



COVER SHEET

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Is differential treatment by gender warranted?

A summary of international and national research shows that, in comparison to men, women generally receive less severe judicial outcomes (e.g. sentences) even when they appear before the court under seemingly similar circumstances. Such a finding leads to the questions: How do we interpret these differences between men and women? Is this disparity in criminal court outcomes just or unjust, warrant or unwarranted? In this paper, I will explore these questions by addressing feminist debates of equality versus difference in the context of criminal court sanctioning.

In 1950, Otto Pollak claimed in his book, *The Criminality of Women*, that female offenders were preferentially treated in a criminal justice system dominated by men and thus characterised by male notions of chivalry. Since Pollak, the question of gender difference in judicial processing has undergone extensive international scrutiny. So, after more than five decades of research, discussion and debate, what can we now say about Pollak's claims. Do women, in comparison to men, receive different judicial outcomes and if so, is this 'fair', 'just' or 'legitimate'?

Today, I am hoping to pave the way for some dialogue around these questions. I will begin by briefly summarising both international and national research that has considered the issue of gender difference in criminal court outcomes, particularly sentencing and remand. I will then consider the ramifications of these research findings with reference to ongoing feminist debates surrounding issues of gender equality, equity and difference.

Official Criminal Statistics

Official crime statistics, both international and Australasian, suggest that women and men are treated differently in the criminal courts. In Great Britain, women are more likely than men to be cautioned and less likely to be remanded into custody or sentenced to imprisonment. In the United States, women constitute only a small proportion of offenders arrested, convicted, and imprisoned. Similar findings are also noted in Australia.

In New Zealand, national statistics show that women are less likely than men to be convicted of an offence or sentenced to imprisonment and are more likely to have their cases discharged. Once imprisoned, New Zealand women receive shorter terms than men and are more likely to be granted early release on parole. Thus, in summary, we can say that men are "disproportionately suspected, apprehended, prosecuted, convicted, and imprisoned throughout the world."

Based on these official statistics we might conclude that our courts are 'sexist', 'biased' or 'chivalrous', because men appear to be treated harsher than women. However, in terms of getting the 'bigger picture', official crime statistics are notoriously problematic. For example, it is possible that sex differences in other key determinants might explain why men's judicial outcomes are harsher than women's. In particular, sex differences in legal variables, such as criminal history or current crime seriousness, may account for the disparate outcomes.

Women's law breaking is, after all, usually less serious and fundamentally different from men's. Thus, any investigation seeking to establish whether men and women are actually being treated disparately by the criminal courts would have to control for these differences.

International Research

International research, which has systematically considered the question of gender and criminal court outcomes, has tended to find that the relationship between sex and judicial processing varies from stage to stage. Nevertheless, women still tend to receive preferential treatment at the point of sentencing and pre-trial release even when legal factors, such as seriousness of criminal history, are held constant. In a recent review of statistical sentencing studies, Kathleen Daly and Rebecca Bordt found that the majority of high quality analyses tended to find gender differences that 'favoured' women over men. Differences between men and women were found to range from eight to 25 percent, with women's sentences being less severe than men's. Incarceration periods also varied, with men being sentenced to an average of about twelve months longer than women when appearing before the court under supposedly similar circumstances.

So how have these differences been explained? Internationally, researchers have highlighted extra-legal factors such as familial ties, histories of victimisation and mental health as possible reasons for why sex differences in judicial outcomes exist.

First, domesticity and dependence appear in the research as traits which often mitigate punishment for women. Economic dependency within the confines of the family is often the reality for many women and they are, in contrast to men, more likely to have others who are dependent on them for their care-giving labour. Under these circumstances, less severe judicial sanctions may be warranted because women, in comparison to men, are more dependent on the family, yet also more depended upon by the family. An analysis of pre-trial release decisions, sentencing and dismissals, conducted by Kathleen Daly in the United States for example, found that "net of case severity, charge severity, the type of offence charged, prior record, and other defendant characteristics, male and female defendants" were being treated differently on "the basis of their ties to and responsibilities for others". Offenders with strong familial ties, the majority of whom were women, spent shorter periods in pre-trial custody and were sentenced less severely than non-familied offenders.

Second, international research has further revealed that in the criminal courts there is a tendency for women and men to be constructed differently in terms of victimisation and pathology. For example, in a now famous British study conducted by Hilary Allen, the construction of judicial discourse was found to be gendered with women more often construed as 'mad', as victims of personal misfortune and thus not altogether responsible for their criminality. In contrast, men were more likely to be presented as 'bad', and as active intentional creatures, who were inherently responsible for their actions. These gendered constructions resulted in the women in Hilary Allen's research being seen as weak, troubled, unable to control their behaviour and therefore less culpable than men. Under these circumstances, the 'disordered' female offender was more likely to be judged as needing help rather than punishment and less severe sentences were the result.

New Zealand Research

In contrast to the rest of the world, New Zealand has produced little systematic research on gender and criminal court sanctioning. However, as is the case internationally, research that has controlled for numerous legal factors still tends to find that women receive less severe judicial outcomes than men. For example, Sue Triggs from the Ministry of Justice undertook a rigorous statistical investigation of sentencing in New Zealand and found substantial differences in the treatment of men and women. Triggs statistically controlled for a large number of legal variables but still found that men were more likely than women to be imprisoned, to receive periodic detention or a monetary penalty. In contrast, women were more likely to receive community service, community programme or no sentence. This essentially meant that men were sentenced more harshly than women, even when they appeared for sentencing under seemingly similar legal circumstances.

I have also conducted research into the question of gender difference in judicial outcomes. For my PhD, I undertook a statistical study of sentencing and remand in Christchurch's District and High Courts and found further evidence that in comparison to men, women receive less severe judicial outcomes. It was noted that sex impacted directly on length of imprisonment term, remand status, length of custodial remand and bail conditions. In all these cases, sex differences in legal variables such as seriousness of criminal history and current offence seriousness could not explain why women's judicial outcomes were generally less severe than men's.

With numerous factors statistically controlled, women's imprisonment terms were found to be substantially shorter than men's. Over all offence categories, which included drug, property and violent offences, women's imprisonment terms were approximately 8.5 months shorter than were men's. Women were 14 percent less likely than men to be remanded in custody and once remanded into custody, men remained there for 42 days longer than women (on average). Over all offence categories, men were also 8 percent more likely than women to be given special bail conditions.

When I separated the sample into individual offence categories, either drug, property or violent offences, I found further evidence of sex-based disparity. Female violent offenders received imprisonment terms approximately twelve months shorter than men and female drug offenders' terms were around five months shorter. Furthermore, women were 24 percent less likely than men to be remanded in custody for property offences. Male drug offenders spent around 26 days longer in custodial remand than women and for those offenders remanded on bail, male property offenders were 40 percent more likely than women to be given special bail conditions.

A further case-study analysis of Probation Officers' pre-sentence reports and Judges' sentencing remarks revealed the process by which men and women came to receive these different judicial outcomes. What emerged were two gendered ways of viewing, understanding and judging offenders and this explained sex differences in sentencing. Similar to international research findings, I identified the family and mental health as key sites where justifications for different judicial outcomes could be found.

My case study analysis revealed that, in contrast to men, women were more often presented as nurturers, dependants, pathological and victims of circumstance. This neutralised their dangerousness, blameworthiness and responsibility, making punitive sanctions seem less appropriate. Male offenders, on the other hand, were more likely to be construed as bad, disruptive, and dangerous. Unless they were in paid public work, judicial sympathy was rarely extended to men. It seemed that employment, especially in the context of providing financial support to a partner and/or children, was one of the few social factors of any benefit to the offending men in my research. Being seen as a 'hard worker' and 'tied down' to 'breadwinning' commitments often decreased men's chances of imprisonment. Perhaps, this is because 'breadwinning' men appear as less of a threat to the social order and thus less likely to need state-controlled regulation.

In New Zealand, acceptable ideals of masculinity require men to be providers rather than carers of families so, unlike the women in my research, when men did have child care responsibilities these were rarely discussed or used by either Probation Officers or Judges to legitimate sentencing leniency. In contrast, constructions of acceptable femininity in New Zealand require women to be carers rather than providers. Not surprisingly, therefore, familial ties and responsibilities, not employment, mitigated women's sentences more often than men's.

Furthermore, my case-study investigations revealed that pathology, emotionality, inner turmoil and trauma were often discussed and used to excuse women's criminality, while detracting from their potential to be dangerous. In the case of women, these gendered constructions enabled rehabilitation to be rationalised over punishment. Judicial discourses surrounding men, on the other hand, supported a masculine ideology which denied men of feeling, vulnerability, weakness and he general right to experience mental unwellness. I found that men were more often placed in the domain of human action, being presented as actively adopting an offending lifestyle or at fault for not ridding themselves of their criminality. Constructing men as powerful actors by presenting them as definers of their own destiny meant that the criminal men in my study were more likely to be held responsible for their actions and to be seen as dangerous. Primacy could therefore be given to punitive sanctioning over rehabilitative measures.

Feminist Debates – Equality vs Difference?

Showing that courts treat men and women differently ultimately led me to the question of so what? How could I interpret these gender-based differences? Were they warranted or unwarranted?

On one hand, it could be said that since fundamental differences between the sexes actually do exist, treating men and women the same might be problematic because it could further disadvantage an already disadvantaged group. For example, it is argued that women's lives are more likely to be characterised by poverty, domesticity, victimisation and dependency. Thus, in recognising the differential needs of men and women, it may be the case that women should receive differential treatment so long as they are not placed in a more negative position as a result.

On the other hand, differential treatment could be viewed as problematic in that it reaffirms men's dominance over women. The judicial protection of women could be

seen as an ideological front for patriarchy, in that traditional ideals about women as 'naturally' domestic, dependent, weak and emotional are being perpetuated. Ultimately, this could result in extensive personal, psychological, social, economic and political damage to women's fight for self-determination and equality.

However, maybe what we need to do is transcend this equality/difference debate. After all, both approaches present men as the standard against which both actions by and treatment of women are measured. In other words, the equality/difference debate is little more than a male-centred debate and as such is problematic because, whether we treat women differently or similarly to men, women are ultimately disadvantaged. The difference stance does little more than nourish a crude socio-biology and the equal treatment stance can and has been used to the detriment of women.

For instance, in parts of the United States, recent sentencing reforms based on male models of justice have been implemented to eliminate 'disparate' sentencing outcomes. Mandatory sentencing minimums, 'get tough attitudes' and Draconian sentencing guidelines which seldom consider offenders' social situations have virtually eliminated sex differences in sentencing. As a result, there has been a dramatic increase in women's imprisonment and incarceration terms.

Furthermore, it maybe the case that prison is a "harsher and more unusual punishment for women than it is for men." If this is the case, then the lighter sentencing of women in comparison to men may be warranted. First, it is said that educational, vocational, recreational programmes and facilities available to males far exceed those available to females. Prison programmes and the everyday regimes of the prison further tend to emphasise a form of repressive refeminsation where conformity to 'conventional femininity' is enforced. Second, the location of many women's prisons may also be a problem. The majority of women, compared to men, are noted to be serving their sentences in prisons many kilometres from home and away from their family and friends. In New Zealand, Carol Phillips notes that the "inevitable consequence is that they [women] are unable to maintain links with the people who could offer them support or to have regular visits from partners or children." On release it is thus more difficult for the women, than it is for men, to re-establish familial links. Third, rules and regulations within women's prisons are notably stricter, and cover more petty details than for men. Fourth, histories of abuse, particularly sexual abuse amongst the female prison population are said to make certain prison practises particularly harmful. For example, strip searches are claimed to be especially traumatic for women. Finally, the sexual abuse of female prisoners by male wardens is raising concerns internationally. In New Zealand, sexual relations between female inmates and male prison officers have recently hit the newspaper headlines (Dominion, 12-8-98, Christchurch Press, 29-9-98) but whether or not this is sexual abuse per se is debatable.

Given all this, perhaps what we need to do is reconceptualise criminal justice and focus on gendered disadvantage rather than difference. Maybe equity rather than equality should be sought through developing a social-based rather than a justice-based approach to criminal justice processing. Instead of a 'male version' of justice which emphasises "fairness, equal treatment, and rationality" in deciding judicial outcomes, maybe what is needed is a 'female version' of justice, one which emphasises "needs, motives, and relationships". Maybe what we need is a "separate,

gentler, more sympathetic justice system exclusively reserved for women".

However, I see this as being problematic for a number of reasons.

First, continuing power over women by some groups of men in society at large does, in my opinion, make this proposition unworkable. It is unlikely that men would agree to such an arrangement, and the potential for women to be rendered powerless by it would be great. Second, a climate of 'just deserts' or 'getting tough' on crime has more recently emerged in New Zealand (e.g. a presumption of imprisonment for serious violent offenders). While the Labour government's new justice initiatives may move us away from this 'get tough' attitude, concern for the care and rehabilitation of offenders still tends to evade many New Zealanders. This means that it is unlikely that a "separate, gentler, more sympathetic justice system exclusively reserved for women" would actually be able to reach fruition.

Second, the idea that there should be a "separate, gentler, more sympathetic justice system exclusively reserved for women" ignores the social reality of men's criminality and lives. Imprisonment may be somewhat 'harsh' and 'unusual punishment' for women, but I doubt that it is a picnic for men either. The physical abuse of male inmates in Mangaroa prison for example, has recently resulted in the government being forced to pay tens of thousands of dollars compensation to male inmates who endured "systematic beatings by hit squads of guards" (New Zealand Herald, 8-9-00).

Third, while the variety of educational, vocational and recreational programmes available to men may exceed those available to women, men are less likely than women to take advantage of them: in 1997, 80% of female prison inmates in New Zealand were enrolled in prison programmes compared to 45% of men. Thus, men and women are both disadvantaged albeit in different ways. Women may lack variety but they benefit from being involved in prison programmes. Men, on the other hand, may benefit from programme variety but miss out when it comes to involvement.

Fourth, while the everyday regime of the women's prison may emphasise a form of repressive 'refeminsation', so too is it likely that dominant masculinity (which can itself be repressive) is reproduced in men's prisons.

Fifth, a recent Ministry of Justice study of male prison inmates primarily responsible for the care of children found that the men, just like women, were clearly traumatised by being separated from their children and their families. This begs the question - how do we know that the trauma or cost of removing women from the family is somehow greater than that caused by removing men? The reality is that scant attention has been given to the way in which a man's imprisonment impacts on his children or his family in general. What research has been done suggests that wives/partners and children are being adversely affected emotionally, financially, mentally and physically by men's imprisonment.

Furthermore, while histories of victimisation and the subsequent effects have emerged as explanations and (often excuses) for women's offending both in New Zealand and overseas, such 'troubles' appear as simply unbelievable in the case of men. In this way, men are essentially being denied reasons for their offending and are thus being held fully responsible for their actions. While it may be the case that histories of

victimisation are more common in the case of female offenders, research shows that criminal men also experience victimisation. Arguably, this has in turn led to impaired personal functioning and ultimately criminality. In addition, the extent of men's victimisation and its subsequent impacts could be greater than we think. Men may be less likely than women to report abuse or neglect because revealing such sensitive information runs counter to dominant ideas about masculinity. A societal inability to acknowledge men as victims further perpetuates men's silence and ultimately adds to their trauma.

Concluding Remarks

The reality is that when men and women appear before the criminal courts they are being treated differently on the basis of gender. It is my contention that this is neither fair nor just. What I would like to see is future feminist discussions aimed at transcending the boundaries of the equality/difference debate by problematising criminal justice processing as it relates to both sexes, rather than simply in terms of women against men. As a societal group, criminal men and women both tend to come from disadvantaged circumstances. Men's criminality, just like women's, does not exist in a social, political or economic vacuum unaffected by unemployment, poverty, drug and alcohol addiction, victimisation, general mental and physical illness. This is not to deny that certain circumstances, which are relatively unique to women's experience, may explain, excuse, or mitigate their criminality. Instead, what I am arguing is that there are also certain circumstances, relatively unique to men's experience, which could also explain, excuse, or mitigate their criminality.

Society, the criminal justice system, and to some extent, feminist discussions (especially those surrounding the victimisation of women by men) continue to present most men in terms of thinking, acting, powerful human beings, while simultaneously embracing women's powerlessness and dependency. As long as this continues, women's right to self determination and power will be reduced and men will continue to vent frustration at a society that refuses to acknowledge their weaknesses and extend them understanding. If this occurs, destructive consequences will continue to be felt, not only by men, but also by women who are so often the victims of men's outrage. Ultimately, perhaps, a gentler and more sympathetic justice system would not be exclusively reserved for women but would be opened up to men as well.