

## **THE SINNERS AND THE SINNED AGAINST – WOMEN IN THE CRIMINAL JUSTICE SYSTEM**

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**By Brenda Hale**

I have several confessions to make. I never knew Lord Longford, although I much admired the compassion, the courage and the conviction for which he was so famous. I do not share his religious faith, belonging as I do to the altogether less demanding Church of England. I have not taken his close interest in the penal system, but specialised in family, welfare and women's law for most of my career. I have never taken any part in the Parliamentary business of the House of Lords, fascinating and learned though its debates can be, particularly on this subject. But I believe that Law Lords should not take part, particularly on subjects which might one day come before us in our judicial capacity. However, I do share Lord Longford's concern for the traditionally despised and rejected in our society. Among these are the women and girls who fall foul of the criminal justice system.

I am, as you might expect, a passionate believer in equality. But equality is a complicated subject. It is now well recognised that a misplaced conception of equality has resulted in some very unequal treatment for the women and girls who appear before the criminal justice system. Simply put, a male-ordered world has applied to them its perceptions of the appropriate treatment for male offenders. Equality means treating like cases alike. But that does not mean treating everyone in same way. Equality also means not treating unlike cases alike. It means recognising and giving effect to significant differences. The European Court of Human Rights put it this way in *Thlimmenos v Greece* (2001) 31 EHRR 411, para 44:

*'The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.'*

Among the rights guaranteed under the Convention is the right not to be deprived of one's liberty, except in the situations permitted by Article 5.1; these include remands before trial and sentences after conviction. It is well known that there has been a massive increase in the prison population, such that our prisons are now virtually full. It may be less well known that there has been a disproportionate increase in the female prison population, both in raw figures and in the proportion of all those in prison. In 1960, they were only 3.3 per cent of the prison population. In 2005 they are around 6.0 per cent. In 1960, there were around 900 women in prison at any one time. In 2005, there are more than 4,600. The figures have levelled off this year.<sup>1</sup> But in the last decade the women's prison population has much more than doubled, whereas the population as a whole has risen by only 50 per cent.<sup>2</sup>

The puzzling thing is that it also seems to be generally agreed that the quantity and quality of women's offending has not risen in line with the increased use of prison for women offenders. Most of the rise is explained by a significant increase in the severity of sentencing. A woman convicted of theft or handling at the Crown Court is now twice as likely to go to prison as she was in 1991. In the magistrates' courts, the chance of a woman receiving a custodial sentence has risen sevenfold.<sup>3</sup> The criminal justice system tries very hard to treat like *offences* alike – a great deal of time and trouble is taken, in judicial and magistrates' training and now by the Sentencing Guidelines Council, to convey an appropriate sense of what we call the 'tariff' – that is, the appropriate sentence for each kind of crime — and to reduce regional and local disparities in sentencing. The system has much more difficulty in working out how to treat like *offenders* alike and, just as importantly, how to treat unlike offenders differently. More and more in recent years women and girls have been punished in the same ways as men and boys. There seems to be less understanding of the ways in which women's lives are still very different from men's. This is not some eccentric feminist view of my own. It was certainly the view of Professor Dorothy Wedderburn and her colleagues in *Justice for Women: the Need for Reform* (2000):

*'Equal treatment – which we fully endorse – does not mean identical treatment, whether for women or for members of cultural or ethnic minorities. In the prison system women prisoners have suffered from the well intentioned attempts to 'impose equality' (and standardisation) and to promote the unity of the Prison*

*Service. And throughout the criminal justice system women offenders have been disadvantaged by a failure to recognise both the degree of deprivation which characterises the backgrounds of so many and the wider consequences of custodial sentences for them and their families.’<sup>4</sup>*

Asimilar trend applies to girls. The United Kingdom already locks up more young people than any other country in Europe<sup>5</sup> and is in trouble with the monitoring authorities of the United Nations Convention on the Rights of the Child for doing so. There were 3,423 children in penal custody in September 2005 of whom 267 were girls. Once upon a time, the very small numbers of girls serving custodial sentences might be placed in local authority secure units. These are much better staffed and resourced than prison service establishments. Indeed, it was the boys who might complain of discrimination, because the criteria for getting into the local authority homes were tougher for them, even though they might have just the same welfare needs as the girls. But this meant that the even smaller numbers of girls who could not be placed in local authority homes had to be held in adult women’s prisons. This has been a major concern of the Chief Inspector of Prisons, who reported this year of the three main establishments holding girls that had been inspected,

*‘All had improved their provision during the year; but all were dealing with some extremely damaged and difficult young women, without adequate resources to do so’.<sup>6</sup>*

So the Youth Justice Board and the Prison service are planning five small discrete units for girls in five women’s prisons, which will be run separately from the main establishment with a multi-disciplinary team. While this will no doubt be an improvement for them, it means that girls are increasingly likely to be held in the same sort of establishments as boys, rather than in places which would be better for them both.

Should we think any of this shocking? Why shouldn’t women and girls who commit crimes be subject to exactly the same punishments as men and boys? I would suggest that there are at least six ways in which a woman offender may be different from the standard male (though if a man differed in the same way I would of course argue that this too might justify a difference in treatment for him).

### **(1) Women are victims as well as offenders**

We tend to think in terms of ‘a clear differentiation between the totally innocent victim and the totally guilty offender’.<sup>7</sup> These images are reinforced in the popular press and sometimes also by politicians. But there is a wealth of evidence that a high proportion of women prisoners have also been the victims of crime, whether physical or sexual abuse during their childhoods, or domestic violence or sexual exploitation in adulthood, or both. To quote the Fawcett Society’s Commission on *Women and the Criminal Justice System* (2004):

*‘ Women with histories of abuse and violence are overrepresented in the prison population. Half the women in one Home Office survey said that they had experienced domestic violence and the true figure is likely to be higher. As a result of increasing awareness about the disturbingly high levels of abuse and violence that women in prison have experienced in their lives, the Prison Service commissioned research which states, ‘it is clear that the majority of women in prison have experienced some form of abuse, and that a history of abuse is one factor amongst others contributing to the risk of offending and of a range of associated problems, including drug and alcohol problems, mental health problems and self harm.’<sup>8</sup>*

There may not always be a direct causal link between ‘victimisation’ and criminality. But, as Judith Rumgay argues, there is undoubtedly an association between them. Abuse and ill-treatment can have an adverse impact upon both physical and psychological health. Behavioural problems and anti-social activity can be a response to psychological distress. Some forms of abuse can also affect the victim’s personal growth and moral development. Violence or sexual exploitation may become an expected element in adult intimate relationships. The abnormal may be seen as normal and the victim adapts herself so as to be able to cope with it. This is something which any judge in the family justice system sees time and again, so it comes as no surprise to read that it is also seen in the criminal justice system. We also see how attempts to escape from abusive environments can actually lead a young woman into even greater danger, disrupting her education and family ties which might in time have given her a way out of her difficulties, and exposing her to the much greater dangers of homelessness and exploitation in the big wide world. Prostitution, drug use, dishonesty and membership of delinquent networks can so easily follow. As Judith Rumgay puts it,

*'Thus, a vicious circle of victimisation and criminal activity develops, creating a toxic lifestyle that is extremely difficult to escape.'*<sup>9</sup>

What is true for the adult women in prison is even more true of the young people in custody. A quarter of adult women have been in local authority care at some time in their childhood, and nearly 40 per cent left school before 16, almost one in ten before the age of 13. Over half of young people under 18 in custody have a history of being in care or social services involvement and getting on for half have been permanently excluded from school. A quarter of the girls (two fifths of the boys) say that they have experienced violence at home. A third of the girls (one in 20 of the boys) say that they have been subject to sexual abuse. A very large percentage has run away from home at some time. Many were not living at home and were either homeless or living in insecure accommodation. The dangers facing young girls are even greater than those facing young boys. It is horrifying that the Prison Inspectorate Report on *Girls in Prison: The education and training of under-18s serving Detention and Training Orders* found that for many of these girls custody was a time of respite in a relatively safe and secure environment.<sup>10</sup>

The fact that many women and girls who commit crimes have also been the victims of crime does not mean that they should be excused from their misdeeds, although in some circumstances it may be an excuse and more often it may be mitigation for what they have done. That is a separate question. But it does mean that their needs while in prison may be very different. In the recent House of Lords debate on prison suicides, for example, Lord Dholakia discussed the link between suicide attempts of prisoners and previous abuse:

*'many of them – and this is particularly true of female and young prisoners – describe memories of physical and sexual abuse as a key factor in producing the mental state that leads them to attempt suicide'.*<sup>11</sup>

It also means that their needs when leaving prison will be very different. In the olden days, women's reconviction rates after leaving prison were lower than men's. Ten years ago less than four out of ten were reconvicted within two years. This is no longer the case. It is now getting on for six out of ten. Once they leave prison the 'toxic lifestyle' can so easily take over once more. So something has to be done while they are in the criminal justice system to try and give them strategies to prevent their become victims again once they have left it.

## **(2) The offending behaviour is different**

No-one is saying that women who commit grave crimes with the same degree of culpability as men should not generally receive the same level of punishment. It is a myth, as Lord Rooker pointed out in the House of Lords' debate on women in prison last year, that all the women in prison are there for shoplifting.<sup>12</sup> But there is a good deal of evidence that women are disproportionately locked up for less serious offences. A much lower percentage than the men have been convicted of offences against the person. More women are sent to prison for theft or handling stolen goods than for any other crime. Of the women actually in prison at any one time, the largest proportion is held for drug offences. This is because they will be serving very long sentences. But the Wedderburn Report pointed out that the great majority of women received into prison were serving very short sentences (para 1.20). This is still the case. In 2003 nearly two-thirds of women sentenced to custody (63 per cent) were sentenced to 6 months or less.<sup>13</sup> The proportion sentenced to less than 12 months is much lower than for men. Also, more than one third of the woman in prison on any one day had no previous convictions, compared with only 15 per cent of the men; only 20 per cent had seven or more, compared with 44 per cent of the men (para 1.21). This could suggest that women are being locked up earlier in their criminal careers than men.

The Home Office comments that

*'courts have been using custody more and more frequently for women over the past few years even though the nature and seriousness of their offending has not, on the whole, been getting worse. . . . The evidence suggests that courts are imposing more severe sentences on women for less serious offences.'*<sup>14</sup>

This is a puzzle indeed, because until now sentencing guidelines have largely ignored any gender issues in their assessment of the seriousness of the crime. One might therefore have thought that the generally less serious offences that women commit would result in generally less serious penalties. Maybe they do. But some scholars have suggested that perceptions of seriousness are based on a 'presumptive male subject'. As Elaine Player puts it,

*'The 'just deserts' approach has tended to rely upon standardised assessments of culpability and responsibility, constructing the boundaries of mitigation and aggravation in ways that fail to recognise the relevance of differences based on gender, race or social class.'*<sup>15</sup>

If you have read the discussion of the aggravating and mitigating factors in assessing the seriousness of the offences of assault and cruelty to a child in the recent consultation paper from the Sentencing Advisory Panel which advises the Sentencing Guidelines Council, you will know exactly what she means.

Sometimes it is the deliberate policy of the system to ignore the special pressures placed upon some offenders. This applies particularly to drug mules. They are often poor young single mothers from the Caribbean, who have been deliberately targeted by the drug barons because they are both less likely to be caught and more readily expendable. The pressures placed upon them may come very close to the defence of duress. But the House of Lords has drawn this very tightly, excluding anyone who voluntarily associates with criminals and ought to have foreseen the risk of being subject to compulsion by threats.<sup>16</sup> If duress fails, the extent to which those pressures can nevertheless be taken into account as mitigation is controversial. The policy is understandable. The prosecution argued in our duress case that it does these women no favours to let them off, as they will then be targeted even more. But that is to put the interests of the group above the interests of the individual. Presumably, this policy is why a fifth of the women in prison are foreign nationals (compared with an overall percentage of 12 to 13 per cent).

### **(3) Female prisoners have special needs**

We know that drug addiction plays a huge part in all offending but again this seems disproportionately so with women. A recent Home Office study found that 66 per cent of female prisoners were either drug dependent or reported harmful or hazardous levels of drinking in the year before custody. In last year's House of Lords debate, Lord Rooker stated that they tend to have a more severe poly-drug use than men and are more used to hard drugs such as heroin. Women prisoners also suffer from particularly poor physical and mental health.

Mental health problems are far more prevalent than among the general population or even the adult male prison population. An ONS study published in 2001 found that two thirds of their sample of women prisoners had symptoms of neurotic disorders, often post traumatic stress disorder, compared with 16 per cent in the general population. Half of those interviewed had a personality disorder and 14 per cent were assessed as

likely to have psychosis. A study published by the Social Exclusion Unit in 2002 found that 70 per cent of women prisoners suffer from two or more mental disorders. This is 35 times the level in the general population.<sup>17</sup>

The relevance of personality disorder to the treatment of criminal offenders is debatable: the specialist mental health services do not want to look after challenging people for whom they can do very little. But the relevance of major mental illness should not be. Yet, as the Prison Reform Trust states in *Troubled Inside: Responding to the Mental Health Needs of Women in Prison* (2003), the inappropriate use of prison service custody for women who are mentally ill is not a new problem: it was found in studies in the 1970s and the 1980s as well as more recently.

The worst aspect of all is the risk of suicide and self harm. Lord Giddens, who knows a great deal about suicide, warned the House of Lords of the unreliability of statistics on suicide generally, and the dangers of not comparing like with like. But outside prison, men are more likely to commit suicide than women, whereas inside prison the position is reversed. The number of women prisoners taking their own lives has risen in recent years, from only one in 1993 to 13 in 2004. This means that, although women make up just over 6 per cent of the prison population, they account for 15 per cent of the prison suicides.<sup>18</sup> We cannot draw many conclusions from numbers which are thankfully small. But each death in custody is a tragedy which hopefully could and surely should have been avoided.

The incidence of self-harming behaviour is also much higher among women prisoners than it is amongst men. Half the prisoners who had to be resuscitated following serious self-harm in 2003 were women. But many, many women prisoners harm themselves in less serious ways. This is a difficult management problem for the prison service, but it also tells us a great deal about the mental distress so many of these women are suffering and the contribution which the experience of incarceration may make to that distress.

#### **(4) The remand experience is different for women**

The Prison Reform Trust, among so much other good work, has recently drawn attention to the special problems faced by women who are remanded in custody. There has been a disproportionate increase in their numbers compared with men (196 per cent compared with 52 per cent between 1992



and 2002).<sup>19</sup> Fewer than one in ten of the women received into prison on remand were charged with violent offences and fewer than half of the women remanded into custody subsequently received a prison sentence.<sup>20</sup>

The Prison Reform Trust found that prison conditions for women on remand are grossly inferior to those for men or for sentenced women.<sup>21</sup> Women on remand are likely to experience inadequate support in the early days of custody, an absence of drug treatment at the time of most urgent need, inadequate time out of their cells, too little purposeful activity, and the denial of opportunities to maintain contact with families.<sup>22</sup> The provision of bail information is inadequate in many places and although hostel places are available in some regions they are not always taken up because of criteria that exclude women who require them or because the women have reasons to feel unsafe or because they are too far from their homes.<sup>23</sup> The Prison Reform Trust suggests the likely explanation for the increase in this group of women in prison:

*'There is strong evidence that social exclusion, manifested in unstable accommodation, mental health problems, dependency on benefits, drug dependency and being victims of abuse, can lead to offending. And, for this reason, judges and magistrates may feel that their decision to deny bail is preventative and therefore justified. But this is short-term thinking that utterly fails to take into account the probable impact of custody: namely, the likely loss of accommodation, separation from children, aggravated financial problems, reduced capacity to obtain paid work, and increased psychological stress. Courts should show a more balanced understanding of the probable impact of incarceration in aggravating these factors, rather than focusing solely on the background of the woman standing before them. Further, if a court remands a woman into custody, motivated by an intention to help her, serious questions need to be raised about whether the decision was based on a presumption in favour of bail'.<sup>24</sup>*

More than half the suicides in prison in 2004 were committed by prisoners on remand, often within a short time of their admission.<sup>25</sup> This is not surprising, given the initial 'incarceration shock'. Imagine what it must be like for a woman to be suddenly taken into custody, often to her surprise, without the opportunity to make proper arrangements for her children or her family, driven long distances to arrive at the prison late at night, and without much support on her arrival.

Anxiety about what is to happen to their children in the short term makes the initial reception into prison particularly stressful for women. The 'First Night in Custody' project conducted interviews with 1,400 women entering Holloway prison for the first time. The Revolving Doors Agency learned that 42 of the women (3 per cent) had no idea who was looking after their children and that 19 children under 16 were looking after themselves. The former figure does not include those women who knew who was looking after their children but had not expected to be separated from them that evening. This is in stark contrast to the position in the Netherlands. There, if a decision is made that a woman with children should be jailed, she is given a breathing space so that she can go home and make appropriate child care arrangements.<sup>26</sup>

### **(5) The prison experience is different for women**

There are many ways in which the impact of a custodial sentence upon women and girls is different from the impact upon others. The first problem is that there are comparatively few of each. This means that there are fewer institutions for them and that these are often a long way from home. This makes it much harder for parents to visit their children and for children to visit their parents. The Chief Inspector of Prisons reported for 2003-2004 that '60 per cent of women in our surveys were more than 50 miles from home'.<sup>27</sup> She also commented, 'Distance from home was a serious problem in relation to regular visits, particularly for women and young offenders'.<sup>28</sup>

Indeed, one Home Office study found that only half of the women who had lived with their children or been in contact prior to imprisonment had received a visit since going to prison.<sup>29</sup> This is a horrifying thought, not only for the women who must surely be worried about their children, but even more for their children.

Women prisoners are far more likely to be the primary carers of young children than are men. Somewhat surprisingly the Prison Service does not routinely ask or record the number of women who have dependent children.<sup>30</sup> Wedderburn (para 1.26) states that 45 per cent had children living with them at the time of their imprisonment. This may be an under-estimate because women may not reveal that they have children for fear that the children will then be placed in local authority accommodation whether voluntarily or compulsorily. An answer to a parliamentary question last year stated that 'prior to going to prison, 60 per cent of the female prisoners who were mothers had been looking after their children at home'.<sup>31</sup>

Many women still define themselves and are defined by others by their role in the family. It is an important component in our sense of identity and self esteem. To become a prisoner is almost by definition to become a bad mother. If she has a husband or partner then again almost by definition she will become a bad wife or partner. Separating her from her family is for many the equivalent of separating a man from his job.

The second problem is that the practices of the Prison Service have mostly been devised with male prisoners in mind. As the Chief Inspector has put it, prisons are geared to young adult males. That is their comfort zone. Everyone else is in a minority and they struggle to know how to cope. A prison may have to change role to take women prisoners at short notice without any staff training for their special needs. She has also described how women prisoners were very understanding and compliant – they would sympathise with the hard pressed officers and say they were doing their best.

In last year's report, she wrote that the service 'struggles to meet the needs of an expanded, changing and increasingly needy population' (2004, p 37). In this year's report she comments,

*'Overall, our reports record the extent of the distress and vulnerability in the women's prison population....managing severely damaged and self-harming women is part of the core business of all the closed prisons we inspected. It is hard to meet that level of need – as the number of self-inflicted deaths among women testified. It is equally hard to provide a positive, interactive regime for less damaged women who nevertheless need support to overcome their difficulties'.<sup>32</sup>*

Prisons suddenly having to change roles and prisoners suddenly having to move prisons (known as churning) are common problems for everyone in a system which is full to bursting. But it adds to the problems of distance and unfamiliarity for the women. It gravely disrupts any treatment and education programmes within the prison, thus hampering the rehabilitative effort. The effect is worse where sentences are short, as they are for most women (especially if much of it has already been spent on remand, thus reducing still further the time available for constructive work).

Finally, a woman's problems on release are likely to be rather different from a man's. If she had a partner before going in, it seems that he is less likely to stand by her while she is in prison than a woman is to keep

the home fires burning while her man is away for whatever reason. So she is quite likely to lose her home. If she does not have a partner she is almost certain to lose her home. Getting her children back when she comes out will depend upon whether or not she can find a new home to go to. So her primary need may be for housing rather than a job.

**(6) There is a disproportionate effect on other people**

Many years ago, when training as a baby judge, I heard a very experienced judge comment that he was reluctant to send a woman to prison because she was usually the more useful member of the family. He meant that others needed her. Most women do not want to take their babies with them into prison. They know that prison is not the best place in which to bring up even the youngest child, and even more, that there is no good time to separate mother and child if they stay together. But some mothers have no sensible alternative. And at some stages in the attachment process the alternative would have to be very good indeed to counteract the damage caused by its disruption. This is a human rights issue. The right, guaranteed by Article 8 of the European Convention, to respect for the family life of both mother and child is engaged by any decision compulsorily to separate them, although it will usually be justified by the greater benefit to the community in the proper punishment and deterrence of crime. But from time to time the courts do refer to the necessary balancing exercise. In *Attorney-General's Reference (Nos 132 and 133, of 2004)*, *The Times* 21 March 2005, for example, the Court of Appeal declined to interfere in unduly lenient sentences for drug dealing because of the impact upon the women's very young children. It also has to be taken into account by the Prison Service in deciding whether or not to admit a mother with a baby to a mother and baby unit: they should have a proper procedure for considering the welfare of the child and balancing it against the other considerations.<sup>33</sup> And although the service is entitled to have a policy of separating mother and baby no later than 18 months, this should not be operated in a rigid fashion, 'however catastrophic the separation might be in the case of a particular child, however unsatisfactory the alternative placement available for the child, and however attractive the alternative solution of combining day care outside prison.'<sup>34</sup>

## Conclusions

There are therefore all sorts of reasons to think about whether the criminal justice system as a whole should be more discriminating — in the correct, non-pejorative sense of that word: the association between offending and having been offended against; the different patterns of offending; the greater incidence of special needs; the different impact of prison, both on remand and after conviction; and the disproportionate effect upon other people. There are at least three possible prongs in tackling this: more sensitive remand and sentencing policies in the courts; more suitable disposals and institutions available to them; and better strategies to prevent offending and, more immediately, reoffending.

A great deal is now going on, especially within the National Offender Management Service, as the Prison and Probation Services have now become. The problem has been recognised, even if the solutions are harder to implement. Both Wedderburn and Fawcett recommended a national network of local women's supervision, rehabilitation and support centres linked to local custodial units. The benefits of these in maintaining family links and enabling resettlement back in the community are obvious. The risks, given the generally lower levels of security and the different offending patterns of many women, are not. But the greatest impact would be if there were more community treatment facilities for women with mental health and substance abuse problems and more community sentences designed with women's needs in mind. This was the preferred solution in a public opinion poll carried out for the Fawcett Commission. But these are only slowly materialising. Instead, two more large women's prisons have been built, causing some to doubt where the Service sees the future.

The Service has also set up the Women's Offending Reduction Programme. Its recent annual review acknowledges that:

*'There is certainly a greater awareness now that achieving gender equality in the criminal justice system is not about treating women offenders the same as men but about recognising the differences between the factors which affect why women offend and making sure that there are the right interventions and services in place to address those factors.'*<sup>35</sup>

After explaining all the initiatives being taken to improve both community provision for women offenders and the regimes within prison, the review goes on to grasp the nettle:

*'Work to improve community based provision for women offenders needs to be supported by effective communication with sentencers if greater use is to be made of alternatives to custody for women. In the Women's Offending Reduction Programme, therefore, there is a particular focus on how women are dealt with at the court stage, and what more can be done to divert women away from custody.'*<sup>36</sup>

This brings me to the thorny problem of the courts' role. In last year's House of Lords debate Lord Rooker was blunt:

*'The Prison Service does not send women to prison. The Government do not send women to prison. It is the courts that send women to prison. This debate should be replied to by someone responsible for the courts. However, if one questions what they do they become very sensitive about what they consider to be interference.'*<sup>37</sup>

There was a call for the Government to do just that in the House of Commons debate on women prisoner suicides on 15 January 2005 when Sandra Gidley MP commented,

*'The judiciary seems to take the attitude that it is okay to send women with children to prison for short periods without taking into consideration the wider impact on the family. If there is a will to reduce the number of women in prison — many of whom are imprisoned for relatively minor offences — the Home Office must impress the importance of those considerations on the judiciary.'*<sup>38</sup>

This is not entirely fair. The courts do not act in a vacuum. They are sensitive to the public opinion they detect from the media and from politicians. They also have to do what Parliament tells them to do. The Criminal Justice Act 2003 extends the sentencing powers of magistrates and provides all sentencers with a wider selection of custodial sentences.<sup>39</sup> But Elaine Player has pointed to several ways in which this Act, far from reducing women's imprisonment, may actually encourage it. Under the previous law, the seriousness of a crime had to be judged in its own right, and only to a very limited extent in combination with other crimes that the offender might have committed. The 2003 Act requires previous offences to be taken into account in deciding the seriousness of the present offence. As many women offenders are repeat

shoplifters or low-level fraudsters, this might disproportionately increase the seriousness of their offence. The 2003 Act also introduces three different types of short term (that is, less than 12 months) custodial sentence: custody minus, which is a suspended sentence with community support, custody plus, which is a custodial sentence where a comparatively short time is spent in custody but a long time is spent under community support and supervision; and intermittent sentences, where time is divided between prison and the community. This last has been specifically trailed as suitable for women offenders with family responsibilities. The concern is that welfare-minded courts — mainly the magistrates' courts — will see these new disposals as especially suitable for women, and impose them instead of pure community sentences, so that the use of custody might actually go up rather than come down. Elaine Player sums up her fears that the Act

*'increases women's custodial eligibility by increasing their risk of breaching a court order, allowing the persistence to aggravate the severity of their sentence, while failing to inhibit their promotion up the sentencing tariff in pursuit of their welfare interests'.*<sup>40</sup>

Part of the answer to this would, of course, be firm guidance from the Sentencing Guidelines Council. They have said that they are going to look specifically at gender issues in sentencing during this year. This will be no easy task.

Of course it is right that the judiciary should jealously guard its independence from Government and the executive. But that does not mean that it should ignore the concerns expressed by others about the trends for which its decisions are responsible. The family justice system is asking itself whether it is indeed unjust to fathers. The criminal justice system could also ask itself whether it is indeed unjust to women. It could engage with the principled debate on the nature and purpose of punishment initiated by Wedderburn. She argued that the different facts about women's offending and the impact of punishment upon them and those for whom they are responsible 'may actually affect the legitimacy or at least the proper extent of state punishment. For example, if a large proportion of certain groups of offenders are people whose basic citizenship rights — such as the right to physical or sexual integrity — have been violated by abuse from which the state has failed to protect them, this must be a relevant factor in determining

the nature, if not the fact, of their punishment. . . though the criminal justice system creates its own moral imperatives, these can never be entirely insulated from broader questions of social justice.’

This brings me back to the title of this lecture. I chose it because I have never forgotten this little poem. It was written by a deeply troubled, self-harming and absconding young woman in local authority secure accommodation. Enormous trouble was being taken about whether she should remain there, where she did not want to be, although she was at least safe and responding to some good work that was being done with her. She was not before the courts as an offender although she easily could have been. The thought that she might have been sent to a prison instead fills me with horror. This is what she wrote:

*Before you  
Judge me try  
hard to love  
me, look within  
your heart t hen ask  
have you seen  
my childhood?*

## Notes

- 1 On 17 October 2005 there were 4,635 women in prison out of a total prison population of 77,702. National Offender Management Service, Prison Population and Accommodation Briefing for 14 October 2005, available at [www.hmprisonservice.gov.uk](http://www.hmprisonservice.gov.uk).
- 2 Prison Reform Trust, *Prison Factfile* (May 2005), at page 10.
- 3 *Ibid.*
- 4 Prison Reform Trust, 2000, para 7.2.
- 5 Howard League for Penal Reform, submission to the UN Committee on the Rights of the Child, *Children in Prison — Barred Rights* (2002)
- 6 Annual Report of HM Chief Inspector of Prisons for England and Wales, 2003 — 2004, HC 204, 2005, at p.59.
- 7 Dr Judith Rumgay, *When Victims become Offenders: in Search of Coherence in Policy and Practice*, Fawcett Society, p 5.
- 8 March 2004, p 43, citing Home Office and Prison Service, *Abuse, Interventions and Women in Prison: A Literature Review*, 2003.
- 9 *Op cit*, p 9.
- 10 Her Majesty’s Inspectorate of Prisons, 2004.
- 11 *Hansard* (HL), 20 October 2005, col. 889.



- 12 *Hansard* (HL), 28 October 2004, vol. 665, col 1475
- 13 Prison Reform Trust, Prison Factfile (May 2005), page 10.
- 14 Home Office, *Women's Offending Reduction Programme: Action Plan*, 2004.
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