

# SCOTCHING A FALLACY

## Are the courts tougher on women than men?

This note summarises some of the issues discussed in a report Carol Hedderman and I published last year, "Does the Criminal Justice System Treat Men and Women Differently?" We had narrow and specific ambitions in producing the report: to scotch a statistical fallacy which surfaces intermittently, deployed to demonstrate that the courts are tougher on women than men.

My main point is that there is no clear and reliable evidence showing that female offenders are treated more harshly than men. I do not want to argue that men and women are necessarily treated exactly the same, or that men get a tougher deal. Rather, the evidence is not good enough to say one way or the other with any certainty. If I had to guess, I would say that overall, men and women are probably treated similarly under similar circumstances, but:

- men and women rarely do commit strictly comparable crimes in strictly comparable circumstances; and
- there is almost certainly extensive sentencing disparity within in each sex.

### The fallacy

The particular version of the fallacy that sets us off was an article in the Guardian in February 1994, by Lynn Hanna, headlined "Guilty of being a Woman". The story-line was that women are more likely to be imprisoned for a first offence, and for less serious crimes. This was certainly not the first time that these arguments had been made. They had appeared in several earlier newspaper articles, and has also been made by academics in the late 1970s.

The statistics quoted, at least those in the Guardian article, were accurate. These were that:

- According to the National Prison Survey, carried out in 1991, 38% of women serving prison sentences were inside for their first offence, but only 10% of men.
- Prison statistics also show that a much larger proportion of the female prison population are serving custodial sentences for less serious categories of crime.

But nothing can be inferred about discrimination on the part of sentencers from differences between the sexes in the proportion either of first offenders or of property offenders who *actually are in prison*. One has to compare the proportion *sent to prison* of men and women who have committed similar crimes and who have similar criminal histories. To repeat the point in a different way, it is the

proportion of the eligible population who get punished in a harsh way which is the key thing to examine, rather than features of a subpopulation who actually get the harsh punishment.

To expose the fallacy we can reduce it to the absurd. Women are convicted of far fewer crimes than men; the crimes for which they are convicted are generally less serious and less violent; and fewer female offenders than males have more than one conviction. These are, I hope, uncontentious statements. Let us now imagine that women were *never* convicted more than once and the only crimes they committed were thefts and frauds. Amongst these crimes there would still be a minority of serious cases that would attract a prison sentence from even the most lenient of sentencers. The consequence would be a female prison population which would be small on the one hand, but of whom 100%, on the other, would be first time property offenders. Would this be proof of sentencing bias? Of course not.

### Sentencing statistics

In our report we gathered together a few statistics which bear on the issue of differential sentencing patterns between the sexes. These can be summarised as follows.

#### Cautioning

Cautioning is the main disposal used for female offenders. In 1992, 61% of all females convicted or cautioned for indictable offences received a caution compared with 36% for males. Women had higher cautioning rates across all age groups and most offences, with the exception of drugs. These statistics by themselves do not demonstrate that sentencers are more lenient towards women; it is possible - if not likely - that within age groups and offence types, women tend to commit less serious offences than men.

#### Remands

A smaller proportion of female offenders are remanded in custody than males. This is probably because women are less likely than men to fall into high risk categories, such as a clear record of failing to appear in court in the past, or offending on bail, or having no fixed address. Of those remanded in custody, some 30% get prison sentences, compared with 40% of men. It is hard to say whether this means that sentencers are quicker to remand women in custody, or whether they are slower to imprison women than men, if they have already had a 'taste of prison' whilst on remand.

#### Sentencing

At the sentencing stage, a much smaller proportion of women go to prison than

men, and a much larger proportion are given absolute or conditional discharges. When women do receive prison sentences these tend to be shorter than men's; in 1992 the average length of prison sentences awarded for indictable offences of the Crown Court was 17.7 months for women aged 21 or over and 21.1 months for men. However, at the risk of repetition, statistics at this general level do not tell us a great deal, because they fail to take account of differences in the mix of crimes which men and women commit.

We examined sentencing patterns for 1991 in slightly more detail, using the Offenders Index. This is a large database maintained by the Home Office Research and Statistics Department, which keeps a record of every court conviction for all Standard List Offences (ie all but the less serious summary offences). The Offenders Index allows analysis which takes account of individuals' previous criminal history, and so male and female offenders can be compared not only taking the offence of conviction into account, but also the number of previous convictions. In other words, it allows analysis which goes some way to comparing like with like. The results, based on a sample of 21,000 offenders, showed that women first offenders are half as likely to be given a prison sentence as men - 4% compared with 8%. And those with 1, 2, 3 or more previous convictions were all less likely to receive custodial sentences than equivalent men. This pattern is repeated when individual types of crime are examined. The same results emerged for ABH - causing actual bodily harm. (These two types of crime account for two thirds of female convictions.) This analysis is not conclusive. It is plausible - to my mind likely - that the value of property stolen by women may have been on average less than that stolen by men, and that the assaults they committed were in general less serious. One really needs a much more fine-grained analysis, with details of the crimes actually committed. It is possible that on the face of it women are being treated leniently, but not as leniently as their less serious offending warrants. At present, we simply don't know the answers to these questions. However, nothing in our analysis pointed in the direction of discrimination against women.

### Summary

In summary, there are many statistics which suggest, but certainly don't prove, discrimination in favour of female offenders. Women are much more likely to receive a police caution than men, and of women who were prosecuted in 1992,

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38% were given an absolute or conditional discharge compared with 19% of men. Taking account, as far as possible, of the offence categories committed, and of criminal history, women are less likely than men to get sent to prison. However, at least in part, this probably reflects the fact that women tend to commit less serious crimes than men. We have not been able to locate any statistics which suggest that in aggregate, women are treated more severely than men.

This is not to say that individual women, like some men, can't get a raw deal in the courts. Researchers have shown that defendants' demeanour can be an important factor in determining what sentence they get, and sentencing disparity, whether within gender or between gender, is obviously unwelcome. It also seems likely that in a system that deals very largely with male offenders, the needs of women offenders are not always effectively addressed. For example, there is evidence to suggest that some probation areas are much better set up to meet the needs of male offenders than those of women. But these questions, though important, are clearly distinct from the question of whether sentencers routinely

discriminate against women. If the evidence points in any particular direction, it is probably against this claim.

## Reference

Hedderman Carol and Hough Mike *Does*

*the Criminal Justice System Treat Men and Women Differently?* Research Findings No. 10. London: Home Office.

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Tameside Local Studies Library

## Ada Summers: the first woman magistrate

Ada Summers was the first woman magistrate, appointed some 75 years ago as a result of Parliament passing the Sex Disqualification (Removal) Act 1919. The same Act repealed s1 of the Qualification of Women Act, 1907, so allowing women mayors and chairmen of councils to become justices ex officio, with the result that any woman holding one of these offices immediately became a justice. The only woman to be in such a position at this time was Ada Summers, mayor of Stalybridge in Cheshire.

Today almost half of the lay magistracy is women (14,043 women out of a total of 30,008 as at 1st January 1995.)

*Thanks to Ann Flintham, Press Officer at the Magistrates' Association for the photograph and the information.*

# NOTES AND QUERIES

## A review of some sentencing studies in England and Wales 1980-1992

### Quantitative studies

Primarily carried out by what many would call 'administrative' criminologists, essentially these studies treat sex as a variable like age, number of offences etc. Also they are based on different samples and courts and used different methods.

**Andreas Kapardis and David Farrington (1981)** *An experimental study of sentencing by magistrates, Law & Human Behaviour*, 5, 107-121.

Sentencing simulation study in which 168 magistrates were randomly allocated to 56 groups of 3 ('Benches') to decide sentences for one of four versions of a case. One such case involved theft from an antique shop in which the price of the goods stolen and the sex of the offender were varied and other elements of the case were held constant.

Analysis of variance in the Kapardis-Farrington experiment showed that both the seriousness of the offence and the sex of the defendant had independent and interactive effects on sentence severity. Generally male offenders were given more

severe sentences.

**David Farrington and Allison Morris (1983)** *Sex, sentencing and reconviction, British Journal of Criminology*, 23, 229-248.

This study extracted information from a single magistrates' court's records about appearances during the first seven months of 1979 for 287 men and 108 women charged with Theft Act offences.

Although most of the factors which were studied appeared to influence sentence severity and reconviction for men and women there were some interesting exceptions to this. For example, employment was more closely related to sentence severity for men, whilst marital status, family background and children were more closely related for women. Overall they conclude that sex itself had no independent effect on sentence severity, but results suggest gender related factors are worth further study. The most important predictor of sentence severity was type of offence.

**David Moxon (1988)**, *Sentencing practice in the Crown Court*, HORS 103 London HMSO.

The first major study of sentencing at the Crown Court. Examined 2077 cases

drawn at random from 18 courts between June 1986 and 1987. Details collected by probation staff sited at the courts, traditional factors (offence, previous convictions, etc) also recorded aggravating and mitigating factors mentioned by counsel, witnesses or in social inquiry reports.

Most sentencing differences reflected differences in offending and previous convictions. When these were controlled women were more likely to get a non custodial sentence. Males with no previous convictions were almost twice as likely as females to get a custodial sentence (37% v 19%).

**Carol Hedderman (1991)** *Custody decisions for property offenders in the Crown Court, Howard Journal*, 207-217 30 (3)

A subsample of the cases collected for David Moxon's study was subjected to further and different forms of analysis. This subsample considered Theft Act cases of 498 males and 121 females. Main purpose was to consider why custody is used in such cases. 24 variables associated with the decision to use custody. Logistic regression showed that nine variables were related to use of custody, independently of each other and all other variables and this included biological sex. Females were

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less likely than males to get custody even when everything else was controlled for. (But as based on same data as Moxon 1988, confirms that his results across a broad range of offences also apply to single offence. Not to be taken as separate, independent confirmation of his findings).

**Roger Hood (1992) *Race and Sentencing: a study in the Crown Court*. Oxford, Clarendon Press**

The only Crown Court study to contain enough ethnic minority defendants to systematically consider race. Examined information about 2,884 males and 433 females tried and sentenced at Birmingham, Dudley, Coventry, Warwick and Stafford during 1989, to consider the relationship between race and sentencing. He found that even in the most serious cases, women were less likely to be sentenced to custody than men when legal and socio-demographic factors were controlled; and that an apparent difference in the custody rates for black and white women was explained by the characteristics of their cases (ie offence seriousness, etc).

**Carol Hedderman and David Moxon (1992) *Magistrates' Court or Crown Court? Mode of trial decisions and sentencing* HORS 125, London HMSO**

An examination of sentencing for selected offences in 7 magistrates' courts and 5 Crown Court centres, the final model of sentencing showed that sex was not associated with sentencing independently of other factors, but it was only thrown out because of the overwhelming influence of the factors which were included (being remanded, whether at Crown Court or magistrates' court).

## Feminist work

Four studies from different schools of feminism.

**Rose Pearson (1976): *Women defendants in magistrates' courts*. *British Journal of Law & Society*, 3, 265-273**

A purely observational study of a small number of cases at one magistrates' court. It concluded that the treatment of women defendants by the courts involves the wide use of discretion and non-judicial measures. Such treatment is claimed to reveal an 'individualised' approach to the sentencing of women which reflects and reinforces the myth of the non-responsible woman.

It may be true that women are particularly vulnerable to discretionary justice, because the infrequency of their offending makes those who do offend appear more exceptional than their male counterparts. However, unfortunately, Pearson's work cannot be regarded as evidence for this as her example was

exclusively female and she made no attempt to control for factors which might affect sentencing.

**Susan Edwards (1984) *Women on Trial*. Manchester: Manchester University Press**

Used a variety of methods to look at the processing of women by the police, magistrates' courts and the Crown Court. But, like Pearson, only examined the way in which women are treated in the courts not men. Indeed Edwards expressly rejects the idea that the treatment of men and women can be compared. Her starting point was that women are processed and sentenced according to different criteria - that they are subject to more individualised sentencing than men. Again, she may be right, but this is something which we need to prove, not assume

**Mary Eaton (1983, 1984, 1986) (i) *Mitigating circumstances: familiar rhetoric*. *National Journal of Sociology and Law*, 11, 385-400 (1983) (ii) *Familial ideology and summary justice*: Unpublished. PhD HSO, LSE (1984) (iii) *Justice for Women? Family Court Social Control*. Milton Keynes Open University (1986)**

An observational study of one London magistrates' court over a two year period (1980 and 1981). During this time she observed 321 cases of which 111 involved women defendants. She states that her aim in conducting this study was:

"to achieve an understanding of the processes from which the pattern of the official statistics is constructed, and to clarify the issue of equality of treatment received by men and women in the judicial process" (1983:386).

She looked at mitigation in represented cases (35 men and 28 women), studied social enquiry reports and interviewed police officers, probation officers and magistrates. She records (1983:387):

"on the few occasions on which men and women appeared in similar circumstances they received similar sentences".

This result was most clear in cases where the offences were 'routine matters' (minor drink or drugs charges) and even in less routine cases it was not sex itself but family or personal circumstances which were considered together with offence and previous record in sentencing.

Eaton also found that in cases where a man and a woman were jointly charged with an offence, blame was not automatically ascribed to either. Each defendant was held to be equally culpable, unless there was evidence which suggested that either the man or the woman had instigated the offence.

Eaton did find that when women were responsible for child-care this was taken into account, but she also found that men with similar responsibilities received simi-

lar consideration. However, Eaton comments that the men and women in her sample rarely were comparable in terms of previous convictions, family circumstances or income.

**Anne Worrall (1990) *Offending Women: female law breakers and the criminal justice system*. London, Routledge.**

This continues the tradition of Edwards and Pearson and her own previous work (1978, 1981). Interviewed magistrates, probation officers, solicitors, and offenders and discusses how women's offending is characterised and managed and dealt with.

This study takes the idea that women are treated differently as given and goes on to consider why, how this happens and the implications for women offenders and women in general. It contains interesting ideas, and the introduction recommends it should be read by 'scholars, policy makers and practitioners'. Scholars of a like mind may be convinced, but policymakers and practitioners are unlikely to be so.

## CONCLUSION

Maureen Cain and Carol Smart say in their introduction to Worrall's book:

"there is a major theoretical crisis at the heart of much feminist work in the field of criminology.

This crisis is *obscured and evaded by the empirical studies that simply add to the quantum store of information*. Others have avoided it by abandoning criminology for wider studies of regulation and analyses of other areas of law and policy. Yet others have addressed it indirectly by giving space to the expression of subjectivity/ies of women law breakers. This has allowed room for other kinds of knowledge to be disseminated..." (Cain and Smart, 1989 in Worrall, 1990)

I would argue that the main reason that empirical studies simply add to the quantum store of information, is because feminists in this country have largely eschewed quantitative techniques. Whatever the theoretical justification, the practical result is that the only research which now examines how women are sentenced tends to be carried out by administrative criminologists, who take sex, not gender, into account like they do age, number of precons, seriousness of offence etc.

It is time for feminist researchers to give more thought to other aspects of sentencing and reconsider opposition to using quantitative techniques.

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