still dealt with more harshly than males, reflecting the long-standing patriarchal nature of jurisprudence in Canada (Schissel, 1993: 105).

As is the case with adult offenders, regardless of legislative measures to eradicate disparate treatment of young male and female offenders, organizational and institutional practices remain far from reaching their substantive goal.

2.3.3 Attempts to Correct Methodological Shortcomings

Some researchers have found that the examination of one stage of the criminal justice process does not provide an adequate picture of leniency or harshness. Examining the deficiencies of these studies, they have seen the importance of considering lower court decisions as well as the treatment of males and females at all levels of the criminal justice process (Green, 1961; Simon and Sharma, 1979; Farrington and Morris, 1983; Ghali and Chesney-Lind, 1986) as a method of achieving a more thorough understanding of leniency and harshness. Moheb Ghali and Meda Chesney-Lind (1986), looked at previous studies and found many problems with their results:

Most of the studies reporting evidence of preferential treatment examine only felony cases; since a far larger proportion of female than male cases involve non-felony offences, this procedure is of somewhat limited applicability. Additionally, only sentencing (which is the end point of criminal justice processing) was examined in most of these studies. Finally, a number of the studies also collect very limited background data on the offenders being processed and in some cases crude offence or sentencing categories are employed. As a consequence, they can control for only the most elementary legal and extra-legal factors and their categories ... frequently blur important distinctions within the offender populations and the responses to their behavior (Ghali and Chesney-Lind, 1986: 165).

In an effort to correct the errors of some of their predecessors, Ghali and Chesney-Lind

examined the impact of gender in criminal justice processing at three distinct levels of decision-making, including the police, prosecutor and the court. Four separate data files from the State of Hawaii's Offender Based Transaction Statistics were employed, providing the age, ethnicity, employment status, marital status and educational background of each of the adults arrested in the city of Honolulu between September 1979 and December 1980. Ghali and Chesney-Lind also collected data on prior arrests and convictions of each individual, totalling 5226 records. Using a probit model, they found that "gender influences the outcome of some but not all of the stages in the criminal justice system" (Ghali and Chesney-Lind, 1986: 168).

After controlling for the above factors, they found that arrested females were found to be more likely than arrested males to be charged. Also, they found that arrested males were more likely than arrested females to be released pending further investigation or to be released when the victim declines to prosecute.

The sex of the defendant was not an influence at the District court level (which handles second and third degree larceny) which was an important finding due to the fact that those charged with larceny were found to be significantly more likely to be female.

At the Circuit court level which handles more serious felony cases, gender had no influence in the determination of the arraignment and plea stage, nor did it have an influence on the finding of guilt or innocence. However, Ghali and Chesney-Lind found that sex did influence the type of sentence. Females with identical sociodemographic characteristics and convicted of identical crimes as their male

counterparts were found to be more likely to receive probation as opposed to a custodial disposition (Ghali and Chesney-Lind, 1986: 168). Ghali and Chesney-Lind concluded that gender may play a role at certain stages of the criminal justice process but the results are not consistent in direction. At the earliest stages of processing, females seem to be at a disadvantage, while at later stages, more "equal" treatment is apparent. Sentencing was the only stage which seemed to allocate more lenient treatment for females, yet Ghali and Chesney-Lind asserted that this may be more of an indication of "practicality" rather than "chivalry". As will be shown in later studies, a more lenient treatment may not necessarily be due to the fact that the individual is a female. Rather, it may be a result of her family status.

David Farrington and Allison Morris (1983) undertook research in England, which investigated whether, after controlling for a number of significant variables including the seriousness of the offence and prior conviction, the sex of the defendant had an effect on the severity of sentencing and the likelihood of reconviction. They gathered information from Cambridge City Magistrate Court records, and collected a sample of 395 individuals sentenced for Theft Act offences between January and July 1979. The sample included 108 women. They found that the sex of the defendant was not a significant factor in the sentencing process. They also found that certain factors influenced sentences for women which did not influence sentences for men. For example, the marital status of the female, her family background and whether she had children were all taken into consideration when sentencing a female, but not a male. The weakness in their study is that although these differences were noted, Farrington

and Morris did not speculate on the reasons for this finding. As will be indicated, more recent research has attempted to explain these differences rather than merely note them.

More recently, researchers have not only been examining several stages of the criminal justice process, but have also been utilizing interactive analyses to test for disparity. In 1995, Margaret Farnworth and Raymond H.C. Teske Jr. tested three related hypotheses of gender disparity in felony court processing. They examined the typicality, selective chivalry and differential discretion hypotheses. The typicality hypothesis proposed that women were treated with chivalry in criminal processing, but only when their charges were in-line with stereotypes of female offences. The selective chivalry hypothesis predicted that decision makers were disproportionately chivalrous to white females, and the differential discretion hypothesis suggested that disparity was most likely in informal decisions such as charge reduction as opposed to formal decisions at final sentencing.

Utilizing multivariate analysis from 9966 felony theft cases and 18176 felony assault cases processed in California in 1988, Farnworth and Teske found that white, African American and Hispanic females with no prior record were more likely to receive charge reductions (73.2%, 73.3% and 76.3% respectively) than their male counterparts (72.1%, 66.4% and 75% respectively). A charge reduction also increased females' chances for probation. "Compared to males with a charge reduction, females whose charges were reduced to misdemeanors were less likely to be sentenced to jail (74% vs. 82%) and more likely to receive probation (25% of the females vs. 16% of the

males)." (Farnworth and Teske, 1995: 37). They also found that males who were younger than 45 with a prior record were more likely to be sentenced to prison than their female counterparts.

Selective chivalry was found as there was a greater tendency to reduce charges from assault to nonassault among white female defendants than among minority females (24.0% for white females vs. 12.6% for African American and 14.2% for Hispanic females). The notion of differential discretion was partially supported in the examination of decisions concerning charge reduction. "The most interesting gender differences in this study were related to charge modifications that occurred prior to final sentencing. Charge reductions were pivotal, both as outcomes and as a determinant of disposition" (Farnworth and Teske Jr, 1995: 41). Finally, Farnworth and Teske Jr. found no discernible support for the typicality thesis.

They concluded that conventional analyses using additive procedures, an exclusive focus on sentencing and tests of single hypotheses of gender disparity limited the identification of disparity in court processing. They also suggested that directions for further disparity research not be limited to gender differences. "The identification of racial disparity or age differences in processing, for example, is likely to be handicapped without a separate consideration of racial and ethnic differences within gender groups" (Farnworth and Teske Jr., 1995: 42).

2.4 A Disjunction Between Quantitative Research and Theoretical Discourse

Some researchers have found that it is inadequate to attempt to find mere leniency

or harshness in their quantitative studies of differential treatment (Simon, 1975; Smart, 1984; Kruttschnitt, 1982; Kruttschnitt and Green, 1986). Hence, they have proposed theories to transcend simplistic interpretations of this phenomenon.

2.4.1 Transcending Simplistic Theories: Beyond Leniency or Harshness

Approaches to court responses to female crime that look simply for evidence of leniency or severity may actually obscure complex and meaningful differences in the judicial response to male and female defendants (Chesney-Lind, 1987: 125).

A number of researchers have attempted to explain some of the reasons behind alleged differential treatment of the sexes. The "liberation hypothesis" (Adler, 1975; Simon, 1975), the impact of the sickness model of female criminality (Smart, 1976), social control (Kruttschnitt, 1982; Kruttschnitt and Green, 1986) and the inclusion of non-legal factors, (Eaton, 1983, 1985, 1986; Daly, 1987, 1989, 1994) are four approaches which have attempted to transcend the earlier efforts to describe the workings of the criminal justice system in terms of either greater leniency or harshness for females. They have sought to qualify and provide explanations of seemingly lenient or harsh treatment.

The male domination of the social sciences stemming from our patriarchal society has undoubtedly led to androcentric views of female criminality. For example, many male criminologists have historically applied their sexist criteria to theorize about the effects of women's emancipation (Pollack, 1950 as cited in Box, 1983: 189). They have postulated, for example, that women's liberation would cause women to become more criminally minded and that the entrance of women into the public institutions would lead

to an increase in the volume of female crime and equalization of treatment of males and females by the criminal justice system. Some female criminologists have also assumed that women's liberation would have an effect on the crime rate (Simon, 1975; Adler, 1975).

2.4.2 The "Liberation Hypothesis" : Does Liberation Provoke a Harsher Treatment of Women by the Criminal Justice System?

Some researchers have examined the possibility that gender role expectations have influenced the treatment of males and females in the criminal justice process and that women have largely benefited from this distinction (Adler, 1975; Simon, 1975). Further, they have also predicted that the Women's Liberation Movement would have a number of effects on this treatment.

In the mid 1970's, Freda Adler postulated that: "as the position of women approximates the position of men, so does the frequency and type of their criminal activity" (Adler, 1975: 251). Therefore, she believed that because of increasing female participation in the labour force as a result of the Women's Liberation Movement, women were no longer limiting themselves to traditionally female crimes such as theft and prostitution. It was predicted that they would commit more traditionally 'male' criminal activities such as crimes against the person, more aggressive property offences and white collar crime.

Additionally, Adler believed that concomitant changes would result within the criminal justice process. She assumed that as women gained more equality with men, the patriarchal judicial process would treat women with less deference and would

impose stricter sanctions . In other words, she believed that the chivalrous response of a male dominated judicial system towards women would no longer be in effect.

Adler suggested that another aspect of achieving equality would be the increasing presence of women police officers, magistrates, lawyers and judges within the criminal justice process. In Adler's opinion, these changes would logically mean that decisions would be more based on facts rather than emotional considerations. "While it is true that some of what is considered female crime [for example, prostitution], will probably be eliminated by fiat, what remains may be prosecuted with more rigor and less compassion" (Adler, 1975: 252).

Although statistical-based research has shown an increase in female crime throughout the 1970's⁹, there has been some debate about its link to the contemporary women's movement. Darrell Steffensmeier (1980) utilized critical theorizing to evaluate the argument that sex differences in the treatment of adult criminal defendants were diminishing as a result of the contemporary women's movement. First, he reviewed empirical studies which, notwithstanding their methodological weaknesses, claimed to test the chivalry thesis.

Steffensmeier believed that the effects of sex on sentencing decisions were much more complicated. He suggested five reasons for the consistent findings of lenient treatment of female offenders across many offence categories. These are: practicality, chivalry, naivete, perceived permanence of behaviour and perception of dangerousness.

⁹ This research has often been exaggerated and some findings have been clearly spurious.

Practicality is understood as the assumption that most women defendants have children to care for, and that sending a mother to prison would disrupt family life.

Steffensmeier admits that fathers are also sometimes given preferential treatment, but "it is reasonable to assume that a defendant's being a parent has a greater effect on the treatment of female than of male defendants" (Steffensmeier, 1980: 350).

According to Steffensmeier, the concept of chivalry implies a generally protective attitude toward women in our culture, while naivete refers to the notion that women are less capable than men of committing criminal acts. Steffensmeier links both of these factors to existing stereotypes of women as weaker, more dependent and more passive than men and the related differential expectations of conformity for men and women. In terms of the perceived likelihood of behaviour, criminal behaviour is less expected for women. "For most kinds of criminal behaviour, female involvement is perceived as unlikely or relatively impossible, whereas male involvement is seen as likely or possible" (Steffensmeier, 1980: 351). Since females only make up a small fraction of criminal offenders, they are not seen as a major crime problem.

The final reason for differential treatment is that people assume that the male offender is more dangerous than the female offender. "The male offender is perceived as more dangerous than his female counterpart because of the content of definitions surrounding the male role and because of the greater physical strength of the male" (Steffensmeier, 1980: 352).

In addition to these five factors, Steffensmeier outlined the philosophical, organizational and economic factors that may produce sex differences in criminal justice

outcomes. For example, judges may be cognizant that institutions for women expend less effort and money on rehabilitation programs than their male counterparts. Therefore, their decisions to imprison may be different for males and females.

A judge who might view imprisonment as an opportunity for offenders to acquire vocational skills which would make crime less attractive economically would find little reason to send women to prison. Or, for example, it may be that more jail/prison space is available for male offenders, or that sending males to prison is financially less costly (Steffensmeier, 1980: 353).

Steffensmeier asserts that the above factors have implications for the assessment of the effects of the contemporary women's movement and also of changing attitudes toward females on sentencing patterns. If chivalry, for instance, operates to produce sex-based differences in sentencing outcomes, females might become victims of a backlash in terms of their treatment. However,

if such factors as perceived danger or perceived future criminality are actually more important than chivalry in accounting for sex-based differences in handling of defendants, then the women's movement and changing attitudes toward women will have little effect on sex-bias ... [T]he slender evidence which is available suggests that the perception of female offenders as less threatening and dangerous than male offenders is largely responsible for the preferential sentencing of female defendants (Steffensmeier, 1980: 354).

Steffensmeier concludes that the effect of the women's movement on sex differences in criminal justice outcomes is not easily measured. He advocates further theoretical discourse on the subject. Since he believes that the reasons for differential treatment can be found by examining judges' motives in sentencing offenders, he feels that special consideration should be given to the assessment of which of the

determinants of sex differences (chivalry or danger) plays the more important role in decision making (Steffensmeier, 1980: 356).

2.4.3 The Sickness Model of Female Criminality: the Alternative Route of Processing Women

The neglect of a serious analysis of women's involvement in crime and criminological studies has been paralleled by a considerable interest in women by psychologists and others who have attempted to analyse women's 'vulnerability' to mental illness. As a result crime has become seen as male deviation and mental disturbance has come to be associated with female deviation (Smart, 1976: 174).

Males and females are treated quite differently when criminal behaviour is perceived as being coupled with mental instability. Due to the fact that criminal behaviour is less frequent in women and does not correspond with the female sex-role stereotype, when it does occur, the female is more likely to be labelled as 'irrational' and consequently defined as 'mentally unstable'. Carol Smart explains this phenomenon: "the basic assumption inherent in this proposition is that the unusual is necessarily abnormal or unnatural and consequently female offenders, who have always been insignificant in statistical terms, are perceived as 'sick' " (Smart, 1976: 147). This indicates that it is insufficient to focus exclusively on harshness and/or leniency of the criminal justice system; the utilization of alternative routes of processing and treatment must also be studied.

In her ground-breaking book published in 1976, Carol Smart problematizes the issue of the pathological model of criminality. She does not deny that this model affects both males and females but she asserts that the impact on women is much more

severe. Firstly, she sees this model as based on the presumption that criminal action is irrational, illogical and without meaning for the actor. Secondly, she contends that within this model, the socio-economic structure of society is seen as having little or no influence on the nature or degree of criminal activity. Consequently, crime is seen as an "individual rather than a social phenomenon with the consequence that attention is devoted to 'treatment' focused on the individual rather than directed towards changing underlying social conditions" (Smart, 1976: 148). Thirdly, she believes that this model denies the presence of the will or intention of the individual and, fourthly, she criticizes the pathological model's failure to address the socio-cultural and historical basis of the legal definition of crime. Due to the socially constructed stereotypes of women as less rational and less intelligent than men, women seem to 'fit' more easily into the pathological model of crime:

Such treatment can therefore be seen to represent a double burden for women. Moreover, with the growing influence of psychological ideas on penal policy, the existence of a double-standard of mental health for men and women within established psychology provides legitimate cause for concern (Smart, 1976 : 148)

Although Smart is generally critical of relying too heavily on statistical research results, she examined hospital admissions for mental illness for the years 1968-1971 and observed a reversal of the patterns of involvement by sex shown in the criminal statistics. "In other words men are more highly involved in crime than women but women are much more subject to mental illness than men" (Smart, 1976: 153).

Some quantitative research has found that women who commit crimes are more frequently medicalized than their male counterparts. Susan Edwards cites figures from a

survey conducted by Gibbens, Soothill and Pope in London, England, which found that 32 percent of women charged with a criminal offence committed in schools, shops or hospitals, were remanded for medical or psychiatric reports, compared to 18 percent of men (Edwards, 1984 as cited in Morris, 1987: 83).

It is important to realize that these results are not reflective of the 'inherent nature' of women as being more susceptible to mental illness. Contrarily, they are more than likely the result of stereotyped conceptions of women which ultimately lead to their over-representation in statistical evidence. However, Smart looks both at differential labelling and different types of stress and structurally-based vulnerability both men and women experience. Ultimately then, the strategy for future research should entail an exhaustive examination of how stereotyped roles of men and women are ascribed and sustained and how they influence the differential processing by various institutions of social control.

2.4.4 Social Control Arguments

Candace Kruttschnitt (1982) has departed from traditional research on female offenders, employing the theoretical perspective of "social control" to explain why gender affects the adjudication process. From this perspective, she has hypothesized that "the quantity of informal social control inherent in a dependency status may explain the sentences that female criminal defendants incur" (Kruttschnitt, 1982: 497).

Utilizing Donald Black's conception of law, Kruttschnitt has fashioned her arguments around the idea of social control. Since traditionally women have been economically dependent upon others, they have also been subject to more social control. For

example, if a woman's source of wealth is derived from her husband, she will have less freedom than a woman whose wealth is her own. Therefore, if the absolute quantity of wealth in a woman's life is held constant, both the source and degree of economic dependency will reveal the amount of informal social control to which she is subject: the more economically independent the woman, the less social control to which she is subject (Kruttschnitt, 1982: 498).

Black's conception of law states that it varies inversely with other forms of social control. Thus, Kruttschnitt relates this idea to the criminal justice context and posits that "if economically dependent women are subject to a relatively high degree of social control, and if social control is inversely related to legal control, then we would expect dependent women to receive lighter sentences" (Kruttschnitt, 1982: 498).

In her stratified random sample of 1034 cases of female offenders drawn from an Adult Probation Department in California between 1972 and 1976, Kruttschnitt included women convicted of disturbing the peace, assault, forgery, drug law violations and theft in order to control for the nature of the offence and to obtain variation in the independent variable (economic dependency). Explaining the effect of economic dependency on the disposition requires that the sample contain women with a range of types of economic support.

If, for instance, fraud had been chosen as one of the offence categories, little variation would have appeared, since 90% of these offences involve welfare fraud. Thus, as the offence categories chosen represent numerous types of conduct, they also ensure that the respective characteristics of these offenders are varied (Kruttschnitt, 1982: 499).

Kruttschnitt determined a woman's economic dependency through a cross-tabulation of

the three variables of source of support, marital status, and those residing with the defendant, not including a husband or children. From this computation, defendants were placed in one of three categories: independent, partially independent, and dependent.

A dependent woman, for instance, would be the one who derives all her economic support from someone else and, at the same time, lives with this person. A partially independent woman is one who derives half of her economic support from her own resources, regardless of her living situation. Finally, an independent woman is one who is totally self-supporting. If she resides with someone else, that person does not contribute to her day-to-day support (Kruttschnitt, 1982: 502).

Kruttschnitt also held constant a number of other legal and non-legal variables, including, prior convictions, income, race, number of children and employment status; all of which have been shown to affect judicial outcome.

Based on multiple regression analysis, Kruttschnitt found that sentencing disparities can be predicted from a woman's economic dependency. "The legal system prefers to exert little control over women whose lives presently contain an indicator of daily social control such as that entailed by economic dependency" (Kruttschnitt, 1982: 510). Kruttschnitt also found that as women were more economically independent, they incurred less informal social control and more legal control.

While Kruttschnitt's findings seem interesting, in her arguments of economic dependency, she fails to discuss the issue of welfare dependency. Consequently, one is left to question whether a woman who is economically dependent on the welfare system will be subject to more or less control by the criminal justice system.

Expanding on her earlier argument, Kruttschnitt, along with Donald Green (1986),

undertook a review of the effect of sex on courtroom outcomes to examine whether judicial attitudes, as indicated by sanctioning behaviours, are altered simply by changes in female criminality or, by changes in traditionally sex-differentiated economic and cultural roles. They utilized a stratified sample of 1558 convicted males and 1365 convicted females and controlled for the variables of sex, offence of conviction, and year of conviction (between 1965 and 1980). They found that women were more likely to receive pre-trial release than men. Subsequently, they controlled for variables considered important in courtroom decisions; pre-trial release status; offence severity; pending cases; number of prior arrests; employment status; race and some other extra-legal variables. They also utilized theoretically grounded variables to control for structural and cultural differences between men and women in society. For example, they felt that the economic source of support, family composition, number of children, number of marriages, years of psychiatric treatment, physical health problems and the presence of a juvenile record might all have an influence on the treatment that an individual will receive.

Kruttschnitt and Green found that with regard to the pre-trial release decision, controlling for structural and cultural differences between men and women resulted in the reduction of evidence of judicial paternalism over the 16 year period. This indicates that we cannot simply assume that women are treated more leniently than men in the criminal justice process; there are a myriad of factors which play a role in the judicial treatment that a female or a male will receive and this treatment changes over time.

2.4.5 Limits of Theory: Testing the Potential of Quantitative Research

After having reviewed the various approaches to quantitative research on differential treatment, one is lead to wonder if statistical research is capable of grasping and weighing all influences on the treatment of males and females in the criminal justice system. Many believe that quantitative studies alone 'mismeasure justice' and that studies should focus either solely on the qualitative aspects of treatment or on a combination of both qualitative and quantitative research.

2.5 Qualitative Research Findings

The studies which have been referred to thus far have all been predominantly quantitative and based on statistical research. Qualitative research has also been undertaken as an attempt both to transcend the analysis of statistical patterns and to explain them. Many qualitative studies have been undertaken in Great-Britain¹⁰.

2.5.1 The Inclusion of Non-Legal Variables: Familial-Based Justice

The consideration of non-legal variables is very important and researchers are increasingly recognizing this hitherto overlooked area. (Eaton, 1983, 1985, 1986; Daly, 1987, 1989, 1994). In her research, Mary Eaton argues that much of the research on the unequal treatment of women and men defendants is flawed as it attempts to quantify and measure factors which are far too complicated to be statistically assessed.

¹⁰ Although this paper focuses primarily on Canadian and American studies, British researchers have been pioneers in the important area of qualitative research. Consequently, it is essential to examine these studies to create a comprehensive picture of research in this area.

She believes that in order to understand the subordination of women in the criminal justice process, it is first essential to understand the context in which men and women are perceived: "[I]t is necessary to be aware of the dominant ideology which structures the perceptions and interpretations of most social actors, and which is manifest in the rhetoric of whose words play an important part in the construction of the judicial process" (Eaton, 1985: 118). It is with these guiding premises that Eaton conducts her research.

In 1983, Eaton published a study which posited that "the process of justice conducted in a magistrates' court serves to reinforce and reproduce the *status quo*" (Eaton, 1983: 387). She conducted a case study of a London court, wherein she observed cases two mornings per week throughout 1980 and one morning per week in 1981. During this time, she selected the court-room with the largest number of female defendants and all cases appearing each morning (including those cases involving male defendants) were observed. During this period, 321 cases were seen, including 210 cases involving male defendants and 111 cases involving female defendants. She also examined social inquiry reports and interviewed police officers, probation officers and magistrates.

Eaton found that magistrates responded to the circumstances of the case and not the gender of the offender and on the occasions on which men and women appeared under similar circumstances, they received similar sentences. In routine matters, the sex of the defendant did not play a role in the sentence given. In less routine matters, Eaton found that "it was usually the personal, or rather, family circumstances, rather

than gender, which were considered together with the offence and previous record in deciding sentence" (Eaton, 1983: 388). Eaton found that the decision of magistrates was influenced by the fact that the defendant was responsible for child care, whether the defendant was male or female. Expanding later upon this idea however, Eaton found that in the probation officers' reports she examined, the responsibility for the child care in the defendant's home was automatically attributed to a woman. This meant that this applied to all women who were mothers, while the only men who were thought to be responsible for child care were single fathers (Eaton, 1985: 130). Further, probation officers often revealed their assumptions about gender roles within the family when they discussed the difficulties of single parenthood. These difficulties were defined as radically different for males and females. "Men were presented as suffering from the emotional stress of providing child care, while women were presented as suffering from the stress of economic deprivation" (Eaton, 1985: 126).

It is important to note that these findings do not demonstrate the absence of discrimination against women rather,

the reproduction of gender differences is a subtle process which is accomplished not by overt sentencing disparities but by the routine processes of the court ... The language of the court-room both reflects and reinforces the prevailing picture of the social order. It contains and communicates the attitudes and assumptions of those involved in the social construction of justice (Eaton, 1983: 388).

Eaton examined pleas of mitigation to strengthen her assertions that the use of 'familial ideology' reinforces the inferior position of women within society. Most often, lawyers utilize their client's relationship to his or her family as a way of explaining or excusing a

defendant's behaviour. This indicates that the family plays a great role in the socialization and control of its members. Eaton argues that "the family structure which the court supports: (a) involves and perpetuates the subordination of women and (b) is necessary for the reproduction of the total society in its existing form" (Eaton, 1983: 397). Since it is within the family that ideologies are formulated and attitudes regarding class, sex and race are constructed, in reinforcing the prevailing model of the family, the court is reinforcing the existing structural inequities within our society.

Eaton does not accuse the courts of overt discrimination, rather, she asserts that pleas of mitigation reinforce the prevailing ideology because "such pleas are addressed to common-sense notions of reality. They rely on a shared and undisputed model of the social world, and particularly of the family ... Familial ideology is masked by familiar rhetoric" (Eaton, 1983: 399).

Examining the way in which the position of women within society is reflected in the construction of social inquiry reports for male and female defendants appearing before a magistrates' court, and also by the routine practices of court personnel, Mary Eaton (1985) further emphasized that the informal control to which women are subject within the traditional nuclear family is a source of oppression for them. She found that both in its public rhetoric and confidential documents, the court was guided by the prevailing ideology of the nuclear family. In her examination of probation officers' "precepts and practices", Eaton found a strong reinforcement of traditional gender divisions. For example, following home visits, when probation officers wrote their reports, they assessed the appearance of a woman's home as a measure of her domestic competence.

In some cases, "the appearance of the home would be used to suggest that the woman had emotional problems which prevented her from doing her duties efficiently" (Eaton, 1985: 129). This meant that a woman was judged on the basis of her responsibility not only for the care of children but also on her ability to keep her house clean. Further, Eaton discovered that males were not being assessed on the same basis as their female counterparts. A male defendant was expected to provide financially for his family and undertake the duties and responsibilities associated with a conventional division of labour. Thus, when a home visit was made to a male offender, the probation officers were seemingly more interested in meeting the woman who was significant in the defendant's life. These findings consequently reinforce the gender divisions and "endorse a sexual division of labour by which women, because of their sex, are defined as different and unequal" (Eaton, 1985: 138).

Inspired by the research of Mary Eaton, Kathleen Daly has undertaken research on gender, crime and punishment (Daly, 1987, 1989(b), 1994). In her studies, she addresses some of the inadequacies in the research of others. Most recently, she has endeavoured to critically transcend the assumptions of simple leniency or harshness by integrating the interactive effects of familial relations and gender in sentencing outcomes. Daly has specifically explored, "who and what judges wish to protect...[A]re their sentencing decisions guided by concern to protect women? Or to protect children? Or to protect women's familial labor?" (Daly, 1989(b): 11).

In one of her studies, Daly interviewed 20 men and 3 women judges working in criminal courts in Massachusetts and New York in an effort to learn what their

sentencing criteria were and whether these varied in sentencing men and women. She identified the following patterns of judicial paternalism:

The protection of children, not the protection of women, characterized the type of paternalism practiced by most judges. The judicial protection of children, which was accomplished by maintaining men's and women's labor for families, might involve excusing some crimes if they were carried out for the welfare of family members. Depending on the nature of the offence and the defendant's prior record, the judges rationalized family-based sentencing disparities for both men and women as necessary for keeping families together (Daly, 1989(b): 27).

Further, she found that generally, the family men and family women were thought to be more deserving of leniency in the courts than the nonfamilied men and women, and the family women even more so than the family men.

The judges justified different sentences for the family men and family women, based on a labor hierarchy, in which the care of children was primary and economic support was secondary for maintaining families. Most judges said that the only factor that distinguished their sentencing of men and women (other case factors being equal) was that women cared for children. If however, a man had primary care for children, he too could be considered with the same leniency (Daly, 1989(b): 27).

She terms this treatment as "familial based justice" (Daly, 1994: 138). She does not deny that legal factors are essential in the determination of differential treatment but she advocates the inclusion of extra-legal factors such as the interactive influences of gender and family in the understanding of any differences in treatment between females and males.

Researchers Mary Eaton and Kathleen Daly have successfully demonstrated the

importance of the qualitative approach in investigations of differential treatment. It is clear that they could not have made the conclusions that they did by relying simply on statistical analysis.

The realization of the valuable contributions of qualitative studies has led some researchers to combine both quantitative and qualitative approaches to the examination of differential treatment (Steffensmeier et al., 1993; Daly, 1994).

2.6 Comparing and Combining Quantitative and Qualitative Research

Recent research has revealed the functionality of combining both qualitative and quantitative research strategies to measure differential treatment. Using state-wide data from Pennsylvania for the years 1985-1987, Steffensmeier et al.(1993) conducted a combined quantitative and qualitative study which expanded and improved upon prior research about the influence of gender on decisions to incarcerate. In their quantitative study, they employed more exact controls for offence seriousness and prior record, utilizing state-enacted guidelines (Steffensmeier et al., 1993: 417). They also used a large number of cases (61 294) and offences (21) and divided the sentencing decision into two stages: the decision about whether to imprison and, if incarceration is chosen, the decision about the length of the sentence.

Using ordinary least squares regression, logistic regression and multiple regression, they found that males are more likely to be incarcerated and to be imprisoned for a lengthier period of time. However, they also found that males have higher offence severity scores and lengthier periods of offending. They concluded that offence

severity and prior record have large effects on sentencing outcomes, while gender (as well as race, age and other contextual variables) is weakly correlated with sentencing outcome.

For their qualitative research, they examined judges' official justifications for their deviations from sentencing guidelines and found that "the departure reasons indicated that judges viewed female defendants as less "dangerous", as less culpable than their male co-defendants, and as having more responsibilities and ties to the community" (Steffensmeier et al., 1993: 433). Next, they conducted interviews with a number of judges regarding gender-based sentencing disparity. They found that the judges viewed the lesser jailing of female defendants as a warranted and sensible practice. To explain this, they said that male and female defendants often differ in their degree of blameworthiness. The judges also considered the practical effects of incarcerating women on the community and the criminal justice system. Finally, judges generally denied the practice of chivalry or paternalism in their own decisionmaking, but believed that these considerations may influence some of their colleagues (Steffensmeier et al., 1993: 435).

Steffensmeier et al. concluded by asserting that in rigorous quantitative and qualitative analyses, controlling for such important contextual variables as child care responsibility, pregnancy, emotional or physical problems, and availability of prison space, those males and females who are charged with similar offences will receive similar treatment. Steffensmeier et al., however, do not account for the fact that these variables affect men and women differently.

More recently, Daly (1994) has demonstrated, through a comparison of qualitative and quantitative research, that many quantitative disparity studies "mismeasure justice". She undertook an aggregated quantitative data analysis and contrasted these results with a detailed qualitative examination of pairs drawn from the same sample. Her research focused on defendants sentenced in a New Haven, Connecticut court from 1986 to 1989. Her "wide sample" consisted of all the women's cases (189) and a random sample of men's cases (208). With this sample, Daly conducted a disparity study, utilizing multiple regression in order to search for statistically significant effects of gender on sentencing outcomes. Controlling for variables of severity of offence and prior record, she found gender-based disparity in sentencing. She found that more wide-sample men than women (73 versus 45 percent) were sentenced to serve time and for those incarcerated, men's time was found to be longer than women's time (fifty-five months versus thirty-three months) (Daly, 1994: 24).

For her qualitative study, Daly selected 40 pairs of men and women from the "wide" sample of offenders who were matched on charge, prior record, age, race, and pre-trial release status. She gathered data from docket files, presentence reports and sentence transcripts and constructed a biography of each offender and a narrative for each crime. Although she uncovered statistically significant differences in treatment in her quantitative study, she found that in providing a narrative or a person's biography, "the story is larger and more meaningful than the sum of its parts. The narrative retains a gestalt that quantification may only approximate or may distort" (Daly, 1994: 265). She found that once these data were examined in a qualitative fashion, gender

differences in treatment became negligible. "Although the traditional disparity study can be improved with better measures, the narrative materials have an integrity and meaning that cannot be captured by quantifying their parts" (Daly, 1994: 258).

Daly concluded by arguing that a combination of quantitative and qualitative research is essential in the understanding of differential treatment. In quantitative studies, examining sentencing outcomes means focusing on whether the punishment is applied uniformly. In the qualitative mode, "the posture of uniformity is at variance with a common sense of justice...The aim instead is to describe meaning and process, to ask how justice gets done, and to learn how members conceive of and confer meaning to justice" (Daly, 1994: 267).

2.7 Unresolved Issues

Through time, trial and error, researchers have fashioned their work in an attempt to correct the errors or omissions of their predecessors. Their research has allowed them to pose crucial questions about the state of our criminal justice system and our society in general. However, while many researchers have made new contributions to the knowledge of gender-based differential treatment, there remain several unresolved dilemmas concerning the issue of disparate treatment of the sexes that have stifled the improvement of social theories and practices. They include:

1. The paucity of adequate Canadian research;
2. The disjuncture between qualitative and quantitative research;
3. The concentration on women which can potentially lead to the negation of men's experience of differential treatment within the criminal justice process;

4. The application of a male standard in research which ultimately affects penal policy;
5. The problematic notion of 'equality'.

Firstly, there is a lack of adequate Canadian research in the area of gender-based differences in treatment. It is often necessary, therefore, to review American and British studies. Although these findings do shed some light on the issue of differential treatment, it is crucial to keep in mind that there may be some important contextual differences between the three countries.

Secondly, what has been shown throughout this chapter is that research results can range widely. One must be mindful not to accept them as definitive and without fault. Also, the question of the relative merits of qualitative and quantitative research methods has been an ongoing concern among social scientists. After a review of both types of research, it seems evident that qualitative studies can fill the gaps which have been left by quantitative research as well as provide a different philosophical perspective. Consequently, it will likely be essential that future research encompass both approaches in order to paint a comprehensive picture of differential treatment. When research is undertaken, however, it is important to bear in mind that although many findings indicate that gender differences in treatment theoretically disappear once the proper statistical controls are introduced, ideologies and social constructions of gender remain institutionally ingrained.

Thirdly, it must also be remembered that the study of the differential treatment of males and females often seems to negate the fact that both men and women experience sexism, racism and class bias within the processes of criminal justice. Feminists

and other researchers, must be aware of this reality when they focus their attention on gender-based differences in treatment.

Fourthly, females are constantly being compared to males, reinforcing the assumption that the male is the 'standard' or male treatment is what is 'normal'. For example, if there is evidence of relative leniency in sentencing outcomes for females, policymakers may attempt to punish women more harshly in the name of equality with men. Kathleen Daly asserts that "statistical protocols and theories have been derived from samples of men. Women defendants, or the 'sex variable', have been inserted in analyses without considering how gender relations shape variability in lawbreaking" (Daly, 1994: 6). This normalizes and perpetuates existing penal policies.

Fifthly, the notion of 'equality' and its various definitions have been found problematic by many social scientists. While this issue will be dealt with at length at a later time, it is crucial to recognize that the push for equal treatment may have profound consequences in actual policy decisions. A Canadian researcher, Renate Mohr acknowledges that the dilemma of equal treatment exists and that it is crucial to search for an approach that goes beyond treating unequals (class, race and gender) equally (Mohr, 1990: 479).

2.8 Concluding Observations

It is evident that the various quantitative and qualitative studies have reached several conclusions utilizing a wide variety of variables, approaches and influences. Some have found harsher treatment for females, some have found lenient treatment of

women and others have found no significant differences. Overall, there seems to be a clear tendency toward "qualified" leniency for women. For example, a woman may receive lenient treatment, but it is as a result of stereotypes of her as weaker, more dependent and more passive. "Certain actions may be interpreted as explicable because of assumed female characteristics and punishment may be accordingly less (though it will probably be paternalistic and may still be stigmatising)" (Heindensohn, 1986: 58). This treatment is therefore, not necessarily beneficial. The administration of justice is a moral and value system as well as a system of social control which reinforces the subordination of women. It is therefore no longer a question of simple leniency or harshness, but has become what differential treatment implies.

Chapter 3

Important Dimensions In The Study Of Differential Treatment: Race, Age, Socio-Economic Status, Demeanor And Family Status

3.1 Introduction

As has been previously shown, there are many factors which play a part in the treatment of men and women in the criminal justice process. Researchers have long been attempting to uncover these factors, as well as provide explanations for gender-based differential treatment at the various stages of the criminal justice process. Some have conducted their research based on the erroneous assumption that differential treatment has its origins solely in gender. In other words, they do not consider the differences among women or men as having an affect on their treatment. This chapter will focus on the dangers of treating gender as an undifferentiated category. There are several important dimensions which interact with gender to affect how an individual is treated within the criminal justice process. It is important to consider intra-gender and cross-gender differences within the dimensions of race, age, socio-economic status, demeanor and family status. An examination of these dimensions will paint a clearer picture of the complicated issue of gender-based differential treatment.

3.2 Race

This section will examine the influence of race in the treatment of males and females in the criminal justice system. Since this study focuses largely on the Canadian context, special concentration will be placed on Natives and the differences in their life experiences as compared to white (also differentiated) men and women.

Then, an examination of American studies will also shed light on the interaction of race and gender within the criminal justice system.

There have been several attempts to explain the crime rates among Native people and the manner in which our criminal justice system treats Aboriginal men and women in conflict with the law. Some comprehensive explanations have taken into account the social, structural and historical contexts surrounding Native discrimination (LaPrairie, 1984; Jamieson, 1981; Jamieson, 1987). Consequently, it is important to provide a concise overview of the impact of colonization on Native people generally, and Native women specifically.

3.2.1 The Historical Context of Discrimination of Native People in Canada

*First Nations peoples are 6 times more likely to go to prison than the majority of the non-Aboriginal population of Canada
(C.A.E.F.S., 1995)*

After the arrival of the European settlers, Aboriginal men and women experienced drastic changes in nearly all aspects of their lives. Wanda Jamieson (1987) has explored the issue of colonization and its impact on Aboriginal people and has found that during the original structuring of Canada, the French and British settlers approached Aboriginal people with the intention of "further[ing] the mercantile interests of these respective countries, [which] led to the development of a staple economy" (Innis, 1975 as cited in Jamieson, 1987: 42). Jamieson cites the fur trade as a catalyst in the effects of colonization:

At first, the fur trade fostered interdependence between the Aboriginal people and the colonizers, as the indigenous peoples possessed skills which were requisite to survival and the economic

exploitation of the land. However, this interdependence was rapidly eroded in the nineteenth century as the colonizers took possession and control of the land and its resources and the Indians became a hindrance to settlement. The marginalization of Aboriginal people was hastened by their territorial displacement onto reserves and through the reduction in food resources which colonization and settlement created (Jamieson, 1987: 42).

Not only were Aboriginal people physically displaced, they soon became subject to the formal and informal controls of the colonizers which ultimately threatened their social and cultural structures. The state fabricated an ideology of protection by establishing reserves which resulted in the isolation rather than the protection of the Aboriginal population.

The development of the welfare state also had an impact on the treatment of Natives in the sense that it "further provided a means of handling this "problem population" wrought redundant by economic development, though services provided to this sector never match[ed] the quality available to the dominant population" (Frideres, 1983 as cited in Jamieson, 1987: 45).

Through this progressive control, racism soon became an integral component of the dominant ideology in Canada. Not only did Natives come to be viewed as inferior to the white man, "these deeply ingrained attitudes temper[ed] the prevailing view of Aboriginal people as incapable of escaping the state of dependency and social disorganization in which they are perceived by most Canadians to live" (Jamieson, 1987: 46).

Undoubtedly, tracing the origin of the oppression of Aboriginal peoples through colonization explains how racist attitudes developed and how they have persisted through time. It is not surprising, therefore, that the treatment that Natives are subject

to at the hands of criminal justice agencies is also riddled with racist and oppressive undertones. Furthermore, our capitalist society is one which is regulated by patriarchal structures, which means that women are dominated and oppressed by men within all institutions. Native women, therefore, must not only face the reality of being Native but also of being female.

3.2.2 Special Concerns of the Native Female

Although there is a scarcity of reliable evidence and a variety of cultures and structural arrangements among the First Nations, some researchers have attempted to outline the special concerns of the Native female (Jamieson, 1981; Jamieson, 1987).

Before colonization, Native women were members of an egalitarian society which viewed both men and women as having equally valued social and economic roles within the community. "Being communal, consensual based societies, authority was dispersed and the traditional female familial "domain" was not considered secondary to the public, political "domain" " (Etienne and Leacock, 1980 as cited in Jamieson, 1987: 52). In many Indian societies, women played an integral part in spiritual and political matters. "While women could not be chiefs, they effectively held the critical balance of power and control and therefore they played a critical and respected role in matters of the group" (Jamieson, 1987: 53).

The colonization process and the introduction of the fur trade precipitated tremendous changes to the balanced and egalitarian Aboriginal structures by modifying their traditional economic organizations. Male and female members were forced to rely on external material goods which ultimately altered the nature of their exchange relationships. The fact that men were responsible for hunting and warfare became

significant in trading and external political relations and this altered the traditional power and control which was held by women. Women's loss of power was reinforced with the introduction of wage labour, which allowed men further control over women's unpaid labour (Jamieson, 1981: 138). Ultimately, the colonizers imposed their 'superior' form of organization and precipitated a shift to patriarchy, not only ideologically, but in law and policy. "This European "form" assumed that the private rights of property were vested in men, and that women should be subject to their husbands, as was the case in European societies" (Jamieson, 1987: 58). One of the particular legal mechanisms which was instituted was the *Indian Act*, which governed and controlled the Aboriginal population, and had a notable effect on Native women.

Carol LaPrairie claims that before 1985, "one of the most significant factors affecting the lives of Indian women in Canada [were] those sections of the *Indian Act* which determine[d] their rights and legal status according to standards which discriminate[d] on the basis of sex " (LaPrairie, 1984: 26). Prior to the 1985 amendments to the *Indian Act*, women lost their Indian status if they married a non-Indian. Since in the 1974 -1985 period, more than one-half of Indian marriages were mixed with more than a quarter between Indian women and non-Indian men (LaPrairie, 1984: 26), this legislation had important implications for the Native woman. She was forced to leave her home and reserve, dispose of any property she held and she could no longer take part in any band business. Her children were not recognized as Indian and were therefore denied any access to the cultural and social amenities of the community. "Most punitive of all, she [could have been] prevented from returning to live with her family on the reserve, even if she [was] in dire need, very ill, a widow,

divorced or separated" (LaPrairie, 1984: 26). Even at her death, her body was not to be buried on the reserve with members of her family.

LaPrairie has suggested that the deprived social position of Native women created partially as a result of Section 12(1)(b) of the *Indian Act* has led them to be vulnerable to systems of formal social control, such as the welfare and criminal justice systems:

Overall women of Indian ancestry are more destitute than Indian men. This destitution, which often forces Native women off reserves with children, leaves some to try to survive in the downtown, often on the streets where they are highly visible to the police. It is therefore not surprising to find Native women both with and without Indian status in large percentages among those arrested for public drunkenness (LaPrairie, 1984: 26).

3.2.3 Native Women in Conflict with the Law

The generally deprived condition of Native people in Canada is even more extreme for Native women, who suffer the consequences of being both Native and women (LaPrairie, 1984: 25).

Carol LaPrairie has attempted to understand Native female criminality by exploring "the broader, economic, socio-cultural, and legal factors which are associated with being both Native and female in a male-dominated, non-Native society, and which contribute to women coming into conflict with the law" (LaPrairie, 1987: 110). In her various articles, LaPrairie firmly believes that the role strain experienced by Native men has had a direct impact on female criminality in several specific ways. Firstly, she asserts that Native women may retaliate against physically abusive Native men. Secondly, Native women may escape from a violent or abusive home and move to a larger city where racism and a low level of education and skill render them susceptible to unemployment. These economic circumstances often lead to alcohol and/or drug

abuse and prostitution and ultimately, conflicts with the law. Thirdly, the presence of Native women in the larger urban areas also renders them more visible to the law enforcement agencies, some of whom are discriminatory and biased in the way they exercise their discretion. Fourthly, a Native woman who has observed or been exposed to abusive treatment by role models in her community may be prone to treating her children in the same manner (LaPrairie, 1987: 109).

LaPrairie seemingly portrays the Native woman's situation as directly resulting from male violence without adequately exposing the roots of this behaviour. This issue, however, is far more complicated than simply blaming the Native male for current female criminality. Wanda Jamieson (1987) has examined the origins of male violence in Aboriginal communities and has found that:

The origins of Aboriginal male violence against Aboriginal women relate to a 'social form' which arose from the colonization process. In this context, the term 'social form' refers to the particular set of social and gender relations which have been intersubjectively developed and intertwined over time within the general development of the Canadian state and capitalism (Jamieson, 1987: 83).

Thus, Aboriginal males have also been exposed to a phenomenon which has literally forced them to internalize and apply a sexist and patriarchal ideology. LaPrairie concludes that:

Native women offenders' violent behaviour is a product of socio-cultural, legal and economic forces, including the undermining of traditional Native roles and values, discriminatory provisions of the Indian Act (prior to 1985 amendments), and social class (LaPrairie, 1987: 110).

According to LaPrairie, the most efficient way to address these concerns is to tackle the structural inequalities within the larger society and to attempt to eradicate the tension

and alienation felt by both Native males and females (LaPrairie, 1987: 110). This tension is perpetuated and exacerbated by the dominant group's ethnocentric attitudes of superiority. Consequently, the first step to be taken to address these concerns would be to recognize that the present state of affairs in Aboriginal communities is a direct result of the racist, sexist and patriarchal practices which were integral ideological influences on Aboriginal communities during the colonization process.

Other Canadian researchers have also taken into account race and its link with gender within criminal justice agencies. The Canadian Association of Elizabeth Fry Societies has outlined the realities of the Native female in conflict with the law. According to their information sheet, "[a]lthough First Nations women make up only 3% of Canada's population, they represent approximately 17% of federally sentenced women" (C.A.E.F.S., 1995). There are certain explanations for the above statistics. Firstly, Native women not only experience cultural discrimination, but must also face gender-based social inequality and low socio-economic conditions. As will be expanded upon later, many white females must also face the reality of a low socio-economic status, however, the difference between white and Native females is that poverty is much more prevalent and desperate among Native females than it is among white females. Also, the treatment of destitute Native women by "helping" agencies may be more degrading and discriminatory as compared to that experienced by white women. Secondly, it is also important to consider the fact that our criminal justice system does not take into account Native traditions, customs and beliefs. Consequently, these barriers reduce the likelihood that Native individuals' encounters with the criminal justice system will be successful (Canadian Association of Elizabeth Fry Societies, 1988).

The dimension of race not only has an effect within Canadian criminal justice agencies, it has also been studied in other countries, most notably, in the United States. It is, therefore, important to briefly review some of the American research on this subject.

3.2.4 American Studies on the Effect of Race on Criminal Justice Outcomes

The issue of race is very salient in the United States and many scholars have attempted to study its effect on sentencing decisions. Several researchers have found that black defendants are sentenced more severely than their white counterparts (Datesman and Scarpitti, 1980; Spohn, Gruhl and Welch, 1981-82, 1985, 1987; Farnworth and Teske Jr., 1995). Researchers have explained this by outlining various forms of discrimination, including: the existence of racial discrimination and wealth discrimination resulting from poor defendants' inability to secure a private attorney or pretrial (Spohn, Gruhl and Welch, 1981-82: 71). Taking these factors into consideration, it becomes essential to include such factors as race in our studies to reveal the face of racism in criminal justice agencies.

Spohn, Gruhl and Welch (1985) have asserted that "failure to examine black and white defendants separately could mask distinctions in the treatment of male and female defendants" (Spohn, Gruhl and Welch, 1985: 179). They have therefore analyzed convicting and sentencing data for black and white male and female defendants in an anonymous U.S. city. Utilizing data from a file of nearly 50,000 felony cases between 1968 and 1979, they chose 29,000 cases where the most serious charge was one of the following: murder, manslaughter, robbery, assault, burglary, auto theft, embezzlement, receiving stolen property, forgery, drug possession and driving

while intoxicated. Their final sample included 21,753 cases involving black males, 5,247 involving white males, 1,647 involving black females, and 318 involving white females.

In the first stage of their analysis, they measured sentence severity on a scale ranging from a suspended sentence to a death sentence. They also used a dichotomous prison/no prison measure. Controlling for race and offence seriousness, they attempted to discover if there were any significant differences in the sentences imposed on black and white, male and female defendants.

The second stage of their analysis involved comparing sentences imposed on a sub-sample of 2,753 male and female defendants controlling not only for race and offence seriousness, but also for prior criminal record, type of attorney (private or public), type of plea (guilty or not guilty), pretrial release status, amount of bail, whether or not the charge was reduced and the gender of the sentencing judge.

They found that without controlling for any legal or extra-legal factors in their first analysis, women (with one exception) received more lenient treatment than men.

"While both Black and White females are less likely than their male counterparts to be incarcerated, Black females receive more lenient sentences than Black males, but there are no differences in the mean sentences imposed on White females and males" (Spohn, Gruhl and Welch, 1985: 181).

When they controlled for prior record and other variables known to have an effect on judicial outcome, they found that:

Black women are incarcerated significantly less often than black men [18% compared to 25%] but about as often as white men. Therefore, the differential treatment of black women and black men may be due less to paternalism in favor of black women than to racial discrimination against black men (Spohn, Gruhl and Welch, 1985: 183).

They explored the possibility that black women are affected by both racial discrimination and paternalism. Due to the small number of white women in their sample, they were not able to compare black and white women with a full set of control variables. They did, however, make a tentative prediction that : "It may be that black women are treated more harshly than white women, showing evidence of racial discrimination, and more leniently than black men, showing evidence of paternalism" (Spohn, Gruhl and Welch, 1985: 184).

They concluded that previous research findings which have pointed to preferential treatment for all female offenders without considering race are misleading. They emphasized that is it essential for researchers to test for an interaction between race and gender before concluding that females are treated differently than males. These findings must be viewed as exploratory, however, since Spohn, Gruhl and Welch did not have an adequate sample size of white women who were sentenced and incarcerated. They were therefore, forced to make tentative generalizations based on illustrative data for white females.

Further to their previous research, Spohn, Gruhl and Welch (1987) undertook research on pretrial discrimination by examining the prosecutor's decision to reject or dismiss charges against male and female defendants who are black, "Anglo" and Hispanic. Using data on 33,000 felony defendants from the Los Angeles county District Attorney's office from 1977 to 1980 and controlling for the age, prior record, seriousness of charge and use of a weapon, they found a pattern of discrimination in favour of female defendants and against black and Hispanic defendants.

Women in each ethnic group were significantly more likely to benefit from charge rejection than their male counterparts. "Anglo" females, however, were more likely to

receive charge rejections (59%) than their black (57%) and Hispanic (54%) sisters. Also, "Anglo" males benefited from more charge rejections (54%) than their black and Hispanic cohorts (46%).

Further, it was found that men were more likely than women to be prosecuted (to plead guilty or go to trial). Hispanics were prosecuted more often than blacks, who were prosecuted more often than "Anglos". Additionally, they found that in each ethnic group, males had a higher rate of prosecution than their female counterparts. "Anglo" females were found to have the lowest rate of prosecution (19%) as compared to black and Hispanic females (30% and 31% respectively). "Anglo" males were found to have the lowest rate of prosecution among males (26%) as compared to black and Hispanic males (39% and 42% respectively). Finally, both Anglo men and women were found to be prosecuted at a lower rate than any other group (Spohn, Gruhl and Welch, 1987: 84).

Spohn, Gruhl and Welch found that prosecutors appear to take both gender and race into account in deciding whether to charge and prosecute the defendant. They offered some speculative reasons for their findings.

Presumably, strong cases will be prosecuted no matter what the gender or ethnicity of the defendant, and weak cases will be dropped. But in marginal cases prosecutors may simply feel less comfortable prosecuting the dominant rather than the subordinate ethnic groups. They might feel the dominant groups are less threatening. Or they might believe they can win convictions more often against blacks and Hispanics than against Anglos. However, if the cases against blacks are on the average weaker (because they include marginal cases that would not be prosecuted against Anglos), then in fact there is some discrimination against blacks at that stage and this presumed assumption of prosecutors is correct (Spohn, Gruhl and Welch, 1987: 186).

They concluded that scrutiny of the pretrial stage is an integral component of discovering differential treatment among and within racial and gender groups.

Coramae Richey Mann (1994) explored the interaction between the race and sentencing of female felons in an effort to "close the research schism, and to illustrate the necessity of using court observation methods in conjunction with files and records to obtain a more comprehensive assessment of the factors impacting on court decisions in felony cases" (Mann, 1994: 160). Utilizing data collected in Atlanta, from a superior court, Mann employed systematic observation of the final disposition of 217 of women's felony cases. She observed 16 male judges (1 black, 15 white), and undertook a chi square test, utilizing the variables of race, municipal court disposition and superior court disposition. She concluded that race was not a significant factor in the sentence determinations of the women in the courts observed. However, although not statistically significant, she noted that a single black woman was more likely than a single white woman to be sentenced to prison (25% and 14.3% respectively), and that a single white woman was more likely to receive probation than a single black woman (71.4% compared to 60%) (Mann, 1994: 169).

3.2.5 Do the Studies in the Previous Chapter Appreciate the Importance of the Differences Related to Race-Based Experience?

Most researchers have not compared the sentences imposed on black and white men and women. This is a serious shortcoming, since research has revealed that black defendants tend to be incarcerated more often than white defendants and that at least some of this disparity is due to racial discrimination (Spohn, Gruhl and Welch 1981-82 as cited in Spohn, Gruhl and Welch, 1985).

Some studies in the previous chapter have not taken into account the race of the individual in order to assess differential treatment in the criminal justice process (for example, Farrington and Morris, 1983; Daly, 1989; Eaton, 1983, 1985). Some have mentioned but not assessed the dimension of race within their studies (for example, Kruttschnitt, 1982; Kruttschnitt and Green, 1984; Daly, 1987). Still others have realized the importance of assessing the impact of race in the treatment of males and females by criminal justice agencies (for example, Nagel and Weitzman, 1971; Moulds, 1978; Visher, 1983; Steffensmeier et al., 1993; Farnworth and Teske Jr., 1995). Nagel and Weitzman (1971) found a pattern of unfavourable treatment of those defendants who were black. They also found that black women were more likely than white women to be incarcerated before and after conviction and that black women (unlike black men) received more favourable treatment than white men (Nagel and Weitzman, 1971: 179).

Elizabeth Moulds (1978) also considered the race of the defendant as an influence in his or her treatment. Although this difference was not statistically significant, she nevertheless noted that non-white women were slightly more likely to receive harsher treatment than white women. She reported that 58.2% of the non-white convicted women received some form of incarceration, while 56% of convicted white female offenders were incarcerated. For males, she found that 82.4% of convicted non-whites were sentenced to incarceration as opposed to 77.5% for whites (Moulds, 1978: 424-426).

Christy Visher (1983) included race as an important dimension in assessing police arrest decisions. She found that the race of the suspect influenced the arrest decision for both males and females. Both male and female black suspects were more

likely to be arrested than their white counterparts. Visher theorized as to the reasons for this differential treatment:

Some theory suggests that black females do not benefit from preferential treatment in the criminal justice system because the gender expectations for black males and females are less differentiated than for white males and females ... Indeed, in these data, chivalrous attitudes that may exist among police officers are apparently directed towards white females and withdrawn from their black sisters, resulting in more frequent arrests for black female suspects (Visher, 1983: 17).

Steffensmeier et al. (1993) estimated interactive models to determine whether legal and contextual attributes have differing effects across gender. Controlling for offence severity, prior record, and contextual factors such as the number of cases and the type of disposition, they found small interactive effects involving gender and race when the sentence length was the dependent variable. They found that among male defendants, race had a negligible effect on the length of the sentence, yet there was a difference among female defendants. Black females received prison sentences that were on average, about three months longer than sentences meted to white female defendants (Steffensmeier et al., 1993: 430).

3.2.6 Conclusion/ Comments:

The consideration of race is crucial in order to provide an adequate illustration of differential treatment. It is undeniable that within the larger societal framework, an individual's race can and does have a significant impact on how he or she is treated. This treatment is often a result of deeply ingrained stereotypes which penetrate all institutions including that of criminal justice. Consequently, to ignore the individual

influence of race on differential treatment would be to treat gender as an undifferentiated category.

Including race in studies of differential treatment de-legitimizes some of the biologically deterministic assumptions about the inherent criminality of certain races. Rather, researchers have shown that societal attitudes and the manner in which we have applied them have directly contributed to the racist practices within the criminal justice system. It remains essential then, to include race as a social construct in empirical studies so that we can elucidate the complicated issues surrounding differential treatment.

The age of the defendant has also become a dimension worthy of consideration by some researchers. It is important to review the influence of age on a defendant's treatment within the criminal justice process.

3.3 Age

Although it is debatable whether age is a legal or extra-legal variable, the dimension of age has been shown to have a substantial impact on the treatment of an individual within the criminal justice system. It is important then, to review the studies in the previous chapter in an effort to discern which ones have utilized age as an important dimension.

3.3.1 Do the Studies in the Previous Chapter Appreciate the Importance of the Differences Related to Age-Based Status and Experience?

There are many studies from the previous chapter which do not take age into account in assessing differential treatment (for example, Moulds, 1978; Steffensmeier,

1980; Kruttschnitt, 1982; Kruttschnitt and Green, 1984; Box and Hale, 1983; Eaton, 1983, 1985; Daly, 1989). Other researchers mention age but do not analyze its impact on differential treatment with relation to gender (for example, Nagel and Weitzman, 1971; Ghali and Chesney-Lind, 1986). Still others recognize that age can potentially have a significant impact on the treatment received by male and female defendants and therefore assess it in relation to gender (Farrington and Morris, 1983; Visher 1983; Steffensmeier et al., 1993, Farnworth and Teske Jr., 1995).

Christy Visher (1983) examined age as a variable in differential treatment.

Although studies have been conducted which indicate that the suspect's age had no significant effect on the probability of arrest, Visher cited Chesney-Lind (1978) who found that:

female delinquents are often overprocessed and the crimes they have presumably committed are usually defined as some type of sexual, moral, or status offence. Thus, police officers may also be more punitive with young women than with older women. Additionally, older female suspects may receive more preferential treatment both inside and outside the court, because cultural norms place older females in a position that warrants increased deference (Visher, 1983: 9).

Further, if an adult woman can show evidence of her compliance with the demands of her sex-role stereotype (for example, marriage and children), she may be treated more leniently because she "can prove conformity to a role which requires her to be nonviolent and subservient toward men" (Chesney-Lind, 1978: 218).

Visher's findings indicate that age does have a significant impact on police arrest decisions, yet only for female suspects. She found that younger females received harsher treatment than older women and explained this by outlining that there are different gender expectations for younger and older women. "Police officers adopt

a more paternalistic¹¹ and harsher attitude toward younger females to deter any further violation of appropriate sex-role behaviour" (Visher, 1983: 15).

Farrington and Morris (1983) examined age as a variable in influencing sentencing decisions. Statistically, they found that age was not significantly correlated with sentence severity. They explained this surprising finding by suggesting that the relationship between age and sentence severity had been masked by the type of offence:

Within each type of offence, the older defendants were more likely to receive severe sentences. However, the types of offences which were associated with more severe sentences (burglary and taking vehicles) tended to be committed by younger defendants, and hence these two effects tended to cancel out (Farrington and Morris, 1983: 239).

Their findings, however, are somewhat problematic. Since it is only possible to assess the impact of age on sentence severity by also considering prior record, it is not surprising that Farrington and Morris were not able to draw a definitive link between age and sentence severity.

Steffensmeier et al. (1993) conducted a multi-variate study to assess the impact of gender on imprisonment decisions. They utilized age as a variable which could potentially influence the treatment of males or females in the judicial process and found that the main determinants of the imprisonment decisions were the seriousness of the crime and the prior record, not the defendant's gender or age (Steffensmeier et al., 1993: 435).

¹¹ Paternalism is not always equated with leniency. In this case, paternalism evolves into punitive treatment when young offenders (especially females) are treated harshly in the criminal justice system "for their own good" (Visher, 1983: 9).

3.3.2 Conclusion/ Comments:

Although age has not been widely utilized in empirical studies and the results are inconclusive, it should be considered as further contributing to our understanding of differential treatment. Moreover, it would be beneficial to include the variable of age as an important component in qualitative studies which would explore the perceptions surrounding the assumed link between women, crime and physiology. For example, it has been claimed that depending on the age of a woman, she may be influenced to commit crimes because of certain biological phenomena. Freda Adler and Rita James Simon (1979) state:

The student of female criminality cannot afford to overlook the generally known and recognized fact that these generative phases [menstruation, pregnancy and menopause] are frequently accompanied by psychological disturbances which may upset the need and satisfaction balance of the individual or weaken her internal inhibitions, and thus become causative factors in female crime (Adler and Simon, 1979: 42)

More specifically, since criminal justice agencies are more likely to explain female criminality in terms of biology and/or physiology, it would be interesting to qualitatively consider the pathologizing of the effects of such things as puberty, childbearing and menopause; all of which are gender-specific and relative to a woman's age.

Another dimension which is also of great importance is that of socio-economic status. It is crucial, therefore, to outline the debates and findings with regard to its link to gender and reaction to crime.

3.4 Socio-Economic Status

Many studies have shown that law-breaking is evenly distributed across all social classes (Sutherland, 1949; Carson, 1970; Leigh, 1982; Mars, 1982; Levi, 1987 as cited in Carlen, 1988: 4), however, this may be an oversimplification. Members of these classes seem to be involved in different types of crime and it is the middle and upper classes who have more influence on what activities are criminalized. Jefferey Reiman (1977) asserts that the socio-economic status of the defendant is the most important factor in the determination of punishment when a person has committed a crime:

For the same behavior, the poor are more likely to be arrested; if arrested, they are more likely to be convicted; if convicted, more likely to be sentenced to prison; and if sentenced, more likely to be given longer prison terms than members of the middle and upper classes (Reiman, 1979: 97).

It is not surprising, therefore, that socio-economic status coupled with gender, can have a great influence on the criminal justice outcome.

3.4.1 Women, Crime and Poverty

In reviewing all the information currently available about women convicted of criminal behavior and the treatment of them within the criminal justice system, one is struck by the deterministic nature of the system - the economic box - within which most women offenders are locked. The major elements of this system, like a plot from Dickens, include poverty, disadvantage, petty crime, overwhelming economic responsibility relating to family, dependency on men and welfare, and entrenchment in the poverty cycle (Chapman, 1980: xii).

A large number of women are serving time in prison rather than paying a fine. This can be attributed to the fact that in many cases, it was their poverty that brought them into conflict with the law in the first place (Elizabeth Fry Society of Saskatchewan, 1988).

Socio-economic status can even have an impact at the sentencing stage. Some judges are aware of the harmful effects of a criminal record when sentencing a middle-class white woman, but by the same token, ignore the impact when sentencing poor women, Native women or women who are associated with men who have criminal records (Mohr, 1988: 13).

Women in conflict with the law in Canada are usually poor and the crimes that they commit are often related to their poverty. "Women shoplift clothing for their children and themselves and they commit welfare fraud to try and make a decent standard of living" (Elizabeth Fry Society of Saskatchewan, 1988). According to the 1992 Poverty Profile, 58.4% of single parent mothers below the age of 65 were considered poor, as well as 45.2% of unattached women above the age of 65, and 37.6% of unattached women below 65 years of age. Poverty rates for men were as follows: 31.7% of unattached men below the age of 65 and 29.2% of unattached men above the age of 65 were considered poor (National Council of Welfare, 1994: 30). There was no figure for single parent fathers. The Elizabeth Fry Society of Saskatchewan reveals that most women who are processed by the criminal justice system are poor and 60% of the offences they commit are property offences such as welfare fraud, shoplifting and cheque forging (Elizabeth Fry Society of Saskatchewan, 1988). Research has revealed that the economic conditions and life circumstances of women are directly related to the types of crimes they commit.

Although it is difficult for all of us to avoid both violating criminal codes and getting caught, it is even more difficult for offenders who are poor and dependent. More often than not, women who are convicted of crime are young and poor, with limited education and skills and more than one child (Chapman, 1980: xiii).

The dimension of socio-economic status, therefore, can have a great effect on how an individual is treated within the criminal justice process. The context of women's lives often dictates that they are much more likely to be poor than their male counterparts and it is all too often the actions of the poor which are most heavily monitored and prosecuted.

Candace Kruttschnitt (1981) examined the effect of a woman's economic rank and employment status on the severity of her disposition. Utilizing a sample of 1034 female defendants processed through an adult probation department between 1972 and 1976, she conducted multiple regression and determined that the likelihood of a woman receiving a harsh sentence is increased if she is economically disadvantaged. Specifically, she found that female welfare recipients are sentenced more severely than employed women and that a woman's welfare dependency is "generally given the greatest weight and appears to have a more consistent impact than either race or income alone on the sentences accorded these women" (Kruttschnitt, 1981: 256). Kruttschnitt concluded that a woman's social characteristics such as economic rank, employment status, prior criminal record and age are good predictors of the nature and extent of the sentence she will receive.

Coramae Richey Mann (1994) explored the unemployment rate of all female felons arrested in Atlanta in the month of September, 1981 and found that 62% of them were unemployed at the time of their arrests as compared to the 8% unemployment rate in the general population of women in Atlanta in 1980 (Mann, 1994: 165). This indicates a strong correlation between socio-economic status and official criminal processing.

It seems then, that the socio-economic status of an individual can influence his or her criminal justice outcome. Consequently, it is crucial to examine the empirical studies in the previous chapter to outline whether they take into account the effect of socio-economic status on criminal processing.

3.4.2 Do the Studies in the Previous Chapter Appreciate the Importance of the Differences Related to Economic Status and Experience?

Many studies described in the previous chapter did not take into account the socio-economic status of the offender as having an influence on how he or she was treated within the criminal justice process (for example, Farrington and Morris, 1983; Steffensmeier et al., 1993; Visher, 1983; Eaton, 1983, 1985; Daly, 1989; Farnworth and Teske Jr., 1995). Some studies realized the importance of socio-economic status and utilized it in the assessment of differential treatment, although they did not elaborate on its effect or importance. (Ghali and Chesney-Lind, 1986; Nagel and Weitzman, 1971).

Nagel and Weitzman (1971) found that poor male and female defendants were more likely to receive unfavourable treatment than their middle or upper-class counterparts. Examining the intersection of race and socio-economic status, they found that black female defendants were more likely to have court-appointed counsel due to their low socio-economic status than white female defendants.

3.4.3 Conclusion/ Comments:

Perhaps a more comprehensive use of the dimension of socio-economic status as an influential factor in the criminal justice treatment would have further strengthened many of the aforementioned studies. Since our society is one which is profoundly

influenced by class-based distinctions, it is not surprising that within criminal justice processes, those who are most heavily monitored and sanctioned are those of the "lower class". Our system of justice has been structured in such a way that - even though it proclaims itself as being equal - it tends to criminalize the actions of the poor. Ultimately, this results in the perpetuation of stereotyped views that poor people are, in fact, more crime-prone than their middle or upper-class cohorts. Again, the inclusion of the dimension of socio-economic status in research is undoubtedly beneficial in the sense that it contextualizes the issue of poverty and its supposed link to criminality.

Although it has not often been considered as an important determinant of the treatment of males and females in the criminal justice process, the demeanor of the suspect does have an effect on how he or she is treated within the judicial process.

3.5 Demeanor

The demeanor of the suspect can also have an influence on how harshly or leniently he or she is treated. Although demeanor has not been a widely used "variable" to uncover differential treatment of males and females, some researchers have outlined its importance (DeFleur, 1975; Visser, 1983). Lois DeFleur (1975) conducted a study of police drug enforcement in Chicago and found that police were sensitive to the arrestees' demeanor during a raid. She found that when suspects were uncooperative, police were harsh in their written reports and tended to press charges more readily. Furthermore, she found that the treatment of female suspects was more influenced by their demeanor than that of males and if females behaved in expected, stereotypic ways, they would have a better chance not to be arrested than their male

counterparts. "Women who cried, claimed to have been led astray by men or expressed concern about the fate of their children were often released, whereas young women who were aggressive and hostile were arrested and processed" (DeFleur as cited in Chesney-Lind, 1978: 203).

Nearly all of the studies in the previous chapter ignore the demeanor of the defendant in their analysis of differential treatment. The most complete study of the influence of demeanor on the treatment of a defendant has been conducted by Christy Visher (1983), who examined this dimension in her study of chivalry in arrest decisions. She found that those suspects (both male and female), who are hostile or antagonistic toward the police are at a greater risk of being arrested than those who are amicable and peaceful (Visher, 1983: 18). Further, Visher stated that:

It appears that female suspects are being arrested for inappropriate gender demeanor because antagonism is a sex-role violation for females, but not for males. Antagonistic behavior increases the probability of arrest for suspects of both sexes, but it may be a more significant determinant of arrest for females than for males (Visher, 1983: 10).

3.5.1 Conclusion/ Comments:

As previously stated, the demeanor of the suspect has not been a widely used "variable" in the assessment of differential treatment within the criminal justice process. Perhaps researchers have taken this dimension for granted in the sense that as a rule and within the larger societal framework, interactions between individuals are more positive when communications are amicable. It is important, however, to specifically consider the influence of demeanor on the treatment a male or female will receive at

the hands of criminal justice agents. What has been discerned in the study of demeanor is that gender-based stereotypes and expectations about women's "passivity" and "deference" to male authority remain inextricably linked with their criminal justice processing.

One dimension which has been increasingly considered as an important determinant of treatment is that of family status.

3.6 Family Status

Recent research indicates that family status can have a great influence on how a man or a woman is treated within the criminal justice process (Eaton, 1983, 1985, 1986; Bickle and Peterson, 1991; Daly, 1987, 1989, 1994). Gayle S. Bickle and Ruth D. Peterson (1991) studied the impact of gender-based family roles on criminal sentencing in an attempt to understand how and why family roles influence criminal justice decisions. To explore the effects of gender-based family roles on judicial outcomes, they examined the sentences of 124 female and 390 male defendants convicted of forgery in eight federal district courts between 1973 and 1978. They utilized several variables in their study, including: marital status, presence of economic dependants, presence of emotional dependants, significant economic support, significant emotional support, means of economic support, living arrangement, age, race, employment status, number of counts at conviction, seriousness, prior convictions, pretrial custody and type of disposition. They found that the federal courts were less likely to give a prison sentence to a female (34.7 %) than to a male (50.2%) forger. They also found that the factors which influence sentencing differ for men and women, with those for

women being determined by a smaller number of factors. For women, the courts were basing sentencing decisions primarily upon criteria such as the number of counts at conviction, offence seriousness, prior criminal record, and pretrial custody.

Surprisingly, they found that for women "none of the offender attributes are statistically significant. While most of the family role factors have the predicted negative association with sentences, the effects are often slight and none achieve statistical significance" (Bickle and Peterson, 1991: 383).

For men, legal (number of counts, prior convictions and offence seriousness) and process (pretrial custody and trial disposition) factors are important contributors to the sentences they receive, as well as status and family-role characteristics. For example, unemployed men charged with a criminal offence are 27.8 % more likely to receive a prison sentence than their employed counterparts. Also, "the familial paternalism perspective suggests that being married should be associated with a greater likelihood of a non-prison sentence. Here, however, the risk of a prison sentence is increased by 23.1 % for married as compared to non-married men" (Bickle and Peterson, 1991: 384). Bickle and Peterson suggest that more severe punishment is meted out to those men who not only violate the law but also, in the process, jeopardize the well-being of their families.

As outlined in the previous chapter, extensive research on family status and its effect on the treatment of male and female defendants has recently been undertaken by Kathleen Daly and Mary Eaton. While this dimension has only recently been recognized, it seems to have a substantial influence on judicial outcome. With this in mind, we can perhaps conclude that previous research findings (which have not considered family status) were inherently flawed.

3.7 Concluding Observations/ Unresolved Issues

This chapter has outlined a number of considerations essential to the assessment of differential treatment in criminal justice outcomes. It has revealed that differential treatment cannot be evaluated solely by reference to gender. Contextual factors such as race, age, socio-economic status, demeanor and family status are all crucial influences on the manner in which males and females are criminally processed.

The empirical studies which have been examined have approached differential treatment in different ways. Some considered certain important variables, but omitted others. Other studies discovered new influential variables, yet they often ignored previously recognized influences.

It is safe to assume that the omission of an influential variable in studies of differential treatment is likely to affect the conclusions. Therefore, seemingly all of the studies which have been reviewed are, to a certain extent, flawed. Some authors do address the important dimensions that affect the treatment that a defendant will receive, but they do not elaborate upon them. For example, they may state the statistical significance of the impact of a certain dimension and not expand upon it or provide a thorough explanation of their results. This can result in a lack of in-depth interpretation of these findings.

Finally, some of the studies seemingly fail to associate the dimensions affecting differential treatment with the larger societal framework. As a rule, race, age, socio-economic status, demeanor and family status all have an effect on how society will regard or label an individual. Further, these dimensions are not single "variables" that act independently of other "variables". They not only interact with one another but are all aspects of a complex social, economic and cultural structure. It is not

surprising, therefore, that these same dimensions will have such a strong influence on the treatment that a defendant will receive at the hands of the criminal justice process. Ultimately, the legal system may be itself involved in the perpetuation of certain ideologies and/or the reproduction of the status quo of structural inequalities.

Chapter 4

Discrimination Revisited - An Examination Of The Concepts Of "Sexism", "Gender Bias" And "Sexist Ideology"

4.1 Introduction

As has previously been shown, males and females have historically been viewed in very different manners. Criminal justice theory and practice have not been immune to this differentiation. In fact, criminologists and criminal justice officials have consistently distinguished male and female offenders in a wide variety of ways. For example, female offenders have been seen as less delinquent, less dangerous, more emotional, and also pathologized differently than their male counterparts. Males have been described as innately more apt to commit crime and more dangerous than the 'good' or 'morally superior' females who will only commit crime if they fall victim to adverse physiological, psychological and environmental influences (Gelsthorpe, 1989: ix).

As a result of this differentiation, the study of and penal response to female offenders have been considered less important. Consequently, many academics and researchers have recently theorized that criminal laws, practices and ideologies have been constructed and applied in a biased, discriminatory or sexist fashion (Smart, 1976; Bottomley, 1979) that has resulted in the perpetuation of existing gender inequalities.

This chapter will seek to undertake a discussion of such concepts as "gender bias", "discrimination", "sexism" and "sexist ideology" in order to further inform the examination of differential treatment within the criminal justice process.

4.2 Defining the Concepts

This section will deal with how feminist academics have outlined the development of sexist ideology and how they have defined and deconstructed the terms "gender bias", "discrimination" and "sexism".

In the 1970's, feminists defined sex discrimination as 'sexism'. For example, Pollock explains the development of sexism by stating that: "In general, women were believed to be very different from men and almost always inferior. Whether they regarded women as infantile, amoral children or as pampered slaves, early sociologists were guilty of gross sexism" (Pollock, 1978: 25). Margrit Eichler has outlined four distinct manifestations of sexism. These are, androcentricity, overgeneralization, gender insensitivity and double standard.

Briefly, androcentricity is understood as being manifested through the construction of our thinking solely around men rather than around men and women. Overgeneralization can be understood as the gathering of information about one sex (male) and utilizing it as though it applies to both sexes (Eichler, 1986: 25). Gender insensitivity can be understood as the omission of sex as a socially significant variable in areas where it is, in fact, significant (Eichler, 1986: 25), and double standard refers to the evaluation of substantially similar situations differently, according to whether a female or male is involved. These manifestations of sexism have been present in countless ways throughout legal and criminological research and practice.

No matter how it has been defined, this kind of behaviour has been witnessed in all institutions and professions. Attempts to remedy discrimination have been made through the courts which, themselves, had not been scrutinized for their sexist and

biased practices. However, when academics began to focus on the judiciary as a potential perpetuator of sexist practices, they found "overwhelming evidence that gender-based myths, biases and stereotypes [were] embedded in the attitudes and behaviors of some of those who serve[d] as judges, as well as the law itself" (Wikler, 1987: 13). In 1980, following the first Canadian judicial seminar on the effects of gender on decision-making, the term "gender bias" was introduced to replace the term "sexism" because the judges appeared "less resistant if the former term was used" (Wikler, 1981: 50). In the 1980's, the U.S. Task Force on Gender Equality defined gender bias in the following way:

Gender bias refers to attitudes and behaviors on the part of participants in the justice system that are based on or reflect: (1) sex stereotypes about the proper "roles" and "true natures" of women and men; (2) cultural assumptions about the relative worth of women and men; and (3) myths and misconceptions about the social and economic realities encountered by both sexes. Gender bias is also found in (4) behaviors that impose a greater burden on one sex than the other (Brockman and Chunn, 1993: 50).

In Canada, a common definition of gender bias is:

Gender bias can be defined as behaviour or decision-making by participants in the justice system which is based on or reveals stereotypical attitudes about the nature and roles of men and women, or of their relative worth, rather than being based upon independent valuation of individual ability, life experience and aspirations. Gender bias also arises out of myths and misconceptions about the social and economic realities encountered by both sexes (Northwest Territories Gender Equality Review, 1991: 3).

Sheila Martin and Kathleen Mahoney have outlined the manifestation of biased judicial behaviour which includes but is not limited to

cases where stereotypes are improperly allowed to influence decision making. It extends to such practices as viewing issues solely from the dominant perspective and failing to acknowledge alternative views; failing to contextualize equality by ignoring

actual inequalities and the real life experience of disadvantaged groups; oversimplifying problems; treating problems without due seriousness; and failing to measure, or measuring and underestimating, the effect judicial decisions have on the litigants and society (Martin and Mahoney, 1987: iv).

Undoubtedly, there has been some variation in the definitional interpretations of differential treatment between males and females, both in general and within the legal system. What can be gained from constructing these definitions is the recognition of the widespread injustices which have been rooted in gender. No matter how this differential treatment is labelled, feminists have unquestionably furthered their cause by attempting to uncover these discriminatory practices. There has, however, been some contention and debate with relation to the above concepts.

4.2.1 Problems with Concepts

Firstly, many feminists have discussed sexism without taking into account that it also affects males. Due to the larger societal patriarchal framework, it is most often assumed that because women have been defined as inferior to their male counterparts, they are the only ones who have been subject to discriminatory attitudes and practices.

Lorraine Gelsthorpe examines this problem by outlining the erroneous argument that sexist theories and practices affect only females. "Theories applied to men are also riddled with stereotypical images of what constitutes manhood, the inherent nature of men, what their needs and desires are and so on" (Gelsthorpe, 1986: 143). For example, men are typically stereotyped into being 'strong', 'aggressive' and 'unemotional'. When they do not adhere to these sex-role stereotypes, they too are subject to discrimination.

Secondly, some feminists have problematized the notion of "gender bias" within the legal system, claiming that it does not reveal the oppression that women are faced with. They believe that gender-bias is a "sugar-coated concept":

Feminists have been highly critical of the concept, gender bias, because it disguises sexual oppression, and reflects a liberal way of thinking about the phenomenon. The term is based on the assumption that the law in its ideal form is free of bias, and that therefore bias can be ultimately eliminated from law to create a gender neutral legal system (Brockman and Chunn, 1993: 4-5).

It is ironic that the term 'gender bias' was adopted to accommodate for the preferences of a male-dominated judiciary, which felt that 'sexism' was too harsh a label. Now, some feminists believe that true 'sexism' has been masked or its effects minimized by the more politically correct¹² (in the patriarchal sense) term 'gender bias'.

4.3 Discourses on Discrimination: Research and Practical Approaches to its Alleviation

Girls are different from boys, or so it is assumed by those professionals and practitioners (for example police, probation officers, educational welfare officers, social workers, teachers and magistrates) who deal with them (Gelsthorpe, 1989: 1).

Following the realization that differential treatment was common in theory and practice among social science theorists and legal and criminal justice officials, feminists began to search for approaches to address it in a meaningful way. This section will focus on these differing approaches and their respective strengths and/or weaknesses.

¹² When the term 'gender bias' was introduced in 1980, the judiciary was (as it is today) dominated by males who replaced the term 'sexism' in order to avoid its impact.

4.3.1 Methods to Alleviate Discriminatory Research

There were a number of ways devised by feminists to attempt to deal with the discriminatory nature of social scientific theorizing and research. Firstly, liberal feminists argued that previous sexist practices could be redressed by simply adding women to existing male-based criminological theories. For example, Lesley Shacklady Smith (1978) believed that by incorporating women into labelling theory, patterns of delinquent activities by females would be understood. Not surprisingly, the commonly defined 'add women and stir' approach was far from adequate for many reasons, most significantly due to the fact that these theories had been defined, constructed and applied by males, for males with no consideration of the differing life contexts of males and females.

Secondly, those who were not satisfied with the liberal approach felt it necessary to attempt to produce a body of literature which was undertaken from a woman's standpoint. Loraine Gelsthorpe outlines the problems with this approach: "This approach, however, is particularly myopic. It ignores the fact that, although male crime has been the subject of a tremendous amount of research, the positivistic approach adopted has failed to further our understanding" (Gelsthorpe, 1989: 26).

Some feminists have felt that the most efficient way to eradicate sexism is not only to seek remedies by changing research strategies but by attacking the institutional manifestations of sexism.

4.3.2 Methods to Alleviate Discriminatory Practice

Not only have feminists felt the need to alleviate discrimination perpetuated by

research and theory but, just as importantly, to root it out from legal practice. Firstly, many have focused on the judiciary itself as a root of the perpetuation of discriminatory practices. Consequently, they have felt that judicial education on the subject of sexism would be beneficial. Although this approach would have limited value in affecting the structural inequities between males and females, feminists in the United States have recognized the necessity of educating judges on gender issues as part of a broader agenda. "Judicial education plays an essential role in the overall strategy to eliminate gender bias from the courts" (Wikler, 1987: 21). Since judges have the power and discretion to interpret the laws, they should therefore be aware of the manners in which sexist practices exist and are perpetuated. Increasingly, judges are seemingly becoming more sensitive to the notion of gender bias, yet, one need only look at relatively recent statements made by judges¹³ to see that (at least in some instances) sexist assumptions and attitudes remain ingrained.

Next, feminists have attempted to tackle discrimination by asserting that laws and practices have a material and economic base which is the primary determinant of sexism. Kress states:

Sexist ideology and practice is rooted in bourgeois morality which defines and controls women - as well as working class men - in ways that mystify the real relations of production, that divide the working class, that defuse class consciousness, that perpetuate the petty bourgeoisie as the upholders and expressers of morality, and that provide a rationale for the victimisation of women inside and outside the criminal justice system (Kress,

¹³ The Canadian Press, on August 23, 1991, cited judges' comments in recent years: "Rules, like women, are made to be violated." Ruling this comment was sexist, in bad taste and unacceptable for a judge, a Quebec disciplinary committee suspended Judge Denys Dionne for four months for making the remark during a 1989 trial. "Sometimes a slap in the face is all that a woman needs and might not be such unreasonable force after all." Comments made by a Manitoba judge who fined a man \$300 two years ago for hitting his wife. The judge was later cleared by a judicial council of conduct unbecoming a judge. "A rape victim should have known better than to accept a ride home with three men in a van". Ontario Judge Ted Matlow gave this summation in sentencing a man to 30 days in jail for raping a woman. A higher court judge later boosted the sentence to six months (National General News, 1991, Aug. 23).

1979: 48).

Kress makes some important claims, however, sexism is not only rooted in the bourgeoisie, but in all social classes. Consequently, her claim becomes dubious. Perhaps a more comprehensive explanation of sexism is one which comprises an examination of the broader societal structures. For example, feminists have taken into account that the legal system does not operate in a vacuum and thus have concentrated on the idea that sexism pervades all institutions. Klein and Kress, for example, state that:

the special oppression of women by that system [the criminal justice system] is not isolated or arbitrary, but rather is rooted in systematic sexist practices and ideologies which can only be fully understood by analysing the position of women in capitalist society (Klein and Kress, 1976: 36).

Although women have increasingly shown that gender bias obstructs the equitable administration of justice, they have been continually asked to explain how it is manifested and how it can be eliminated. Further, there remains a widespread ideology that the system is neutral. "Approaching gender bias in law as a distinct issue, rather than a component or consequence of women's larger inequality, stems from the cultural esteem conferred in the legal system and a widespread reluctance to acknowledge that many of our current social structures are deeply dysfunctional" (Martin, 1993: 19).

By outlining the biases in our social structure, feminists are addressing a deeper issue. It is beneficial to recognize that sexism in the legal system is the product not only of attitudes of legal personnel and sexist laws, but of sexism in the wider societal framework. "The treatment of women by the justice system reflects the treatment of

women in the society in general. Gender bias in a legal system is a reflection of gender bias in the larger society" (Northwest Territories Gender Equality Review, 1991: 2).

4.4 Problems with Generalizations About Sexism

Despite numerous claims and assertions about sexist ideology and sexist practices, we know very little about the form which 'sexism' is alleged to take in everyday practice (Gelsthorpe, 1989: 28).

Although several feminists have attempted to define, re-define and tackle sexism in research and practice, there is some question as to the form and understanding of the manifestation of sexism itself. Lorraine Gelsthorpe provides an illustration of the complication of the issue in an organisational context as a method of illuminating the operation of sexism in every day practice and complementing the prevalent approaches to the operation of the law and social institutions as they relate to women and girls.

In order to do this, Gelsthorpe has undertaken qualitative research to gain information on whether the practices and views of professionals toward young female offenders can be labelled as 'sexist'. She spent four months with juvenile liaison officers in a police station in central England, observing them and talking to them about their work. She observed 2 male and 2 female police constables and a male sergeant and later discussed with them, their views about young offenders.

She found that overall, these police officers viewed boys' and girls' offending as different. In shoplifting, for instance, she found that staff in the juvenile liaison office suggested that boys and girls were stealing very different things even though these beliefs were not consistent with the available detailed information. "Analysis of details

available revealed a discrepancy between what the officers believed was occurring and what was happening in practice" (Gelsthorpe, 1986: 130).

Additionally, Gelsthorpe found that the officers' understanding of the reasons for offending was different for boys and girls.

The boys, staff claimed offended for the immediate reward and status, and sometimes for no reason at all...[O]ffending on the part of girls was seen essentially to stem from the pressure placed upon them to look attractive and they too were seen as greedy but it was felt that girls more than boys stole less impulsively (Gelsthorpe, 1986: 130).

When Gelsthorpe questioned the practitioners about the ease or difficulty in dealing with girls as opposed to boys, the officers felt that girls were more deceitful than boys. As more questions were posed and more observations conducted, it was evident that the officers' impressions that male and female offenders were different dictated the differential treatment that they received. It was also evident that they expected girls they were dealing with to behave in certain ways which they thought were 'normal' and 'appropriate' for them.

Most researchers would conclude that the officers exhibited and practiced sexism, but Gelsthorpe asserted that the observations that she conducted did "not reflect the full picture of what happened in practice and how images of the girls were formed" (Gelsthorpe, 1986: 138). Gelsthorpe then placed the events she observed in what she calls an 'observational context' and found that there were other aspects in the officers' lives which influenced their behaviour. For example, it was essential for them to be seen as busy and they also had a need to be seen doing real police work.

Gelsthorpe elaborated on these points by explaining that in addition to the routine processing of offenders, the juvenile liaison officer was asked by parents to

speak to their 'difficult' children. Often, the officer felt expected to respond more to the complaints about girls because "girls are usually good so a complaint means trouble...but also because they perceived that if they did not respond, the press, in particular, would berate them for lack of response" (Gelsthorpe, 1986: 139).

In addition to the need to respond to these complaints, Gelsthorpe noticed that the officers sought reasons to get out of the office and to look outside for more rewarding work. She found that this opportunity was seen as 'real police work' and she related this to the idea that "the difficult behaviour of the girls was exaggerated out of the officers' desire to create interesting work for themselves, more than out of specific concern for the girls and their behaviour" (Gelsthorpe, 1986: 140).

From looking more closely at the reasons behind the behaviour of the police officers, Gelsthorpe found that the attitudes held by the officers were subject to a myriad of influences. Further, she found that the notion of 'sexist bias' was more complicated once it was placed in an organizational context: " 'Sexist ideology' is not a discrete phenomenon, but a mixture of personal views, professional policies and practices which are continually 'shaped' by the exigencies of practice and organisational constraints" (Gelsthorpe, 1986: 142).

Gelsthorpe concluded that the conspiratorial notion of sexism is problematic. "However ideas about women and girls have been shaped, it is clear that there is no one unified motivational force underlying the shaping" (Gelsthorpe, 1986: 143). By this, she meant that neither men nor the capitalist mode of production, nor the family, nor the law itself can be solely blamed as chief conspirator in a plot against women.

It is important to note that Gelsthorpe was not attempting to minimize the effects of sexism, rather, she was seeking to outline the complicated nature of 'sexism' and the

other dimensions involved in the behaviour of criminal justice officials.

4.5 Concluding Observations

The longevity of the oppression of women must be based on something more than conspiracy, something more complicated than biological handicap and more durable than economic exploitation (Mitchell, 1974: 134).

An understanding of differential treatment within the criminal justice process cannot be achieved without a review of the concepts which attempt to explain it. This chapter has explored some of these concepts and has also revealed that our quest to clarify this dilemma requires further study. Firstly, since it has been discerned that sexism is present not only in the legal system but in other societal structures, it becomes crucial to undertake research on the effects of gender bias within all institutions.

Secondly, discriminatory treatment based on gender has been defined in various ways. No matter which term is adopted, it is important for it to be free of androcentric bias.

Thirdly, the idea of sexism in research and practice is undoubtedly a crucial consideration. However, what has, at times been done, is that many feminists have emphasized the 'sex' variable as the sole 'blind spot' in Criminology. There are, however, other omissions made by traditional criminological theorists and researchers which have affected the treatment of those who do not fit the 'white, male, middle-class' stereotype. Criminology, as a discipline, until recently, has tended to, by and large, focus on the poor and the young. Lorraine Gelsthorpe calls this the "selective nature of

criminological study" (Gelsthorpe, 1989: x). In effect, we cannot discuss sexism in isolation from racism, classism and age-based discrimination. Not all females (or males) are equally subject to the commonly defined notion of sexism. As discussed in the previous chapter, race (Spohn, Gruhl and Welch, 1985, 1987; LaPrairie, 1987; Mann, 1994), age (Chesney-Lind, 1978; Visher, 1983), socio-economic status (Nagel and Weitzman, 1971; Kruttschnitt, 1981; Mann, 1994), demeanor (Visher, 1983; DeFleur, 1975) and family status (Eaton, 1983, 1985; Daly, 1987, 1989(b), 1994) can all either mitigate or aggravate the discriminatory treatment that a female (and male) offender will receive. The exclusive focus on the sex variable in some of the well-known studies has meant an artificial separation of various aspects of the individual's identity as well as misrepresentation of social forms of prejudice.

Fourthly, when we discuss discrimination, we should also address the notion of equality. It has been illustrated that discriminatory treatment does exist within the criminal justice system and within all institutions. The debate centres on ways of dealing with it. This chapter has touched upon some of the ways that feminists have taken in order to deal with discriminatory theory and practice. One of the most significant developments, has, in recent times, been a search for equality. It has proven, however, to be far less straightforward than initially assumed. The following, final, chapter will attempt to elucidate various approaches to equality and emerge with a more comprehensive understanding of the discrimination / equality dilemma.

Chapter 5

Controversies in Equality

5.1 Introduction: Problems of Equality in Criminal Law

"The illusion that women have achieved equality is almost as pervasive as the reality of oppression" (Brodsky and Day, 1989: 3).

As has been shown, women are subject to differential treatment in countless contexts by criminal justice agencies. This treatment has, at times, been typified as 'unfair' or 'unequal' largely due to the fact that the criminal justice system was created by men in the interest of men. This reality has precipitated a multi-faceted debate about the notion and centrality of equality within the feminist realm. The most emphasized issue has been the struggle to develop an adequate definition and application of equality with relation to the criminal justice system. This final chapter will seek to outline the strengths and weaknesses of the various interpretations and applications of equality.

Before examining the differing notions and definitions of equality, it is first essential to outline the theoretical frameworks of those who contribute to these understandings. Not surprisingly, feminists have been among the forerunners in the equality debate, however, not all feminists approach the idea of subordination in the same manner. Consequently, a brief outline of these various theories and contributions will facilitate a more comprehensive understanding of equality.

5.2 Feminist Theories and their Studies of Differential Treatment

"A feminist analysis seeks to identify sources of discrimination and inequality based on sex. A feminist analysis includes proposals to create situations in which equality prevails in law and in fact" (Boyle et al., 1985: 1).

Although feminists recognize that women have been oppressed in all facets of life and wish to identify and represent women's interests, they differ in their approaches and interpretations of this treatment. Sally Simpson explains that:

Feminism has expanded into a diverse set of perspectives and agendas, each based on different definitions of the "problem", competing conceptions of the origins and mechanisms of gender inequality/oppression, and divergent strategies for its eradication (Simpson, 1989: 606).

The principal streams within the feminist realm which will be outlined in the context of this paper include: liberal feminism, result equality feminism, Marxist feminism, socialist feminism, radical feminism, and integrative feminism. All of these streams have been influential in criminological theorizing, although some have had a greater influence than others. This section will first briefly outline the main tenets of each of the feminist streams followed by examples of the contributions they have made and approaches they have taken in the field of criminal justice. Furthermore, it will be important to determine the manner in which feminists from differing streams deal with differential treatment within the criminal justice process.

5.2.1 Liberal Feminism

Associated with mainstream liberalism, liberal feminism emphasizes formal equality and individual rights. The liberal feminist perspective accepts the basic

economic and political institutions of society and identifies the source of women's oppression as discrimination in such areas as education, the workplace and politics and in the denial of formal equality rights. Liberal feminists believe in the ideal of equality of opportunity and equal application of "fair" and "neutral" rules. Further, they assert that differential treatment based on gender has been an impediment in the achievement of equal opportunity. Liberal feminists also believe that men and women can collaborate and androgenize gender roles and eliminate laws and policies which discriminate against women.

The problem with liberal feminism is its adherence to the notion of "neutrality" which limits the understanding of feminist concerns. Specifically, this adherence "permit[s] liberal feminists to recognize essentially female-specific needs only if comparable male analogies [can] be found or if the fight [can] be framed in gender-neutral terms" (Boyd and Sheehy, 1989: 258). Further difficulties with liberal feminist practices will be delineated in the discussion of absolute gender neutrality in section 5.3.1 of this chapter.

The liberal feminist's strategy for dealing with differential treatment

If one applies the basic theoretical premises of liberal feminism to the idea of differential treatment, one can discern that there are particular strategies which are employed to deal with this issue. First and foremost, since they seek absolute gender neutrality, liberal feminists treat any form of differential treatment of men and women based on gender as inherently wrong. Second, their research strategies are confined to a rigid set of criteria to measure inequality. Finally, liberal feminists refer specifically to the "unequal treatment of women" which assumes that we should measure this

treatment against a male standard.

In the criminal justice context, liberal feminists deal with differential treatment in a very distinctive way. For example, in the United States, legal challenges to women's prison conditions have been aimed at making prisons for women more like male institutions, in terms of geographical proximity and vocational programs. "The trend now is to bring the institution for women "in line" with the rest of the state's institutions by making the institution for women "more like" the institution for men in tangible ways (i.e., in the number of programs provided) and in intangible ways (i.e., through the ways in which the staff interacts with the inmates)" (Chesney-Lind and Pollock, 1995: 167).

5.2.2 Result Equality Feminism

Following the enactment of the *Canadian Charter of Rights and Freedoms*, some feminists felt that liberalism's notion of gender neutrality was not the answer to the inequality between the sexes: "the judiciary might assume that identical treatment of men and women is now constitutionally required in all cases because gender-neutral legislation suggests that the sexes are equally privileged or disadvantaged by social and economic structures" (Shrofel, 1985: 108).

As a result, a new form of liberal feminism was born which sought to consider equality of results as opposed to equality of opportunity. Although it remains within the liberal paradigm by accepting the basic social and economic institutions, it draws from some of the insights of radical feminism¹³ and asserts that most facets of modern society are gendered and that feminist strategies must be gendered. Result equality feminists focus largely on the implications for policy on the treatment of women within

¹³

The approach of radical feminism will be explored in section 5.2.5 of this chapter

the criminal justice process. "Result equality feminism, therefore demands an extensive rethinking of the underlying assumptions and content of legal rules, on the theory that equal application of a male-oriented legal system cannot drastically alter women's disadvantaged position" (Boyd and Sheehy, 1989: 259).

Susan Boyd and Elizabeth Sheehy assert that result equality feminism has contributed to the facilitation of engagement with the state to allow for law reform which is more meaningful for women.

The result equality feminist's strategy for dealing with differential treatment

One important component of a result equality approach is the careful scrutiny of legal rules for their actual effects on men and women (Boyd and Sheehy, 1989: 259).

Within the criminal justice system and in the creation of policy, result equality feminists focus on some of the issues of women's specificity. For example, they believe that sentencing policy should take into account the issues of motherhood and separation from children. They also consider the impact of monetary fines on the lives of women. Since their economic situation is, by and large, more desperate than that of their male counterparts, they are more likely to be unable to pay their fines and to be forced to serve prison time. A further example of an issue dealt with by result equality feminists would be the advocacy of the re-definition of the laws of self-defence for battered women.

5.2.3 Marxist Feminism

Marxist feminists believe that the causes of gender inequalities originate from

the hierarchical relations of control with the rise in private property and its inheritance by men. For Marxist feminists, class relations are central and gender relations are ancillary. In other words, gender relations are moulded by and subordinate to the need to maintain the dominant class relations.

In order to overcome the condition of gender inequality, Marxist feminists believe that it is essential to transform our society from a capitalist to a socialist one, to bring women into economic production, to socialize housework and child care, to abolish marriage and sexual relations founded on principles of private property and finally to eliminate social classes and economic subordination (Daly and Chesney-Lind, 1988: 141).

The Marxist-feminist approach in dealing with differential treatment

Marxist feminists have also taken a distinctive approach in the analysis of differential treatment within the criminal justice system. "Marxist feminists (e.g., Wilson, 1985; Hartz-Karp, 1981) argue that prisons, like other institutions of social control (e.g. mental health facilities), retool deviant women for gender-appropriate roles in capitalist patriarchal societies" (Simpson, 1989: 616). In order to deal most effectively with differential treatment within the criminal justice process, Marxist feminists would direct policy for women to participate in the struggle against capitalism as it is impossible to abolish patriarchy within capitalist societies.

5.2.4 Socialist Feminism

Socialist feminists believe that women's oppression is based in patriarchal

capitalism while taking into account the significance of class, race and gender as crucial components in the understanding of difference. For example, the modes of production relate to areas of sexuality, childbearing and rearing, and feminist analyses explore their construction and organization within society. Socialist feminists assert that the private sphere is of equal value to the economic, political and public life and demand that these two spheres be considered together. "The personal is political and economic and the political and economic is personal" (Danner, 1991: 53).

In considering the intersection of race, class and gender, socialist feminists' main objective is to elucidate the importance of difference. Mona J. E. Danner explains that:

Patriarchy cannot be separated from capitalism, neither can racism, imperialism, or any oppression based on 'otherness'. All are related dialectically. While we often separate them for analytical purposes, none can be separated in reality, and it is increasingly questionable whether they should be separated in analyses (Danner, 1991: 53).

Social feminists believe that gender difference can only be dealt with by constructing a completely new society which is free of gender, race and class stratification (Simpson, 1989: 601). Essentially, they continually focus on the reproduction of socio-economic relations through mechanisms of reproduction of family structure, gender inequality and the division of labour.

The Socialist feminist approach to differential treatment

Many socialist feminists conduct criminological research focusing on how the differential treatment women receive within criminal justice agencies is affected by

class and race¹⁴. Research which focuses on these dimensions can also be found within the positivist realm, however, the difference in these two approaches lies in the theoretical framework adopted and the interpretation of results. Boyd and Sheehy have noted the most significant contribution of socialist feminism as offering the best explanation of the role of law in reinforcing women's economic subordination (Boyd and Sheehy, 1989: 265).

5.2.5 Radical Feminism

Radical feminism, usually seen in part as a response to Marxist feminism, attempts to locate the origin of the oppression of women in patriarchy. "The desire for supremacy, the psychological pleasure of power, and male fear of female sexual and reproductive capacity are identified as the motivating forces of patriarchy" (Boyd and Sheehy, 1989: 260). Radical feminism rejects male oriented Marxian analysis and seeks to develop feminist analytical methods rather than relying on male theories of objectivity and neutrality. Radical feminists believe that men are inherently more aggressive than women who have been easy to dominate due to their relative size disadvantage and dependence on men throughout their child-bearing years. Radical feminists also focus on sexuality as the central aspect in the domination of women and often argue on such issues as the control of reproduction (Simpson, 1989: 605).

The essentialist side of radical feminism has been criticized, however, for erroneously assuming that there is a commonality and universality in women's subordination. As has been indicated on several occasions, there are significant

¹⁴ For examples of socialist feminist research, see French, 1977, 1978; Lewis, 1981; Raftner, 1985.

power differentials among women which undoubtedly speak to the fact that gender is not an isolated category. The dimensions of race, age, socio-economic status, demeanor, ethnicity, sexual orientation, physical or mental disability and religion can, in combination or alone, paint a very different picture of certain women as compared to others.

The Radical Feminist's assessment of differential treatment

Non-essentialist contributions of radical feminists to the field of criminal justice and differential treatment have provided further insight into gender relations which vary from those of liberal feminists. Researchers Christine Rasche, Carol Smart and Meda Chesney-Lind represent those who have attempted to show relationships between the criminal law's control of women and male control of female sexuality. For example, Christine Rasche explored the area of prostitution and found that prostitutes with sexually transmitted diseases were more likely to be institutionalized and controlled than non-diseased prostitutes (Simpson, 1989: 616). This was done largely to protect the health of men.

Carol Smart examined the double standard of sexual morality and the idea that the laws governing prostitution have been a source of oppression for women. She further examined the ideological content of the views of judicial actors in England to consider how ideologies of female sexuality which inform the law are perpetuated in policy making and law reform. She found that: "this sexual objectification of prostitute women reinforces their special status as denigrated legal subjects and helps to preserve legislation which, by most standards, must be regarded as unusually harsh

and repressive" (Smart, 1985: 51). Further, she indicated that the sexual objectification of prostitute women provides the basis for maintaining the law which is based on men's direct control over women's bodies.

Meda Chesney-Lind has also adopted a radical feminist perspective in her research on young women in conflict with the law. She linked the family's double standard of male and female behaviour to the law and found that females were more likely to be sanctioned for violating their sex roles and acting out sexually than were their male counterparts. She found that officials in all levels of the criminal justice system seemed to be enforcing a double standard of justice. "Routine procedures in the juvenile justice system encourage the evaluation of male and female misbehavior in different ways, and as a consequence they are systematically violative of the civil rights of women " (Chesney-Lind, 1978: 191).

Further, radical feminists view laws which govern reproduction, sexual assault and pornography as intended to maintain the patriarchal status quo and consider male violence as a means of control of women, making the reliance on the formal/penal control less necessary. Ultimately, they believe law to be a gendered institution which is of little potential to be used by women to their advantage, unless there is a complete reconceptualization of law; in essence, the adoption of a feminist jurisprudence.

In the evaluation of the strengths of the differing feminist streams, Boyd and Sheehy have asserted that radical feminist thought has provided the most beneficial analysis of how the legal and criminal justice systems have entrenched subordinating notions of female sexuality (Boyd and Sheehy, 1989: 266).

5.2.6 Integrative Feminism

Integrative feminism combines radical feminism and result equality feminism and focuses on the systemic oppression of women. It analyses knowledge and the world as essentially patriarchal. Integrative feminists wish to outline the differences between women and men, without accepting a 'natural' role for women (Boyle et al., 1985: 2). They advocate a restructuring of societal values which will, in turn, reflect the reality of women's lives. Essentially, the goal is not for women to be allowed to participate in the existing male society and humanity, rather to reconstruct existing structures and principles toward a 'humanizing feminization'. "This integrative recognition of women's equality and women's specificity is what we must aim for" (Miles, 1985: 45).

The Integrative Feminist's approach to differential treatment

Some integrative feminists advocate the retention of gender-specific crimes (e.g. rape, exploitation of women in pornography, etc.) to protect women, provided that the pertinent legal statutes are aiming to equalize women socially and sexually (Boyd and Sheehy, 1989: 261). Further, the fact that there is a small number of women within the system of criminal justice, and that they have specific needs (many of them having extensive histories of victimization), requires that women should not be subjected to male standards, rather a women-centred treatment within the criminal justice system should be advocated.

In the evaluation of feminist theories, Boyd and Sheehy have noted that integrative feminists have succeeded in offering an opportunity to translate radical theory into terms which are accessible and amenable to other feminists and non-feminists as well.

Although feminists all begin from a similar basic premise, it is clear that the means they employ to explicate gender hierarchies and to theorize about possible remedies are many and varied. It has been said that future strategies for understanding and ameliorating women's inferior status may be found in the integration of insights from various theoretical categories as well as in outlining the common links between apparently different feminist theories (Lahey, 1987: 84-85).

5.3 Feminist Conceptions of Law

It has become a commonplace notion that law and the criminal justice process have posed intellectual and political problems for feminists and for all women. Carol Smart has outlined some of these specific problems in an effort to explore the dialectical relationship between law and feminism.

Firstly, since law is constructed within such narrow confines and specific regulations, there is a resistance to the idea that feminist theoretical analysis can be applied within a legal framework. Secondly, the notion of the applicability of feminist theory to law is complicated by law's claim to be objective, neutral and free of sexual bias. Thirdly, there is a resistance to all theory due to the argument that law is a practice which has material consequences for women and thus what is needed is counter-practice, not theory.

The above problems have been characterized as major obstacles to feminist legal theorizing by feminists as they "meet with the frustrations of being ignored or seen as outmoded in and by law and are simultaneously moved to renounce theory by the moral imperative of doing something through or in law" (Smart, 1992: 29).

Further, feminists' entry into the field of law has precipitated a struggle to

reconcile the inherent differences between law and feminism. Smart has asserted that the fact that law is 'gendered' has rendered it difficult to build a positive symbiotic relationship between the two approaches. She has outlined the three phases which have offered analytical promise in the development of the idea that law is gendered. These are: law is sexist; law is male; and law is gendered.

5.3.1 Law is Sexist

As outlined in the previous chapter, the notion that law is sexist has been one which has received great support from feminists who feel that:

in differentiating between men and women, law actively disadvantage[s] women by allocating them fewer material resources... or by judging them by different and inappropriate standards (for example as sexually promiscuous), or by denying them equal opportunities, or by failing to recognize the harms done to women because these very harms advantaged men (for example, prostitution and rape laws) (Smart, 1992: 31).

Smart agrees with the insights provided by those who see law as sexist, however, she believes that this notion can be utilized more as a strategy than an analytical tool.

Essentially, the 'law as sexist' stage recognizes an important reality, however, it does not adequately represent the problem posed by law. She exemplifies this dilemma by stating that:

[t]he argument that law is sexist suggests that a corrective could be made to a biased vision of a given subject who stands before law in reality as competent and rational as a man, but who is *mistaken* for being incompetent and irrational. This corrective suggests that law suffers from a problem of perception which can be put right such that all legal subjects are treated equally (Smart, 1992: 31).

Ultimately, this approach maintains men as the standard against which women are

being judged and does not tackle the cultural and structural problems associated with the continued subordination of women.

5.3.2 Law is Male

The idea that 'law is male' recognizes that the ideals of objectivity and neutrality in law are actually masculine values which have developed as universal values. Therefore, as opposed to the idea of law as sexist, this analysis proposes that when a man and a woman stand before the law, it is not that law fails to apply neutral and objective treatment to a female, it is that this neutral and objective treatment has been constructed as masculine. Moreover, "to insist on equality, neutrality and objectivity is thus, ironically, to insist on being judged by the values of masculinity" (Smart, 1992: 32).

Again, Smart believes these insights to be of significance, yet she finds them problematic in a number of ways. Firstly, she asserts that this approach illustrates law as a unified form of knowledge without considering its internal contradictions. Secondly, it presumes that any system which has been formulated based on universal values and impartial decision making systematically serves the interests of men as a unitary category:

We can see, therefore, that while great care is taken in these arguments to effect a distance from a biological determinism, there lingers an unstated presumption that men as a biological referent either benefit or are somehow celebrated in the rehearsal of values and practices which claim universality while (in reality) reflecting a partial position or world view (Smart, 1992: 32).

Thirdly, Smart points to the limitations of the idea of law as male due to the fact that it

does not include dimensions such as age, race and class within the framework of law, rather, these dimensions become additives or afterthoughts. Although these additives are meant to overcome criticisms of ageism, racism and classism directed at feminist theory, they merely compound the problem.

5.3.3 Law is Gendered

The third feminist conceptualization of law does not reject the insights of the idea that 'law is male', but the notion that law is gendered allows us to view it as processes which function in different ways and in which there is no assumption that they are inherently exploitive towards women and serving men. Smart asserts that the idea that 'law is gendered' :

does not require us to have a fixed category or empirical referent of Man and Woman. We can now allow for the more fluid notion of a gendered subject position which is not fixed by either biological, psychological or social determinants to sex. Within this analysis, we can turn our focus to those strategies which attempt to do the 'fixing' of gender to rigid systems of meaning rather than falling into this practice ourselves (Smart, 1992: 33).

As a result, we can begin to analyse law as a process which *produces* fixed gender identities rather than seeing it as a process which is applied to previously gendered individuals.

The idea of law as being gendered will be further expanded upon in the conclusion of this chapter. This proposition may well be an effective mechanism which will provide a new way of searching for the ideal of equality.

As with the different views on women's specificity and the differing theoretical

strategies of feminists, there is also a great deal of controversy and debate in the attempt to construct a universal definition of equality. The following section will outline some of the most widespread definitions of equality.

5.4 How has "Equality" been Defined and Applied?

Despite the widespread commitment to equality in the political discourse of disempowered groups, the concept of equality remains elusive in its theoretical articulations (Sheppard, 1991: 81).

As with the various streams of feminism, the approaches to defining equality are also many and varied. Christine Boyle et al. have set out the following interpretations of the meaning of equality: "absolute gender neutrality; gender neutrality with exceptions based on real, as opposed to imagined, differences between the sexes; and the [non] subordination principle" (Boyle et al., 1985: 13). Boyle et al. have omitted a fourth approach to equality which must also be included; it has been called 'equity'.

5.4.1 Absolute Gender Neutrality: The Liberal Conception of Equality

The first approach to equality is informed by the ostensibly clear, formalistic, and process-based idea that equality means sameness of treatment (Sheppard, 1991: 83).

Absolute gender neutrality connotes that men and women should be treated identically, rejecting any legal distinctions between the sexes. The main objective of the gender neutrality approach, therefore, is to ensure that gender cannot, in any case, be considered a reason or basis for differential treatment.

Formal Equality through the Charter

Despite adherence to the principle of equality in the legal system,

widespread inequalities persist in our society (Sheppard, 1986: 196).

Through the enactment of the *Canadian Charter of Rights and Freedoms*, the basic demands of liberal feminists were met. In essence, they had achieved formal gender equality. The section of the *Charter* which pertains to equality is as follows:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In addition, section 28 of the *Charter* provides that the rights and freedoms set out in it apply equally to women and men.

28. Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to all male and female persons.

As will be shown, the term 'equally' is problematic and the mere existence of formal regulations to allow for equality does not provide a universal solution for or definition of equality. In fact, some feminists are of the opinion that the *Charter* "will only be of assistance to women if used by Parliament and the judiciary to address the existing reality of the subordination of women" (Boyle et al., 1985: xviii).

Yet, as Diana Majury notes, although women in Canada could still reject the equality-based approach to issues after the entrenchment of the *Charter*, this would be a high-risk strategy. "Whether we like it or not, by virtue of its "entrenchment" in the Charter, equality has gained a level of prominence which makes it difficult for Canadian women simply to opt out of the equality discourse" (Majury, 1987: 175). This does not

mean, however, that formal equality is without problems. In fact, there are many theoretical and practical difficulties associated with formal equality.

Problems with Formal Equality

Mandating formal equality (i.e. that men and women be treated identically in world of real inequality, is to maintain inequality, not eradicate it (Boyle et al., 1985: 16).

The idea of formal equality has increasingly been a point of contention and debate between liberal feminists and their feminist critics and it has been recognized that this definition is problematic for a number of reasons. Firstly, Boyd and Sheehy remark that : "this adherence to neutrality permitted liberal feminists to recognize essentially female-specific needs only if comparable male analogies could be found or if the right could be framed in gender neutral terms" (Boyd and Sheehy, 1989: 256).

Secondly, it has been found that this approach "is premised on a vision of the world as a conglomeration of similar individuals, rather than an interconnected matrix of diverse individuals and groups" (Sheppard, 1991: 85). As has been shown, there are many power differentials created by such dimensions as gender, race and age resulting in many individuals with different needs, cultural differences and different experiences. Therefore, sameness of treatment can generate inequality because the "neutral" principles have been formulated by those from the dominant white, male, middle-upper class echelons of society. It is crucial to recognize that treating women and men identically does not ensure equality due to the fact that women and men have different social realities.

Many post-liberal feminists are frustrated with the empty promise of formal

equality and assert that rather than being beneficial to women, it can result in greater inequality, substantive injustice and male domination. Ann Scales, for example, asserts that: "law has made the objectification of women more efficient by pronouncing formal equality, while systematically continuing to deprive us of real authority to create ourselves and our world" (Ann Scales, 1989: 35).

Diana Majury has noted that the Charter equality provisions are being utilized in a large number and variety of cases, including all too often arguments which have been successfully employed directly against women. Moreover, she asserts that in other cases, equality arguments have been employed to further the interests of men at the expense of the interests of women (Majury, 1987: 175).

Finally, Colleen Sheppard acknowledges the counterproductive result of applying a liberal conception of equality:

As a result, formal equality fails to acknowledge the very real and pervasive disparate effects that equal treatment can generate. Moreover, it demands conformity to the norms of dominant groups as a precondition to equality. For women, this translates into a right to be treated the same as men despite our differences from men. Gender differences are ignored and the gendered content of supposedly sex-neutral standards is hidden (Sheppard, 1991: 85).

Christine Boyle et al. provide an example of the application of gender neutrality resulting in harmful effects for women. In a case in the New Brunswick Court of Appeal entitled *Chase v. the Queen*, the judges found that touching a female's breasts was not to be considered sexual assault because breasts were defined as secondary sexual characteristics. Further, they stated that to include breasts would require the inclusion of beards. This case provides a good example of the reduction of an issue to a gender-neutral level when gender itself is obviously of significant value to the context of

the situation (Boyle et al., 1985: 16). Ultimately, if women and men are treated identically by the law in every case, many of the existing biological, social and economic "inequalities" will remain as such.

Allison Morris also believes that identical treatment is not the proper objective for the criminal justice system. We should not treat male treatment as the "norm" and there may be biological or socially conditioned differences between men and women which justify differential treatment. She defines "real justice" as:

taking into account the consequences of a penalty: for example, the fact that, at least in this culture and at this time, child-rearing is primarily the responsibility of women and that their children suffer as a result of their incarceration. Thus it can be argued that a mother's responsibility to her children should take priority over her responsibility to the law (Morris, 1988: 171).

This of course has been treated with caution by those who are concerned that such an approach reinforces the traditional role of women as their "natural" and inevitable destiny.

A notable 1989 Supreme Court of Canada decision has indicated that identical treatment should not be the objective. In *Andrews v. the B.C. Law Society*, the court rejected the notion that each individual should have the same treatment, stating that "every difference in treatment between individuals under the law will not necessarily result in inequality, and, as well, that identical treatment may frequently produce serious inequality" (Status of Women Canada, 1995: 5).

5.4.2 Gender Neutrality with Exceptions

The second notion of equality concentrates on instances wherein exceptions to gender neutrality are acceptable. It results from the realization that although the

original intent of liberal feminists was to benefit women by providing for equality, this approach quickly became problematic in the sense that it ignored the special needs of women who had been historically subjugated in a variety of contexts. The liberal conception of equality also had the effect of implying that if women did receive special treatment to redress past injustices, the result would be reverse discrimination.

This revised notion of equality, therefore, considers certain exceptions to absolute neutrality as being justified. It is believed, however, that this approach would allow for a variety of applications and interpretations "depending on how much difference is taken to justify differential treatment... [T]hus, only biological exceptions may be contemplated, though a range of genuine (as opposed to stereotypical) social, psychological and economic differences could be added" (Boyle et al., 1985: 14).

This approach to equality is related to the perspective represented by result equality feminists and integrative feminists who recognize differences between males and females but assert that the value of each gender is the same.

Problems with the Differences Approach

There are those who believe that in recognizing the differences between males and females, discrimination will persist "under the guise of 'protective' legislation and the perpetuation of stereotypes" (Boyle et al., 1985: 16). Further, there is an ongoing fear that asserting differences will perpetuate the existing inferior status of women.

For example, the law in Canada and in many other countries labelled all women based on their reproductive age. This resulted in the legal prohibition of women from working in certain places because of their reproductive functions, even if they did not intend or expect to have children.

Further, although it is believed that biology is objective and neutral, its meaning and implications are socially constructed. Therefore, this approach could ultimately lead to dangerous generalizations and perpetuated stereotypes about women.

5.4.3 The [Non]-Subordination Principle

"The systematic relegation to inferiority is what is wrong"
(Boyle et al., 1985: 15).

The third notion of equality, the [non]-subordination principle, rejects the 'differences' approach on the basis that it ends up treating women as inferior "whether the differences between men and women are real, or based on false stereotypes" (Boyle et al., 1985: 15). Instead, the [non]-subordination principle focuses on the issue of male supremacy and asserts that to be equal is to be non-subordinated. The inferiority of women is evident in many areas, including differential access to legitimacy, authority, pay, protection and bodily integrity.

Catherine Mackinnon, who favours the [non]-subordination principle, asserts that male domination has been so ingrained in our society that state action against it has not been sought. "The [non]-subordination principle allows attention to be focused on prostitution and pornography, rather than making it theoretically possible for women to commit certain crimes, [e.g. sexual assault] which seems to have been the crux of government policy so far" (Boyle et al., 1985: 15). Essentially, the law must speak on the issues of victimization and subjugation of women so as to ensure that women have equal benefit of the law.

Supporters of the [non]-subordination principle believe that it should be utilized as a standard guiding criminal law reform due to the fact that absolute gender neutrality

has severe limitations as well as the certainty that the [non]-subordination principle:

has the benefit of involving theory as informed by history, reality and women's experience of inequality. Discrimination at this point in Canadian history involves the subordination of women, not the making of distinctions on the basis of sex ... [T]aking a crime that men commit and making it gender neutral is not 'removing' gender discrimination, while passing effective laws which increase the physical safety of women would do so (Boyle et al., 1985: 15).

5.5 Contextualizing Equality

Some researchers have transcended the idea of merely defining equality and have elucidated the importance of contextualization. In essence, it is important to ground our understanding of equality in material reality. Contextualization can be understood as a methodology which is concerned with the inclusion of previously ignored perspectives and experiences. Once we recognize the diversity of human experience and the realities of various groups, classes and individuals, we thus realize that there are no "universal truths". Relating this methodology specifically to feminism and equality, it is important to outline the commonalties of women and the diversity of their lives. "For to deny, silence or ignore the differences among women in the name of a new "universal woman" is just as partial and biased in favour of women from the dominant cultures and classes as the "universal man" feminists critique" (Sheppard, 1991: 83).

Colleen Sheppard has emphasized the importance of the phrase "equality in context" by stating that :

[T]o understand legal concepts and developments, we must examine the social, political, economic, cultural, ideological, familial and historical context within which they emerge...We cannot develop an adequate and fair concept of legal equality

without incorporating knowledge of such social realities (Sheppard, 1990: 111).

She further believes that in addition to contextualization, one must understand the realities of inequality such as prejudice and social and economic disadvantage.

Without the knowledge of both contexts and the nature of inequality, we are not properly equipped to formulate an adequate definition of legal equality.

In relation to the criminal justice system specifically, an example of the need to contextualize crime would be in the cases of rape and child sexual abuse. Essentially, these cases should not be analyzed within the confines of law alone, but be contextualized in the domains of sexuality and power. Smart asserts that in doing this,

law does not hold the key to unlock patriarchy, it provides a forum for articulating alternative visions and accounts...[I]t is important to resist the temptation that law offers namely the promise of a solution. It is equally important to challenge the power of law and to insist on the legitimacy of feminist knowledge and feminism's ability to redefine the wrongs of women which law too often confines to insignificance (Smart, 1989: 165).

An ensuing debate occurs, however, as an attempt is made to balance the idea of contextualization with the enshrined constraints of the rule of law and the notions of objectivity and neutrality:

For underlying or entangled within debates about the constitutional meaning of equality are concerns about institutional constraints, in particular, concerns with protecting a view of the rule of law as objective and neutral, and a concern with the legitimacy of judicial review. The institutional matters can constrain our vision of the substantive definition of equality (Sheppard, 1990: 112).

It is impossible to ignore the above dilemma, due to the fact that institutions are slow to change, however, it remains important to maintain the ideal goal of 'substantive' equality. The following section will explore the idea that the legal institution relies on

its claim to objectivity and is not easily challenged by other disciplines or approaches.

5.6 The "Juridogenic" Nature of Law

The criminal law of a democratic country 'must' protect the values shared by the majority of its citizens, of both sexes, of all ages, of all ethnic origins, and of all social, educational and economic backgrounds (Boyle et al., 1985: 1).

The idea of law has been constructed on the basis of its neutrality and power and with the function "to right wrongs, to create more rights, and hence empower the disadvantaged" (Smart, 1989: 161). Practically however, there are many instances wherein legal practices have the opposite effect. At times, law can worsen certain conditions. Carol Smart exemplifies this dilemma by discussing the issue of sexual abuse:

There are many examples of what I call the juridogenic potential of law...Perhaps the most obvious is in the area of child sexual abuse and rape. It is commonplace that the legal 'cure' is frequently as bad as the original abuse. It is less well established that the very legal process itself creates its own harms; it creates its own order of damage for the abused child or woman (Smart, 1989: 161).

Law embodies a claim to a superior and consolidated field of knowledge which does not acquiesce to other competing discourses. Consequently, feminists have difficulty furthering their interests through the fashioning of their own alternative reality. To effectuate change, they are forced to work within the confines of law and ultimately, "the feminist movement is too easily 'seduced' by law and even where it is critical of law it too often attempts to use law pragmatically in the hope that new law or more law might be better than the old law" (Smart, 1989: 160). This reality does not work in the interests of women due to the fact that legal language, methods and procedures have

no relation to women's lives. When feminists attempt to transform law, they are not only questioning legal discourse but 'naturalistic' assumptions about masculinity, such as those of rationality, reason and objectivity. As well, since masculinity makes up the dominant world view, it is not surprising that law is resistant to radical forms of feminism. As Carol Smart explains, however, law is receptive when the feminist agenda "is presented in terms of equality, equal opportunity, or difference. The equality claim rests on the assumption that individual will be tested (by comparison with the male norm)..." (Smart, 1989: 87). Ultimately, feminist scholarship has become trapped into debates about the usefulness of law to the liberation of women, or the merits of equality versus difference as strategies, or the extent to which law reflects the interest of patriarchy.

Law's claim to neutrality is one of false objectivity. Women have historically not been involved in the creation or maintenance of our criminal justice system, including the determination of what constitutes a crime, the significance of the values violated and the determination of sanctions (Boyle et al., 1985: 1). Moreover, femininity has been constructed as representing values inimical to law, including irrationality, subjectivity and emotionality.

5.7 Conclusion/ Comments

This chapter has attempted to outline some of the main tenets of feminist theorizing along with the relationship of feminism to law generally and equality specifically, with reference to differential treatment within the criminal justice process. What has been discerned is that feminism and law are fundamentally at odds with one

another. Furthermore, the idea of equality is one which seemingly fits more closely within the realm of law, therefore, it is not surprising that a feminist search for "a theory of real and actual equality" cannot help but expose and challenge the traditional assumptions of political neutrality in the legal system, its rules and its agents (Boyd and Sheehy, 1989: 266). This dilemma has lead Boyd and Sheehy to question whether these contradictory approaches can ever be resolved to provide a workable interpretation of equality, and whether feminist methodology will transform the legal system or be subsumed within it (Boyd and Sheehy, 1989: 266).

Other authors question the very idea of equality as a goal for feminists and portray it as either meaningless or precarious. Carol Smart believes that we have been asking the wrong questions. Rather than asking how law can transcend gender, we should ask how gender works in law and how law works to produce gender. In doing this, we abandon the goal of gender neutrality for a method of bringing into being "both gendered subject positions as well as subjectivities or identities to which the individual becomes tied or associated" (Smart, 1992: 34).

There are also those who respond to critics of the concept of equality and see promise in the indeterminacy of equality. Diana Majury states that:

the indeterminacy of equality offers greater promise and provides more fertile ground for exploration and argumentation than any equality formula. An open-ended approach allows "equality theory" to respond to the different circumstances and factors which combine to make a specific woman's situation unequal or to perpetuate women's inequalities more generally. Equality is a useful tool because it enables women to speak in a language which is counter to domination and subordination.

It is obvious that the internal debates between feminists about the notion of equality have yet to be resolved.

5.8 Epilogue: The Preservation of Patriarchy

Even if the police, the courts and prisons operated with total fairness to women in their own terms...they would still be part of a society which has fundamental injustices based on sex at its core (Heidensohn, 1986: 55).

After having reviewed the relationship between women and the law, the empirical studies of differential treatment, the dimensions which interact with gender to produce differential treatment, the notion of discrimination and the definitions of equality, it becomes obvious that this issue cannot be explained by a simple assertion of leniency or harshness.

The study of differential treatment in the criminal justice process speaks to a greater social problem. Many researchers have attempted to explain disparity without taking into account a multitude of contextual factors. They have failed to recognize that differential treatment based on gender permeates all institutions. Men continue to enjoy superior positions in the public sphere, which leads to the priority of male interests and perceptions also within the criminal justice agencies. Recent research reveals that in quantitatively controlling for these contextual factors, gender differences in criminal justice processes tend to disappear. However, by remembering that there is an underlying masculinity of law, theoretically controlling for these variables does not make the reality of differential treatment disappear. What must be remembered is that gender does not operate in isolation from stereotyped social constructions of what this

concept entails and there remain countless gendered assumptions about males and females. Therefore, when changes in law are made, they are generally unable to transform the established social structures and ideologies. Law's value-laden application continues to emphasize essentialized typifications and stereotypes of women.

As long as these institutionalized stereotypes and power differentials are maintained within the larger societal framework and the prevailing patriarchal ideology remains tainted with sexism, racism and classism, we can continue to anticipate differential treatment not only in the criminal justice system but in all social, economic and political and legal institutions.

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