

## ABSTRACT

Title of thesis:

REFOCUSING ON GENDER: CAN FOCAL CONCERNS THEORY EXPLAIN GENDER DISPARITIES IN SENTENCING OUTCOMES?

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Focal concerns theory argues that sentencing decisions reflect judges' beliefs about three primary considerations: blameworthiness of the defendant, protection of the community, and practical concerns. This perspective has been used as the theoretical foundation in an abundance of research and has proven particularly useful as a framework for explaining sentencing disparities related to offenders' demographic characteristics. Little work, however, has been able to incorporate perceptual measures of the three focal concerns into studies of sentencing outcomes and social inequality. This study uses a dataset that combines official county court records with case-level judicial surveys to conduct a more direct test of the focal concerns theory of judicial decision-making. It measures judicial assessments of each focal concern for each court case and then evaluates the extent to which these assessments explain gender disparities in two sentencing decisions: the decision to incarcerate, and the determination of sentence length.

REFOCUSING ON GENDER: CAN FOCAL CONCERNS THEORY EXPLAIN  
GENDER DISPARITY IN SENTENCING OUTCOMES?

by

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## Chapter 1: Introduction

Researchers in the field of criminal justice have long been interested in the fundamental question of social inequality in punishment. However, as Hagan (1989: 116) laments, “Criminal justice research lacks theoretical initiative.” What little theory exists within the field is fairly specific and designed to explain particular empirical findings (Bernard & Engel, 2001). This tradition of atheoretical criminal justice research has precluded a complete and nuanced picture of social inequality in the complex American criminal justice system. For example, a sizable body of research suggests that social inequality does exist in judicial sentencing practices (see Baumer, 2013; Daly & Bordt, 1995; Mitchell, 2005), highlighting the importance of understanding how judges make decisions and how their decision-making processes may result in social disparities. However, without a theoretical foundation on which to build and organize sentencing research, the processes through which social inequality appears remain unclear.

Within the relatively small realm of criminal justice theory, focal concerns theory has emerged over the past two decades as the predominant sentencing framework. Focal concerns theory sketches out a process by which court actors use stereotypes based on easily observed demographic characteristics to shape perceptions about three focal concerns: blameworthiness, community protection, and practical constraints. These focal concerns in turn form the basis for court actors’ sentencing decisions. The focal concerns theory, developed by Steffensmeier and colleagues (1980; 1993, 1995, 1998), provides a useful framework for understanding how gender, race, age, and other extralegal factors affect sentencing decisions.

The focal concerns framework, however, is difficult to test. The factors that contribute to perceptions of each focal concern are not explicitly laid out in Steffensmeier and colleagues' formulation of the theory. Focal concern measures are not employed consistently across studies; some measures are included in some studies and not others, while other measures have been used to represent different or multiple focal concern concepts (Hartley, Maddan, & Spohn, 2007). Further, analyses of the theory have been unable to directly measure judges' perceptions of the three focal concerns, instead relying on proxy measures that are more easily observed. Researchers use these indirect measures as predictors of sentencing outcomes and then interpret their results in the context of the focal concerns framework. Thus, while the bulk of sentencing research obtains results that are interpreted as being consistent with the focal concerns theory, more nuanced tests are needed to advance understanding of the theory in contemporary sentencing research.

Focal concerns theory was first formulated to evaluate gender disparities in sentencing (see Steffensmeier, 1980; Steffensmeier, Kramer, & Streifel, 1993), but considerations of gender disparities, both inside and outside of the focal concerns framework, have received relatively little attention in recent years (see Table 1 for a list of contemporary research evaluating gender and focal concerns). Women have always constituted only a small fraction of offenders who are involved with the criminal justice system (Bonczar, 2003; Simon, 1975), often leading researchers to disregard them in analyses of sentencing disparities. Crew (1991) offers two additional reasons for this inattention. First, scholars may simply assume that women are given leniency and feel little need to further explore this assumption. Second, while the legitimacy of racial



disparities in sentencing has been under fire for more than half a century, the legitimacy of gender disparities in sentencing has not been seriously questioned until more recent times. Essentially, gender disparities have never been as controversial as other disparities in the criminal justice system, such as racial and ethnic disparities.

This study provides an improved test of the ability of the focal concerns framework to explain gender disparities in two sentencing outcomes. It uses a unique dataset that combines official court data with case-level surveys completed by judges in a single county to examine the relationship between defendants' gender, the three focal concerns specified in Steffensmeier and colleagues' theory, and sentencing outcomes. The project makes two significant contributions to the sentencing literature. First, it more directly measures judges' perceptions of focal concerns and empirically links those perceptions with gender disparities in sentencing. In this way, the project offers a test of the focal concerns theory, rather than justifying it as a perspective with post-hoc interpretation of the results. Second, it provides an evaluation of whether or not perceptions of blameworthiness, community protection, and practical constraints help to explain the gender gap in sentencing, as focal concerns theory predicts.

## Chapter 2: Theoretical Framework

### *Early Gender Disparity Research*

Research conducted prior to the 1990's generally found a small but still significant advantage for female defendants with respect to the decision to incarcerate (Farnworth & Teske, 1995; Frazier & Bock, 1982; Ghali & Chesney-Lind, 1986; Gruhl, Welch, & Spohn, 1984; Hagan & Bernstein, 1979; Hagen, Nagel, & Albonetti, 1980; Johnson, Kennedy, & Shuman, 1987; Myers, 1979; Nagel, Cardascia, & Ross, 1982; Rhodes, 1977; Rich et al., 1982; Spohn, 1999; Wooldredge, 1998; Zimmerman & Frederick, 1984). Fewer gender effects, however, were found for sentence length. Some research suggested that women do receive shorter sentences than men (Curran, 1983; Farnworth & Teske, 1995), while other research found no gender differences (Albonetti, 1991; Nobiling, Spohn, & DeLone, 1998; Wooldredge, 1998; Zatz, 1984) or even more severe sentences for women in some cases (Zingraff & Thomson, 1984).

Two early reviews of the literature on gender disparities arrived at these same conclusions. Nagel and Hagan (1983) evaluated gender differences across a number of different decision points throughout the criminal justice system. They identified only 16 studies that included gender as a predictor in assessments of sentencing decisions, dating all the way back to 1934 (Martin, 1934). Although some of the methodology from these studies would be considered crude and outdated today, the conclusions were quite consistent; women were found to receive preferential treatment. Nagel and Hagan concluded that the effect of gender was slight in comparison to the effects of other legally relevant factors such as offense seriousness and criminal history, but it was significant nonetheless.

More recently, Daly and Bordt (1995) analyzed 50 unique data sets from studies published through the mid-1990's that assessed the effects of gender on sentencing outcomes. Of the 38 that controlled for prior record in some fashion, 26 percent identified no gender effects, 29 percent mixed gender effects, and nearly half found effects suggesting that women receive sentencing leniency. Gender effects were common even when a variety of controls were included. Gender effects were more likely for the decision to incarcerate than for sentence length; that gap ranged from 8 to 25 percent for studies that the authors deemed to be high-quality. Gender effects were also more noticeable among felony offenses, in offenses prosecuted in federal courts, and in courts in urban areas. Of the 249 court outcomes that were examined in the 50 datasets, only two showed leniency for men.

The authors identified a need to better understand how gender-related determinations influence court decisions, as well as how women end up in felony court and how women navigate the criminal justice system. They note:

With more research, we may find that gender gaps can be explained largely by the character and seriousness of men's and women's current and previous lawbreaking. We should be prepared, however, to notice and document other gender-linked forms of disparity, some of which are positive. Refracted through layers of culture and social institutions, such positive forms of disparity are the justice system's recognition of gender difference (Daly & Bordt, 1995: 164).

This acknowledgement of the possibility of extralegal explanations for disparity in the criminal justice system mirrors the general conclusions drawn by research conducted up until the 1990's. Some work identified no gender disparities in sentencing, but the majority detected at least a slight leniency toward female defendants left unaccounted for by legally relevant factors. This tendency led scholars to suggest that women are treated less harshly simply because of their gender. Though more

contemporary research has made significant strides toward resolving the methodological issues inherent in much of this work, the gender gap still has not been fully explained.

#### *Contemporary Gender Disparity Research*

*Main effects for gender.* Contemporary gender disparity research has worked to address some of the shortcomings in earlier literature, incorporating better control measures as well as interactions between gender and other characteristics into analysis. Freiburger (2009), for example, examined the decision to incarcerate among a sample of drug offenders with several key control measures, including offense seriousness and prior convictions. Even after accounting for offense and criminal history characteristics, which did have significant effects on the likelihood of incarceration, female defendants still received leniency relative to males. In a similar but larger study, Rodriguez, Curry, and Lee (2006) used a random sample of over 7,000 felony offenders from 10 counties in Texas to examine gender disparities across offense types. Across the entire sample, they reported strong gender disparities in the odds of a prison sentence, but the effects varied significantly by offense type- females benefited from their gender for drug and property offenses, but not for violent offenses. In contrast, among those defendants who were sentenced to prison, females benefited most for violent offenses, far less for drug and property offenses.

A small group of studies has evaluated the extent to which state sentencing guidelines have reduced gender disparities in sentencing. For example, Steffensmeier, Kramer, and Streifel (1993) used 1985-1987 data from the Pennsylvania Sentencing Commission to examine gender differences in sentencing outcomes under sentencing guidelines. As expected, offense seriousness and criminal history were the most

important determinants of both the decision to incarcerate and sentence length, but women were still less likely to receive an incarceration sentence.

Koons-Witt (2002) was able to examine the relationship between gender and incarceration before and after the introduction of sentencing guidelines in Minnesota. Contrary to her hypotheses, gender was not independently related to the likelihood of imprisonment in in the pre-guidelines, early guidelines, or late guidelines periods. Females were less likely to receive an incarceration sentence if they had dependent children in the pre-guidelines or later guidelines period and if they were not white in the early guidelines period. Koons-Witt thus found support for her conjecture that sentencing practices would experience a jolt at the time of guidelines implementation but would soon revert back to pre-guidelines patterns of disparity. Building on Koons-Witt's (2002) work, Blackwell, Holleran, & Finn (2008) capitalized on a temporary suspension of sentencing guidelines to assess gender differences in sentencing outcomes with and without sentencing guidelines in Pennsylvania. Female defendants were less likely to receive a sentence of incarceration than male defendants before, after, and during the suspension. Further, the suspension of the guidelines did not have any significant effect on how male and female defendants were sentenced.

Contemporary research also finds evidence of gender disparities under federal sentencing guidelines. Mustard (2001) examined federal sentences, finding that male defendants received 12 percent longer sentences. This disparity was driven chiefly by guidelines departures; departures accounted for 67% of the difference in sentence length between male and female defendants. Male defendants were also more likely to receive a prison sentence than females. Doerner (2012) used 2000-2003 federal data to look at

gender disparities in three outcomes: the incarceration decision, sentence length, and guidelines departures. Again, females benefited from their gender status for each of the sentencing outcomes. Even after controlling for guidelines departures, females were still less likely to be incarcerated and had shorter sentences. Doerner and Demuth (2014) aimed to explore the gender gap in federal sentencing with more robust measures of legal case characteristics and nested models that assessed the isolated effects of legal and extra-legal variables. Females were less likely to receive an incarceration sentence and received shorter sentences than males regardless of which legal and extralegal variables were included.

*Interactive effects for gender and other factors.* Detailing the isolated effect of defendants' gender on sentencing outcomes can be a vast oversimplification of the complex processes at work in judicial decision-making. To gain a more nuanced perspective on the effects of gender in the courtroom, many researchers have looked at the intersection of gender and other variables. Rather than assessing whether or not men and women are treated differently in the criminal justice system, researchers are asking *under what conditions* men and women are treated differently. Freiburger (2010) used a survey of randomly assigned hypothetical vignettes to study the impact of having a family on the gender gap in sentencing. She asked judges from Pennsylvania to indicate the likelihood that they would incarcerate hypothetical defendants on a scale from 0 to 100 percent, and she found that gender remained a significant predictor of incarceration after controlling for family status. In contrast to the conclusions of prior work (see Kruttschnitt & Green, 1984; Daly, 1987; Daly, 1989), Freiburger also found that being a parent reduced the likelihood of incarceration more for males than for females. At the

same time, other work has demonstrated the constancy of the gender gap across some contexts. For example, Weidner, Frase, and Schultz (2005) analyzed both individual-level and county-level factors in data from the Bureau of Justice Statistics' State Court Processing Statistics (SCPS) program, showing that females were significantly less likely to receive a prison sentence than males and that this effect did not vary by county.

One particularly popular line of research examines how gender and race interact to affect sentencing outcomes. Spohn and Beichner (2000) evaluated the interaction of gender and race/ethnicity in three major U.S. cities, finding that both the independent effects of race and the joint effect of race and gender varied by location. The authors concluded that the effect of race was conditioned by gender, with men being more disadvantaged by minority status, but that the effect of gender was not conditioned by race. Choosing to look at aggregate rather than location-specific gender and race effects, Steffensmeier and Demuth (2006) used SCPS data from the 1990's to examine the effects of race and gender interactions on sentencing outcomes among large urban courts all across the United States. In concert with Spohn and Beichner (2000), they found that gender conditioned the impact of race; both black and Hispanic females actually benefited more from their status as females than would be expected, given their status as racial/ethnic minorities.

Brennan and Spohn (2009) evaluated gender and race disparities in sentence length for drug offenders in federal courts located in Iowa, Minnesota, and Nebraska. Though females received shorter prison sentences than males overall, further analysis showed that this effect was driven almost entirely by a gender disparity among black defendants. White males and white females did not receive statistically different

sentences, on average. Freiburger and Hilinski (2013) arrived at somewhat similar conclusions with data on personal, drug, and property offenders convicted in a single Michigan county. Women in their sample were more likely than men to receive a sentence of probation but equally likely to receive a jail or prison sentence. The authors also found that significant interactions between race and gender were primarily due to the harsher penalties given to young black men.

Further clarifying the gender and race interaction, researchers have studied the nexus of gender, race, and other characteristics such as age and offense type. Steffensmeier, Kramer, and Ulmer (1998) evaluated the effects on sentencing of combinations of offenders' race, gender, and age with 1989-1992 PCS data. Controlling for offense severity and prior record, their results indicated that race, gender, and age each had significant independent effects on both the incarceration and length-of-term decisions, but also that the three social statuses had interactive effects. For example, the independent influences of both age and race on sentencing were conditioned by gender, with particularly pronounced effects for male offenders. The interaction of race and age on sentencing was conditioned by gender; for males, black offenders received harsher sentences only among young offenders, but for females, black offenders received harsher sentences regardless of age. Young black males received more severe sentences than any other age-race-gender combination.

Spohn and Holleran (2000) replicated Steffensmeier, Kramer, and Ulmer's (1998) research approach and expanded upon it in three ways, examining outcomes in three large urban jurisdictions, including Hispanics, and testing for interactions among race/ethnicity, gender, age, and employment status. Young black males consistently



received the harshest penalties, while young Hispanic males were incarcerated more often than white males in some cities. Concurrent with Steffensmeier, Kramer, and Ulmer's findings, they concluded that gender had the largest independent effect, while being young, unemployed, male, and a racial/ethnic minority interacted to produce particularly harsh sentences. Harrington and Spohn (2007) further replicated and extended Spohn and Holleran's research by separating incarceration sentences into jail and prison sentences for their analysis. Their results were notably consistent with Spohn and Holleran's conclusions.

Doerner and Demuth (2010) used data from the U.S. Sentencing Commission (USSC) to examine the independent and joint influences of race, gender, and age on sentencing outcomes. Once criminal histories and offense characteristics had been taken into account, they observed that females had 42% lower odds of incarceration and 25% shorter sentences than males. The gender gap in the likelihood of incarceration was the largest and similar for black and Hispanic defendants, while the gender gap in sentence length was largest for black defendants and similar for Hispanic and white defendants. Above and beyond the main effects of being Hispanic or black, male, or young, being a young minority male was particularly disadvantageous. Warren, Chiricos, & Bales (2012), however, suggest that some of these effects may be conditional. For less serious property and drug crimes, the combination of being male, black, and young was particularly disadvantageous relative to all other demographic groups. Among the most serious crimes (murder, sexual assault, and robbery), these effects generally disappeared, suggesting that sentencing outcomes are more constrained by the seriousness of the crime for more severe offenses and less susceptible to judicial discretion.

Modern sentencing literature as a whole suggests that gender disparities are still alive and well in sentencing practices, even after the implementation of sentencing guidelines in some courts. The mechanisms through which these disparities operate, on the other hand, are less clear-cut.

### *Theories of Gender Disparity in Sentencing*

Several perspectives explain why defendants' gender may influence sentencing outcomes. Under the chivalry hypothesis, court actors, including prosecutors and judges, are reluctant to 'harm' women and even fail to believe that women could be criminal (Pollak, 1950). Leniency for women during sentencing is an expression of gallantry; the male-dominated criminal justice system feels that it should protect women and views harsh punishment as something that conflicts with this goal. While still sexist in nature, leniency toward women is more benevolent. The paternalism hypothesis, on the other hand, argues that court actors view women as childlike, unable to defend themselves and therefore not responsible for their own actions. In this case, as Moulds (1978) argues, leniency is more of a pejorative gesture, driven by the presumption that women are incapable of making informed decisions and should not be punished for their wrongdoing. Though this sense of paternalism does outwardly allow for clemency toward women, it still embodies the depreciatory attitude that women are necessarily subordinate to men. The undertones of the sentencing leniency in the chivalry and paternalism hypotheses differ dramatically, but they make similar predictions about gender disparities in sentencing, namely that women will be consistently treated more leniently than men.

One response to the chivalry and paternalism hypotheses was a counterclaim—the evil woman hypothesis. This hypothesis asserts that female offenders are actually

treated more harshly than men by the criminal justice system when they commit crimes inconsistent with gender stereotypes. Women who commit violent and other serious crimes are viewed as evil and disrespectful of traditional gender roles (Rasche, 1975). These women are punished more severely because their behavior violates the gender stereotypes that the courts espouse.

Scholarship on gender disparities speculates further about the exact mechanisms through which judges grant sentencing leniency to female defendants. Nagel and Hagan (1983) listed several assumptions, representing both chivalrous and paternalistic attitudes, that may be influencing this leniency: women are less culpable, are more emotional and less responsible for their own actions, are not dangerous, commit crimes as isolated incidents rather than as part of criminal patterns, can be deterred easily, are responsive to rehabilitation efforts, and are unable to withstand harsh or traumatic punishments. Similarly, Steffensmeier, Kramer, and Streifel (1993) extracted five themes from interviews with judges in Pennsylvania that explain why females received more lenient sentences. These justifications included that the defendant has a nonviolent prior record, the defendant has mental or physical health problems, the defendant is pregnant or has dependents for which he/she is responsible, the defendant was only an accomplice in the crime, and the defendant shows remorse.

The theorized mechanisms through which gender disparities operate can be conceptualized as part of a broader scheme of judicial decision-making. In this scheme, judges are required to render sentencing decisions that are made complex by the absence of perfect information. They therefore look for techniques for reducing uncertainty and

simplifying the decision-making process while still appearing fair and impartial. Judicial decision-making theories attempt to identify and explain these techniques.

### *Theories of Judicial Decision-Making*

General theories of judicial decision-making provide a useful framework for understanding the exercise of judicial discretion. Early sentencing scholars framed their work with one of two competing perspectives: conflict or consensus. Conflict theorists argued that individuals in power create and enforce laws that assist them in maintaining their dominant status, such that judges make decisions that perpetuate the subordination of powerless social groups such as racial/ethnic minorities, women, and low-socioeconomic status citizens (Barak, Leighton, & Flavin, 2010; Reiman & Leighton, 1984). Alternatively, applied consensus theory emphasized the shared values and interests of society, contending that judges craft sentencing decisions to reflect these values and promote justice (Durkheim, 1933; Hagan, 1989).

In the structural-organizational perspective, March and Simon (1958) argue for a “bounded rationality” in which court actors deal with uncertainty about offenders’ future behavior by adopting a rationality that depends on both habit and the existing social structure. In situations that call for highly discretionary decision-making, judges use past experiences and present stereotypes to develop patterned responses that assist in reducing uncertainty. The social psychology discipline provides a second useful perspective, called causal attribution theory. Attribution theorists contend that people make judgments of causality based on factors, both individual and contextual, that are thought to affect behavior (Carroll & Payne, 1976; Heider, 1958). Application of this principle to judicial decision-making suggests that judges make causal assumptions about criminal behavior

based on defendant and crime characteristics. In other words, judges rely on causal attributions related to defendants' gender, race, age, socioeconomic status, and other individual factors to interpret defendants' past behavior and predict defendants' future behavior.

Albonetti (1991) reconceptualized judicial decision-making research by marrying the structural-organizational and causal attribution perspectives. In short, she reasoned that in order to cope with high uncertainty, judges use causal attributions about defendants and the circumstances of their crimes to assess their propensity for future criminal behavior. Heuristics that link observable social characteristics such as gender and race to criminality give judges a simple way to predict future criminality and make consistent sentencing decisions.

#### *Focal Concerns Theory*

Steffensmeier and colleagues' focal concerns theory combines elements from theories on both general judicial decision-making and gender disparity. Focal concerns theory argues that sentencing decisions reflect judges' beliefs about three "focal concerns": blameworthiness, community protection, and practical concerns. Blameworthiness considers the seriousness of the offense and has two components: culpability, and harm caused by the offense.<sup>1</sup> Consistent with the retributive concept of just deserts, blameworthiness is the focal concern most clearly explicated by law, such that an offender's punishment should be proportionate to his or her crime and should vary depending on the degree of responsibility and the degree of injury caused. Although a

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<sup>1</sup> The term "culpability" has been used interchangeably with blameworthiness in some previous work, but this research confines its usage to reflect only criminal intent and accountability, irrespective of the actual consequences of the crime, to remain consistent with the original focal concerns authors. Culpability is thus defined here as the degree to which an offender should be held responsible for his or her criminal actions (see also von Hirsch, 1976).

precise list of the factors that theoretically influence perceptions of the three focal concerns has not been detailed either by the original authors or by subsequent researchers, factors that influence blameworthiness may include offense characteristics such as offense severity and offender characteristics such as criminal history, prior victimization, and role in the offense (e.g. leader, follower). In particular, offense severity is one of the most commonly used measures of blameworthiness.

The second focal concern is protection of the community. One major goal of the court is to minimize harm to the community by preventing future crime, so in the face of great uncertainty, judges must make predictions about future offending by the defendant. Community protection considers the need to incapacitate the offender or deter both the offender and others from future criminality. Here, considerations of the character of the offender are relevant, rather than characteristics of the offense. The two key components of community protection are how likely the offender is to recidivate or commit any future crime, and how dangerous the offender is, which is a reflection of the offender's propensity for future violence and harm. Factors that may influence the likelihood of recidivism include offender characteristics such as proclivity for future offending, criminal history, employment, and drug dependency, and factors that influence perceptions of dangerousness may include case characteristics such as the use of violence or a weapon.

Practical concerns, both individual and organizational, are the third consideration for sentencing decisions. Borrowing from workplace organization perspectives (March & Simon, 1958; Ulmer, 1997), Steffensmeier and colleagues (1993, 1995) note judges' awareness of the impact of assigned sentences on the courtroom workplace as well as the

larger correctional system. Judges remain sensitive to working relationships among courtroom actors, the need for a steady case flow, limited correctional resources, and the court's legitimacy within the community, among others. Likewise, at the individual level, judges must remain cognizant of how sentencing decisions affect offenders and their families. For example, disruptions to the offender's family and social ties, as well as the offender's health and ability to handle prison conditions, are practical factors that judges may consider.

Steffensmeier and colleagues acknowledge the complex interactions and overlap between these three focal concerns. Some case and offender characteristics contribute to judges' perceptions of multiple concerns; an offender's criminal history, for example, may factor into both the judge's perceptions of blameworthiness and concerns about protecting the community. Moreover, there is necessarily uncertainty surrounding predictions about future outcomes like recidivism and violence. In the absence of perfect information, however, judges are still expected to make objective sentencing decisions. To explain how judges overcome this obstacle, Steffensmeier and colleagues borrow from Albonetti's (1991) integrated theory, arguing that attributions based on observable factors such as race, gender, and age are used to form conclusions about the future behavior of offenders, which are in turn used to determinate appropriate criminal sanctions.

The application of focal concerns theory provides one explanation for gender disparities in sentencing: females are sentenced more leniently than males due to judges' differential perceptions of the three focal concerns. First, judges tend to view women as less culpable. Their blameworthiness is mitigated by the potential for victimization or

coercion by men, by drug or alcohol addiction, or by psychological disorders. Women also appear less dangerous to the community, with qualitatively less serious criminal records and more social bonds that will protect them from future criminality. Practical considerations likewise favor female defendants; judges perceive women as more likely to have a family and/or a job that will be negatively impacted by harsh punishment and more likely to cause great costs to the correctional system, due to gender-specific factors such as health care and child welfare. According to the focal concerns framework, these gender-based attributions about blameworthiness, community protection, and practical constraints are the reason that gender disparities are observable in sentencing outcomes.

#### *Critiques of Focal Concerns Theory*

Despite the theoretical prominence of focal concerns theory, recent critiques suggest several limitations in both the original formulation and subsequent testing of the theory. Theoretical critiques include ambiguity in the elements included in each of the different theoretical domains, inconsistency in the operationalization of focal concerns constructs, and a lack of distinct, testable propositions. Empirical shortcomings of focal concerns theory testing include an overreliance on official data sources from limited jurisdictions, potential for omitted variable biases, and an absence of measures capturing theoretical constructs that are more proximate to judicial perceptions.

First, the theoretical domains within the focal concerns framework have not been fully explicated. The theory distinctly lays out three focal concerns concepts, but the exact groups of variables that represent each of these concepts are not clearly detailed. Instead, Steffensmeier and colleagues only suggest some components that may influence perceptions of each focal concern. For instance, in addition to offense severity,



“biographical factors”, such as criminal history and prior victimization, and the offender’s role in the offense were identified as two main factors influencing views of blameworthiness, but this list is by no means exhaustive (Steffensmeier, Kramer, & Ulmer, 1998: 767). Focal concerns researchers have largely been left making their own decisions about what measures should constitute each concept.

In the same vein, there is little consistency in the literature with respect to how each focal concern construct is operationalized. Pierce (2012) points out that many variables are excluded from some analyses and included in others, while other variables may fit into multiple focal concerns categories. For example, defendant’s role in the offense is used as a measure of blameworthiness by Steffensmeier, Ulmer, and Kramer (1998) but is not included in a number of other studies (Freiburger, 2009; Kramer & Ulmer, 2002; Spohn & Holleran, 2000; Steffensmeier, Kramer, & Streifel, 1993). In contrast, offense severity is routinely included in focal concerns analyses, but it has been treated as a measure of both blameworthiness and community protection (Steffensmeier, Kramer, Ulmer, 1998), blameworthiness only (Steffensmeier, Kramer, & Streifel, 1993), and community protection only (Hartley, Maddan, & Spohn, 2007). Kramer and Ulmer (2002) suggest that this fuzzy operationalization is interminable because the interpretation of each focal concern may vary by context; they contend that researchers cannot arrive at a single operationalization of each concept because the variables that best constitute the concepts differs by courts and communities.

The third theoretical criticism of focal concerns theory is that it lacks clear testable and falsifiable predictions. Focal concerns theorists have not laid out the concrete hypotheses that can be derived from the theory, instead alluding to a complex interplay

between concepts in the framework. As a result, different researchers have tested the theory in varying ways. Tests of focal concerns theory are a collection of extended analytic models that often do not fit together cohesively.

Other criticisms pertain to empirical testing of the theory. For instance, the bulk of focal concerns research has been conducted using official data from the Pennsylvania Sentencing Commission (PCS). Although focal concerns theorists have characterized PCS data as particularly well-suited for focal concerns evaluations, the data are still collected from a single state and contain only certain types of information. The frequent use of this dataset limits the generalizability of focal concerns research and places constraints on the variety of variables that are included in analytic models. The measures representing each of the key focal concerns have been dictated by the information available in the PCS data rather than by theory.

This reliance on official data also increases the potential for omitted variable biases in analyses of the theory. The different official datasets used for focal concerns analyses tend to have similar sets of variables available, so some variables that may play a significant role in judicial decision-making, such as number of offenders' dependents, offenders' role in offenses, and offenders' health status, are frequently excluded from analyses (some exceptions include Doerner, 2012; Doerner & Demuth, 2014; Freiburger, 2010; Hartley, Maddan, & Spohn, 2007; van Wingerden, van Wilsem, & Johnson, 2014). Excluding variables that may be causal factors of sentencing decisions can result in over- or underestimation of the focal concerns factors that *are* included in analytic models. It is unlikely that analyses capture the full scope of each focal concerns construct. In turn, it is

unclear whether or not theory assessments are accurately portraying the effects of focal concerns factors on sentencing disparities.

One particularly important limitation is that focal concerns research has been unable to empirically link judges' *perceptions* of the three focal concerns set forth by Steffensmeier and colleagues (1993, 1998) with observed gender disparities. Not a single study has directly measured judicial perceptions of the focal concerns for individual defendants. The modal approach to the research assumes that such perceptions are close reflections of more easily observed variables, such as type of offense or number of prior offenses committed, and can therefore be represented by them. Because of this, past evaluations have only indirectly assessed the theory; they have been unable to directly test the key focal concerns. Focal concerns researchers assume that the variables available in accessible datasets are adequate proxies for judicial perceptions of the three concerns, but there is little evidence to support the validity of this assumption. Prior work uses the theoretical framework provided by focal concerns theory to guide post-hoc interpretations of results rather than to test its empirical validity.

#### *Focal Concerns: A Perspective or a Theory?*

For the reasons just discussed, some argue that focal concerns theory is not a theory at all:

It has no set of testable propositions; most hypotheses that have been derived from this work have been extended over time. The primary concepts of this perspective are also underdeveloped. Different concepts can actually contain the same variables. Because of this, and the fact that focal concerns theorists do not allude to how these concepts fit together, except in a "complex interaction," aspiring focal concerns empiricists are left to their own devices in testing extended analytic models. At this point, the "focal concerns theory" is no such thing; it is merely a perspective (Hartley, Maddan, & Spohn, 2007: 73).

The crux of these arguments is that focal concerns theory does not have clearly delineated, testable concepts and propositions. In its current state, Hartley, Maddan, and Spohn (2007) deem it incapable of undergoing theory testing. Despite such sharp criticism, however, it seems that focal concerns theory still has the potential to inform sentencing research and explain sentencing disparity if properly specified. Focal concerns theory thus may benefit from a reformulation, in which the focal concerns, as well as the manner in which they fit together, are more definitively laid out. This paper attempts to provide such a reformulation by altering conceptualization of the focal concerns, addressing the way in which the concerns interact, and specifying the hypotheses that can be derived from the theory.

#### *A Reconceptualization*

As Steffensmeier and colleagues (1998) clearly state, blameworthiness is the focal concern that represents retributive justice and is most closely detailed by law. Blameworthiness can still be broken down into culpability, which is an attribution made about the offender that reflects both criminal intent and accountability, and harmfulness, which is an attribution made about the consequences of the criminal act. What Steffensmeier and colleagues fail to explicitly note, however, is that blameworthiness is situational; the two domains of blameworthiness can both be thought of as products of the circumstances *specific to a particular offense*. While the harmfulness of the offense is inherently event-specific, perhaps less intuitive is that culpability is also event-specific, such that the culpability of an offender may differ for different crimes at different points in time. In other words, it is the characteristics and context of the criminal act that are relevant to blameworthiness attributions, not the enduring characteristics of the offender.

Factors influencing perceptions of culpability may include the role the offender played in the offense, the degree of self-defense or provocation involved, prior victimization of the offender, the mental health of the offender at the time of the offense, the influence of drugs or alcohol at the time of the offense, immaturity of the offender, the use of a weapon, and remorse/willingness to make restitution for the offense. These culpability factors are only relevant to perceptions of blameworthiness to the extent that they reflect the intent and responsibility of the offender at the time the offense was committed; for example, in order to influence perceptions of blameworthiness, prior victimization must have a noticeable association with the commission of the offense. An individual who murders his/her spouse is likely to be considered less blameworthy if he/she has previously been abused by that spouse. On the other hand, a gas station clerk who steals from the cash register is unlikely to be considered any less blameworthy if he/she has previously been assaulted. Harmfulness is a more straightforward concept, capturing all the consequences of the offense. The serious or bizarre nature of the act, the success of the act, injuries, monetary or property losses, and other social/psychological damage can all be considered consequences of an offense and play into the concept of harmfulness.

The second focal concern, community protection, considers the dangerous, violent, or criminal nature of the offender, with the goal of better predicting the offender's future behavior. Again, as Steffensmeier and colleagues (1998) describe, community protection encompasses predictions about both the offender's likelihood of recidivism and the offender's future dangerousness. However, they then suggest that characteristics of the offense, such as crime type (e.g. violent versus property) and use of

a weapon, as well as other case information, are the types of factors used to make predictions about future offending. If community protection is reconceptualized as the concern that embodies the objective of crime prevention, though, community protection should only consider the context of the specific offense insofar as that context contributes to an understanding of the offender's more general proclivity for offending and harm. This is an important theoretical distinction- characteristics of the offense for which the offender has been convicted only matter for community protection because they constitute part of the offender's behavioral history. To illustrate, the commission of a violent crime is only pertinent to community protection as part of a criminal history that suggests the offender may be willing to use violence in the future, and the use of a weapon is only pertinent as part of a criminal history that suggests the offender may use weapons in the future.

Factors that play into predictions about future offending may therefore include the length of the offender's criminal record, frequency of offending, drug or alcohol dependency, health problems, enduring mental health problems, employment history, work ethic, and job skills/education. Predictions about future dangerousness are predicated on factors such as the seriousness of the offender's criminal record and a history of weapon possession/use.

The final focal concern is the consideration of practical constraints, which are essentially the consequences of punishment. This concern is pragmatic in nature and acknowledges that sentencing decisions do not function in a vacuum- they have effects on a variety of entities related to the offender and the courtroom. The idea of practical constraints seems to be somewhat of a "catch-all" category, in that it encompasses a wide

range of factors that simply do not fall neatly into the categories of blameworthiness or community protection. Still, this third concern is nontrivial; it is reasonable to expect that judges do weigh the consequences of their sentences into their decision-making, and these consequences range from effects on the individual offender and his/her family to effects on the courtroom workplace and the correctional system.

It should be stressed that the practical constraints concern encompasses a diverse group of factors. Steffensmeier and colleagues divide these factors into two groups, designating individual and organizational consequences. However, this project offers a slightly revised view of what constitutes each of these types of consequences. Further, these two groups each seem to have their own theoretically distinct and delineable domains, and specifying these domains provides further clarity to an otherwise miscellaneous grouping.

The concept that Steffensmeier and colleagues term “individual” concerns is a combination of two types of consequences: consequences to the offenders themselves, and consequences to other individuals connected to the offender. Examples of concerns directly affecting the offender include his/her ability to ‘do time’ and survive prison conditions, health conditions, special needs, and the effects of incarceration on offenders’ social status, employment, and housing. These are all consequences to be borne by the offender alone; they embody concerns about the effects of punishment on the offender’s safety, health, and success during and after incarceration. The second domain of “individual” concerns acknowledges that punishing offenders can affect other individuals connected in some way to those offenders, particularly family members. Factors in this

second category thus include number of dependents and other variables that capture the relationships between offenders and family members.

Likewise, “organizational” concerns can be decomposed into factors related to the court and factors related to the larger correctional system and community. The court can be thought of as having its own organizational culture, complete with professional relationships, normal operating procedures, and goals such as efficiency and cohesion. Judges remain sensitive to the operations of the court, such that they will consider the effects of a particular sentence on court actors and the courtroom environment. As a result, legal factors such as plea bargaining and the caseload of the courtroom can play into judges’ sentencing decisions. The other set of organizational concerns relates to the status of the surrounding community and correctional system. Incarcerative sentences entail numerous costs for the correctional system; to the extent that judges are aware of the state of various parts of the criminal justice system, prison overcrowding, budgetary constraints, and the cost of alternative sanctions may all play into sentencing decisions. Sentencing habits can further affect the legitimacy and efficacy of the court within its local community. Consequently, community characteristics such as demographic makeup, norms, and politics may also influence the way judges make sentencing decisions.

With these reconceptualized focal concerns in mind, it is possible to elaborate upon parts of the complex interplay between concepts that Steffensmeier and colleagues acknowledge in their original layout of focal concerns theory. It does seem possible to derive a basic two-stage model that explains demographic disparities in sentencing outcomes; this conceptual model is displayed in Figure 1.



In the first stage of the model, the theory posits that judges make attributions about blameworthiness, community protection, and practical constraints that are related to easily observed characteristics of the offender and offense. The first hypothesis is that perceptions of these three concerns will differ by demographics such as gender, race/ethnicity, and age. In the second stage, judges use those attributions related to the three focal concerns to make sentencing decisions, such that offenders are sentenced more harshly when they are perceived as more blameworthy and/or more of a threat to the community, or when fewer practical constraints are present.

Several other limitations of focal concerns theory research could be addressed with greater use of survey research, which is the ideal and most direct way to measure judges' perceptions, but focal concerns researchers avoid surveys due to the difficulties associated with the methodology. Response rates to paper-based surveys are low and falling (de Leeuw & de Heer, 2002; Fowler, 2014), and judges are also unlikely to commit to completing questionnaires, which essentially amount to more paperwork, each and every time they hear a criminal case.

This research project attempts to address some of the criticisms of focal concerns theory by employing data from a judicial survey that elicited judges' perceptions of more direct indicators of focal concerns. This allows for an examination of more proximate measures of the focal concerns outlined in the theory. As a more direct test of focal concerns theory, this research investigates whether or not gender disparities in sentencing can be explained at least partially by differences in judges' evaluations of offenders' blameworthiness, community protection, and practical constraints associated with offender punishment.

## Chapter 3: Data and Methods

### *Hypotheses*

There are three main hypotheses in this investigation. Focal concerns theory argues that judges make gender-based attributions about offenders that relate to blameworthiness, community protection, and practical considerations. The first hypothesis addresses whether or not these attributions result in differential assessments of the three focal concerns between males and females.

*Hypothesis 1: Judicial perceptions of blameworthiness, community protection, and practical considerations will vary by defendants' gender; women will be viewed as less blameworthy, less of a threat to the community, and more negatively impacted by harsher sentences.*

The second hypothesis relates to whether or not gender is a significant predictor of the decision to incarcerate and the length of incarceration sentence. Prior research suggests that there are indeed gender disparities in sentencing outcomes that disadvantage male defendants.

*Hypothesis 2: Male defendants will be more likely to receive an incarceration sentence and will receive longer prison sentences than females.*

The third hypothesis pertains to whether or not measures of the three focal concerns can explain observed gender disparities in sentencing outcomes.

*Hypothesis 3: The effect of gender on sentencing outcomes will be reduced when measures of blameworthiness, community protection, and practical constraints are included in the model.*

## *Data*

The dataset for this research contains information on 962 felony offenders sentenced by 18 judges between May 1976 and June 1977 in Essex County, New Jersey (Gottfredson, 1999a, 1999b). This data is available to the public from the Inter-University Consortium for Political and Social Research (ICPSR #2857).

Essex County is a county in northeastern New Jersey. In 1977, the population of Essex County was approximately 879,000; 64% were white, 35% were black, and 1% identified as another race (U.S. Census Bureau, 2004). The seat of Essex County is Newark, which is predominantly black and the most populated city in New Jersey (U.S. Census Bureau, 2000).

Data were collected in two waves, but this research project only uses data from the first wave. During the first wave, judges completed questionnaires about every offender sentenced between May 1976 and June 1977. A copy of this questionnaire is provided as Figure 2. The questionnaires solicited descriptions of the sentence imposed and assessments of offense seriousness, offenders' propensity for future offending, length of prior records, seriousness of prior records, offenders' social stability, and mitigating/aggravating factors that influenced sentencing decisions. Probation officers also provided objective case file information, including demographic information, charged and convicted offenses, prior probations and probation revocations, jail terms, prison terms, prior sentences still being served at time of sentencing, and sentencing recommendations from the prosecutor and probation offices. Once missing data is taken into account, the final sample size for this research is 918.<sup>2</sup>

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<sup>2</sup> The full sample of 962 offenders has some missing data on variables of interest in this study. Listwise deletion is used for those cases missing data on either gender (14 cases), age (6 cases), or at least one of the

### *Dependent Variables*

Descriptive statistics for each variable in this study are detailed in Table 2. This research uses two separate sentencing outcomes as the dependent variables in its analysis. The first dependent variable is the decision to incarcerate, which is measured as a binary variable (1=incarceration sentence, 0=non-incarceration sentence). Incarceration includes sentences of jail, prison, and lengths of stay at the Garden State Correctional Facility (Yardville), which is a minimum security complex with extensive academic and vocational training programs in New Jersey. The second outcome of interest is the length of the incarceration sentence. Judges were asked to specify the minimum and maximum number of months to which each defendant was sentenced, so sentence length is represented by a continuous logged measure of the midpoint of the prescribed sentence range. The middle of the sentence range takes into account both the minimum and maximum sentence lengths and is a better estimate of the sentence that judges realistically expect defendants to complete than either the minimum or maximum sentence lengths. For the analysis, this variable is logged to adjust the heavy skew of the distribution.

### *Independent Variables*

Three of the main independent measures for this analysis are the focal concerns measures, hereafter referred to as perceptual measures, capturing the concepts of blameworthiness, community protection, and practical constraints.

*Blameworthiness.* Three variables tap into the concept of blameworthiness perceptions. The first variable that measures harm is judges' ratings of offense

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questions on the judicial questionnaire (24 cases). Missing data for race/ethnicity is discussed in Footnote 10.

seriousness, which ranges from 1 (Very Low Seriousness) to 9 (Very High Seriousness). For this measure, judges were asked to rate the seriousness of the act leading to the most serious conviction.

The second and third blameworthiness variables are measures of legal mitigating and aggravating factors that influence judges' perceptions of either offenders' culpability or the harm they caused.<sup>3</sup> Judges were asked to indicate what mitigating factors they considered while making their sentencing decisions. The mitigating factors that affect perceptions of culpability include that the offense was between family members/acquaintances and that the offender acted in self-defense or under strong provocation, was not the instigator or ring-leader, is willing to make restitution, is young and immature, was intoxicated, and has a drug or alcohol addiction.<sup>4</sup> The mitigating factors that affect perceptions of harm caused include that the offense produced no or minor injury, involved only low-value property, was against property rather than person, made no financial gain, was not successful, and had no serious results. A single binary variable measures whether or not judges specified any of these blameworthiness mitigating factors as impactful for sentencing (1= mitigating factor specified, 0=none specified).<sup>5</sup>

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<sup>3</sup> Although ideally the blameworthiness mitigating and aggravating factors would have been further divided into the two components of blameworthiness (i.e. culpability mitigating and aggravating factors, harmfulness mitigating and aggravating factors), several of these listing categories occur infrequently and do not have enough qualifying cases to stand alone empirically. Culpability and harmfulness factors are therefore aggregated into a single "blameworthiness" factor" for analysis. This same issue arises with the categories for community protection and practical constraints factors as well; although separation of focal concerns domains is desirable, it is not feasible with this dataset.

<sup>4</sup> Addiction is categorized differently based on whether it is used as a mitigating or aggravating factor. As a mitigating factor, it indicates that judges consider offenders with a drug or alcohol addiction less culpable; they view the substances as at least partially responsible for the crime committed. As an aggravating factor, addiction is indicative of offenders' greater likelihood of future offending (see Steffensmeier, Kramer, & Ulmer, 1998).

<sup>5</sup> Unfortunately, mitigating factors and aggravating factors are each measured as a single categorical variable in the dataset. Therefore, even though judges were permitted to mention more than one mitigating

The aggravating factors that affect perceptions of culpability include that the offender showed no remorse and used a weapon. Aggravating factors that affect perceptions of harm include that the offense caused great injury to victim, involved a helpless victim, was serious or bizarre, involved a large amount of money or property, and involved a large amount of drugs. Again, a single binary variable measures whether or judges specified any of these blameworthiness aggravating factors as impactful for sentencing (1= aggravating factor specified). Counts of the most common mitigating and aggravating factors for each of the focal concerns are detailed in Table 3; only those factors that were identified at least five times in the data are listed.

*Community Protection.* Four variables that capture judges' predictions of future offending and perceptions of dangerousness are used to represent the community protection concern. The first variable, which measures the likelihood of future offending, is the perceived risk of committing any crime: judges were first asked to provide their prediction of recidivism for "any type of crime" within two years on a scale ranging from 0 (Very Low) to 10 (Very High).<sup>6</sup> The second community protection variable is a rating of offenders' criminal history. Judges were asked to rate the length of offenders' prior conviction record, seriousness of offenders' prior conviction record, and length of offenders' prior arrest record separately on scales from 0 (No Record/Not Serious) to 5 (Extensive/Very Serious). These three ratings are all indicators of criminal history but are highly correlated and measured with some error; to reduce the error, these indicators are

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and aggravating factor for a single case, each case can have up to one mitigating factor and up to one aggravating factor coded. For cases in which more than one mitigating or aggravating factor was specified by the presiding judge, it is unclear how data collectors chose which factor to code. Although the effect of multiple mitigating or aggravating factors may be different from the effect of a single mitigating or aggravating factor, the analysis is unable to make this distinction.

<sup>6</sup> The dataset also contains predictions of recidivism for property crime and for violent person-to-person crime. These two additional measures are highly correlated with predictions of recidivism for any type of crime ( $r = .787$  and  $r = .689$ , respectively) and are also excluded for this reason.

averaged into a single criminal history variable that ranges from 0 to 5.<sup>7</sup> Although some focal concerns researchers have stated that criminal history could also factor into considerations of blameworthiness under Steffensmeier, Ulmer, and Kramer's (1998) focal concerns framework, it is included as a measure of risk of future offending and therefore a community protection factor for this analysis. Prior criminal record has been shown to be a significant predictor of recidivism (Blumstein, Farrington, & Moitra, 1985; Greenberg, 1991; Kleiman, Ostrom, & Cheesman, 2007; Langan & Levin, 2002), and judges are likely to view an extensive criminal record as indicative of a higher probability of future criminal behavior. The correlation between these two perceptual measures, perceived likelihood of future offending and the criminal history index score, is positive and somewhat strong at .603.

The third and fourth community protection variables are measures of mitigating and aggravating factors that influence judges' perceptions of offenders' dangerousness and risk of future offending. While no mitigating factors that affect perceptions of dangerousness are available, mitigating factors that affect perceptions of risk of future offending include that the offense was an isolated or situational incident and that the offender is hard-working or has a good employment record, has no or minor prior record, has good job skills or education, and responds well to supervision.

Aggravating factors that affect perceptions of dangerousness include that the offender used a weapon, possessed several weapons, has a very serious prior record, and is a danger to society. Aggravating factors that affect perceptions of risk of future offending include that the offender has a lengthy prior record, a history of similar offenses, has committed offenses with high frequency, appears to be developing a pattern

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<sup>7</sup> All correlations are greater than .75. The alpha reliability coefficient for this index variable is .93.

of offending, has a crime-oriented lifestyle, has mental problems, needs strict supervision, has previously failed to respond to supervision, lacks vocational training, and has an alcohol or drug addiction. These mitigating and aggravating measures are constructed in the same way as the measures for the blameworthiness concept.

*Practical Constraints.* Perceptions of practical constraints are represented by two variables. The first is a judicial rating of individuals' social stability. Judges were asked to rate offenders' social stability on a scale from 1 (Very Low) to 5 (Very High). Judges may interpret this concept differently, but elements of social stability may include strong family and peer bonds, stable professional and personal networks, and a steady job. Although this variable could alternatively act as a measure of community protection, judges do consider how incarceration and/or a longer prison sentence will disrupt offenders' standing in their communities, so it is used as a practical concern for this analysis.

The second variable is a measure of mitigating factors that indicate judges' deliberation of practical concerns involving the offender, the community, and the court. The mitigating factors in this variable that indicate judges' consideration of individual practical constraints and consequences include that the offender is an active member of the community, has good family ties, has family problems (e.g. disabled child, ailing mother), and is old. Mitigating factors in this variable that indicate judges' considerations of organizational practical constraints include that the offender pled guilty/saved the time and resources needed for a trial or would require educational assistance or psychiatric therapy. This measure is constructed in the same way as the measures for the blameworthiness and community protection mitigating and aggravating concepts.



*Objective Focal Concerns Measures.* Several objective measures related to the focal concerns that are frequently used in focal concerns research are included in analysis. First, a series of dummy variables capture offense type; these offenses categories include homicide, aggravated assault, robbery, simple assault, theft, fraud, drug, burglary, weapons, and an “other offense” category that captures other relatively infrequent offenses (e.g. incest, bribery, perjury, labor law violations). The reference category for analysis is drug offenses. The number of counts convicted in the current case is measured as a continuous variable. These two variables represent the types of objective measures of offense seriousness used in prior focal concerns research. Two additional variables represent objective measures of community protection considerations from past focal concerns research. These variables, the number of prior jail terms and prior prison terms served, are both measured as continuous counts.<sup>8</sup>

Some of these objective case measures are expected to tap into the same concepts as the perceptual measures included in this study. For example, offense type and number of conviction counts are expected to overlap conceptually with perceived offense seriousness, and prior jail/prison terms are expected to overlap with perceived criminal history and risk of future recidivism. However, correlation matrices suggest primarily small to moderate positive correlations between perceptual and objective measures thought to capture the concepts of blameworthiness and community protection (see Table

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<sup>8</sup> Prior arrests and prior convictions have also been used extensively as indicators of criminal history, but information on arrests and convictions was collected at the end of the first wave of data collection, approximately one year after sentences were imposed. When these data were collected, a large portion of offenders were still serving incarceration sentences, and the author of the study was unable to collect data for many of these confined offenders. Prior arrests and convictions are therefore available only for a subset of offenders (n=469) that is biased toward those with non-incarceration sentences. This analysis therefore excludes these measures and instead follows the path of Spohn & Welch (1987), who conclude that prior incarceration terms are better predictors of sentencing decisions than prior convictions and prior arrests.

4).<sup>9</sup> The exception to this trend is the relationship between prior jail terms and the perceived criminal history index score, which correlate highly and positively at  $r = .75$ .

### *Extralegal Variables*

The first and most important extralegal variable in the analysis is the gender of the defendant, which is a binary variable (1=Female). Age is also included as a control variable. It is operationalized as age at time of sentencing and is a continuous variable. Additionally, the analysis controls for defendants' race and ethnicity. Race is measured using a single binary variable (1=Black, 0=Other). Ethnicity is measured using a second binary variable (1=Hispanic, 0=Other). The categorical variable in the dataset that measures race/ethnicity is missing approximately 44 percent of the data, so a third binary variable accounts for missingness on the measures of race and ethnicity.<sup>10</sup>

### Analytic Strategy

This research conducts a series of analyses to test the assertion that gender disparities in sentencing can be accounted for by judicial perceptions of the three focal concerns. To assess whether or not judicial perceptions of blameworthiness, community protection, and practical considerations vary by gender (Hypothesis 1), a series of two-sample Mann-Whitney tests are conducted in which male and female defendants are compared on each focal concern perceptual measure. Nonparametric Mann-Whitney tests do not assume a normal outcome distribution and are therefore favorable to two-sample t-

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<sup>9</sup> To further assess the relationship between the perceptual and objective case measures, a series of ordinal logistic regressions were run in which demographics and objective case measures were used to predict perceptions of offense seriousness, criminal history, likelihood of future crime, and social stability. Results (not shown) similarly suggest small to moderate positive relationships between perceptual and objective case measures; though objective measures were generally significant in the models, as a group they did not strongly predict the perceptual outcomes. Pseudo R-squared ranged from .10 to .13 in these models.

<sup>10</sup> Information about defendants' race/ethnicity is subject to the same data collection issue as some of the objective focal concerns measures (see Footnote 8). Specifically, race/ethnicity is provided for approximately 81 percent of offender who received non-incarceration sentences but only for 40 percent of offenders who did receive incarceration sentences.

tests in this case because the outcomes of interest (i.e. the four perceptual measures) are all ordinally ranked. Further, a series of two-proportion z tests are conducted to assess gender differences in the listing of focal concerns mitigating and aggravating factors.

The first sentencing outcome of interest is the decision to incarcerate. Consistent with prior sentencing research, a logistic regression is used to evaluate this outcome, because normality of the error terms cannot be assumed. The logistic regression is based on a Bernoulli distribution and is appropriate for this analysis. First, the study runs a logistic regression model in which the dependent variable is whether or not the defendant was given an incarcerative sentence and the primary independent variable is the gender of the defendant. Age and race are included as controls. This baseline model establishes whether or not there is in fact a gender disparity in the decision to incarcerate, controlling for age and race (Hypothesis 2).

The second model, in which the objective focal concerns measures traditionally used in focal concerns have been added, shows the degree to which these objective measures can account for observed gender disparities. A third logistic regression model further incorporates this study's perceptual measures of the three focal concerns. This fully-specified model enables an evaluation of the usefulness of focal concerns perceptual measures for explaining gender disparities after controlling for the objective measures used in past research (Hypothesis 3). Because the sample cases are naturally clustered into groups based on the presiding judge, and it is possible that observations may be correlated within judge groups, the standard errors are corrected for clustering by judge. This helps avoid underestimation of the standard errors and false inflation of the t-statistics.

Using the same logic as the analyses that examine the decision to incarcerate, a second set of models allows for an evaluation of gender disparity in the length of the incarceration sentence. Only those defendants who were sentenced to a prison term are included in this second set of models, bringing the sample size for this part of the analysis down to 532 cases. The sentence length outcome is logged to adjust for the skew of the distribution, and following the approach taken in other sentencing research, the models for this part of the analysis are OLS regressions.<sup>11</sup> Again, standard errors in this model are corrected for clustering by judge. First, gender is regressed on logged sentence length, with age and race as controls, to determine whether or not there is a gender disparity in the length of the sentences imposed. The intent of the project was next to expand the baseline model in the same fashion as the logistic regression models, adding objective focal concerns measures, perceptual measures, and both sets into the fully-specified model. However, the baseline sentence length model does not reveal a significant gender disparity in sentence length, rendering the expansion of the model to explain gender disparity immaterial and unnecessary. This result is further discussed below.

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<sup>11</sup> The selection of defendants for incarcerative sentences introduces the possibility of sample selection bias, but the conditional regression used in this analysis does not account for this bias. Therefore, alternative models are run to assess the impact of the modeling strategy. This is further discussed below.

## Chapter 4: Results

The results of the Mann-Whitney and two-proportion Z tests are presented in Table 5. All four ordinal focal concern measures have effects in the expected direction, such that males are perceived as having higher offense seriousness, longer and more serious criminal histories, higher likelihood of future criminality, and lower social stability. Only the differences for criminal history and likelihood of future criminality are statistically significant, however, while the difference in offense seriousness is marginally significant ( $p = .06$ ). In contrast, of the five mitigating and aggravating factor measures, only the aggravating factor for blameworthiness is even marginally significant; men are somewhat more likely to have had an aggravating factor listed that contributed to perceptions of blameworthiness.

Thus, the data show limited support for this study's first hypothesis; consistent with expectations, male offenders were perceived as having committed more serious offenses, longer and more serious criminal histories, and higher likelihoods of future criminality. Judges were also slightly more likely to specify an aggravating factor that contributes to perceptions of blameworthiness for males. However, there are no gender differences in perceived social stability, nor in the likelihood of having a blameworthiness, community protection, or practical constraints mitigating factor or a community protection aggravating factor.

Initially, two sentence outcomes were assessed for gender disparities: the decision to incarcerate and sentence length. There does not, though, appear to be a significant relationship between gender and sentence length. The results of an ordinary least squares (OLS) regression on sentence length with only demographic variables as predictors

indicate that females do not receive significantly longer or shorter incarcerative sentences than males ( $\beta = -.3396$ ,  $sd = .24$ ).<sup>12</sup> For sentence length, Hypothesis 2 is therefore not supported: in this sample, incarcerated females did not, on average, have shorter sentences than incarcerated males. As there is no gender disparity in length of sentence, the remainder of the analysis focuses only on the decision to incarcerate.

The results of the logistic regressions for the decision to incarcerate are listed in Table 6. The base model (Model 1), with only gender, age, race, and ethnicity included as independent variables, demonstrates significant effects in the predicted directions for gender, age, and race on the decision to incarcerate. The odds of receiving an incarcerative sentence were roughly 61% lower for female offenders, almost three times higher for black offenders, and 3% lower for each additional year older. Contrary to expectations, ethnicity did not have a significant effect on the decision to incarcerate. This inability to detect any effects, however, may well be due the small number (25) of Hispanic offenders in the sample.

In Model 2 of Table 6 the objective focal concerns measures have been added to the base model as predictors. The gender effect lessens but remains statistically significant; female offenders had approximately 48% lower odds of receiving an incarcerative sentence. In line with this study's predictions, then, the measures typically used in focal concerns research do not appear to account entirely for the gender gap; even after accounting for offense type, number of counts convicted, and prior jail/prison terms, females were still only half as likely to receive a sentence of incarceration as males. The

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<sup>12</sup> To assess the impact of the methodological decision to use an OLS regression to model sentence length, alternative modeling strategies were employed. These strategies include an unconditional regression in which non-incarcerated offenders are included and specified as having a sentence length of 0 months, a Heckman two-step selection model, and a Tobit regression model. Results for these alternative strategies are provided in Appendix A.

likelihood of incarceration also decreases slightly for older offenders and black offenders, but the age and race effects remain significant and positive. Again, there is no ethnicity effect on the decision to incarcerate.

With the objective focal concerns measures in the model, the number of counts convicted, prior jail terms, and prior prison terms are all positively related to the decision to incarcerate. In particular, each additional conviction count more than tripled the likelihood of receiving an incarcerative sentence. Examining offense types, relatively few findings of interest emerge. Offenders convicted of a homicide had 22 times higher odds of being incarcerated than offenders convicted of a drug crime, while offenders convicted of a robbery had 2.4 times higher odds. Fraud or forgery offenders had 80% lower odds and simple assault offenders 75% lower odds of receiving an incarcerative sentence. No significant effects emerged for other offense categories.

Model 3 includes only the focal concerns perceptual measures, along with the demographic variables. The inclusion of the perceptual measures reduces the gender effect to marginal significance, although the odds of incarceration are still 46% lower for females. The perceptual measures included in this study therefore appear to do a slightly better job independently explaining gender differences in incarcerative sentencing than the measures typically used in focal concerns research, but they do not fully explain the disparity. The perceptual measures do, on the other hand, fully explain the initial race disparity observed; unlike Model 2, in Model 3 black offenders are not significantly more likely to receive an incarcerative sentence. Age continues to have a significant effect on the likelihood of incarceration, although this effect is slightly smaller after accounting for the perceptual measures.

Of the four Likert scale perceptual measures, higher perceived offense seriousness, higher perceived likelihood of future crime, and lower perceived social stability all increase the odds of receiving an incarcerative sentence. Only the criminal history index score is nonsignificant. The nonsignificance of the criminal history index score is somewhat surprising, given the importance of criminal history in prior sentencing work. Because it can be argued that judges use offenders' criminal history only as a tool for making predictions about future offending, and the correlation between the criminal history index score and predictions about future offending is relatively high at .60, Model 3 was re-run without the measure for perceived likelihood of future crime. Interestingly, when predictions about future criminality were excluded, the criminal history index measure became significant in the expected direction (results not shown; odds ratio=1.43,  $p<.001$ ).<sup>13</sup> This suggests that offenders' criminal histories indeed play into concerns about community protection by informing judges' predictions about future offending. From an empirical standpoint, the effect of criminal history on the incarceration decision operates indirectly through perceived likelihood of future offending; when a more direct measure of the likelihood of future offending is available, criminal history becomes less statistically relevant.

The mitigating factors for both blameworthiness and community protection, as well as the aggravating factor for blameworthiness, are also significant in Model 3. Offenders with a blameworthiness or community protection mitigating factor listed had roughly 57% and 69% lower odds of receiving an incarcerative sentence, respectively.

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<sup>13</sup> Robust standard errors for the criminal history index score effect were compared for the models with and without likelihood of future crime. The standard error for criminal history is actually slightly larger in the model that excludes likelihood of future crime (.114 vs .104), indicating that an inflated standard error resulting from multicollinearity is not the reason for the lack of a significant criminal history effect in Model 3.



Offenders with a blameworthiness aggravating factor had over eight times higher odds of being incarcerated. The community protection aggravating factor failed to attain significance in the model, as did the practical constraints mitigating factor.

In the fully specified model, Model 4, both the objective and perception focal concerns measures are included, along with demographics. The main independent variable, gender, remained at least marginally significant in each previous model, but it is no longer significant after accounting for both sets of focal concerns measures. It should be noted, though, that the odds ratio for gender in the full model (.57) suggests that substantively, women are still less likely to receive an incarcerative sentence after accounting for all focal concerns measures. Compared to the gendered odds ratio when only the perceptual measures are included (see Model 3), which is .54 for females relative to males, the odds in the full model are not substantively that different. The full model only reduces the gender effect size by 8%.<sup>14</sup> Thus, although the combination of perceptual measures and objective case measures appear to do a better job explaining the gender gap than either set individually, and the combination does render the gender gap in incarceration nonsignificant, this improvement is relatively slight and the “success” of the model that includes both sets of measures should be interpreted with some caution. The age effect, which was significant in all other models, also disappears in the fully specified model. The race and ethnicity effects, which were both non-significant in the model with only perceptual measures added, remain non-significant.

Among the objective focal concerns measures, the most dramatic shift from previous models involves the effects of prior jail and prison terms. While both were significant in Model 2, the effects of prior jail and prison experiences on the decision to

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<sup>14</sup> This reduction is calculated using logistic regression coefficients rather than odds ratios.

incarcerate disappear once all perceptual measures are also added to the model. This is not surprising. Given that prior jail and prison terms capture a similar, albeit more limited, concept of criminal history as the criminal history index score, it is reasonable to expect that accounting for predictions of future crime would render jail and prison terms nonsignificant, just as it did the criminal history index score in Model 3. This is particularly true for prior jail terms, a variable correlating highly ( $r = .75$ ) with the criminal history index score. A few changes in the effects of objective measures are worth noting as well. The effects of committing robbery, simple assault, or fraud/forgery relative to a drug offense are all reduced to nonsignificance once perceptual models are added to the model. Homicide, though, remains a significant predictor of incarceration even with the addition of perceptual measures- once offense seriousness and other perceptions are controlled, homicide offenders still have over 17 times greater odds of incarceration than drug offenders.

Relative to Model 3, in which only perceptual measures are included, there are no significance changes in the effects of the perceptual measures when objective measures are also added. All perception variables remain statistically significant in the expected direction except the criminal history index, the community protection aggravating factor, and the practical constraints mitigating factor, which do not attain significance in any model.

Model comparisons indicate a series of improvements in explanatory power and fit across all four models. Likelihood ratio tests indicate that both the objective and perceptual measures independently improve the fit of the model substantially [results not shown in tabular form;  $\chi^2(12) = 247.18, p < .001$  and  $\chi^2(9) = 427.95, p < .001$ ,

respectively]. Likelihood ratio tests comparing the fully specified model to the objective-only and the perceptual-only models indicate that the fully specified model has a significantly better fit than either nested model (results not shown in tabular form;  $\chi^2(9) = 240.00, p < .001$  and  $\chi^2(12) = 59.23, p < .001$ , respectively). A Vuong closeness test comparing the fit of the objective-only and perceptual-only models indicates that the perceptual measures as a group appear to be a better fit and have more explanatory power than the objective measures for a model predicting the decision to incarcerate (results not shown in tabular form;  $z = 5.64, p < .001$ ).<sup>15</sup> This group of results therefore indicates that although the perceptual measures appear to have significantly more explanatory power than objective case measures, the inclusion of both perceptual and objective case measures provides the best explanation for gender disparity in the decision to incarcerate.

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<sup>15</sup> A likelihood ratio test is not appropriate for this comparison because the two models of interest contain different sets of predictors, and neither model is nested within the other. This analysis instead uses the Vuong closeness test, which is a model selection test based on likelihood ratios that uses the Kullback-Leibler information criterion (see Vuong, 1989) and as such can compare two non-nested models.

## Chapter 5: Discussion and Conclusions

This project provides an improved test of Steffensmeier and colleagues' (1998) focal concerns theory, linking more direct measures of judicial perceptions with gender disparities in sentencing. Results from the analyses indicate some support for the hypotheses derived from focal concerns theory. First, male offenders were perceived as having longer/more extensive criminal histories and a higher likelihood of future criminality, but they were not perceived as having significantly lower social stability or lower offense seriousness.

Moreover, there were no real gender differences in the likelihood of having any type of mitigating or aggravating factor listed, in contrast with expectations that female offenders would be more likely to have a mitigating factor and less likely to have an aggravating factor. There are, however, at least two explanations for why this analysis failed to detect significant gender differences in mitigating and aggravating factors, particularly the practical concerns mitigating factor. First, the small number of women in the sample reduces the statistical power in the analysis, and this effect is compounded by the relative rarity of listed mitigating and aggravating factors. The limited power may be inhibiting the ability of the analysis to detect true gender differences in the mitigating and aggravating factors. Second, the dataset for this project does not include information about defendants' children, spouses, or other dependents, which may contribute to sentence mitigation. Some research suggests that offenders with children are more likely to receive leniency in sentencing—judges are cognizant of children's welfare and the impact that various punishments will have on offenders' dependents—and there may be gender differences in these family effects that advantage females in the sentencing

process as well (Daly, 1989; Freiburger, 2010). Likewise, there is no available information on defendants' ability to withstand prison conditions or defendants' roles in their crimes, both of which may also generate more lenient sentencing for females.

The second hypothesis guiding this project predicted that there would be gender disparities favoring female offenders in the decision to incarcerate and the length of sentence. Although analysis revealed significant gender disparity in the decision to incarcerate, no such gender gap was found in the determination of sentence length. This is generally congruent with prior work, which tends to find more consistent gender disparities in the decision to incarcerate than in sentence lengths (e.g. Daly & Bordt, 1995). However, the number of female offenders sentenced to incarceration in this sample is again small, and there may not have been enough statistical power to detect significant gender differences in sentence length.

The final hypothesis stated that focal concerns measures would reduce the effect of gender on sentencing outcomes, implying that at least some of the gender gap can be explained by perceptions of blameworthiness, community protection, and practical constraints. In order to test this, models were run that incorporated both objective focal concerns measures (those typically used in prior focal concerns research) and measures unique to this study that more directly capture perceptions of the focal concerns concepts.

Consistent with previous work, the set of case information variables typically used to represent the three focal concerns concepts were unable to fully account for gender disparities in the decision to incarcerate. Even after controlling for offense type, counts charged, and prior jail and prison terms, a gender gap remained. It may be that the group of objective case variables used in this study simply is incomplete, such that

gender differences in other objective case information available to judges at sentencing but not considered in this study are responsible for the remaining gender gap in incarceration. Again, examples of such information may include offenders' role as leaders or accomplices and number of dependents. Alternatively, the objective case information may be inadequate proxies for the focal concerns concepts detailed in focal concerns theory; easily accessible case information may not sufficiently capture judges' perceptions of blameworthiness, community protection, and practical constraints.

In tepid support of the latter explanation, the set of perceptual focal concerns measures independently did a better job explaining the gender disparity in the decision to incarcerate, although a marginally significant effect persisted. Even after accounting for more direct measures of perceived offense seriousness, criminal history, predictions of future criminality, and social stability, though, female offenders were still less likely to be incarcerated than similarly situated male offenders. Interestingly, when both the objective and perceptual focal concerns measures were incorporated, the gender gap was reduced enough to become statistically nonsignificant. The combination of perceptual and objective case measures additionally explained away the age effect, and both the perceptual and objective measures independently eliminated the race effect as well.

This set of results has several noteworthy implications for focal concerns theory and future sentencing work. First, much sentencing research finds persistent demographic differences even after accounting for focal concerns concepts and consequently concludes that focal concerns theory cannot fully explain these disparities. This project sheds light on this trend and suggests an alternative interpretation. Although sentencing work tends to find focal concerns theory insufficiently explanatory, the reason for this shortcoming

may not be due to flaws in the theory itself, but rather in its empirical testing. Given the inability of offense type, charge count, and prior jail/prison terms to explain the gender gap, objective case measures may not be telling the full story of judges' decision-making processes. Objective case information has historically been much more accessible to focal concerns researchers, and for this reason objective case measures are traditionally accepted as proxies for judicial perceptions in sentencing studies, but it appears that these case measures may not be adequate stand-ins for perceptions of blameworthiness, community protection, and practical constraints. Judges' perceptions are difficult to obtain and measure, but they are a key part of the sentencing equation.

Moreover, this study indicates that when directly measured perceptions of the focal concerns concepts are available, their explanatory power may be superior to that of objective case measures. The perceptual measures included in this project, though not themselves an exhaustive group, are a better modeling fit than their objective case counterparts. This indicates that these types of perceptual measures, which one may argue more directly capture the focal concerns concepts, allow for more effective tests of focal concerns theory.

The interesting dynamics between criminal history and predictions of future criminality across the incarceration models also does much to clarify both the relationship between the two concepts and the categorization of criminal history in the focal concerns framework. This project classifies criminal history as a community protection variable, in accordance with the reconceptualization of community protection as a concept capturing traits of the offender and not the offense. It was suggested that criminal history is an indicator of risk of future offending. Some scholars, though, argue that criminal history is

better considered a measure of culpability and blameworthiness, because repeat offenders are viewed as more culpable when they continue to offend in spite of prior interactions with the law (e.g. Hartley, Maddan, & Spohn, 2007; Von Hirsh, 1976).

This series of analyses provides evidence that judges use offenders' criminal history as an indicator of their proclivity for future offending, in effect supporting the classification of criminal history as a community protection variable. The criminal history index score used in this study, which captured both the seriousness and extensiveness of prior offending, was only impactful on incarceration sentences when the more direct measure of perceived likelihood of offending was excluded. When both criminal history and likelihood of future offending were considered, criminal history became statistically nonsignificant for the decision to incarcerate. Likewise, the objective case measures of prior jail and prison terms became nonsignificant when the perceptual measures, including perceived likelihood of future offending, were added to the incarceration model. These results suggest that the effect of offenders' criminal history on the decision to incarcerate operates indirectly through perceptions of the risk of future crime, confirming that judges use offenders' criminal histories to make predictions about their future offending.

A third set of implications involves the importance of focal concerns theory for race and age disparities in sentencing. Although gender disparity was the primary focus of this analysis, examinations of other demographic effects revealed interesting trends worth mentioning. Although there were nontrivial data concerns involving missingness and selection bias, the finding that the race effect was sliced dramatically when perceptual measures were considered suggests that perceptual measures, more than



objective case information, may be particularly important for teasing apart the mechanisms at work behind the well-documented racial disparity in incarceration. Similar conclusions can be reached regarding the age effect; in this study, perceptual measures reduced the age effect more than the objective case measures, and the inclusion of both types of measures eliminated it altogether.

In conjunction with the observed gender effects, these findings do lend credence to the efficacy of focal concerns theory- the focal concerns concepts may well play a pivotal role in explaining demographic disparities in judicial decision-making. Differential perceptions of blameworthiness, community protection, and practical constraints may indeed be the root cause of the tendency for female, white, and older offenders to receive more leniency in sentencing, particularly in the decision to incarcerate. Furthermore, it may be that prior focal concerns research has generally failed to fully account for such disparities because of the frequent use of objective case information as proxy measures for the focal concerns concepts. The failure to more directly capture perceptions of the three focal concerns could be one of the most significant limiting factors in focal concerns research.

This study provides several insights about focal concerns theory and its testing, but there are several methodological limitations that should be noted. First, several relevant factors were absent from analysis that could be influential for judicial decision-making and the explanatory power of focal concerns theory. Some of these, including number of defendants, health and ability to withstand prison conditions, and defendants' role in the crime, have already been mentioned. In addition, the consideration of guilty pleas, which are used prevalently to reduce sentences (Forst, 2002; Smith, 1986), are only

incorporated in this study as a practical constraints mitigating factor. However, it is inappropriate to assume that judges listed a guilty plea as the mitigating factor in all plea-out cases. Some judges may have chosen not to specify a guilty plea as a mitigating factor, while others may have specified multiple mitigating factors and guilty plea may simply not have been the factor coded. Contextual-level variables such as judges' caseloads and demographic information are also absent from analysis. Some research indicates that these types of contexts are impactful in individual sentencing decisions (Myers, 1988; Steffensmeier & Britt, 2001).

The frequency of missing race and ethnicity information also constitute a limitation in this study. A large body of research indicates that racial/ethnic minorities are disadvantaged in sentencing outcomes (see Baumer, 2013; Mitchell, 2005). With nearly half of the individual offenders missing data on race/ethnicity, the true race and ethnicity effects on sentencing in this sample were unable to be fully and reliably measured. Moreover, although the full dataset included 918 offenders, only 83 were females. While this was enough to establish gender differences in the decision to incarcerate, it may not have been sufficient to establish differences in the determination of sentence length. More female representation in samples of offenders, as well as larger samples, will allow future research to determine whether or not gender also has a significant effect on sentence lengths.

Perhaps the largest limitation of the current research is the time at which the data was collected. All offenders in the sample were sentenced nearly 40 years ago. One could argue that gender relations in the U.S. have shifted dramatically since that time, such that judges may hold different attitudes and make different attributions about female

offenders today than they did when this data was collected (Barak, Leighton, & Flavin, 2010; Daly & Tonry, 1997). Further, the state of New Jersey did not have any sentencing guidelines in place during the 1970's, but 21 states, including New Jersey, have instituted sentencing guidelines since that time (Kauder & Ostrom, 2008). One of the express intents of sentencing guidelines is to reduce discretion and the impact of extralegal variables in sentencing, so results from this analysis of sentencing practices in the 1970's should not be employed as a representation of sentencing practices in states that have guidelines in effect. Future research should investigate focal concerns theory using perceptual measures in a more modern sample of offenders in locations both with and without sentencing guidelines.

Though it possesses its share of limitations, this study moves beyond traditional focal concerns testing to incorporate perceptual measures of the focal concerns concepts, enabling it to compare the explanatory power of perceptual measures and objective case information and to successfully account for gender disparity in a sample of convicted offenders. There is still, however, much work to be done to explain gender and other demographic disparities in sentencing. From a theoretical perspective, future research must continue to refine focal concerns theory, disentangling the concepts detailed in the theory and further specifying how they link together. This paper clarifies some of the focal concerns concepts and establishes a set of hypotheses for empirical testing, but the mechanisms behind these relationships remain unclear. On the empirical side, more research needs to employ perceptual measures in addition to traditional objective case variables in an effort to more directly capture judicial perceptions of blameworthiness, community protection, and practical constraints. This study, with its own novel measures

that better capture focal concerns perceptions, indicates that such improvements are worthwhile pursuits and may provide a more thorough and detailed explanation of sentencing disparities. It provides some hope that focal concerns theory may indeed help to explain how judges make decisions and how their decision-making result in widely noted social inequality in sentencing.

## Appendices

Table 1: Gender Disparity Evaluation in Contemporary Focal Concerns Research

Authors	Year	Data	Outcome	Unexplained Gender Disparity?
Freiburger & Hilinski	2013	One county in Michigan	Decision to incarcerate, incarceration sentence length	Leniency toward females for decision to incarcerate and jail sentence length, but not prison sentence length
Doerner	2012	Federal districts data	Decision to incarcerate, incarceration sentence length	Leniency toward females in both outcomes
Pierce	2012	One county in one state	Decision to incarcerate	Leniency toward females
Doerner & Demuth	2010	Federal districts data	Decision to incarcerate, incarceration sentence length	Leniency toward females in both outcomes
Freiburger	2010	Vignettes in Pennsylvania	Likelihood of decision to incarcerate	Leniency toward females
Brennan & Spohn	2009	Three federal district courts (Minnesota, Nebraska, and Iowa)	Prison sentence length	Leniency toward females
Freiburger	2009	Pennsylvania data (plus pre-sentence investigations for drug offenses)	Decision to incarcerate	Leniency toward females
Johnson, Ulmer, & Kramer	2008	Federal districts data	Judicial departures	Females more likely to receive judicial and substantial assistance departures

Hartley, Maddan, & Spohn	2007	Federal districts data	Decision to incarcerate, incarceration sentence length	Leniency toward females for decision to incarcerate only
Crow & Bales	2006	Florida state data	Decision to incarcerate, incarceration sentence length	Leniency toward females for both outcomes
Rodriguez, Curry, & Lee	2006	Seven counties in Texas	Decision to incarcerate, incarceration sentence length	Leniency toward females in both outcomes
Steffensmeier & Demuth	2006	75 largest US counties (SCPS)	Decision to incarcerate, incarceration sentence length	Leniency toward females for both outcomes
Ulmer & Johnson	2004	Pennsylvania state data	Decision to incarcerate, incarceration sentence length	Leniency toward females for both outcomes
Engen, Gainey, Crutchfield, & Weis	2003	Washington state data	Judicial downward and upward departures	Females more likely to receive downward departures, no difference in upward departures
Kramer & Ulmer	2002	Pennsylvania state data & qualitative interviews	Judicial downward departures	Leniency toward females
Spohn & Beichner	2000	Three counties in Illinois, Florida, and Missouri	Decision to incarcerate	Leniency toward females
Spohn & Holleran	2000	Three counties in Illinois, Florida, and Missouri	Decision to incarcerate, incarceration sentence length	Leniency toward females for decision to incarcerate for 2/3 counties, no gender effect on sentence length
Steffensmeier & Motivans	2000	Pennsylvania state data	Decision to incarcerate, incarceration sentence length	Leniency toward females for both outcomes

Table 2: Descriptive Statistics (N=918)

		Mean	SD	Min	Max
<b>Dependent Variables</b>					
	Incarceration (1=Yes)	.58	.49	0	1
	Logged Sentence Length Midpoint, In Months (n=532)	2.81	1.54	-.69	6.51
<b>Independent Variable</b>					
	Gender (1=Female)	.09	.29	0	1
<b>Focal Concern- Blameworthiness</b>					
	Offense Seriousness	5.35	2.42	1	9
	Mitigating Factor- Blameworthiness (1= Yes)	.10	.30	0	1
	Aggravating Factor- Blameworthiness (1=Yes)	.16	.37	0	1
<b>Focal Concern- Community Protection</b>					
	Criminal History	1.86	1.57	0	5
	Prediction of Any Future Crime	4.20	2.88	0	9
	Mitigating Factor- Community Protection (1=Yes)	.15	.35	0	1
	Aggravating Factor- Community Protection (1=Yes)	.14	.35	0	1
<b>Focal Concern- Practical Constraints</b>					
	Social Stability	2.41	1.06	1	5
	Mitigating Factor- Practical Constraints (1=Yes)	.08	.27	0	1
<b>Objective Focal Concerns Measures</b>					
	Homicide	.04	.21	0	1
	Aggravated Assault	.08	.27	0	1
	Robbery	.19	.39	0	1
	Simple Assault	.03	.16	0	1
	Theft	.10	.30	0	1
	Fraud/Forgery	.05	.22	0	1
	Drug Offense	.25	.43	0	1
	Burglary	.10	.30	0	1
	Weapons	.12	.32	0	1
	Other Offense	.04	.21	0	1
	Number of Counts Convicted	1.37	.96	1	9
	Prior Jail Terms	1.39	2.21	0	9
	Prior Prison Terms	.22	0.73	0	8
<b>Control Variables</b>					
	Race, Black vs Other (1=Black) (n=493)	.70	.46	0	1
	Ethnicity, Hispanic vs Other (1=Hispanic) (n=493)	.05	.22	0	1
	Age at Sentence	28.66	9.24	17.78	73.09

Table 3: Focal Concerns Mitigating and Aggravating Factors

	Blameworthiness		Community Protection		Practical Constraints	
		Count		Count		Count
Mitigating Factor	Young/immature	30	No/minor prior record	90	Guilty plea	43
	Alcohol/drug addiction	17	Responds well to supervision	17	Good family ties	9
	Cooperative with authorities	11	Good job skills/education	8	Family problems/old	8
	Between family/friends	11	Hard-working, employed	7		
	Not instigator or ringleader	8	Isolated incident	6		
	Self-defense /provocation	7				
	Intoxicated	7				
	Against property, not person	6				
	Willing to make restitution	5				
	No or minor injury	5				
Aggravating Factor	Serious or bizarre offense	94	History of similar offenses	27		
	Large amt of drugs involved	26	Unresponsive to supervision	14		
	Used weapon(s)	10	Alcohol/drug addiction	10		
	Great injury to victim	7	High frequency offender	10		
	Showed no remorse	6	Serious prior record	9		
	Helplessness of victim	5	Crime-oriented lifestyle	5		

Note: Only those factors with counts of at least five are included in this table. Additional blameworthiness mitigating factors include no financial gain, only low-value property involved, crime was not successful, and crime had no serious results. Additional practical constraints mitigating factors include the offender is an active member of the community and offender requires educational assistance or psychiatric therapy. Additional community protection aggravating factors include the offender is a danger to society, has mental problems, requires strict supervision, and lacks vocational training.



Table 4: Correlation Matrices for Focal Concerns Perceptual Measures and Objective Proxy Measures

Blameworthiness		Community Protection		
	Offense Seriousness Rating		Prediction of Any Future Offending	Criminal History Index Score
No. of Counts Convicted	0.242	No. of Prior Jail Terms	0.494	0.752
		No. of Prior Prison Terms	0.221	0.441

Table 5: Mann-Whitney Tests and Two-Proportion Z Tests for Differences in Perceptual Focal Concerns Concepts By Gender

	Average for Males	Average for Females	Z-Score	P-Value
<b>Mann-Whitney Tests</b>				
Offense Seriousness	5.39	4.87	1.85	0.06†
Criminal History	1.90	1.39	2.95	0.00**
Prediction of Future Crime	4.30	3.19	3.40	0.00**
Social Stability	2.39	2.53	-0.79	0.43
<b>Two-Proportion Z Tests</b>				
Blameworthiness Mitigating	.10	.15	-1.14	0.13
Blameworthiness Aggravating	.17	.11	1.42	0.08†
Community Protection Mitigating	.15	.14	0.57	0.29
Community Protection Aggravating	.15	.11	0.99	0.16
Practical Constraints Mitigating	.08	.07	-0.24	0.41

†p<.10; \*p<.05; \*\*p<.01; \*\*\*p<.0

Table 6: Logistic Regressions of Decision to Incarcerate

		Model 1		Model 2		Model 3		Model 4	
Demographics		Logit	Odds	Logit	Odds	Logit	Odds	Logit	Odds
	Gender- Female	-0.94***	0.39	-0.66*	0.52	-0.62†	0.54	-0.56	0.57
	Age	-0.04***	0.97	-0.04**	0.97	-0.03*	0.97	-0.02	0.98
	Race- Black	1.08***	2.96	0.96**	2.62	0.44	1.55	0.42	1.52
	Ethnicity- Hispanic	0.53	1.71	0.36	1.44	0.52	1.69	0.17	1.19
Objective Focal Concerns Measures									
	Homicide			3.12***	22.63			2.84**	17.16
	Aggravated Assault			0.29	1.34			0.14	1.15
	Robbery			0.89*	2.43			0.47	1.60
	Simple Assault			-1.38*	0.25			-0.56	0.57
	Theft			-0.39	0.67			-0.39	0.68
	Fraud/Forgery			-1.62**	0.20			-0.56	0.57
	Burglary			-0.07	0.93			0.26	1.30
	Weapon Charge			-0.60	0.55			-0.12	0.89
	Other Offense			0.16	1.17			0.39	1.47
	Counts Convicted			1.21***	3.35			1.13***	3.10
	Prior Jail Terms			0.31**	1.36			0.05	1.05
	Prior Prison Terms			0.42**	1.52			0.15	1.16
Perceptual Focal Concerns Measures									
	Offense Seriousness					0.36***	1.43	0.25***	1.28
	Criminal History Index					0.14	1.15	0.09	1.09
	Likelihood of Future Crime					0.31***	1.37	0.35***	1.42
	Social Stability					-0.43**	0.65	-0.4**	0.67
	Blameworthiness Mitigating Factor					-0.84**	0.43	-0.97**	0.38
	Blameworthiness Aggravating Factor					2.16***	8.63	2.22***	9.18
	Community Protection Mitigating Factor					-1.17*	0.31*	-1.43**	0.24
	Community Protection Aggravating Factor					0.19	1.21	0.41	1.50
	Practical Constraints Mitigating Factor					0.01	1.01	-0.07	0.93
	Intercept	0.83*	2.29*	-1.45	0.23	-1.56*	0.21	-3.00**	0.05

Table 6: Logistic Regressions of Decision to Incarcerate (Continued)

	Model 1	Model 2	Model 3	Model 4
Pseudo-R2	0.18	0.38	0.52	0.57

N=918

†p<.10; \*p<.05; \*\*p<.01; \*\*\*p<.001

Offense type reference category: drug offense

Robust SE in parentheses, clustered by judge

Figure 1: Conceptual Diagram of Focal Concerns Theory

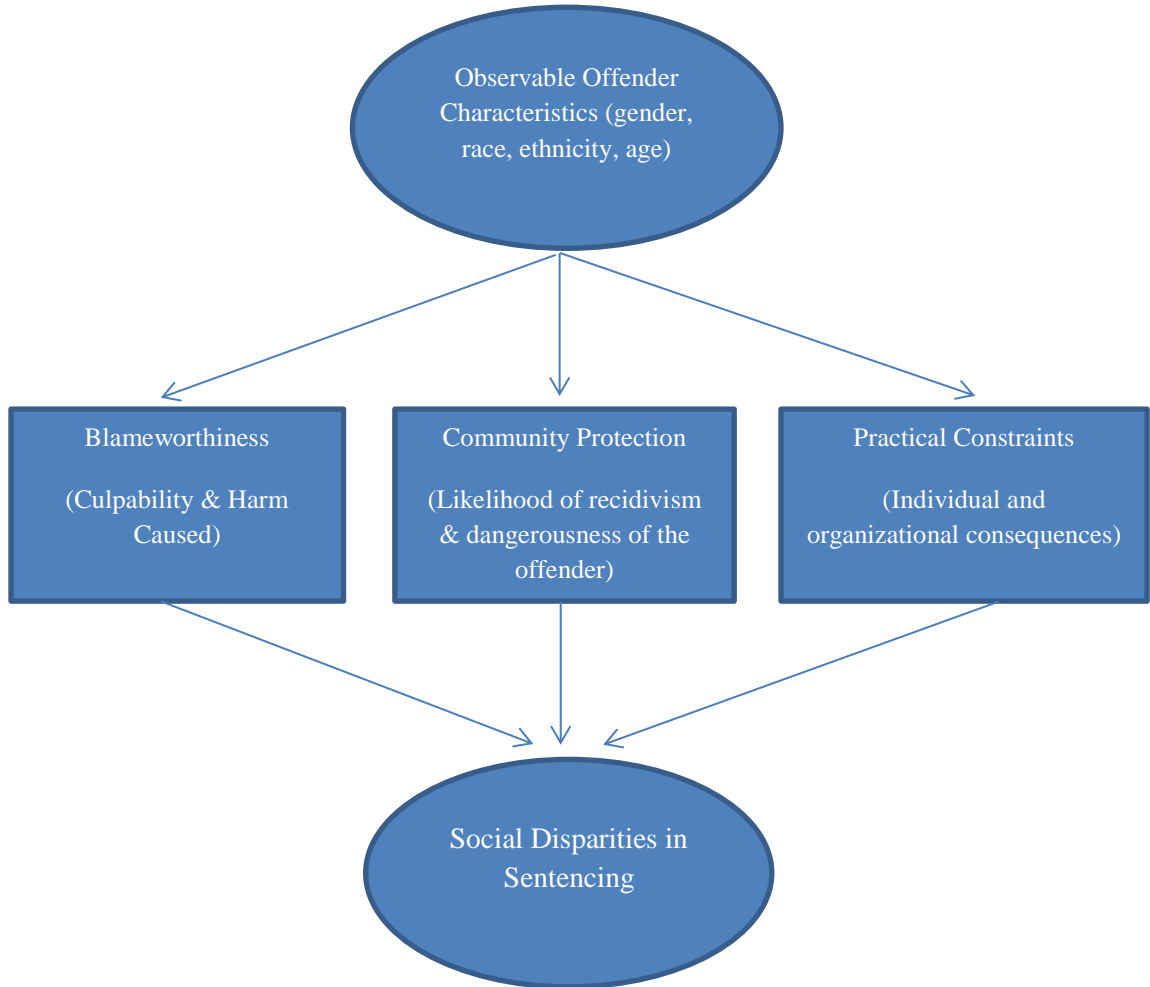


Figure 2: Data Collection Instrument, Survey

Judge's Code #: \_\_\_\_\_ Date: \_\_\_\_\_ Case #: \_\_\_\_\_

1. Most serious present offense:
  - a. Charged: \_\_\_\_\_
  - b. Convicted: \_\_\_\_\_
2. Total number of present counts:      a. Charged: \_\_\_\_\_      b. Convicted: \_\_\_\_\_
3. Rate the seriousness of the act leading to the most serious conviction.
 

VERY LOW	VERY HIGH
SERIOUSNESS	SERIOUSNESS
1	10
4. Your prediction for recidivism within the next 2 years:
  - a. Any type of crime:
 

VERY LOW	VERY HIGH
0	10
  - b. A property crime over the value of \$200:
 

VERY LOW	VERY HIGH
0	10
  - c. A violent person to persons crime:
 

VERY LOW	VERY HIGH
0	10
5. Length of prior adult record:
  - a. Arrests:
 

NO RECORD	EXTENSIVE	NO INFORMATION
0	5	6
  - b. Convictions:
 

NO RECORD	EXTENSIVE	NO INFORMATION
0	5	6
6. Seriousness of prior adult convictions:
 

NO PRIOR ADULT CONVICTIONS	TRIVIAL	VERY SERIOUS
1	5	6
7. Social stability:
 

VERY LOW	VERY SERIOUS
1	5
8. a. Number of prior probations: \_\_\_\_\_      b. If revoked, how many times? \_\_\_\_\_
9. Number of jail terms: \_\_\_\_\_      10. Number of prison terms: \_\_\_\_\_
11. Special factors affecting the sentence not included above: (Use reverse side if necessary)
  - a. Mitigating: \_\_\_\_\_
  - \_\_\_\_\_
  - b. Aggravating: \_\_\_\_\_
  - \_\_\_\_\_
12. Recommendation, if any, of
  - a. Prosecutor: \_\_\_\_\_
  - b. Probation Officer: \_\_\_\_\_

Figure 2: Data Collection Instrument, Survey (Continued)

(continued)

13. Sentence imposed in this case: \_\_\_\_\_  
 \_\_\_\_\_

14. Time already served on present sentence: \_\_\_\_\_ N/A ( )

15. Sentence concurrent to sentence being served: Yes ( ) No ( ) N/A ( )

16. Sentence consecutive to sentence being served: Yes ( ) No ( ) N/A ( )

17. Sentence being served is for a term of: \_\_\_\_\_ N/A ( )

18. Which items listed below were included in your reasons for sentence and what weight did you attach to each item?

Retribution _____	Reintegration _____
Incapacitation _____	Other, e.g., general deterrence
Special deterrence _____	Specify: _____
Rehabilitation _____	Total: 100 points

1. In determining the most serious offense use the offense which could result in maximum confinement. Crimes involving violence are more serious than crimes without violence, even if the penalty is the same.
2. The answer to No. 3 relates to the most serious offense selected in the answer to No. 1.
3. In making your subjective evaluations, please place a slash mark on the line to indicate your opinion.
4. In determining prior jail terms do not include time served for inability to make bail. Do include sentences to a correctional facility, jail and the Railway Diagnostic Center. Prison terms means a State or Federal Prison. Include only Adult Sentences.
5. In distributing the 100 points, you may assign 100 for any one, provided the total is 100.
6. Questions 1, 2, 8, 9, 10, 12, 14, 15, 16 and 17 can, in most cases, be filled in by the Probation Officer and submitted to you with the pre-sentence report. The rest of the questions must be answered by you.
7. Concurrent terms of incarceration are considered one sentence even if not imposed by same judge or at same time.
8. In answering Question 4, the prediction is for recidivism within the next two years if the inmate were released into the community at this time.
9. In answering Questions 14 to 17, inclusive, where there is no term of incarceration, indicate N/A (not applicable).

## Appendix A: Alternative Model Specifications

The unconditional regression and Tobit regression models do suggest significant gender effects on sentence length, but these models do not differentiate between the incarceration and sentence length decisions. When sentence length is evaluated independently of the decision to incarcerate (as in the Heckman and unconditional regression models), gender is only significant in the decision to incarcerate. Therefore, it is reasonable to conclude that observed disparities in the unconditional and Tobit regression models are driven by disparities in the decision to incarcerate rather than sentence length, making these models inappropriate strategies for sentence length analysis. Moreover, there is no variable in the dataset that can reasonably act as an exclusion restriction, so a Heckman two-step selection model is not necessarily appropriate for this analysis either (for a discussion of the importance of the exclusion restriction, see Bushway et al., 2007), but results do not differ substantially between the Heckman model and the conditional regression.

Table A1. Alternative Models for Logged Sentence Length

	Conditional Regression	Heckman 2-Step	Unconditional Regression	Tobit
Gender	-0.34 (.24)	-0.37 (.23)	-2.95*** (.45)	-1.38*** (.28)
Age	-.02* (.01)	-.02** (.01)	-.11** (.03)	-.05*** (.01)
Race	-.16 (.25)	.23 (.24)	3.44*** (.55)	1.69*** (.32)
Ethnicity	.15 (.24)	.18 (.24)	1.60 (1.31)	.91 (.63)
Intercept	3.75***	3.65***	-1.86	1.57***
R2	.02	--	.22	.06
N	532	918	918	918

†p<.10; \*p<.05; \*\*p<.01; \*\*\*p<.001

Clustered by Judges; Robust standard errors are reported in parentheses.

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