

The feminist sentencing law



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Feminist Sentencing Law

Outline and evaluate feminist critiques of sentencing policy

A feminist discourse of criminology is a relatively recent development and is seemingly much needed in field which is dominated primarily by men, both in terms of law professionals and offenders. For this reason, it will first be necessary to outline briefly the general principles behind sentencing policy before progressing to a consideration of feminist critiques.

This will first examine the critical standpoint taken towards women as offenders, viewing sentencing policy in the light of liberal feminism, 'difference' standpoints and finally in respect of postmodernist views. This will lead on to a brief discussion of critiques of sentencing policy in crimes in which women are victims rather than offenders, and an examination of the way in which this can be seen to endorse patriarchal structures in society. As a result of this, the essay will conclude that feminist critiques of sentencing have an important role to play in raising awareness of the dominance of male perspectives in criminology.

The law is objective in the sense that there is no discrepancy in the definition of crime dependent on the sex of the perpetrator. There is, however, the possibility that gender has a bearing society's perception of crime, which may in turn influence the sentencing procedure. Ashworth (2002) identifies the introduction of mandatory and minimum sentencing in the Crime (Sentences) Act 1997 as a significant restriction on judges' discretion.

However, judges still exercise a significant amount of discretionary power in determining the nature and length of sentences. This allows the full range of contributing factors to be taken into account, but also introduces the possibility of the sentence being affected by factors with no bearing on the deed in question. Sentencing may also be motivated by a number of different concerns. This variety of justifications for choosing a particular type of punishment over another is relevant to a discussion of feminist theory, as again it is subject to interpretation and discretion.

In addition, some critics claim that certain approaches are particularly appropriate or inappropriate to women, or that there are significant differences in the way in which these theories are applied to the different sexes. A consideration of feminist critiques of sentencing policy must then take into account the motivation for respective sentences imposed on men and women as well as the nature and length of the sentences themselves in order to evaluate the validity of such perspectives.

Gelsthorpe and Morris (1992) point out that although criminology is male-oriented, it does not deal with men and masculinity, but rather 'deals with men without acknowledging this and hence creates theories about criminals without a conceptualisation of gender.' (p. 3-4). Bryson (1999) attributes this to the under-representation of women in the judiciary, highlighting it as a decisive factor in confirming the marginalisation of women's experiences.

The legal system is indeed dominated by male professionals, for example only 22% of police officers and 9% of high court judges are female (The Fawcett Society, 2007), confirming the likelihood of the law being treated in

correspondence with dominant male interests. Some feminists would further Bryson's position (Bryson, 1999) and argue that the law itself is based on a gendered process of moral reasoning and thus protects men in society. This is supported by Gilligan's ideas juxtaposition of an ethic of responsibility (which determines women's moral thinking) with the male ethic of rights (Gilligan, 1982 cited in Bryson, 1999). Feminist perspectives, therefore, play an important role in highlighting the extent to which male perspectives dominate models of sentencing and introducing the possibility of an alternative, female experience.

Gelsthorpe draws attention to the absence of one, single homogenous feminist view, highlighting instead the existence of 'differences and tensions' (2002: 511). All feminist approaches, however, find common ground in arguing against the traditional perception of courts showing a greater degree of leniency towards women than towards men. This is confirmed by statistical analysis, highlighting the fact that only a small percentage of known offenders are female (19% in 2002) and the lesser magnitude of crimes committed by women.

Shoplifting is the most commonly occurring crime among women, followed by drug offences, theft and fraud ([www. crimeinfo. org. uk](http://www.crimeinfo.org.uk)). This, however, contrasts the fact that between 1995 and 2005, the imprisonment rate for women in England and Wales increased by 175% (compared to an increase of only 85% for men) ([www. crimeinfo. org. uk](http://www.crimeinfo.org.uk)). This alone suggests a greater readiness to sentence female offenders to imprisonment for less serious crimes. This is confirmed by the number of female offenders who have no previous convictions and who are sent to prison (over a third of the

whole female prison population), which is more than double the proportion of men who are sent to prison for a first offence (www. crimeinfo. org. uk). This adds weight to feminist critiques of sentencing policy and stands in direct contradiction to the chivalrous viewpoint, whereby women are perceived to be treated more leniently because men do not consider them capable of being motivated by criminality and thus are reluctant to treat them harshly.

Feminist critiques oppose this idea of chivalry and introduce the concept of double deviance: not only are women deviant in the sense that they have committed a crime, but they have contravened society's expectations of 'normal' feminine behaviour and are thus doubly stigmatised (Heidensohn, 1992). Therefore as well as being punished for their crimes, women are sanctioned for deviating from their perceived feminine role. Thus women have been historically portrayed in relation to 'stereotypes based on their supposed biological and psychological nature.' (Gelsthorpe, 2002: 517).

A liberal feminist perspective would attempt to combat this by demanding equal treatment for men and women and insisting that the same structural analyses of class, state control and policisation of deviance which came to be applied to male crime is extended to women (Gelsthorpe, 2005). The liberalist view of equality demands the insertion of women into such theories, and their equal treatment within the system, but the limitations of such a position quickly become clear. Smart dismisses such a liberal perspective as having 'done so little to emancipate women' (2003: 76) and it is evident that while it causes women to be acknowledged within the field of criminology, it does little to challenge stereotypes of female behaviour.

A simple demand for equality of treatment fails to acknowledge the fact that theories of women's crime may demand a starting point distinct from that of male deviance (Gelsthorpe, 2002). Equality does not necessarily mean the same treatment for all, but could be applied to the need to consider theoretical perspectives in the same way, whilst acknowledging the fact that male and female notions of crime are rooted in different systems of behaviour. Naffine identifies this shortcoming in reinforcing the way which liberal feminism, although calling for a consideration of a female discourse of criminology, tends to leave the male dominated theories intact and does not demand that these be reconsidered in the light of feminist critiques (1997: 36)

This acknowledgement of difference is consistent with 'difference' theories of feminism, which call for a broader conceptualisation of the context of gender and power relations in order to consider female criminality. This approach goes beyond demanding that women be treated equally, arguing that it is inappropriate to apply certain forms of male criminology to women, and as such women should be treated differently within the criminal justice system. It focuses on how women's 'experiences' are distinct from men's, and the implications of this for sentencing policy.

One widely-held belief of this theoretical standpoint is that the difference between male and female experience renders prison inappropriate for women, as it subjects them to further oppression on the basis of gender roles already present in society, and as such, alternative sentences should be prioritised. A variety of reasons are given by way of justification for this. Smart (1976) argues that the role which women are expected to adopt in

prison reinforces the gendered perception of them in society, with tasks such as cooking, cleaning and sewing taking priority over the kind of vocational training which might benefit them to find employment on their release.

This is compounded by the fact that women's sentences are typically shorter than men's. Statistics highlight that many more women are reminded in custody pending trial than men, and that less than half of these are actually sentenced to serving any time in prison. (www. crimeinfo. org. uk).

Furthermore sentences tend to be shorter, for example nearly two-thirds (63%) of women sentenced to custody in 2005 were given a sentence of six months or less (The Fawcett Society, 2007).

Proportionally then, more women tend to be imprisoned for shorter periods, long enough to disrupt their home life, but not long enough to allow them to develop strategies to readjust to life on the outside. Smart (1976) suggests that the reinforcement of dominant and patriarchal gender norms in prisons is based on the fact that a woman who is stereotypically passive and caring is not a criminal woman, and this is, therefore, another consequence, perhaps, of the double deviance view of female offenders.

The claim for different treatment of men and women also endorses the societal status quo in its basis on women's traditional role within the family. Statistics abound as to the number of women with child dependents taken into custody and the negative impact separation. Smart (1976) identifies this familial function as one of the reasons for which prison is an inappropriate sanction for female offenders, and attributes the increased hardships which women experience in prison as due, in part, to their greater need for family

life and the consequences of enforced separation from their children (p. 140).

To subscribe to such a view, however, neglects the possibility of men as primary caregivers for their children and creates a gendered perception of family life in which the role of the woman is perceived to be superior to that of the man. This reinforces stereotypical views of women and also risks advocating a two-tier perception of the female criminal justice system, in which women who are also mothers are given greater worth than those who are not. Psychological differences between women and men are also highlighted as a reason for varying prison experience of the two genders.

The Fawcett society cites statistics on the prevalence of self harm, suicide attempts and other mental health issues in women prisoners as compared to men. Gelsthorpe (2002) attributes this to the systems of control which operate within prisons, locating the problem in the way in which women are treated in custody than the unsuitability of prison sentences for women per se. To highlight mental health issues as a reason for which women should not be imprisoned is in a sense to endorse a stereotype of women as weak and fragile and thus condone the very perceptions which feminists seek to destroy.

Difference perspectives then create a paradox in that the argument for a different approach to women also endorses a structurally stereotyped view. Postmodern approaches move beyond this to acknowledge commonalities in male and female experiences of sentencing, and emphasise the importance of power structures extending beyond the division of men and women.

Gelsthorpe (2002) rejects the idea of innate differences between men and women, believing instead that these differences are socially constructed. Wider considerations of the circumstances of crime are necessary, but these should focus on other forms of structural oppression in society.

In accordance with this, Naffine (1997) denies the possibility of criminal women and claims that just as there is no homogenous explanation for why men commit crime, theories must look beyond gender to ideas of diversity and socio-economic status in attempting to explain criminal behaviour in both men and women (p. 53). Gelsthorpe (2002) too supports this view in claiming that the question should be less about crime in relation to men and women, but the political process of criminology and the consideration of why certain acts have come to be defined as criminal, while others remain legal.

These perspectives, therefore, situate feminist critiques in the wider context of a society in which gender is one of many factors giving rise to oppression and in which diverse structural forces operate across each other to shape perceptions and reactions to criminal deeds. This is reflected in general support for retributive justice, in which sentences are motivated by consideration of compensation for the victim and therefore often involve community focussed sentences.

While this seems more fitting to the rehabilitative function which has been seen to be lacking in the imprisonment of women, feminist critics also raise concerns about the appropriateness of this approach to crimes where women have been victimised or oppressed. By the very fact that it takes place within a society and system heavily dominated by male concerns, such an

approach can be seen to reinforce structures of oppression in terms of violent crimes against women.

This essay could not be complete without acknowledging the body of feminist literature which argues for the oppression of women in society by the very fact that men are not sentenced severely enough for crimes which they commit against women. This approach draws attention to the inadequacy of laws themselves, coupled with a lack of enforcement and triviality of sentences imposed by ‘a largely ageing, male judiciary’ (Edwards, 1992: 146).

This then echoes Bryson’s point that the dominance of men in the legal profession means that sentencing can never truly reflect women’s interests. Feminist critiques appear clearer and more unified here than in terms of the sentencing of female offenders. Naffine argues that the sexual relations of men to women implied within the common understanding of rape reflect a culturally dominant male view (1997: 104), thus women’s interests are not reflected in bringing perpetrators to justice. Chambers and Millar (1992) examine the process of rape trials and the way in which cross-examination typically tries to imply some amount of blame on the part of the woman for not resisting more strongly, thus perhaps having an effect on the sentencing procedure and encouraging less severe sentences.

The very nature of rape as a private crime, often with no witnesses and only the word of the victim against that of the defendant means that conviction and sentencing are problematic at best, but this should not be used as justification for dismissing feminist critiques of sentencing, which make a

valid point about the dominance of male perspectives and attitudes within the judiciary system.

It is evident, therefore, that feminist critiques have filled a gap in terms of female perspectives in criminology, and they are significant for this very reason. It has emerged in the course of the discussion however, that it is more the way in which sentences endorse the societal status quo than the sentences themselves which seem to be inappropriate, although feminists are justified in highlighting the worrying trend towards the imprisonment of women.

It is not, enough, however to insert women into pre-existing theories which deal with men: the prevalence of male attitudes in the criminal justice system means that oppressive attitudes need to be reviewed, not just in the light of women, but in the consideration of other oppressed minorities in society, in order to ensure a system which really is fair to all.

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