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Sentencing Women, Silencing Care: The Best Interests of the Child and the Need for a Feminist Sentencing Framework

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Abstract

This article explores the need for a gender-sensitive approach to sentencing women – particularly mothers – who are in conflict with the law. Focusing on the sentencing frameworks of South Africa and Australia, two common law jurisdictions, it examines whether caregiving responsibilities are adequately recognised as a mitigating factor during sentencing. In both jurisdictions, socio-economic conditions and gendered caregiving roles are often overlooked, to the detriment of vulnerable women. The research questions whether existing sentencing principles reflect women's lived realities or remain shaped by patriarchal norms. Grounded in international and regional standards, this article proposes practical guidelines to ensure that caregiving responsibilities are meaningfully considered in sentencing decisions.

Keywords: Primary caregiver; sentencing; substantive equality; family hardship; Aboriginal women; best interests of the child.

Introduction

Imprisonment is a standard sentence in most common law jurisdictions, which affects not only the offender but also their dependants. This impact is particularly severe when mothers are incarcerated, as women are often the primary caregivers of children, leading to profound consequences for both their own lives and those of their children (Sheehan & Flynn, 2007). This article examines the need for a gender-sensitive approach to sentencing mothers, to ensure the social and caregiving roles typically fulfilled by women are meaningfully considered during the sentencing process. It critically questions whether the foundational sentencing principles of equality and proportionality incorporate a female perspective, or whether they remain entrenched in patriarchal values that have historically influenced and continue to influence the criminal justice system. To this extent, the sentencing frameworks of South Africa and Australia,[1] two common law countries, are examined to assess the extent to which caregiving responsibilities are recognised as a mitigating factor during sentencing and to question whether such a consideration should be mandatory.

South Africa is often heralded for its progressive constitutional framework and its clear judicial recognition of the best interests of children in the context of sentencing caregivers (Millar & Dandurand, 2018). However, despite this progressive framework, the application of this standard has been ambiguous. Sentencing practices and the imprisonment of women in both jurisdictions reveal a lack of judicial awareness of the contextual realities of caregiving, which are deeply rooted in the socio-economic conditions of these countries. This lack of consideration disproportionally impacts the most vulnerable women, underscoring the need for a sentencing framework that is responsive to their lived realities.

The analysis is grounded in international and regional frameworks that prioritise the best interests of children in all decisions affecting them and recognise the need for gender-responsive sentencing. The sentencing frameworks of South Africa and Australia are examined with particular attention to how the status of being a primary caregiver is considered in sentencing decisions. This discussion is followed by an exploration of the contextual realities of caregiving in each jurisdiction, highlighting the need for a feminist approach to sentencing outcomes. We conclude that women's caregiving responsibilities, together with the best interests of the child, should be recognised as a relevant mitigating factor in the sentencing of women who come into conflict with the law. This discussion offers practical guidelines for effectively implementing such considerations within the criminal justice systems of these countries. We have endeavoured to explore these jurisdictions for their shared history of colonialism; the discrimination towards and oppression of Indigenous peoples in their respective criminal justice systems; and the patriarchal application of the common law and statute to the sentencing of women as primary caregivers.

International Framework

Several international and regional norms and standards require criminal courts to consider children's best interests in all decisions affecting them, including sentencing parents and primary caregivers. Article 3(1) of the United Nations Convention on the Rights of the Child (1989) (CRC) provides that the best interest of the child shall be a primary consideration in all matters that affect the child, and article 4(1) of the African Charter on the Rights and Welfare of the Child (1990) (ACRWC) requires that in all actions concerning the child, the best interests of the child shall be the primary consideration. This means the child's best interests should be considered when any parent faces the possibility of incarceration.

The CRC recognises the family as a vital component of a child's life, with its Preamble affirming the family unit as a fundamental part of society. Similarly, the Preamble of the ACRWC acknowledges the child's unique and privileged position in African society and emphasises the importance of growing up in a happy and loving family environment. Article 9(1) of the CRC further obliges state parties to ensure that children are not separated from their parents unless competent authorities determine that such separation is necessary in the child's best interests – for instance, in cases of abuse or neglect. Article 9, sections (2) and (3) also require that all parties to such proceedings be given the opportunity to participate, and that the child's right to maintain personal relations and direct contact with both parents is upheld, unless this is contrary to the child's best interests.

Article 5 of the CRC calls on state parties to respect the responsibilities, rights and obligations of parents, extended family members or the wider community to provide appropriate direction and guidance to the child in the exercise of their rights, in accordance with the child's evolving capacities. As such, children have the right to receive this guidance from their parents to meaningfully exercise the rights afforded to them under the CRC (Tobin & Varadan, 2019). When a parent or primary caregiver is incarcerated, they are unable to fulfil these responsibilities, thereby hindering their ability to provide the direction and support required under Article 5.

Article 12 of the CRC further affirms the child's right to be heard in all matters affecting them, provided they are capable of forming their own views, with due weight given in accordance with their age and maturity. Indeed, article 12 has emerged as one of the most influential provisions of the Convention in both international and domestic law (Lundy et al., 2019). Accordingly, sentencing courts must, where practical and in the child's best interest, seek the views of children affected by their decisions, particularly when they can offer meaningful input regarding their preferred living arrangements.

Article 30(1) of the ACRWC expressly provides for the special treatment of pregnant women and mothers of infants and young children who are accused or convicted of a criminal offence. Notably, Article 30(1)(a) emphasises that non-custodial sentences should be the first consideration when sentencing pregnant women and mothers of young children. The United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules) encourage states to develop gender-responsive sentencing alternatives for women. These rules urge the courts to consider mitigating factors such as the absence of a criminal history, the nature of the offence, caregiving responsibilities and personal background when determining an appropriate sentence (Rule 61; Millar & Dandurand, 2018, p. 247).

Although Australia was one of the first states to ratify the CRC upon its entry into force in 1990, it has not been incorporated into domestic law. Australia is therefore a dualist state in which international law runs concurrently with domestic law (Tobin, 2021). Unless Australia incorporates the CRC into domestic legislation, the courts cannot enforce its provisions. In contrast, South Africa, which ratified the CRC and the ACRWC, has incorporated the provisions of both treaties into domestic legislation through its comprehensive and progressive Bill of Rights in Chapter 2 of the South African Constitution (1996). Section 28(1) lists substantive rights, based on the rights provided for in the CRC, enforceable under the law, while section 28(2) contains

the best interests of the child clause. The inclusion of section 28 in the Bill of Rights therefore constitutionalised children's rights and, according to some legal scholars, has propelled South Africa from a dualist state to a monist state as far as children's rights are concerned (Sloth-Nielsen & Kruuse, 2013).

The international framework clearly highlights the need to consider the best interests of the child and the importance of the family unit when sentencing parents and primary caregivers. The question arises of whether this progressive framework is reflected in the domestic legal systems of South Africa and Australia, and to what extent the best interests of children and their caregivers are considered during sentencing.

Sentencing Primary Caregivers and the Context of Care

Sentencing in South Africa

Aligned with South Africa's common law heritage, judicial officers have broad discretion in determining an appropriate sentence. This discretion is guided by established precedent and rooted in South Africa's sentencing framework, the principles set out in *S v Zinn* (1969), which require the crime, the offender and the interests of society to be considered during sentencing (known as the *Zinn* triad). In addition to the triad, South African sentencing courts often refer to the principles of punishment when considering appropriate sentences with reference to deterrence, retribution, incapacitation and rehabilitation (Terblanche, 2020).

The South African sentencing framework is further impacted by minimum sentencing legislation, which prescribes minimum sentences for specific offences (*Criminal Law Amendment Act 105 of 1997*). Sentencing courts can depart from these prescribed sentences and impose a lesser sentence if 'substantial and compelling circumstances' exist (Section 51(3)(*a*)).

In sentencing primary caregivers, the South African Constitutional Court's judgment in *S v M* (2008) is widely praised for its child-centred approach, which prioritises the best interest of the child in the sentencing process (Lauwereys, 2020; Skelton, 2008). In this case, the Constitutional Court had to determine the appropriateness of a custodial sentence for a fraud conviction, given that the accused was the primary caregiver of her three minor children (para 2). The Court provided guidelines for sentencing a primary caregiver, emphasising the need to consider the impact of a custodial sentence on children and whether they would receive adequate care during the primary caregiver's imprisonment (para 36). Most importantly, the Constitutional Court affirmed that, regardless of the sentence imposed, the best interests of children must remain paramount when sentencing a primary caregiver. The Court emphasised that this consideration does not shield parents from accountability but rather ensures the well-being of children affected by punishment. Accordingly, in balancing the competing rights of the state to punish criminal conduct and its obligation to maintain family care, a court must sentence an offender – even if they are a primary caregiver – to prison if, in terms of the application of the *Zinn* triad, a custodial sentence is deemed appropriate. The best interests of the children will be considered as an independent factor during sentencing only if there is more than one appropriate sentence, one of which is non-custodial (paras 38–39). Applying these guidelines, the Court overturned the initial custodial sentence, determining that the best interests of the children required them to remain in their mother's care (para 77).

Shortly after the *S v M* judgment, a subsequent Constitutional Court decision narrowed its application by restricting the consideration of children's best interests in sentencing cases to sole primary caregivers (*MS v S*, 2011). Despite nearly identical factual circumstances, the Court in *MS v S* held that the availability of alternative family care, specifically the children's father, ensured their well-being during the mother's incarceration, thereby justifying the imposition of a custodial sentence (para 63). The judgment has led courts to often limit the consideration of the child's best interest in sentencing primary caregivers to cases where no alternative care is available (Lauwereys, 2020, p. 161). In essence, if another person can house the children during the parent's incarceration, this is often deemed sufficient, and the children's best interests are deemed to be adequately addressed.

Although the Constitutional Court in *Bannatyne v Bannat*yne (2003) recognised the gendered nature of caregiving in the context of enforcing maintenance orders, its interpretation in *MS v S* reflects no such sensitivity and reveals little understanding of the complex realities of caregiving. Kathleen Daly (2002, p. 66) observed that while traditional courthouse justice operates within the abstractions of criminal law, it must also engage with the complex realities of people's lives, requiring a nuanced consideration of context and relationships. Erica Kane and Shona Minson (2022) argue that the imprisonment of women with caregiving responsibilities inflicts additional harm, leading to heightened stress, mental illness and a loss of familial connection that extends beyond their custodial sentence, requiring them to renegotiate motherhood upon their release.

Should the context of caregiving be considered in sentencing, and to what extent should caregiving responsibilities influence sentencing decisions? It is argued that judicial officers should systematically consider the impact of incarceration on dependent children when sentencing a sole parent or primary caregiver (Flynn et al., 2016; Millar & Dandurand, 2018).

Gabriel Silveira de Queiros Campos and Elda Coelho de Azevedo Bussinguer (2023) argue that principles of equality and proportionality should be theorised from a female standpoint, recognising that sentences may be applied differently to different individuals to account for the disproportionate impact of criminal justice on women. This is particularly relevant in the sentencing of women who are the primary caregivers of children. The provision of primary care to children is highly gendered, with women predominantly serving as primary caregivers. Consequently, women's imprisonment has a far greater impact on children's lives than the imprisonment of men/fathers (Hatch & Posel, 2018).

Context of Care in South Africa

Understanding care in South Africa and elsewhere requires an understanding of the socio-economic conditions in which caregivers, particularly women, provide care and are expected to do so. Nolwazi Mkhwanazi et al. (2018, p. 70) note that the formation and composition of South African families are not simply a logical outcome of biological reproduction or marriage, but are influenced by historical and social processes. Poverty plays a significant role in shaping household composition, with co-residency patterns between children and parents reflecting broader socio-economic disparities (Waterhouse & Bennett, 2024). Among these disparities, race remains the most significant determinant in the distribution of poverty (Bonthuys et al., 2023, p. 17).

Most Black African children in South Africa do not grow up in two-parent households, and where they do live with a parent, it is mostly with a mother (Hatch & Posel, 2018). This can partly be attributed to the continued impact of Apartheid's migrant labour system, which prohibited Black African men from relocating with their families to the urban centres where they worked (Posel et al., 2023). Today, persistently high unemployment rates further reinforce patterns of migratory labour, perpetuating family separation and socio-economic instability (Hatch & Posel, 2018). Statistics reveal that Black African women are particularly likely to live in women-headed households and are more likely to be poor, unemployed and have lower educational levels than other women and men (Bonthuys et al., 2023, p. 17).

Children who live without either parent are predominantly cared for by other women, particularly grandmothers, whose lives are significantly impacted by this responsibility (Hatch, 2024; Waterhouse & Bennett, 2024). It affects their physical and emotional well-being, increases financial strain and imposes substantial logistical constraints (Muruthi et al., 2020). Increased financial pressures on families – especially those headed by older women – create considerable stress, potentially contributing to harsh and inconsistent behaviours by carers (Sheehan & Flynn, 2007). Research indicates that women-only and neither-parent households in South Africa are highly dependent on government grants for survival (Posel et al., 2023; Waterhouse & Bennett, 2023). Old age and child support grants, implemented by the South African government to address high unemployment and poverty levels, contribute significantly to household income.[2] However, their minimal value does little to lift dependents out of poverty, especially when they serve as the household's sole source of income, as is often the case (Goldblatt, 2014; Posel et al., 2023). Male-dominated households are more protected from poverty, which can be ascribed to greater access to employment and the absence of dependants (primarily children) (Posel et al., 2023).

Sentencing in Australia

Like South Africa, Australian sentencing law is a blend of common law and statute. The Commonwealth of Australia comprises six autonomous states and two self-governing territories. Each state and territory has a statutory sentencing framework that, together with the common law, determines sentencing outcomes for criminal offences before the courts.[3] Furthermore, sentencing is based on specific objectives or guideposts, such as just punishment, community protection, general and specific deterrence, rehabilitation and denunciation (Bagaric, 2019, p. 156; Walsh & Douglas, 2016). Added to these objectives is the principle of proportionality, which in essence requires that the punishment be commensurate with the seriousness of the crime and with what is objectively necessary to achieve the objectives set out above (Bagaric, 2019).

Similar to the wide discretion in sentencing available to South African judicial officers, Australian sentencing courts are also afforded significant leeway in considering various factors when determining an appropriate sentence. In the past, these factors included the offender's advanced age, ill-health, severe disability and terminal illness (Walsh & Douglas, 2016). In addition, the common law allows courts to consider aggravating and mitigating factors when passing a sentence.

Unlike South Africa, Australia does not explicitly consider primary caregiver status as a relevant consideration in sentencing. However, caregiving responsibilities may be considered a mitigating factor under the broader category of family hardship. In

R v Constant (2016), the South Australian Court of Appeal explained that the test for family hardship is hardship experienced by the offender's family, which would constitute *more than that which would be necessary* to secure "the community's welfare and protection" by enforcing the criminal sanction passed by the court (para 67). Furthermore, the Victorian Supreme Court of Appeal in *Markovic v The Queen* (2010) (*Markovic*) held that for family hardship to serve as a mitigating factor, the common law test for exceptional circumstances must be applied and that, unless the circumstances under consideration appear to be exceptional, family hardship cannot be considered a mitigating factor (para 3).

Notably, factors that lead to the findings of exceptional circumstances include a lack of an alternative carer for a child other than state care and where the offender has care responsibilities for a child with a serious illness or disability (Walsh & Douglas, 2016). However, pregnant women and breastfeeding mothers are generally not considered exceptional circumstances (*R v O'Dea* (2002)). Tamara Walsh and Heather Douglas (2016) report that in some Australian cases where the offender does not meet the strict rules of the "exceptional circumstances" test, the adverse effect of a harsh sentence on the offender's dependent children can still encourage the courts to show some measure of leniency under the court's "residual mercy discretion" (see, for example, *R v Carmody* (1998)). The concept of mercy is derived from the English common law; it is a Biblical concept that "is understood as deriving from God's pitying forbearance towards his creatures and his willingness to forgive their offences" (Fox, 1999, p. 4). However, the Victorian Court of Appeal stated that the traditional common law approach treats family hardship as raising a question of mercy and therefore is not a factor to be considered in addition to family hardship (*Markovic*, paras 12–15*)*.

The family hardship principle for mitigating the severity of a sentence is also found in statute in two jurisdictions: The Commonwealth and the Australian Capital Territory (ACT). In the ACT, section 33(1)(o) of the *Crimes (Sentencing) Act 2005* states that when deciding on the severity of a sentence for an offender, the sentencing court must consider "the probable effect that any sentence or order under consideration would have on any of the offender's family or dependants." Similarly, when dealing with federal offences, section 16A(2)(p) of the *Crimes Act 1914* states that:

> in addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court [such as] the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.

Broadly considered, the courts have generally interpreted these provisions along the same lines as the common law principle that requires exceptional circumstances before a court considers family hardship as a mitigating factor warranting a sentence reduction (Millar & Dandurand, 2018).

In line with the South African Constitutional Court's position, family hardship does not shield individuals from accountability, but may be considered a mitigating factor in sentencing, albeit only under exceptional circumstances. In addition, a promising feature in Australia is that, following the South African example, some courts are willing to consider the child's best interests (Walsh & Douglas, 2016). This approach appears to lower the requirements of the exceptional circumstances test by focusing on the vulnerabilities of the child as a significant factor (Larsen, 2015).

Despite this, Australian sentencing courts pay little attention to the impact of criminal justice decisions on dependent children of parents in conflict with the law (Millar & Dandurand, 2018; Flynn et al., 2016). Concerningly, authorities often disregard prisoners' parenting responsibilities during arrest and incarceration (Flynn et al., 2016; Healy et al., 2001). It is argued that prisoners are seen only as individuals throughout the process of arrest, sentencing and incarceration, with no regard for any parenting role they may have (Flynn et al., 2016). In their whole population-based longitudinal study, Helen Meyers et al. (2017) point out that, "There is often a lack of recognition of the unique needs of women prisoners and their families, especially relating to their parenting role, within existing prison policies" (p. 2).

Context of Care in Australia

In examining the context of caregiving in Australian families, the 2024 *Uniting Families Report* highlights significant diversity in family structures (Naidoo et al., 2024). The report found that 69 per cent of Australian children live in couple-parent families, whereas over 30 per cent reside in single-parent households, step-families and/or blended families, multigenerational arrangements, foster care or other kinship-based settings. In contrast, only one in three Aboriginal families comprises couple-parent households. The report also reveals persistent gendered patterns of care. Sixty-five per cent of women reported doing more than their fair share of child-rearing and 75 per cent of single mothers indicated that they bear the primary responsibility for raising their children. Women in Australia, much like in South Africa and many other parts of the world, are often the primary caregivers of children.

Overall, Australian and South African women bear the primary responsibility for childcare, playing a crucial role in children's lives before incarceration (Parry, 2021, p. 276). Consequently, when women are imprisoned, it profoundly affects both the children for whom they care and their own lives, particularly in relation to their caregiving roles.

Research indicates that the female prison population is increasing at a significant rate. Globally, in the first decade of this century, female incarceration rates increased by 16 per cent (Meyers et al., 2017). Over the same period, Australian female incarceration rates also increased markedly, from 19.8 per 100,000 in 2001 to 24.7 in 2012, with 2010 recording the highest number of 25.5 per 100,000 (Jeffries & Newbold, 2016). At the lowest incarceration rate in 2002, female prisoners comprised only 7 per cent of the total prison population (Jeffries & Newbold, 2016).

In the Australian context, Aboriginal women constitute the fastest-growing cohort in the Australian prison system (Australian Law Reform Commission, 2017; Deadly Connections, 2020; Jeffries & Newbold, 2016; MacGillivray & Baldry, 2015). It is suggested that, "Women's prisons in both Australia and New Zealand are now more likely than a decade ago to be the domain of the colonized" (Jeffries & Newbold, 2016, p. 200). Furthermore, female prisoners are some of the most vulnerable individuals in our communities (Meyers et al., 2017). For instance, Aboriginal women in prison are disproportionately more likely to be mothers or primary caregivers; to have experienced family and sexual violence; to have mental health issues or limited cognitive function; to have a drug dependency; to have been in the child protection system as children; to have been in conflict with the law in the past; to be homeless or living in unstable housing; to be unemployed; and to have low levels of education (Australian Law Reform Commission, 2017). This has severe consequences for Aboriginal children.

The Royal Commission into Aboriginal Deaths in Custody concluded that the over-representation of Aboriginal people in the criminal justice system is a direct result of poverty and systemic discrimination (Deadly Connections, 2020). The incarceration of Aboriginal women is deeply embedded in what Mignolo (2007) terms the "colonial matrix of power," compromising four interrelated domains, one of which is the control of gender and sexuality, including the regulation of family and education (p. 156). This system of control continues to inflict intergenerational harm (Cox, 2017, cited in Anthony et al., 2021). This disadvantage is rooted in a legacy of oppression, violence, trauma and systemic discrimination stemming from colonisation – harms that are perpetuated across generations (Human Rights Law Centre and Changing the Record, 2017, cited in Australian Law Reform Commission, 2017, p. 349). Incarceration of Aboriginal women causes "grief, loss and trauma" for both mothers and children (Anthony et al., 2021, p. 3).

It is crucial to contextualise Aboriginal women's mothering outside the accepted Western notion of motherhood. Traditionally, as in South African communities, Aboriginal communities base their social structure around kinship care (Lohoar et al., 2014). In these communities, mothering is performed by mothers, aunts, grandmothers, nieces, aunties, cousins and big sisters in a collective approach to childrearing (Lohoar et al., 2014). Therefore, the impact of the incarceration of Aboriginal women includes not only parental incarceration but is a much broader concept, which also impacts other female caregivers in the extended family.

The arrest and incarceration of a mother can be a deeply traumatic and stressful experience for children, particularly when they witness the event at first hand. Such separation can have long-lasting emotional and psychological effects, especially on younger children who lose not only their mother's care but also the companionship and protection of siblings. In many cases, older children are compelled to assume adult responsibilities prematurely (Healy et al., 2001). Additionally, the stigma associated with having an incarcerated parent can lead to feelings of shame and social ostracisation within the broader community (Masson, 2019).

More broadly, a survey of male and female prisoners in the United States found that 88 per cent of male prisoners reported that their children were cared for by the children's mothers. In contrast, only 37 per cent of female prisoners indicated that their children were in the care of their fathers, with the majority reporting that their children were being cared for by extended family members (Meyers et al., 2017). A similar pattern emerged in England and Wales, where a survey of female prisoners revealed that only a minority of children were in the care of their biological fathers (Masson, 2019). These findings underscore the profound impact of maternal incarceration on extended families and dependent children, often resulting in disrupted living arrangements, weakened family bonds and adverse emotional and psychological outcomes. A vital part of sentencing must be the submission of pre-sentencing reports that incorporate the likely adverse effects of incarceration, not only the caregiver but also on any dependent children (Flynn et al., 2016). Crucially, pre-sentencing reports must include a broad definition of motherhood to include all women who provide care to children.

Rethinking Sentencing Through a Feminist Lens

Alina Miamingi (2020) argues that the best interests of the child can only be meaningfully understood within the cultural and socio-economic context of the community in which the child lives. Given that, in most communities, women are the primary caregivers, any evaluation of a child's best interests must also take into account the well-being and circumstances of these women. This interconnection underscores the importance of considering women's lived experiences and their position within the criminal justice system, particularly in the context of sentencing.

Analysing several studies on the sentencing of women, Loraine Gelsthorpe and Gillian Sharpe (2015) identified four recurring themes in sentencing practices. First, women's transgressions are often explained through a focus on pathology. Second, marital status and motherhood influence sentencing outcomes, frequently resulting in more lenient treatment. Third, women – particularly those from minority ethnic groups or non-conventional circumstances – who fail to conform to traditional norms of respectability tend to receive harsher sentences. Lastly, women whose sexuality deviates from pious or moral expectations are punished more severely (Gelsthorpe & Sharpe, 2015, p. 120).

These findings reflect broader theoretical debates about the relationship between gender and sentencing. The first perspective, chivalry theory, suggests that women are often sentenced more leniently than men for similar crimes due to protective societal attitudes, particularly those associated with women's perceived roles as mothers and caregivers (Bontrager et al., 2013; de Queirós Campos, G.S., & de Azevedo Bussinguer, 2023; Herzog & Oreg, 2008) The second perspective challenges this assumption, arguing that women who deviate from socially acceptable gender norms – what Karen Brennan (2018, p. 264) terms "the feminine ideal" – are subject to harsher punishment (Nagel & Johnson, 1994, p. 189). Thus, Aboriginal, impoverished, independent and sexually non-conforming women are often perceived as more blameworthy than women who do not possess these characteristics.

Building on these theoretical perspectives, empirical research supports that women who are married or have children seemingly receive greater leniency in sentencing than their male counterparts (Doerner & Demuth, 2014, p. 246). However, it is also confirmed that such leniency is closely tied to women's conformity to the "feminine ideal." The overall influence of gender and caregiving status on sentencing remains contested, as findings vary across datasets, methodologies and analytical frameworks (Bontrager et al., 2013, p. 351). These complexities are compounded by sentencing reforms in jurisdictions such as South Africa and Australia, where the introduction of minimum sentences and increasingly punitive approaches have curtailed judicial discretion. Such developments risk entrenching formal equality in sentencing practice while overlooking the substantive gendered realities that shape women's offending and punishment.

Feminists advocating for gender-differentiated sentencing, grounded in a substantive interpretation of equality, argue that courts should consider the disproportionate impact of punishment, especially custodial sentences, on women (de Queirós Campos et al., 2023, p. 865). This requires sensitivity to the economic, ideological and political conditions under which women offend, as well as the types of offences they commit. Research consistently shows that women generally pose a lower risk to society and are less likely to reoffend, suggesting that non-custodial alternatives may be more appropriate (Carlen, 2000). Nevertheless, judicial reasoning frequently treats such differences as irrelevant, adhering to the principle that similar cases should be treated alike (Hudson, 2002).

Challenging this view, Bagaric and Bagaric (2016) argue that neither proportionality nor equality principles justify imposing identical punishments on women and men who commit the same offence. They contend that equality in sentencing is appropriate only where offenders are similarly situated, which requires considering not just the nature of the offence but also the broader personal and social factors shaping culpability (p. 40). Their argument highlights the limitations of formal equality and supports a more contextually grounded, substantively fair approach to sentencing.

Similarly, Kathleen Daly (1995) critiques the assumption that men's experiences and offending patterns serve as the benchmark for sentencing. She cautions against merely substituting a "male standard" for a "female standard," instead calling for recognition of the diversity of women's lives and the structural conditions influencing their offending (p. 167).

Building on Daly's insights, Barbara Hudson (2002) advances the case for a substantive understanding of equality in sentencing, arguing that recognising difference requires deeper engagement with the concepts of agency and choice. While individuals act intentionally, Hudson emphasises that their choices are often constrained by social and structural inequalities. When agency is narrowly defined as the capacity to act or refrain from acting, these constraints are obscured. She therefore argues that choice should be understood as a matter of degree, acknowledging that some individuals possess far less freedom of action than others (Hudson, 2002, p. 43). Without recognising these limits, assessments of culpability risk are fundamentally unjust.

Extending these arguments to the South African context, Catherine Albertyn (2023) observes that courts often recognise women only within narrow frames —victims of violence, burdened mothers, or through stereotypes of capacity and role —rather than as agents navigating structural constraints (p. 174). This limited framing obscures the realities of women who make difficult choices under conditions of economic and social deprivation and fails to appreciate how caregiving responsibilities and gendered expectations restrict their autonomy. For many women, caregiving is not a matter of free choice, and imprisonment only deepens the inequalities they already face.

Although some South African courts actively consider primary caregiver status as a mitigating factor, others mention it only in passing, with little indication of its impact on sentencing (Lauwereys, 2020, p. 163). Within the South African context and considering the *MS v S* judgment, the emphasis on the availability of alternative care overlooks the specific challenges faced by women as primary caregivers. Similarly, the concept of family hardship within the Australian context fails to consider the contextual realities of family care, especially for Aboriginal women. The broader consequences of their imprisonment, particularly the impact on children and families, are often disregarded. Considering the sentencing frameworks in South Africa and Australia, the question arises of whether the status of primary caregivers – particularly women – should be a mandatory consideration in sentencing.

The sentencing courts are guided by three primary considerations: blameworthiness, public protection and practical constraints (Arazan et al., 2019, p. 26). However, Pina-Sánchez and Grech (2017) note that, due to limited time, resources and background information, judicial officers often rely on "perceptual shorthand" (p. 3) As a result, sentencing decisions reflect not only the specific offence and offender but also ingrained habits and social structures, drawing on patterned responses shaped by social stereotypes. Therefore, it is not only case characteristics that determine the outcome of a sentencing decision, but also the experiences, stereotypes and potential prejudices of a judge (Fearn, 2005; Pina-Sánchez & Grech, 2017). Brian Johnson (2005, p. 278) argues that variations in sentencing outcomes can be attributed to differing courtroom social environments, which are influenced by political, social and organisational contexts. Given the patriarchal foundations of criminal law, sentencing often reinforces harmful gender stereotypes, embedding them as perceptual shorthand.

Judges should have a deeper understanding of the impact of sentencing on women who are primary caregivers. To ensure that primary caregiver status is fully considered, Erica Kane and Shona Minson (2022) have advocated for the broad application of this mitigating factor, aiming to prioritise non-custodial sentences. They propose that courts treat this consideration as a distinct step, requiring the collection of comprehensive information about dependent children before sentencing and ensuring that this information is meaningfully incorporated into the decision. This sentiment is echoed in empirical research by Thalia Anthony, Gemma Sentance and Larissa Behrendt (2021), in which Australian Aboriginal women prisoners indicated that they would like to see a system in which courts are held accountable for the harm done to their families as a result of incarceration. These women feel that non-custodial options must be considered during police bail decisions and bail hearings in court, especially for minor offences. To illustrate, the Australian Law Reform Commission (2017), in its inquiry into the incarceration rate of Australian Aboriginal people, found that Aboriginal women are over-represented in the remand phase and less likely to be granted bail by the court than non-Aboriginal women. For Aboriginal caregivers, the availability of non-custodial sentencing options can have a profound effect, particularly given that Aboriginal women are disproportionately criminalised – often as a result of systemic racial profiling – for minor offences such as driving without a licence, offensive language, shoplifting, public disorder and breach of court orders (MacGillivray & Baldry, 2015). Furthermore, some Aboriginal prisoners felt that writing letters to the court outlining their individual family circumstances positively impacted their sentence outcome (Anthony et al., 2021).

Pat Carlen (2000) argues that sentencing women differently does not imply that women should have an equalising right to a different sentence. Instead, she advocates for an ameliorative and pragmatic approach to sentencing that recognises the distinct circumstances that might affect women offenders (p. 85). She argues that this could be achieved by reserving prison sentences for cases in which individuals pose a danger to the public and are likely to reoffend. Imprisonment should therefore be a last resort, imposed only when no alternative sentence is available and the offender presents a significant risk to the community (Millar & Dandurand, 2018).

Conclusion

It is axiomatic that incarceration is a standard sentence in most common law jurisdictions. It therefore affects the offender and any dependent children. It has been shown that the impact in South Africa and Australia is particularly severe when mothers are incarcerated, as women are often the primary caregivers of children, leading to profound consequences for both their own lives and those of their children. Sentencing principles of equality and proportionality lack a female perspective, and they remain entrenched in patriarchal values that have historically influenced and continue to influence the criminal justice systems

in these two jurisdictions. Unsurprisingly, and as a result of this historical influence, the sentencing frameworks of both South Africa and Australia reflect a marked lack of recognition for caregiving responsibilities, particularly those of vulnerable women, as a mitigating factor.

South Africa is often heralded for its forward-thinking constitutional framework, very progressive Bill of Rights and its clear judicial recognition of the best interests of the child principle in the context of sentencing caregivers. However, as can be seen from extant case law, despite this progressive framework the application of this principle has been ambiguous. Sentencing practices and the imprisonment of women in both jurisdictions reveal a lack of judicial awareness of the contextual realities of caregiving, which are deeply rooted in the cultural norms and traditions and socio-economic conditions of these jurisdictions. This lack of consideration disproportionally impacts the most vulnerable women and their dependent children, underscoring the need for a sentencing framework that is responsive to their lived realities.

To this end, it is argued that judicial officers should routinely inquire into the effects of parental incarceration when sentencing offenders who are sole parents or primary caregivers of dependent children (Flynn et al., 2016; Millar & Dandurand, 2018). Pre-sentencing reports should include an assessment of the likely adverse effects of imprisonment, not only on dependent children but also on their caregivers (Flynn et al., 2016). Bagaric and Bagaric (2016) call for a fundamental reassessment of sentencing approaches to women, contending that imprisonment should not be the default sentence for women and should be imposed only in cases involving the most serious offences, such as violent or sexual crimes. Similarly, Gelsthorpe and Sharpe (2015) advocate for alternatives to custody for women, arguing for a substantive equality approach to sentencing. Sentencing courts should also adopt a broad definition of motherhood, one that extends beyond biological mothers to include all women who assume caregiving responsibilities for children within a family or community context, such as grandmothers, aunts, cousins, nieces and older sisters. Their roles in caregiving and parenting within these frameworks should be meaningfully considered when determining appropriate sentences for women, reflecting the realities of care in both countries.

Given the broad discretionary nature of sentencing in South Africa and Australia, legislative or judicial guidance is necessary to ensure that primary caregiver status and the context of caregiving are consistently considered personal mitigating factors in all applicable sentencing decisions. The social context of women's caregiving responsibilities should be recognised along with the best interests of the child as a relevant mitigating factor in the sentencing of women who are in conflict with the law.

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[1] Part of the research for this article was carried out and written on Darkinjung land, Australia. As authors, we would like to acknowledge the Darkinjung people as the Traditional Owners of this land and pay our respect to Elders past, present and emerging.

[2] The Social Assistance Act 13 of 2004 is the primary legislation governing social grants in South Africa. The current monthly amounts for the Child Support Grant and the Older Persons Grant are R560.00 (approximately US$32.00) and R2310.00 (approximately US$115.00), respectively, as per General Notice 6031 GG52370 of 24 March 2025.

[3] *Crimes Act 1914* (Cth); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Crimes (Sentencing) Act 2005* (ACT); *Sentencing Act 1995* (NT); *Penalties and Sentences Act 1992* (Qld); *Sentencing Act 2017* (SA); *Sentencing Act 1997* (Tas); *Sentencing Act 1991* (Vic); *Sentencing Act 1995* (WA).

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