

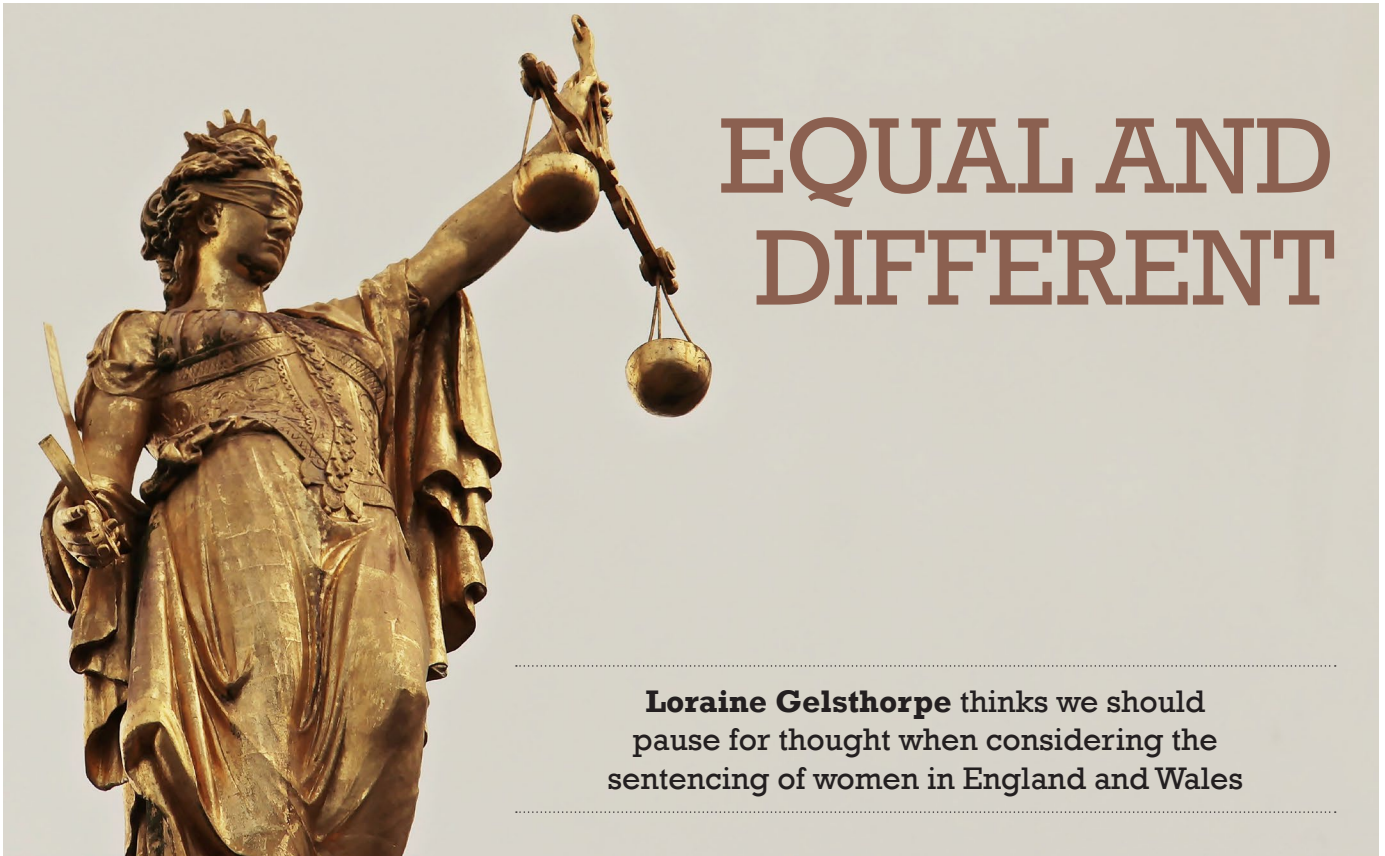
scottish justice matters

Volume 5 | Number 2 | November 2017

ISSN 2052-7950



WOMEN AND JUSTICE ARE WE MAKING PROGRESS?



EQUAL AND DIFFERENT

Loraine Gelsthorpe thinks we should pause for thought when considering the sentencing of women in England and Wales

THE PROMPT for this short article came from discussion with colleagues at a European Society of Criminology Working Group conference in Edinburgh on *Sentencing and Penal Decision-making* in June 2017. Following decades of neglect of women in relation to policy, and myths, muddles and misconceptions regarding women offenders, there has been more attention in the past two decades, in both England and Wales, and in Scotland. There have been some positive changes in response to pushes for recognition of women's particular needs in criminal justice policy and practice. The need for gender-specific policies has been acknowledged by the Labour, Coalition and Conservative governments (if to different degrees). It is now recognised that women prisoners have specific and distinctive needs. Jean Corston's (2007) *Report of a Review of Women with Particular Vulnerabilities in the Criminal Justice system* in England and Wales, and Scotland's 2012 *Commission on Women Offenders* (chaired by Elish Angiolini) are both important instruments in this quest.

I want to focus on some ways of reducing the use of custody for women via sentencing, but without emphasising women's 'greater needs' and vulnerability compared to men. First, some recent context.

Sentencing women in England and Wales: some recent context

Analysing recent sentencing trends in regard to women, Hedderman and Barnes (2015) conclude that whilst the number of women (and men) entering the criminal justice system in England and Wales declined between 2007 and 2011, policy changes led to fewer pre-court disposals (cautions and the like) and increased prosecutions for 'less serious' offences. This particularly impacted on women. Secondly, notwithstanding an unprecedented increase in the number of women sentenced to immediate imprisonment in England and Wales in the 1990s, the overall use of imprisonment for women has been stable since about 2006, levelling off at about 4,000 women in prison at any time. Thirdly, most women are sentenced in the magistrates' courts for relatively minor offences, and magistrates' use of custody has remained fairly static (despite their claims that they rarely and reluctantly use custody, Hedderman and Gunby, 2013). Judges (in the Crown Court) deal with more serious offences; here, Hedderman and Barnes (2015) observe a marked drop in the use of immediate custody for women.

A fourth observation from Hedderman and Barnes (2015) is that Suspended Sentence Orders, which were introduced by the *Criminal Justice Act 2003*, increased at both the magistrates' courts and at the Crown Court during the period under scrutiny. At the Crown Court, this had the intended effect of reducing the use of custody, but at the magistrates' courts the SSO largely replaced other community orders. Since breach of an SSO is likely to lead to imprisonment, even where the original offence did not merit such a sentence, this is a worrying development.

Put simply, there is suggestion that Judges' more critical approach to the use of custody reflects the possibility that they have been more influenced by campaigns to reduce the use of custody (especially short sentences). It may also be that their 'more rounded' experience of what constitutes 'seriousness' relates to the illegal act itself, whereas for magistrates, persistence in offending and noncompliance with orders may signify seriousness. So what else can be done to reduce the use of custody for women?

Reducing women's imprisonment

Campaigning groups such as the Howard League, the Prison Reform Trust, the Soroptomists, and the Fawcett Society have all focused on women and criminal justice in recent years, championing the need to give women greater attention and to address their needs more directly. Collectively, they have argued that women are more vulnerable than men (referring to high suicide rates and suicide attempts and self-harming in prisons; psychological problems, the impact of mothers' imprisonment on children, women's social deprivation, and the psychological sequelae which can result from early abuse or recent domestic violence. This kind of campaigning has clearly had some effect, but arguably not enough in terms of reducing the use of custody for women. So what other possibilities are there? And particularly, what other possibilities are there without compromising sentencing principles of equity and proportionality which are so central to perceptions of legitimacy in criminal justice sentencing?

One approach would be to focus much more on the fact that women's lower level crime alone justifies low level sentencing. Even where there have been increases in violence (as commonly perceived) this tends to be young women getting 'lippy' and aggressive around pubs and clubs (generally not knifings, gang violence, or domestic violence against partners). Increases in the misuse of drugs tends to be 'possession' rather than buying, selling and 'pushing' drugs. A focus on the lower level of crime seriousness as a basis for lower level sentencing would benefit women, but not exclude men who also commit low level crime.

A second option would be to limit sentencers' powers of sentencing. Certainly there is need to strengthen or raise the custody threshold, but this argument is as strong for men as it is for women. One worry is that by focusing on women's vulnerabilities and needs in arguments about sentencing, men's needs and vulnerabilities are neglected, and that somehow, it is assumed that sentencing and criminal justice practice is all okay for men.

A third option would be to place greater constraints on the effect of previous convictions in sentencing; this would benefit both men and women, but particularly women who generally have fewer previous convictions when they are sentenced to custody. A fourth possibility is to focus on the problem of Suspended Sentence Orders and tough breach conditions. England and Wales could of course learn from Scotland following recent developments relating to the presumption against short custodial sentences.

Another possibility would be to strengthen sentence impact mitigation (plus third party impact provision) (see Minson, 2014) though this need not be gender specific. Structured deferred sentences (MacDivitt, 2008) initially seem attractive as an alternative to custody, but tough conditions attached (completing this or that task or complying with curfews and so on) may lead to high breach rates, and high breach rates lead to custody. For example, the new supervision arrangements in England and Wales under the *Offender Rehabilitation Act 2014*, whereby everyone serving over a day's imprisonment is now subject to 12 months supervision, has already resulted in high breach rates amongst women who have failed to keep appointments (Prison Reform Trust, 2017). (Anecdotally, we

learn that this is to do with child care challenges). Thus there is scope also to review and revise breach conditions. Another possibility of course is to create specialist women's courts, entailing proper assessment of women's needs and tailoring the content of any interventions to address those needs, with reviews and support interventions along the way. However, the evidence on such courts thus far is mixed (Centre for Justice Innovation, 2016).

Conclusion

My aim here is simply to encourage 'pause for thought'. Recent campaigns for the better treatment of female offenders have focused particularly on women's needs, with only partial impact in terms of reducing the use of custody. An unintended consequence of this is to (a) assume that the sentencing and treatment of men in the system is perfectly acceptable, and (b) generate concerns about unequal and unfair sentencing amongst the judiciary, the magistracy. So one issue is whether it might be better to transcend gender differences and concentrate much more on legally relevant factors such as offence seriousness. This could benefit women, but not exclude men from such benefit, and ultimately uphold principles of equity and proportionality in sentencing. There is recognised need for differentiation in the treatment of men and women, but perhaps any differences should be in the 'form' of penalty (via the content of the penalty intervention), rather than in terms of the 'level' (via sentencing).

Loraine Gelsthorpe is Professor of Criminology and Criminal Justice and Director, Institute of Criminology, University of Cambridge. lrg10@cam.ac.uk

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