

Book Review

Myrna S. Raeder

Is Justice Gendered?

As an unending stream of women pour into correctional facilities, it is fitting that the criminal justice community should pay more attention to whether gender makes a difference in the crimes that women commit, the pathways that they take to criminality, the sentences they receive, and the impact that their sentences have on their children. These three books approach such issues quite differently, and provide essential reading not only for academics, but also for defense counsel, prosecutors, judges, child welfare workers, policy makers, and correctional officials among others. I will consider the contribution of each book separately.

Women and Girls in the Criminal Justice System: Policy Issues and Practice Strategies, Russ Immarigeon, Ed.

(Civic Research Institute 2006) 564 pp.; hardcover ISBN 1-887554-52-1, \$133.95; available online at www.civicrosearchinstitute.com/co25.html

Women and Girls is a compilation of 52 articles that originally appeared in the bimonthly publication *Women, Girls & Criminal Justice*. Russ Immarigeon, whose work in this field has been uniformly thoughtful and thought provoking, also edits that publication. Given the oft heard but questionable observation that only academics and feminists need be concerned about female offenders, I am delighted that he has created an invaluable one-volume reference text that can easily be accessed by a much wider criminal justice audience. The book is divided into six parts to facilitate its ease of use by those who are looking for specific topics, and provides a wealth of information and an excellent overview of the many diverse policy, legal, and moral issues that surround our present practices.

The section headings are entitled: Policy Matters; Juvenile Justice Issues and Programs; Mothers and Children; Gender-Specific Classification, Risk Assessments, and Programming; Drug Treatment, Health Care, and

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Mental Health Services; and Programs and Practices. Each section is preceded by an introduction that summarizes the issues presented in the individual chapters. Although it is to be expected that some overlap is inevitable in a book that includes articles written over a four-year time span by multiple authors, it is remarkable how little distraction this causes because the essays are so rich and varied in their content. Moreover, the articles are all relatively short, ranging from approximately five to 15 pages and are well written by a veritable who's who of authorities ranging from academics in a variety of disciplines, to lawyers, service providers, and advocates.

Those who are interested in gender-related criminal justice issues will immediately recognize what a treasure this compilation is, but the brief identification of each author gives the casual reader little hint of the stellar quality of the chapters within. Each article includes the date of its original publication, and one notes that it was updated for this publication. Ideally all of the chapters could have included a paragraph update, though I understand the difficulty that such a task would have created given a large multiauthored book. Ironically, this omission does not adversely impact the book because one of the depressing things about this field is that the issues that consumed us 30 years ago are still mainly the same, except made worse by the burgeoning female offender population, and the solutions first posed decades ago are mainly the same, albeit now crafted with more sophistication and backed by more research.

Despite my pessimism about the impact of punitive sentencing practices on women and their children, this book not only details the problems, but shines a welcome light on programs and policies that might prevent juvenile girls from entering the adult system, and hold women accountable at the same time as they are given the tools they need to become productive community members and reunite with their children. Moreover, I was reminded how recently the study of women offenders became a recognized field by a chapter summarizing a 1998 research conference held by the International Community Corrections Association that was considered innovative because it focused on females. Indeed, it was only in 1999 that the

Office of Justice Programs sponsored its first and only National Symposium on Women Offenders.

Rather than detail the content of 52 chapters, the following synopsis is my explanation of why the book is worth reading, regardless of which of the following group you fall into. In other words, if you ever prosecute, defend, or sentence a woman, you should be aware of the gender issues raised by this book.

Defense counsel: Too few lawyers representing females think creatively about defenses, sentencing options, and alternatives to incarceration when their clients fit the typical profiles of female offenders that reveal their high levels of abuse, drug and alcohol dependency, mental illness, and struggles to raise their children as single mothers. As Judge Gertner has noted in discussing departures for coercion under the federal sentencing guidelines: “[i]n my experience few lawyers even bother to examine the relationship between the woman offender and her male codefendants, much less litigate it.” (Hon. Nancy Gertner, *Women Offenders and the Sentencing Guidelines*, 14 YALE J.L. & FEMINISM 291, 303 (2002).) This book provides food for thought about finding placements, and constructing arguments based on empirical data to use in plea bargaining and sentencing. (See also Myrna S. Raeder, *Primer on Gender-Related Issues That Affect Female Offenders*, CRIM. JUST., Spring 2005, at 4.)

Prosecutors: Too often prosecutors think that women are simply asking for a gender break due to their family ties. The book explains the tragic collateral consequences leading to termination of parental rights facing women who are sentenced to a term of even two years. Also understanding more about female offenders will better inform decisions about whether an incarcerative sentence is needed, given the low public safety risk posed by most nonviolent female offenders, and their lower recidivism rates.

Judges: Too few judges pay attention to collateral consequences facing women concerning their children, or seem to care about what happens to women in the institutions to which the judges send them. I have argued elsewhere that correctional factors can be legitimate sentencing considerations. (Myrna S. Raeder, *Gender-Related Issues in a Post-Booker Federal Guidelines World*, MCGEORGE L. REV. (forthcoming 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=888820#PaperDownload). National Association of Women Judges has a long-standing Women in

Prison Project that created a curriculum to sensitize judges who sentence women, and also has championed the use of appropriate gender-specific programming for incarcerated females. This book also contains many of those insights.

Policy makers: Too few policy makers think about the fact that gender does make a difference in the criminal justice system, not only in sentencing, but also in collateral consequences that face women on reentry. If we are poised for a paradigm shift in correctional policy, as the eminent historian Professor Nicole Rafter suggests in her overview chapter, this book presents the data that support the development of improved evidence-based policy. For example, gender-specific classification instruments discussed in later chapters clearly give the lie to any rationale based on incarcerating nonviolent women for their risk to public safety. In fact, recent efforts in California have identified more than 4,000 incarcerated women who are eligible for community placements based on their risk factors.

Correctional officials: Too often correctional officials follow the mode of simply adding women into a male model. This gender blindness can be seen in issues ranging from providing women with zippered one piece jumpsuits, substance abuse programming that does not deal with the underlying trauma of domestic violence, or cross-gender supervision that inappropriately intrudes on privacy interests or can lead to staff sexual misconduct. This book explains why such a view disserves women, how gender-specific policies and classification tools can also foster institutional goals, and also details the legal ramifications of suits brought alleging sexual abuse. In addition, one of the longer chapters written by Barbara Bloom, Barbara Owen, and Stephanie Covington discussing gender responsive strategies is based on their groundbreaking report for the National Institute of Corrections, for which I had the pleasure of writing a legal appendix. The full report can be downloaded at <http://nicic.org/Library/018017>. Another chapter addresses how the shift from rehabilitation to retribution and risk management in the 1990s places strain on inmate and staff relations, and explains why the implementation of the newer policies are not uniform.

Service providers: Too few service providers have easy access to information about the variety of models for programming that exists in community corrections, jails, and prisons. This book serves as a ready checklist of what factors are important in creating appropriate services, and

includes 10 chapters detailing specific programs and practices that offer innovative approaches to ensure that women offenders succeed in the community. In addition, it contains a section devoted to drug treatment, health care, and mental health services.

Probation and parole officers: Too few supervisors of women recognize the stress that they face concerning their children. An entire section is devoted to mothers and children, and discusses the various collateral consequences of incarceration that impact them. Not only do such restrictions hinder them from obtaining employment, education, and housing, but often the combined effect of these disqualifications prevent women from reuniting with their children. For example, women fall into the catch-22 of needing a suitable apartment before they regain custody of their children, but are ineligible for the apartment or financial assistance due to their drug conviction. Similarly, the presence of children may impact their ability to satisfy their probation or parole obligations. Given that women who return to custody tend to have a high rate of technical violations, rather than new offenses, understanding the context of women offenders' lives is important for those supervising them. As one of the chapters points out, distance and limitations on visiting may result in released prisoners having fewer family support networks on release. It should come as no surprise that without such networks reentry becomes more difficult.

Academics: Too few of you have probably asked your librarian to obtain a copy of this book. More importantly, how many of you are including gender issues in your criminal justice courses? This book includes little-known facts that may spark discussion in your classes. For example, Professor Nicole Rafter's historic overview starts in 1820 when, contrary to the recent past, men were considered more reformable than women. How better to demonstrate how criminal justice policy is shaped by attitudes, not simply facts? Similarly, Marc Mauer, director of the Sentencing Project, analyzes the impact of the "drug war" on women comparing differences in three states and their effect on sentencing. Again, the results demonstrate that more women are arrested and charged due to changing policy, rather than based on changes in women's criminality.

Anyone interested in juvenile justice: Too few books focus specifically on girls. Therefore, it is significant that an entire section of this book is devoted to the key issues concerning females who

become subject to the juvenile justice system. Professor Francine Sherman, who directs the Juvenile Rights Advocacy Project at Boston College School of Law, writes the introductory chapter. She explains how girls enter the system often as runaways or truants, which for many stem from their victimization at home. While casual readers might think that the relatively low number of girls detained signals the absence of any problem, in fact, there is general agreement that not only are girls disproportionately represented as status offenders, but they become subject to juvenile court because status offenders are so easily bootstrapped into delinquents in many jurisdictions by violating court orders that require them to stay in school or not to run away, or by relabeling their incorrigibility as assaultive behavior. Girls are detained at higher rates than boys, often to provide them with services, and their stays are lengthy due to a lack of female programs. Professor Sherman discusses the numerous advocacy issues that lawyers can raise on behalf of this population.

Other chapters focus on the mismatch of delinquent girls in programs designed for boys, and suggest approaches for working with juvenile girls. Professor Meda Chesney-Lind is the coauthor of several of the chapters that focus on myths and realities of relational violence committed by girls, suggesting that some girls become mean or aggressive as a reflection of their powerlessness and marginalization. She posits 12 ways to prevent fighting by girls, and reminds the readers that most of girls' aggression is nonviolent. The only disappointment about this section is the absence of a chapter on girls and gangs, a topic that Professor Chesney-Lind has extensively addressed elsewhere, including in this magazine. (Meda Chesney-Lind, *Are Girls Closing the Gender Gap in Violence?*, CRIM. JUST. Spring 2001, at 18) (arguing that relabeling of assaults accounts for the spike in arrests of girls for violent crimes.)

Victims as Offenders: The Paradox of Women's Violence in Relationships by Susan L. Miller

(Rutgers University Press 2005); 184 pp.; cloth ISBN 0-8135-3670-7, \$62.00; paper ISBN 0-8135-3671-5, \$22.95; available online at http://rutgerspress.rutgers.edu/acatalog/_Victims_as_Offenders_2240.html

Susan Miller, a professor of sociology and criminal justice at the University of Delaware, has writ-

ten a short but fascinating book about women who commit violent acts against their intimate partners. Although most domestic violence is associated with male batterers, there is a substantial controversy about the extent of female aggression. As everyone agrees, and Miller points out in the first sentence of her book: "It would be foolish to claim that women do not use violence." The debate instead revolves around whether women are as violent as men in relationships, or in the words of the participants: Is there gender symmetry in the use of interpersonal violence? To the uninitiated, this is more than an academic quibble. In the last 10 years, the Violence Against Women Act (VAWA) has distributed some \$2 billion in grants to help end violence against women and hold perpetrators accountable. (See United States Department of Justice's VAWA Web site at <http://www.usdoj.gov/ovw/overview.htm>). If men were as victimized as women, this could signal that researchers and programmers should follow an entirely different approach, could challenge existing political alliances, and cause a paradigm shift in funding. In other words, this has the potential to unravel a 35-year agenda known as the battered women's movement or battered women's shelter movement.

Those who challenge the view that women comprise a relatively small percentage of relational perpetrators range from well-respected, albeit controversial, researchers, such as Donald Dutton who disclaims any intention to defund women's services, to supporters of men's rights groups, some of which have sued shelters for battered women because they exclude men. They argue that hiding women's violence is political correctness run amok that hinders efforts to devise workable approaches to treat both male and female aggression. Those who support the view that women's violence in relationships is primarily a response to male violence are battered women's advocates typically characterized as feminists, though that title suggests a monolithic viewpoint, which I have yet to find. Interestingly, the opponents are not divided by gender; males and females participate in both sides of the dispute. Thus, while not quite as polarized as the pro-choice/pro-life divide, the split is quite real and the participants are separated by differences that are philosophical as well as empirical.

Miller wastes no time in telling us where she stands: on the side of the battered women's movement. A real plus of the book is that she describes each side's position in detail. I appreciated this immensely, since previously, this dispute often

struck me as one in which each side pointed to studies that they alleged backed their position without coming to grips about why the opposing studies were not equally valid. The data come from three sources: studies in family violence, national crime victimization surveys, and "feminist" studies. The family violence research appears to demonstrate mutual combat between husbands and wives based on its conflict tactic scale (CTS), which was revised in light of early criticism, but is still denounced by women's advocates as not effectively measuring contextual factors. The national crime victimization surveys show males are more aggressive than females, and the feminist studies based on samples from battered women's shelters and hospitals show even more gender asymmetry.

What causes such vastly different results? Feminists agree that women resort to violence, but claim it is primarily defensive, or its motivation is not to control their partners but to express emotion or escape violence. The criticisms of CTS include that it does not distinguish aggressive violence from self-defensive or retaliatory violence; it exaggerates the extent of women's violence by excluding injury and sexual assault; it lacks reliability in that men underreport their use of violence, while women underreport their victimization; and it fails to address the role of fear. CTS is also said to reveal four different types of domestic violence patterns, only one of which fits the category that the public thinks of as domestic violence. Thus, relying on undifferentiated CTS data that fail to separate these patterns causes a skewed result.

More global critiques of gender symmetry ask why women are so overrepresented in emergency rooms and morgues. The response to the increasing arrest rate of women for domestic violence, a problem that has come under serious scrutiny, is to compare the homicide rates, which have shown no similar spike based on gender, to the assault rates that have. Thus, women's advocates posit that the higher female arrest rates are caused by changes in arrest policy, not by changes in female criminality. (See, e.g., Darrell Steffensmeier et al., *Gender Gap Trends for Violent Crimes, 1980-2003*, 1 FEMINIST CRIM. 72 (2006) (concluding policy shifts rather than increases in violence have escalated the "arrest proneness" of females for assault).) Women's advocates have long considered more female arrests as an unintended consequence of mandatory arrest policies, since it is often easier to arrest both parties to the dispute than to figure out who was the primary abuser. Indeed, there has

been some suggestion that some batterers have learned how to manipulate the system, and will call 911 to report that they have been abused rather than chance that their victimized partner will complain to the authorities. Miller briefly mentions battering in same sex relationships, but that is clearly not the focus of her analysis.

Miller's book also discusses her three-year research project analyzing domestic violence arrests as well as her observations from attending 12-week female offenders' programs. She finds that women's violence differs significantly from that of men. She notes that increased arrests are in part caused by the criminal justice system being incident driven, rather than contextual. Thus, an officer cannot debrief the relationship when making a quick judgment of who to arrest, and pro-arrest policies make the police more likely to arrest both partners, particularly due to the fear of a civil suit if they guess wrong and the other spouse is later significantly injured or killed. Miller views the increased arrests of battered women as a misapplication of a policy that was intended to benefit them, and calls for arrests of primary aggressors and the adoption of a contextually based framework to evaluate domestic violence arrests. Although she does not totally clarify how context will be considered, I assume that it would involve educating officers and prosecutors about the research on domestic violence. She also questions whether batterers' treatment for female offenders works as intended, particularly because some of the women appear to plead guilty in exchange for probation and treatment without an understanding of the consequences of a conviction, in order to get back to their children or because of their fear of incarceration. Thus, some women in treatment groups may be victims, rather than offenders. Apparently, such groups are very dependent on their leader, which is generally an issue as to their effectiveness. It is clear that further study needs to be undertaken of this phenomenon.

In her discussion of advocacy programs designed to help domestic violence victims, I was encouraged to see Miller recommend that they include all battered women, even those charged with or convicted of crimes. Her rationale is that many of the women arrested are victims, not offenders. I have long argued that battered women who commit crimes related to their battering should be given appropriate victim services and their backgrounds be considered by judges in sen-

tencing. Although Miller focused specifically on cases in which there is a direct link between previous domestic violence and the women's crime, researchers have started to evaluate the indirect impacts of violence and the role of multiple traumas and the cumulative impact of victimization as contributing generally to women's involvement in crime. Indirect effects of victimization include physical injuries, alcohol and drug addiction, internalizing feelings of worthlessness, constricting social networks, losing homes to escape abusive partners, undermining their motivation, impairing their ability to concentrate on school and work, and generally exacerbating their economic marginalization. Ultimately, this "poly-victimization" has ripple effects that push these women out of the mainstream. (See Dana D. DeHart, *Pathways to Prison: Impact of Victimization in the Lives of Incarcerated Women* (Sept. 2004), at www.ncjrs.gov/pdffiles1/nij/grants/208383.pdf.) In my view, this analysis indicates that these women should be treated as victims, as well as offenders.

Given the number of domestic violence cases prosecuted, increasing arrests of women, and the ubiquity of batterers programs that are unclear in content, this book raises a number of issues that are of interest across the spectrum of the criminal justice community.

The Fairer Death: Executing Women in Ohio by Victor L. Streib

(Ohio University Press 2006), 208 pp.; cloth ISBN 0821416936, \$44.95; paper ISBN 0821416944, \$24.95, available online at www.press.uchicago.edu/cgi-bin/sc_add_query.cgi/300/3065

Many of you may know Professor Victor Streib because of his superb work on behalf of the Criminal Justice Section related to the Juvenile Justice and the Ad Hoc Innocence Committees. Others may know him because of the multiple citations to his articles in various Supreme Court cases, but I am sure that a number of you will be surprised to learn that he has another area of specialty: women on death row. For the past 25 years Streib has been keeping track of every woman who has been sentenced to death and executed in the United States, and providing a wealth of information about state and nationwide trends. He continually updates this material, which can be found at <http://www.law.onu.edu/faculty/streib>. Now he has written a thoroughly researched and disquiet-

ing book that provides us with vivid snapshots of the few luckless and until now forgotten women who have broken into the typically all-male death penalty club in Ohio. Although this topic may sound somewhat arcane, the book gives us a window into how the death penalty has been applied over two centuries in Ohio and raises the implicit question of whether gender bias was at work, as well as suggesting the arbitrariness of decisions as to who deserves the death penalty. Moreover, because Ohio is presented as representative of a number of death penalty states, the questions suggested by his portrayals have national significance.

Part I, entitled "A Context of Sex Bias," recognizes that the causes, impacts, and even existence of sex bias in the death penalty is still debated by scholars, but the discrepancy in outcomes for men and women is obvious. Some of the disparity is explained because women do not commit the type of crimes that usually produce death sentences. For example, Streib discusses the domestic homicide discount that makes it rare for the murders of relatives and sexual intimates to result in the death penalty, thereby excluding a high percentage of homicides committed by women. Ironically, advocates on behalf of battered women complain that the domestic discount also ensures that most males who kill their intimates will also escape the death penalty. Statutory factors also have a skewed effect on the death penalty, particularly the offender's previous record of violent crimes, which is likely to be less for women. Duress is another factor that mitigates the sentence for women more than for men. Although Streib suggests that some disparity is unintentional, and based on reasonable factors, assumptions that women who kill are more likely to have been under emotional strain or coerced are examples of bias that are more difficult to support. Whether or not one agrees with his view that gender bias protects most female murderers from execution, his analysis is a significant contribution to the literature.

The second chapter provides a national overview that details how the death penalty is being applied to women nationwide, comparing it to the application for men. The first fact that jumps out from the page is that women account for only 10 percent of murder arrests nationally, so given that not all states have the death penalty and not all murders are capital, disparity is to be

expected. However, even with these caveats, there is a precipitous drop to 2 percent for actual death sentences given to women. Women become even more unusual on death row, where they comprise only 1.4 percent of the population, and ultimately they were only 1.1 percent of those executed since 1973. Streib points out that the practice of executing women is even more atypical now than in previous centuries, but while only one woman was executed from 1973 to 1997, recent executions have returned to their historic rate. Even with the domestic discount, nearly half of the 49 women still on death row killed their intimates, children, or other relatives.

Streib then describes the Ohio death penalty experience before turning to the most gripping part of the book, the personal vignettes of the four women who have been executed in Ohio and the 11 women sentenced to death there in the current death penalty era (1973-2005). It is these biographies—many accompanied by pictures from happier days—that indisputably raise the specter of the arbitrariness of the death penalty, as well as suggesting the inconsistent role played by race, mental disability, coercion, confessions, and trial demeanor in the death penalty decision. If one believes in the death penalty, it is obvious that some of these women committed the types of brutal crimes that justify their sentences. Still others either had very bad judgment, bad luck, or a bad lawyer, such as the woman who refused three plea bargains, the first for 25 years, and the second and third to a life sentence. However, even she escaped death when the U.S. Supreme Court vacated her sentence on the grounds that the Ohio death penalty did not give the sentencing judge a full opportunity to consider mitigating circumstances.

Yet others appear to call out to readers plaintively asking, why me? In fact, Streib notes in closing "it would be difficult to explain why these eleven women were sentenced to death for their crimes while hundreds of other Ohio women who committed murder were not." By the end of the book he accomplishes his stated task of ensuring that the 15 women he describes will no longer be ignored or forgotten. Instead, their stories will haunt those who read them. This book adds the dimension of gender to the existing discussion about the fairness of the death penalty in the United States, and is relevant to everyone who takes part in that debate. ■