

The Space In-between: The Gendered Marginalisation of Women's Custodial Remand

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Introduction

Custodial remand is the period of pre-trial incarceration when an individual carries the presumption of innocence. As such, its use raises distinct issues regarding the proportionality of criminal justice systems; within western democracies the rule of law is dependent upon proportionality of the punishment exerted by courts on their citizen's behalf. Yet, it is a topic often overlooked in ongoing discussions regarding penal reform. Within the broader context of remand imprisonment, is the issue of women's pre-trial incarceration. Women's imprisonment generally is a significant issue within criminal justice. Over 714,000 women are imprisoned globally, with a post-millennium increase of 53% in women's imprisonment rates¹. This is a disproportionate acceleration, with rates for men rising 19.6% over the same period². Women involved with criminal justice have features of vulnerability which feed into their 'offending behaviour'³, and impact their adverse experience of imprisonment⁴, with solutions to women's 'offending' instead found in improved access to community-based support services.⁵ This incongruence between women's increasing imprisonment rates, and the efficacy of custodial responses to their 'offending pathways', creates a 'penal paradox'⁶, the outcome of which is a universal call for the decarceration of vulnerable women.⁷ The custodial remand of women heightens this incongruence, with many women contained by courts for reasons relating to marginality rather than severity of crime.

This paper examines the issue of women's custodial remand in Northern Ireland, contextualised within the broader global arena of remand imprisonment. It addresses a number of concerns arising from remand use: first dismantling practitioner and policy frameworks of 'women's offending pathways'; second examining processes of criminalisation arising at the interface of social care, mental health and addiction issues with criminal justice policing; and third, exploring the gendered pains of remand imprisonment. This high-lights remanded women's relegation to a 'space in-between' in a prison system conceived, designed and implemented for first, men, and second, sentenced prisoners. Finally, this paper signposts future actions to respond to these concerns: diversions of women from criminal justice pathways at the point of policing and court decision-making; recognition of women's hierarchy of needs regarding gender and trauma responsive prison environments; continued and united mobilisation of calls for the decarceration of women.

The extent and implementation of custodial remand

Pre-trial custody has been conceived as both a 'cause for concern'⁸ and 'a travesty of justice'⁹, with rates of remand imprisonment raising doubts regarding the need and justification for pre-trial custody at the existing scale. The excessive global use of pre-trial detention results in remand to custody of an estimated 14,000,000 people annually, with frequent violations of the presumption of innocence in a court of law, raising human rights abuse issues¹⁰. Bail

can be denied to a defendant under a number of exempting circumstances, including: risks of reoffending, tampering with witnesses or failing to surrender to the court; insufficient information for bail decision-making or necessity to complete inquiries; restrictions relating to category of offence, offending on bail; and including remand of non-imprisonable offences when court considers defendants requires custody for their own welfare¹¹. Decisions to invoke exemptions is impacted by criteria relating to the seriousness of offence, previous history of bail conditions compliance, strength of evidence, and defendant's social background, including 'character, antecedents, associations and community ties'¹².

The decision to impose remand or grant bail is a significant aspect of criminal court procedures¹³, with legal, social and psychological impact arising from deprivation of an individual's liberty prior to trial¹⁴. While remand imprisonment is a precaution rather than a punishment¹⁵, the often 'punishing and stressful experience' of remand imprisonment presents a contradiction between its non-punitive concept, and the lived experiences of remanded prisoners¹⁶. In fact, the deduction of time remanded from custodial sentences, exhibits 'exact equivalence' of penal value¹⁷. There are tensions between custodial remand goals of defendant welfare, maintenance of justice system integrity, and community protection¹⁸ with decisions about who is remanded and who is bailed impacted by poverty, marginalisation and accompanied by 'increasingly stringent and onerous conditions'¹⁹. Unlike sentenced prisoners who receive discharge payments, remanded prisoners receive no financial help post-release, and those acquitted receive no financial recompense²⁰. The remand population is likely to experience pre-incarceration social deprivation, homelessness, mental health issues and/or drug and alcohol addictions²¹, often remanded for mental incapacity testing and protection from self-harming behaviours²² with many women remanded to custody for offences 'that neither merit, nor require a custodial sentence'²³.

These issues raise questions regarding the proportionality exerted by criminal justice systems towards remanded women, with 60% of those remanded in magistrate's courts, and 41% of those remanded in crown courts, failing to receive a custodial sentence²⁴ evidencing propensity to remand women to custody regardless of the severity of crime. This highlights issues regarding the consideration and assessment of women's bail options²⁵ alongside the proportionality of punishment exerted towards women by the courts²⁶.

In Northern Ireland, women's imprisonment almost trebled between 2004-2014. While daily imprisonment rates of women dropped from the peak of 67 women in 2014, to an average of 54 women in 2016²⁷, these figures mask an increase in the annual number of receptions to Ash House which have risen from 317 women in 2014 to 413 women in 2016²⁸. An element of this rise is the increase in female remanded receptions, which increased by 51 women from 2015-2016²⁹. Remanded women still form the majority of those who 'churn' through the revolving door of the prison estate, making up 57% of women imprisoned annually³⁰. As the following sections discuss, a number of concerns emerge during interrogation of this phenomenon, relating to *which* women end up remanded to custody, *how* this process occurs, and *what* their experience of custody is once there.

Dismantling women's offending pathways

Women imprisoned share several pre-incarceration commonalities, known as 'offending pathways', entailing multiple factors of vulnerability, victimisation, marginality and social exclusion, which should be addressed to reduce 'risk' of offending/reoffending. Despite recognition of women's 'victimhood' through this approach, their position as 'deviant lawbreakers' is given primacy through discourses centralising 'offenders', 'offending behaviour' and 'offending pathways'. This institutional victim-blaming can be dissected using a lens of intersectionality,³¹ which high-lights the position of intersecting structural oppressions in the exclusion, marginalisation and eventual criminalisation of remanded women. Women in Northern Ireland experience a unique matrix of oppressions: the intersection of structural harm relating to gender, class, race, disability, sexual orientation and gender identity, in line with other regions, but also through additional oppressions arising from the Conflict,

persisting paramilitarism, and the manifestation of gender in a society underpinned by overlapping frameworks of sectarianism and the twin engines of conservative Christian patriarchy.

These intersecting factors result in veins of trauma, gender-based violence and loss running through marginalised women's lives from childhood into adulthood. An outcome of these harms is the negative impact on mental health and ensuing patterns of addiction, alcoholism, self-harm and suicidal ideation. These 'negative coping mechanisms' result in many women rotating along a continuum of marginal spaces: children's home; juvenile detention; psychiatric institutions; women's aid shelters; drug and alcohol units; homeless hostels; prisons. What often occurs then, is the reinterpretation of the harms marginalised women experience, and the needs those harms produce, as 'risks' demanding responding punishment and control. This reinterpretation of marginalisation feeds into judicial decision-making as women's conflated needs/risks are seen to necessitate containment in custody. For many remanded women, prison is used as a site of safety: for psychiatric assessment, mental health transfers, social work assessments and preparation of social care supports or to give women a respite from their addictions and 'chaotic lives'. Dismantling 'offending pathways' allows examination of the structural production of these routes, providing a counter discourse to existing narratives framing vulnerable women as deserving of punishment.

Criminalisation of vulnerability

While many women are remanded for reasons outside of severity of crime, related to 'no fixed abode', 'chaotic' lifestyle, 'risk' to self and psychiatric assessment, for some 'pathways' are interrelated with the severity of crime. For these women, their lives are interspersed with incidents of crisis which result in public disorder issues, and ensuing escalation of behaviour via an interface with criminal justice agents as the response. This leads to criminalisation and co-produced imprisonability as a direct outcome of criminal justice policing of the problem posed. This process occurs at policing interface with those marginalised through alcoholism, substance abuse and homelessness and/or those with mental health issues and learning disabilities, including suicidal and self-harming crises. As women reported: *'I'm in now for breaching the peace, assault on one policeman and attempted criminal damage of their wing mirror'; 'assaults against the police, resisting arrest, and criminal damage to police cars.'* Rather than de-escalating women's 'disorder' associated with drinking, their resistance to police intervention produced multiple charges. Women were also arrested in the context of their suicidal ideation and attempts to take their lives, with police response to women's mental health crisis escalating the event. As women outlined: *'Two men pulled me down [off the bridge] and phoned the police... when I was coming over the bridge onto the pavement, my leg accidentally touched one of the officers and she said 'Assault!'; 'I was knocking things over and I had a razor and I was cutting my face and my arms... the police lifted me. I was charged with threat to kill, attempted choking and criminal damage.'* In some cases, women were remanded until psychiatric assessment could be carried out, in others, mental health issues were demoted to give primacy to alcohol or drug use, and women faced charges relating to the escalation that had occurred in that context.

The pains of remand imprisonment

Once remanded women enter the prison, they experience multiple layers of the 'pains of imprisonment'³², including the pains of remand³³, additional pains related to gender³⁴, and the gendered experience of custodial remand³⁵. Remanded women endure a painful experience of prison, as an outcome of disproportionate vulnerability imported into the prison, and the restricted environment they can endure. The entry period entails stresses including adaptation to prison and proximity to the event that led to their committal - especially those women remanded in relation to mental health crisis, drug overdose and suicide attempts. Remanded women could experience long periods of entry lock-up alongside their imported addiction and mental health needs. For those women residing in the setting for longer than a week, the differentiation between their status and that of sentenced prisoners were intangible, as they were absorbed into the 'secure college' rehabilitative regime. This regime designed for first,

young men, and second, sentenced prisoners, was not appropriate for responding to remanded women's distinct needs.

Not only did remanded women continue to endure a prison within a prison,³⁶ their imprisonment shaped entirely by young males with whom they shared the prison complex, they were also marginalised within a women's rehabilitative regime which was not responsive to their specific needs. Despite the Prison Review Team recommendation for a smaller, discrete therapeutic framework for women³⁷, in recognition of their gender-specific vulnerabilities, women receive an education and work based rehabilitative model, which fails to give primacy to their hierarchy of needs³⁸. While remanded women's basic psychological, physiological and safety needs are unmet in the community, education and self-actualisation are not their most crucial needs. An education and work based model decreases the space for more gender-responsive alternatives and leaves deficits in the needs-focused support remandees should/could experience. Often remanded for reasons of marginality and vulnerability related 'risk', the remand regime in fact layers further pains upon already harmed women.

What are the consequences of these issues?

- As a consequence of these processes, too many women are being sent to prison unnecessarily. Many remanded women exist in a 'space in-between', surviving on a 'continuum of marginality' that extends from their social environment before prison, through their remand regime in the prison, and extending to their post-release conditions.
- The hyper-policing women experience upon this continuum consolidates their marginalisation, working to criminalise women, and co-producing their imprisonability. Perceptions of women's 'risk' can see them remanded to custody for containment, safety, and as an outcome of failure to explore or enact expedient bail supports and alternatives.
- Once in prison, the punitive 'pains' of remand imprisonment raise questions about the proportionality of criminal justice responses vulnerable women receive. In the absence of severity of crime, incarceration is not the most appropriate response to marginalised women and highlights disproportionate application of criminal justice penalty.
- Consequences arise for prisons, with custodial staff often under-equipped to deal with the remand populations issues of complex psychosocial need, putting additional pressure on stretched prison regimes.
- On release, remanded women do not receive discharge grants, and can be released from court with no possessions, and no way to access support. In fact, the collateral damage exerted by custodial remand can see women released to reduced circumstances, their 'criminogenity' enhanced rather than diminished.

How can we respond to these concerns?

- **Diversion from the point of policing**

Alternative responses to women in alcohol, drug and mental health crisis are needed. 'Justice divestment' and 'problem solving justice' initiatives are to be welcomed, as are 'street triage' and 'crisis de-escalation' pilot services. It is essential that not only justice partnerships are developed, but also non-criminal justice centred, community based, multi-disciplinary models for responding to people in crisis.

- **Diversion from the point of court**

Developed mechanisms could enhance the consideration and assessment of women's bail options during remand decision-making, including development of partnerships to produce gender-specific bail support systems. 'Problem solving' court pilots are welcomed but should ensure emphasis on the processes and

mechanisms necessary to divert women from custodial remand. Gender responsive hostels should be developed as a matter of urgency, to reduce custodial remand related to homelessness, or the negative issues arising from existing mixed hostel provision.

- **Therapeutic Environment**

In the absence of decarceration, a therapeutic community prison model should be developed that recognises the hierarchy of women's needs relating to safety; physiological and psychological need; addiction needs; and trauma responsiveness. It should also contain a framework for enhanced restorative practice.

- **Remand regime**

The distinction between remand and sentenced prisoners must be explicit, in recognition of the distinct needs and heightened vulnerability remand populations raise. Remand prisoners should not experience the most confining and debilitating prison regime, instead being afforded conditions corresponding to their 'presumed innocent' status.

- **Decarceration**

Alternatives to custodial remand would significantly reduce the number of women incarcerated, working towards wider aspirations of women's decarceration. This is a project that requires the support, advocacy and partnership of criminal justice practitioners, as experts and providers of insider knowledge, alongside practitioners and advocates who witness the existing harms of custodial remand.

¹ Walmsley, R., 2017. *World Female Imprisonment List. Fourth Edition.* London: International Centre for Prison Studies.

² ibid

³ Gelsthorpe, L. and Morris, A., 2002. Women's imprisonment in England and Wales: A penal paradox. *Criminal Justice*, 2(3), pp.277-301; Corston, B.J. (2007) *The Corston Report: A Report of a Review of Women with Particular Vulnerabilities in the Criminal Justice System*; Department of Justice (DOJNI) (2010) *Women's Offending Behaviour in Northern Ireland: A Strategy to Manage Women Offenders and those Vulnerable to Offending Behaviour 2010 – 2013*, Belfast: DOJ.

⁴ Carlen, P. (1983) *Women's imprisonment: A study in social control*, Routledge & Kegan Paul London; Scraton, P. and Moore, L., 2005. *The Hurt Inside*. Belfast: Northern Ireland Human Rights Commission; Scraton, P., Moore, L., 2007. *The Prison Within: the Imprisonment of Women at HBW 2004-06*. Belfast: Northern Ireland Human Rights Commission; Walker, S., and Worrall, A., 2006. *Life as a Woman: The Gendered Pains of Indeterminate Imprisonment*. In Y. Jewkes and H. Johnston, eds., *Prison Readings: A Critical Introduction to Prisons and Imprisonment*. Cullompton: Willan Publishing

⁵ Prison Reform Trust, 2017a. *Why focus on reducing women's imprisonment?* London: Prison Reform Trust.

⁶ Gelsthorpe and Morris (n3) 277.

⁷ Corston (n3); Women in Prison, 2017a. *The Corston Report 10 Years On*. London: Women in Prison; Women in Prison, 2017b. *Women, Criminal Justice and Turning Lives Around. Briefing for 2020 Supporters*. London: Women in Prison; Prison Reform Trust, 2017a. *Why focus on reducing women's imprisonment?* London: Prison Reform Trust; Prison Reform Trust, 2017b. *Bromley Briefings Prison Factfile Autumn 2017*. London: Prison Reform Trust.

⁸ Ashworth, A. (2010) *Sentencing and Criminal Justice*, Cambridge: Cambridge University Press.p311

⁹ ibid (Lord Woolf)

¹⁰ Schönsteich, M., 2014. *Presumption of guilt: The global overuse of pretrial detention*. Open Society Foundations.

¹¹ Dell, S. (1977) 'The Bail Act 1976', *The British Journal of Criminology*, 17(2), pp. 185-188.

¹² Player, E., Roberts, J., Jacobson, J., Hough, M. And Robottom, J., 2010. Remanded in custody: an analysis of recent trends in England and Wales. *The Howard Journal of Criminal Justice*, 49(3), pp. 231-251.

¹³ Kellough, G. and Wortley, S., 2002. Remand for plea. Bail decisions and plea bargaining as commensurate decisions. *British Journal of Criminology*, 42(1), pp.186-210.

¹⁴ Freeman, S., and Seymour, M. 2010. "Just Waiting": The Nature and Effect of Uncertainty on Young People in Remand Custody in Ireland', *Youth Justice*, 10(2), pp. 126-142.

¹⁵ Sarre, R., King, S., & Bamford, D. (2006). *Remand in custody: critical factors and key issues*. Australian Institute of Criminology.

¹⁶ Freeman, S. 2009. *Surviving on remand: a study of how young people cope in remand custody in Ireland*. (Doctoral dissertation, Dublin Institute of Criminology)

¹⁷ Player, E., 2007. Remanding women in custody: Concerns for human rights. *The Modern Law Review*, 70(3), pp. 402-426.

¹⁸ Sarre, King and Bamford (n15).

¹⁹ Schonteich (n10) 38.

²⁰ Prison Reform Trust (n7).

²¹ Birmingham, L., Mason, D., & Grubin, D. (1996) 'Prevalence of mental disorder in remand prisoners: consecutive case study', *BMJ*, 313(7071), pp. 1521-1524; Mason, D., Birmingham, L., & Grubin, D., 1997. Substance use in remand prisoners: a consecutive case study. *British Medical Journal*, 315(7099), 18-21; Seymour, M.A. And Butler, M., 2008. *Young people on remand*. Dublin: The Stationery Office; Freeman (n16); Freeman and Seymour (n14).

²² Player (n17) 420.

²³ Pattinson, T., 2017. Prison as a place of safety for women with complex mental health needs. *The Griffins Society*.

²⁴ Prison Reform Trust, 2018. *Prison: the facts. Bromley Briefings Summer 2018*. London: Prison Reform Trust.

²⁵ Player et al. (n12) 239.

²⁶ Player (n17); Ashworth (n8).

²⁷ DOJNI 2017a. *The Northern Ireland Prison Population 2016 and 2016/17*. Belfast: DOJNI

²⁸ DOJNI 2017b. *Prison Population Data Tables 2016-17*. Belfast: DOJNI.

²⁹ Crone, E. (2017) *The Northern Ireland Prison Population 2016 and 2016/17. Research and Statistical Bulletin 27/2017*, Belfast: DOJNI

³⁰ DOJNI (n29).

³¹ Crenshaw, K.W. (1991) 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour', *Stanford law review*, 43(6), pp. 1241-1299.

³² Sykes, G., 1958. *The Pains of Imprisonment. The Society of Captives: A Study of a Maximum Security Prison*, pp.63-78; Goffman, E., 1961. *Asylum*. New York: Garden City; Boyle, J., (1984) *The Pain of Confinement: Prison Diaries*. Dufour Editions.

³³ Gibbs, J.J., 1982. The first cut is the deepest: Psychological breakdown and survival in the detention setting. *The pains of imprisonment*, pp. 97-114. Beverly Hills: Sage; Harvey, J., 2005. Crossing the boundary: the transition of young adults into prison. In Liebling, A., and Maruna, S., (eds.) *The effects of imprisonment*, pp. 232-255; Freeman (n16).

³⁴ Carlen (n4); Scraton and Moore (n4)

³⁵ Player (n17); O'Neill, J., 2016. Time after Time: A study of women's transitions from custody. London: *The Griffins Society*.

³⁶ Scraton and Moore (n4)

³⁷ Owers, A., Leighton, P., McGrory, C., McNeill, F. And Wheatley, P., 2011. *Review of the Northern Ireland Prison Service. Conditions, Management and Oversight of all Prisons*. Belfast: Prison Review Team.

³⁸ Maslow, A. H. (1943). A theory of human motivation. *Psychological Review*, 50(4), 370-396.

NB. Maslow's Hierarchy of Needs is a theory which suggests a five tier model of human needs. This pyramid model recognises the primacy of physiological needs, followed by safety, love and belonging, esteem and self-actualisation.