

SENTENCING FEMALE OFFENDERS IN THE MAGISTRATE'S COURT: PRELIMINARY REPORT ON A PILOT STUDY¹

Bronwyn Naylor
Lecturer in Law
Monash University

IN AUSTRALIA, WHERE SENTENCING GUIDELINES ARE UNCOMMON, THE SEX of the offender is not officially a relevant factor in sentencing. However, as Fox and Freiberg (1985) note in their text on sentencing in Victoria, a bias in favour of women is 'well entrenched'. Numerous cases are cited in which the courts have stated that it was appropriate to apply a 'lower tariff for females' (p. 465). Appeals on the ground of disparity by a male co-accused against a sentence which is more severe than that imposed on his female co-offender are usually unsuccessful. The reasons given for leniency as a general practice have included 'reasons of compassion', public opinion favouring a more merciful sentence for a female, the lower recidivism rate of women, and the differences in prevalence of crime between the sexes, making deterrent sentences unnecessary in the case of women (p. 466).

Fox and Freiberg found that some courts treated child care responsibilities as a reason to reduce a sentence, whilst others took the view that such matters should not *automatically* give rise to lenience.

The Victorian Sentencing Committee (in the nine pages devoted specifically to sentencing women in its three-volume report) in 1988 also noted the tendency to regard being female, and having the care of children, as mitigating factors, although it considered that the courts were now more ambivalent about this. The Committee lamented the lack of research in Victoria on the sentencing of women, which it said made it difficult to evaluate how women were being sentenced, whether they should be given special consideration when being sentenced, and whether they were

¹ This research was funded by a grant from the Criminology Research Council.

disadvantaged in the use of sentencing options. In the absence of information on sentencing practices, the Committee recommended that:

Gender, of itself, should not form the basis for differential treatment in sentencing (Report vol. 1, p. 375).

The Australian Law Reform Commission (ALRC) (1988) also examined these issues, noting that many women are financially unable to fulfil conditions of bail; that if they are a single parent they are likely to have sole care of the children and may thus be excluded from community based sentencing options; that in such cases imprisonment may be more harsh than for a male, resulting in severance of family bonds and possible loss of the child; that a high percentage of women are imprisoned for drug offences, for which prison may be inappropriate; and that women's prisons tend to provide fewer programs and facilities than prisons for men. The ALRC recommended that:

The gender of the offender should not, in itself, be a matter relevant to sentencing; that is, an offender should not be treated differently simply because of his or her sex (p. 1).

However it also recommended that motherhood of a young child should be a relevant consideration and that:

Only in exceptional circumstances, which constitute a real concern for the safety of others, should such a parent be imprisoned.

It stated that child care responsibilities should not be permitted to limit the range of sentencing options available for offenders, and recommended that child care facilities be part of centres providing community-based dispositions (p. xxv).

Background to the Present Study

This study was undertaken to test the hypothesis that gender affects sentence in a range of ways, not necessarily explicitly. It was assumed that any such effect will sometimes be to the woman offender's apparent advantage and sometimes not. The study was also undertaken with the view (endorsed by the Victorian Committee and the ALRC, *inter alia*) that research is needed to ascertain just how gender is operating in sentencing decisions.

There has of course been widespread recognition by legal philosophers of the relevance of judicial values to decision-making, although not traditionally in relation to gender. As Norma Wikler (1987) observes:

When social scientists and feminist legal researchers finally turned their attention to the judiciary they found overwhelming evidence that gender-based myths, biases and stereotypes are embedded in the attitudes and behaviours of some of those who serve as judges, as well as in the law itself (p. 13).

Starting with the above hypothesis—that sentencing is a gendered process—it was important to examine both substantive and methodological questions:

- in what ways is gender relevant to sentence? and

- how can the effect of gender be tested empirically?

An observation study was designed to examine sentencing as an active process, recording observations and analysing both quantitative and qualitative data. The study which will be discussed here was designed as a pilot study, to test both the methodology and the hypothesis.

It should be emphasised that the findings discussed in this paper are only tentative. Data entry is not yet complete, and only preliminary analysis has been carried out on the data which has been entered².

Other Studies

Studies based simply on a comparison of sentences of male and female offenders for similar offences show that female offenders tend to get lower sentences than men (for example, Farrington & Morris 1983).

This kind of comparison has been easily made (given relative ease of access in most jurisdictions to sentencing statistics with a raw gender breakdown). It also seems to be part of the 'folklore' or common understanding of practitioners. It is generally seen as bearing out the so-called 'chivalry thesis'.

More sophisticated analyses pointed out that female offenders were far more likely to be first-time offenders, and to have committed a less serious form of the relevant offence; they stole smaller or fewer items, used less violence, and so on. Prior history of offending, and seriousness of offence, are fundamental factors in determining severity of sentence, for any offender. Once these variables were entered into the equation, it was possible to conclude that female offenders are not being treated any differently from males in equivalent circumstances. However it has also been argued that gender still affects decision-making, but in more complex ways.

Farrington and Morris (1983), for instance, concluded from a study of Magistrate's actual decisions that the sex of the defendant did not have any direct influence on severity of sentence or probability of reconviction. Women tended to receive lower sentences insofar as they had generally committed less serious offences and were less likely to have prior convictions.

However, when the sentencing of men and of women was examined separately, different factors were found to be significant. Looking at the factors which were important for women (but not for men), it was observed that women convicted with other offenders were more likely to receive a severe sentence than those convicted alone. Further, women in the 'other' marital status category (generally divorced or separated) received heavier sentences, as did women from a deviant family background (usually broken home). It was suggested by Farrington and Morris that magistrates may have disapproved of these categories of women offenders.

An alternative interpretation can be drawn from the work of Kruttschnitt (1982) who investigated the link between economic independence, informal social control, and heavier sentences for women. In a study of convictions in a Californian population in the 1970s Kruttschnitt found that sentence may differ with the extent to which a woman is economically dependent upon someone else for her day-to-day existence: the more dependent she is, the less severe her disposition. She concluded

² The Report, 'Gender and Sentencing in the Victorian Magistrate's Courts: A Pilot Project, was provided to the Criminology Research Council in September 1992.

that the degree to which a female offender can be shown to be under informal social control may produce a lighter formal sentence.

Roger Douglas (1987) examined data on sentencing in Victorian Magistrate's Courts collected in 1978, 1979 and 1983. He looked at (a) reasons given by magistrates when sentencing; (b) the relationship between gender and sentence; and (c) this relationship after controlling for legally relevant variables (seriousness, priors) and participation (representation, plea in mitigation). He found that Magistrate's reasons for sentence were generally 'legally'-oriented, emphasising seriousness of the offence, and defendant's prior record, with few references to personal circumstances or to treatment. He found no evidence suggesting the latter factors were given more weight in relation to women offenders than for men.

The one area in which he found a gender difference was in the amount of fines, for traffic cases and for traditional crimes, female defendants being fined significantly less, even after controlling for the other variables. Douglas suggests that this may indicate a *generalised* assumption about women's lower capacity to pay a fine, rather than a reaction to the individual defendant's resources, which were rarely provided in court. In any event, Douglas also concluded that, looking at Magistrates' stated reasons for decision, sentences were largely unaffected by the input of social information (see above). The lower fines imposed on women might therefore reflect 'benign stereotyping, based on a realistic assessment of women defendants' poorer economic circumstances' (p. 355). He conceded however that his data did not preclude the possibility that:

female defendants may have been sentenced according to different criteria to those used to sentence males ... the possibility that those whose domestic arrangements approximated most closely to traditional roles would have been dealt with more leniently than those whose arrangements differed from traditional roles ... Nor do they enable an investigation of whether different magistrates reacted in different ways to gender (p. 355).

Several Australian studies have noted the importance of individual differences between magistrates (eg. Grabosky & Rizzo 1983; Lawrence & Homel 1987; Polk & Tait 1988). This is a factor which was also addressed in the present study.

A number of studies have found clear gender-stereotypes in sentencing when they have looked *within* the category of 'woman offender'. Several writers have observed that women may be treated more leniently than men when they act in an approved feminine role, but that they seem to receive no advantage, and may in fact be treated more severely, if engaging in 'unfeminine' crimes (such as crimes of violence) or in untraditional roles.

For example, Visher (1983) in a study of police arrest decisions found that chivalry is demonstrated at arrest stage if the woman displays appropriate gender behaviour and characteristics, but that there is no advantage to a female offender if she deviates from stereotype. So older, white female suspects are less likely to be arrested than younger, black or hostile women. The fact that an offence is against property seemed to be weighted more heavily for female defendants for males. Different factors were also found to influence arrest decisions for male and for female suspects.

Class and race are likely to be linked with gender in prosecution decisions, as suggested by Visher's study. Kruttschnitt (1984) looked at the question whether sex per se, or social statuses associated with sex, affect sanctions. She found that significantly different variables affect sentence for males and for female offenders,

and that women were more likely to remain free, both before and after adjudication. However she also concluded that differences in the social locations of male and female offenders may confound assessments of gender effect, such as single-parenthood and poverty. The relevance of class was also noted by Wundersitz et al. (1988), who concluded that class factors may be interacting with gender factors to benefit the young women in their study.

Mary Eaton (1983) observed that magistrates in the court she studied were influenced by child care responsibilities and social problems, such as financial stresses, or the care of an invalid. This was so regardless of gender of the defendant—although in fact women tended to be more frequently in such circumstances.

Eaton went on in her research, however, to look at the images of society which are constructed in the plea in mitigation—pictures which communicate attitudes about the social order. She observed that both male and female defendants relied on arguments based on their familial place when pleading. But the type of family invoked was one which, while so familiar, reinforced the subordination of women. For instance, a husband could argue that he should be treated more leniently because he was now trying to make the marriage work; there was a tendency to privilege the maintenance of the marriage relationship, even in the face of evidence that the wife did not want him back (p. 394).

The Current Research

Having surveyed the literature, it was clear that what was needed as a starting point was to try to capture the decision-making process in total, by examining as much as possible of the information being presented to the sentencer, as it was presented. This should include legal, factual, social and personal information, presented verbally by the offender, or representative, or welfare worker, and behaviourally, particularly by the offender.

The primary focus of the research design was obviously on identifying the influence of gender. However class and race factors were not ignored, in recognition of the importance of looking at 'structured inequalities of all kinds and their importance for explanations both of criminality and of the workings of the legal, judicial and correctional systems' (Edwards Hiller 1982, p. 83).

It was also important to be able to identify and distinguish the 'legally appropriate factors', found by Douglas (1987) to be most commonly determinative; the other factors which the magistrate may explicitly refer to as relevant to decision; and factors which may in fact influence sentence differences, which the magistrate may not have stated, or perceived, as affecting the decision.

Methodology

Choice of Magistrate's Court

Magistrate's Courts hear the vast majority of all criminal matters, and represent the most public (and most accountable) face of the justice system for most people who will come into contact with that system. They handle the minor offences which perform a 'control' role in society, but magistrates are also seeing more of the 'serious' end of the criminal spectrum, as their jurisdictional limits are regularly increased. The

Magistracy itself has been professionalised over the past few years; it is also the only Victorian court at present with women members. In 1990 there were around ninety-four magistrates in Victoria, at least thirteen of whom were women, including the Chief Magistrate. It therefore provided a high-volume, wide-ranging and accessible body of cases for observation.

Data was to be collected which could be analysed both quantitatively and qualitatively. Quantitative analysis would require a substantial number of cases, out of which it was hoped there would be enough comparable cases to draw conclusions about the decision-making process (and particularly the effect of gender on sentencing). Qualitative analysis would require detailed recording of observations, including a narrative of the circumstances of the offence, and where possible verbatim notes of pleas and sentencing comments.

After discussions with the Chief Magistrate, it was decided to concentrate on three busy metropolitan courts, Melbourne (City) Court, Prahran and Broadmeadows. The research was carried out over a period of around five months, with observers sitting in the various courts, and courtrooms at those courts, recording all matters coming before that court for decision on that day. Collection of data ended in July 1991.

The single most consistent 'gender' aspect of crime is of course the low percentage of women involved. The ratio of male to female offenders obviously varies with the type of offence. Over the five-month period around 1200 cases were recorded. Data on 734 cases has been entered to date, of which around 17 per cent were female offenders (n=125), charged with the full range of offences prosecuted in those courts over the period of observation.

It is relevant to note that most cases recorded were uncontested—they were mentions, pleas or *ex parte* hearings. Only 7.6 per cent (n=56 out of 734) of cases were contested. This probably reflects the workload of the court; it means that most cases observed were relatively brief, with the facts only peripherally disputed.

Some Findings

The main findings to date are essentially descriptive. In fact, the findings set out in this paper represent only a selection of all the information collected, but give an interesting picture of prosecutions for summary offences. It has not been possible to test correlations as yet, as the data is still being entered; this will be carried out over the next couple of months.

Age of offenders

Age was specifically referred to in something over half the cases. For most of the remainder of cases where the defendant appeared at the hearing, age was estimated by the observer. As found in other studies of 'criminal populations' the majority of defendants were young. Of the sample analysed so far, 50.8 per cent were between seventeen and twenty-five. There was no significant difference in age breakdown between male and female offenders.

Employment

As far as could be ascertained, only 47.4 per cent of defendants were in the paid work force. According to the Australian Bureau of Statistics, in the general population 4.8 per cent of males over fifteen are unemployed. This was therefore generally a fairly *needy* population: 30.8 per cent were 'unemployed', 7.6 per cent were 'on pensions' and 10.2 per cent were students.

There were significant differences in the employment status of male and female defendants, some of which presumably reflect differences in the general community. Women were far more likely than men to be economically dependant, either on family or the state. Significantly fewer female defendants were in the paid work force (27.8 per cent compared with 51 per cent); slightly more were unemployed than were the men (36.1 per cent compared to 29.8 per cent) and many more were said to be engaged in home duties (12.4 per cent compared to 0.6 per cent). Considerably more women were also said to be receiving pensions (13.4 per cent compared to 6.5 per cent).

Legal representation

Most defendants had legal representation (62.8 per cent; n=461). Of the remainder, 24.1 per cent (n=177) appeared for themselves, while 12 per cent (n=88) made no appearance and had no representative at court. Female defendants were slightly more likely than males to have legal representation, and less likely to appear for themselves. Females also had a higher non-appearance rate.

Extent of involvement in hearing

As might be anticipated, given the predominance of uncontested hearings (and of legal representation), the majority of defendants had very little active involvement in the hearing. Over half simply stood to receive the sentence (n=397; 54.1 per cent); 18 per cent (n=132) had some interaction, answering questions from the magistrate, while 6.4 per cent (n=47) ran their own defence.

Female defendants appeared to participate significantly less in their case. They were more likely to take no active part (at most, standing to be sentenced); men also tended to be in this category, but more men actively gave evidence than women. Very few women contested cases in this sample (5 out of 56 cases). However, given the exigencies of a contest, they seemed equally as likely as a male defendant to be involved in the hearing of a contest, for instance by giving evidence.

Offences

At this stage of the analysis the first charge has been examined, assuming (for the sake of simplicity) that the first charge will usually be the most serious.

Traffic and property offences combined comprised over half (51.7 per cent) of the workload studied. Traffic offences alone constituted almost one-quarter of first charges. This is so despite the trend in recent years to have minor traffic matters dealt with administratively. Property offences were an even more substantial group, constituting 30 per cent of all first charges; theft and wilful damage were the major offences in this group. The theft prosecutions will be looked at in more detail later, being a group which included a number of female offenders. The other substantial category was alcohol-related offences. Sixteen per cent of first charges were in this class, most of these being 'drink-driving' offences.

A number of 'offences against public order' were charged (14 per cent); the largest single category was soliciting for prostitution, mostly involving female defendants. People charged with soliciting for prostitution rarely appeared, and usually received a standard fine.

Drug offences made up 9.9 per cent of charges, the most common being possession of cannabis, usually only enough for the defendant's own use. Offences against the person represented 6.5 per cent of first charges.

There were statistically significant differences in charges between male and female offenders. Only slightly fewer women were charged with traffic offences (with similar numbers of male and female licence holders), drug, property, regulatory and alcohol-related offences.

However, significantly fewer women than men were charged with offences against the person (7.6 per cent of males, n=46, compared with 0.8 per cent of females, n=1). Significantly more women were charged in relation to 'public order' offences (8.3 per cent males, n=50; 20 per cent of females, n=25). Half the female

offences (n=13) were for loitering for prostitution: males had a fair spread of public order offences, the main ones being indecent language and offensive behaviour.

Table 1

**Offences Charged
(First charge)**

	Male	Female	Total
Traffic	141 23.4%	21 16.8%	162 22.4%
Drugs	59 9.8%	13 10.4%	72 9.9%
Against person	46 7.6%	1 0.8%	47 6.5%
Property	176 29.2%	41 32.8%	217 30%
Public order	50 8.3%	25 20%	75 10.4%
Regulatory	23 3.8%	6 4.8%	29 4%
Alcohol	101 16.7%	15 12%	116 16%
Other	3 0.5%	3 2.4%	6 0.8%
Total	599	125	724

Sentencing: In line with the high volume of much magisterial work, little time overall was spent on sentencing. Where magisterial considerations were indicated they were usually addressed to circumstances of the offence, and the seriousness of the offence. This is consistent with the findings of Douglas, that magistrates in their stated reasons are primarily concerned with 'legally relevant' factors. Other considerations referred to in a reasonable number of cases included family circumstances of the offender; the fact of this being a first offence; and special and general deterrence (often along the lines of 'this should teach you a lesson', and 'make sure we don't see you back here again'). Details of both plea material and sentencing comments are yet to be analysed.

Aggregate sentences: looking at the total 'cost' to the defendant, custodial sentences were in this sample very rare (around 4 per cent); fines were by far the most common disposition, being imposed in almost two-thirds of cases. Around one-quarter of cases involved a bond.

Case Study: Prosecutions for Theft

Non-motor vehicle theft prosecutions are to be examined as a separate group. The data analysed to date showed 101 first charges, with ninety-five convictions. Sixty-seven convicted defendants were male and twenty-eight female. Some preliminary findings are given below.

Seriousness of charge

This was identified by reference to the value of the item stolen. Almost half of the offences (43.2 per cent) fell into the first category of seriousness (that is, less than \$50 in value). Overall there was no statistically significant difference in seriousness of offence between male and female offenders.

Number of prior convictions

As with the general population sample, the largest category had no priors (60.7 per cent of females and 56.1 per cent of males); there was also no statistically significant difference between males and females, on the present analysis.

Age

The largest age groups were under 20 and 31-35. There were more females in the 26-30 age group (females 22.2 per cent; males 12.1 per cent), and more males in the 31-35 age group (males 37.9 per cent; females 29.6 per cent), but these differences were not statistically significant.

Employment

There were even fewer defendants in this group who were in the paid work force, suggesting an economic motivation for the crime. Only 11.1 per cent of females, and 32.3 per cent of males were in paid work, a statistically significant difference.

*Sentencing**Table 2***Sentencing for Theft
(First charge)**

Sentence	Male	Female
Fine	23 34.3%	7 25%
CBO	8 11.9%	3 10.7%
Bond	32 47.8%	14 50%
Susp. sent.	3 4.4%	3 10.7%
Cust. sent.	5 7.5%	2 7.1%
Court fund	13 19.4	6 21.4%
Total Males convicted of theft:		67
Total Females convicted of theft:		28

Note: More than one form of disposition may be imposed on an offender.

There appears to be little difference in sentencing on the basis of gender on the face of these data; small numbers preclude drawing any conclusions at this stage. A matter which may however be interesting to follow up is the use of the suspended sentence for female offenders, and the possibility that it is used in preference to a fine, in response to the lesser economic capacity of women charged with theft³.

³ Analysis of the full set of data obtained in this study found little difference between men and women in the imposition of custodial or suspended sentences. Male offenders were, however, significantly more likely to have a fine imposed; female offenders more frequently obtained a bond. But after controlling for offence seriousness and prior record, the only difference was in size of fines, with the men tending to receive lower fines. This is discussed further in the Report mentioned at footnote 1.

Conclusion

It is now well recognised that personal values affect decision making in the judicial process. It is therefore highly likely that perceptions regarding gender, and gender-appropriate behaviour and treatment, are influential in sentencing offenders. The literature reviewed suggests that where the offender is female, the degree of conformity to certain stereotypes does in fact correlate with the severity of sentence. This study is an attempt to examine the sentencing process in the lower criminal courts for indications of, and explanations for, such gender influences.

The research is still in progress, and any interpretations being drawn from the data collected to date must obviously be very tentative. The study shows important differences in the circumstances of the women and men coming before the courts; however further analysis is needed to ascertain whether these do affect the sentences imposed, at least at a statistically discernible level.

There is some suggestion in the data that gender and sentence are related, but sentencing is not clearly more lenient for female defendants, and the gender effect (if any) does not appear to be all in one direction. It will be important to examine the qualitative material to understand the context in which these cases arose and were disposed of.

The methodological question is also open—whether this form of analysis is the best way of discovering how gender perceptions affect the decision making process.

Finally, the issue which must be addressed will be, what are the implications for the participants in the criminal justice system—female and male offenders, decision-makers, lawyers—of the findings as to the effect of gender on decision making?

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