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THE BEST INTERESTS OF THE CHILD AND THE SENTENCING OF OFFENDERS WITH PARENTAL RESPONSIBILITIES

ABSTRACT. There is a growing body of empirical research demonstrating that sentencing and other criminal justice decisions often have a detrimental, even traumatic impact upon an offender's dependent children. Judges must balance numerous factors when making sentencing decisions, generally encompassing the protection of the public, the seriousness of the offence, and the personal circumstances of the offender. Should the probable impact of a sentence on an offender's dependents be a significant factor to be weighed with these other factors in the process of sentencing? More specifically, when a court is sentencing an offender with parental responsibilities, does it have a duty to inquire about the potential impact of the sanction on the offender's dependent child or children? Must it consider the principle of the best interests of the child or a child's right to family life as a separate legal consideration in constructing a sentence? International human rights standards suggest that it does. After reviewing existing evidence on the potential hardship of sentencing decisions for an offender's dependent children, the authors examine the experience of six countries in interpreting and applying these standards in their domestic laws, policies, and practices. They discuss some options for sentencing reforms in the broader context of efforts to reduce high rates of imprisonment in many countries and the need to address the differential impacts of criminal sanctions for primary caregivers and their children.

I INTRODUCTION

The situation of children whose parents are facing criminal sanctions is an emerging criminal justice policy concern. The effects of a sentencing or other judicial decision on people other than offenders are

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sometimes referred to as “collateral consequences”,¹ “collateral damage”,² or “third party impact”.³ There is a wealth of research demonstrating that these decisions can have a significant, even traumatic impact upon an offender’s dependent children. For example, the children of parents serving a sentence of imprisonment often end up in the care of the state and are at greater risk of victimization and criminal involvement. For these children, their parents’ predicament is often a disruptive and potentially a traumatic experience that can affect their development and social adaptation.⁴

When making sentencing decisions, judges must balance numerous factors generally encompassing the protection of the public, the seriousness of the offence, and the personal circumstances of the offender. Should the probable impact of a sentence on the offender’s dependents be a significant factor to be weighed with these other factors in the process of sentencing? More specifically, when a court is sentencing a parent, does it have a duty to consider the best interests of a dependent child and/or their right to family life? If so, how should such a consideration be weighed against other considerations such as proportionality or public safety? To answer such questions, we review some of the available evidence on the potential hardship of sentencing decisions for an offender’s dependent children. We also consider international human rights standards now requiring criminal courts to systematically recognize and consider the principle of the best interests of a child or a child’s right to respect for family life when sentencing a parent as a *specific* and *independent* legal consideration in order to mitigate foreseeable and avoidable harms to the child.⁵ This brings us to how six common law countries (including

¹ J Hagan and R Dinovitzer, ‘Collateral Consequences of Imprisonment for Children, Communities, and Prisoners’, 26 *Crime and Justice*, 1999, 121–162.

² L Feig, ‘Breaking the Cycle: A Family-Focused Approach to Criminal Sentencing in Illinois’, *Advocates’ Forum*, 2015, 13–24.

³ JV Roberts and G Watson, ‘Reducing Female Admissions to Custody: Exploring the Options at Sentencing’, *Criminology & Criminal Justice*, 2017, 1–22, at 3.

⁴ See, for example, the CDC-Kaiser Permanente Adverse Childhood Experiences (ACE) Study, which defines living with an imprisoned household member as one of seven types of adverse childhood experiences. Available at: <https://www.cdc.gov/violenceprevention/acestudy/about.html>.

⁵ On the anticipated harms to children associated with parental incarceration, see, e.g., T Lerer, ‘Sentencing the Family: Recognizing the Needs of Dependent Children in the Administration of the Criminal Justice System’, *Northwestern Journal of Law and Social Policy*, 9(1), 2013, 23–57, at 27. See also the comments of Mr. Justice Sachs in *S v. M.*, (CCT 53/06) [2007] ZACC 1, at para 35 on the duty of a sentencing

South Africa which uses a mixed system of common law, civil law, and customary law) are interpreting and applying these standards in their domestic laws and policies. We conclude the article with some observations on the implications of these various developments for future sentencing reforms.

II POTENTIAL HARDSHIP OF SENTENCING DECISIONS FOR AN OFFENDERS' DEPENDENT CHILDREN

There are situations where the removal of a dangerous or chaotic parent from the family home has a positive, protective effect on the affected children.⁶ However, children can also be adversely affected at all stages of a parent's involvement with the criminal justice process, from the point of arrest to the time of reintegration into the community following release.⁷ Even the sentencing of an offender to a community-based sanction is not without an impact on the offender's children and family life in general. Dependent children are affected in many ways, including immediate and long-term emotional, psychological, financial, material, physical and social impacts. In some cases, they may be exposed to trauma because they witness their parents' arrest or may find themselves in the care of state agencies. In others, the loss of a working parent or a parent who pays child support means reduced financial stability, or a need to move to a different home or to a different school. Many of these children find themselves in public care with limited contacts with their parents or family. Despite the strength and resilience of many of these children, the disruption, shame and stigma associated with their parent's crime and

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court to acknowledge the interests of children based on averting avoidable harm and unnecessary suffering.

⁶ See, J Travis, B Western, and S Redburn (editors), *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, Committee on Causes and Consequences of High Rates of Incarceration, Committee on Law and Justice, Division of Behavioral and Social Sciences and Education, National Research Council of the National Academies, Washington, D.C.: The National Academies Press, 2014, especially at 260–280.

⁷ For a review of some of this abundant literature, see, e.g., A McCormick, H Millar, G Paddock, *In the Best Interests of the Child: Strategies for Recognizing and Supporting Canada's At-Risk Population of Children with Incarcerated Parents*, University of the Fraser Valley, British Columbia, 2014, at 3–15. Available at: https://cjr.ufv.ca/wp-content/uploads/2015/05/Children-with-Incarcerated-Parents_Amended.pdf.

conviction may have severe psychological and developmental consequences for them, including mental health and physical problems. Other people's response to their situation, especially when it is insensitive, ostracising or stigmatising, can further cause these children to experience fear, anxiety, rejection, insecurity and anger, and lead them to further isolate themselves or seek social acceptance in negative ways. They are at high risk of antisocial behaviour and poor mental health.⁸

While we do not know exactly how many children are affected by parental criminal justice system involvement, we know that they are numerous in every country. We also know that arrest, adjudication and incarceration do not affect all families equally. Children in families already at a disadvantage due to other factors tend to face even greater challenges when their primary caregiver is arrested, convicted or incarcerated.⁹ The parents' trouble with the law only accentuates this disadvantage, for example through further isolation and ostracization, and blocked access to public housing, social services and benefits. Moreover, there is growing recognition that parental criminal justice system involvement, including imprisonment, disproportionately affects Indigenous and minority children, and other marginalized groups (e.g., children of foreign nationals).¹⁰

⁸ There are many studies showing the high risk of antisocial behaviour and poor mental health outcomes among children of prisoners as compared to children without imprisoned parents. However, it is hard to determine whether parental criminal justice involvement and imprisonment cause an increase in risk for children or whether this increased risk can be explained by the presence of other disadvantages in these children's life. See: J Murray, D P Farrington, I Sekol, R F Olsen. *Effects of Parental Imprisonment of Child Antisocial Behaviour and Mental Health: A Systematic Review*, Campbell Systematic Review, 2009, at 4. See also J Travis, B Western, and S Redburn, 2014.

⁹ See, e.g., J Murray, D Farrington, D., and I Sekol, 'Children's Antisocial Behavior, Mental Health, Drug Use, and Educational Performance After Parental Incarceration: A Systematic Review and Meta-Analysis', *Psychological Bulletin*, 138 (2), 2012, 175–210; J Poehlmann, 'Children of Incarcerated Mothers and Fathers', *Wisconsin Journal of Law, Gender and Society*, 24(2), 2009, 331–340; C Wildeman, 'Parental Imprisonment, the Prison Boom, and the Concentration of Disadvantage', *Demography*, 46(2), 2009, 265–280. See also the Princeton Columbia Fragile Families and Child Wellbeing Study. Available at: <http://fragilefamilies.princeton.edu/sites/fragilefamilies/files/researchbrief42.pdf>.

¹⁰ See, e.g., D Cullen, *Briefing Paper: Children of Incarcerated Parents Minorities in Criminal Justice Systems*, Prepared for the 8th session of the UN Forum on Minority Issues, November 2015, Quaker United Nations Office, 2016. Also: O Robertson, *Collateral Convicts: Children of Incarcerated Parents*, Quaker United Nations Office, March 2012. See especially: F Gerry and L Harris, *Women in Prison*:

Although still in its early stages and methodologically imperfect,¹¹ there is a growing body of empirical evidence showing that parental imprisonment is likely to expose many children to a number of immediate and future adverse consequences or harms that in turn may affect a child's developmental capacities and life chances.¹² While recognizing that parental imprisonment may be beneficial for some children in some circumstances, especially if a child is the direct victim of his or her parent's criminal behaviour, and understanding also that the effects of parental imprisonment are heterogeneous and vary in relation to a wide range of factors including the nature of the parenting relationship, the child's age and level of resiliency, and a host of other social and economic factors,¹³ the anticipated adverse

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Is the Penal System Fit for the Purpose, Halsbury's Law Exchange, 2014, at 20–21 on Black ethnic minority women and foreign national women in UK prisons.

¹¹ These methodological deficiencies include a lack of large-scale quantitative and longitudinal studies making it difficult to separate the effects of imprisonment from other cumulative risk factors.

¹² See: P Scharff Smith, *When the Innocent are Punished – The Children of Imprisoned Parents*. Palgrave Macmillan UK, 2014; JA Arditti and J Savla, 'Parental Incarceration and Child Trauma Symptoms in Single Caregiver Homes', *Journal of Child and Family Studies*, 22(8), 2015, 551–561; DH Dallaire and LC Wilson, 'The Relation of Exposure to Parental Criminal Activity, Arrest, and Sentencing to Children's Maladjustment', *Journal of Child and Family Studies*, 19, 2010, 404–408; DH Dallaire, JL Zeman, and TM Trash, 'Children's Experience of Maternal Incarceration-Specific Risks: Predictions to Psychological Maladaptation', *Journal of Clinical Child and Adolescent Psychology* 44(1), 2015, 109–122; S Gaston, 'The Long-term Effects of Parental Incarceration', *Criminal Justice and Behaviour*, 43(8), 2016, 1056–1075; S Hissel, B Catrien and C Kruttschnitt, 'The Well-Being of Children of Incarcerated Mothers: An Exploratory Study for The Netherlands', *European Journal of Criminology*, 8(5), 2011, 346–360; T Krupat, 'Invisibility and Children's Rights: The Consequences of Parental Incarceration', *29 Women's Rights Law Reporter*, 39, 2007, 43; A Jones, B Gallagher, M Manby, O Robertson, M Schützwohl, AH Berman, A Hirschfield, L Ayre, M Urban, K Sharratt, and K Christmann, *Children of Prisoners: Interventions and Mitigations to Strengthen Mental Health*. University of Huddersfield, Huddersfield, 2013; O Robertson, *The Impact of Parental Imprisonment on Children*, Quaker United Nations Office, 2007; Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility*, 2010; L Townhead, *Pre-Trial Detention of Women and its Impact on their Children*, Quaker United Nations Office, 2007.

¹³ See, e.g., J Murray, 'The Effects of Imprisonment on Families and Children of Prisoners', in A. Liebling and S. Maruna (eds.), *The Effects of Imprisonment*, Willan Publishing, 2005, 442–492, at 446, who also notes variation *within* a family as different children are likely to experience parental incarceration in different ways, and variation over the cycle of criminal justice contacts. Also, while it is sometimes

consequences for a child broadly include some level of distress, disruption and disadvantage, developmental challenges, and difficulties maintaining relationships.

In brief, the available empirical evidence suggests that we can generally expect some level of *distress* to a dependent child who is separated by imprisonment from their parent or guardian, especially a sole or primary caregiver. A child may experience some degree of emotional or psychological discomfort or trauma as a result of their forcible separation from a parent. We can also expect some level of *disruption* or change to a child's caregiving and living arrangements, including the continuity and quality of parenting and potentially the loss of a family environment. A child may be placed in temporary or permanent informal family or formal state care and parental rights may ultimately be terminated by the state. If placed in alternative care, a child may be separated from their siblings. Many children affected by parental imprisonment are likely to experience greater *deprivation* due to increased financial instability of the family, depending on the financial role of the parent who is imprisoned, and may face multiple household moves, sometimes to ensure closer proximity to the imprisoned parent. A range of adverse *developmental effects* are associated with parental imprisonment, including poor school performance and reduced educational achievements, increased mental health risks, increased alcohol and drug use, and increased risks of anti-social behaviour, including inter-generational criminality. Children may also experience difficulties maintaining relationships with an imprisoned parent due to the distances, costs, trauma and stigma associated with various forms of prison visitation and their parents' criminal status.

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assumed that the long-term incarceration of a parent is what is most problematic from the point of view of the children, there is some evidence that short stays in prison can also have a detrimental impact. See, e.g., IM Masson, *The Long-Term Impact of Short Periods of Imprisonment on Mothers*, PhD Thesis, The Dickson Poon School of Law, King's College London, University of London, 2014; L Baldwin, and R Epstein, Short but Not Sweet: Exploring the Impact of Short Sentences on Mothers, *European Journal of Parental Imprisonment (Child Impact Assessments and Sentencing)*, Winter 2015, 2015, at 20–22; Swavola, Riley and Subramanian, 2016. See also: S Wakefield and C. Wildeman, *Children of the Prison Boom: Mass Incarceration and the Future of American Inequality*. New York: Oxford University Press, 2013. See also: J Hagan and H Foster, 'Intergenerational Educational Effects of Mass Imprisonment in America', *Sociology of Education*, 85(3), 2012, 259–286.

Summarizing some of the existing research, Murray and Murray explained that parental incarceration, particularly maternal incarceration, might threaten children's attachment security because of parent-child separation, confusing communication about parental absence, restricted contact with incarcerated parents, and unstable caregiving arrangements.¹⁴ According to attachment theory, such a separation is likely to be traumatic and to have lasting adverse effects. Most concerning, however, are the poor developmental outcomes associated with attachment insecurity and disorganization.¹⁵

2.1 *Consideration of Family Impact in Sentencing Decisions*

Notwithstanding these 'foreseeable' or 'avoidable' harms to children, the children of parents facing criminal sanctions are largely invisible in criminal justice decision-making involving their parents. In fact, a range of publications variously describe them as 'hidden', 'invisible', 'forgotten', 'overlooked', 'collateral convicts', 'orphans of justice' or as 'inadvertent victims'. These descriptors are especially true of the criminal sentencing process wherein a convicted person's children are not a direct party to the legal proceedings or germane to the traditional purposes of sentencing that focus on proportionality in balancing the interests of society with the seriousness of the offence and the circumstances of the offender and aggravating and mitigating factors relating to the offence and the offender. Nor are most children likely to be present in court proceedings when their parent is sentenced, which arguably contributes to their invisibility. In common law countries, children have historically been considered only as a mitigating personal circumstance of the convicted parent. Even then, children's interests are not routinely considered, notwithstanding a general acknowledgment that parental imprisonment causes some level of disruption to children and their families, extending to the potential disintegration of the family unit. Generally speaking, for 'family ties' and 'excessive hardship to dependents' to be taken into account at the time of sentencing, such impact has to be seen as 'extraordinary' or 'exceptional' in nature, with varying and subjective

¹⁴ J Murray and L Murray, "Parental Incarceration, Attachment and Child Psychopathology", *Attachment & Human Development*, 12 (4), 2010, 289–309.

¹⁵ Murray and Murray, 2010; DW Makariev and PR Shaver, "Attachment, Parental Incarceration and Possibilities for Intervention: An overview", *Attachment & Human Development*, 12 (4), 2010, 311–331; RJ Shlafer and J Poehlmann, "Attachment and Caregiving Relationships in Families Affected by Parental Incarceration", *Attachment & Human Development*, 12 (4), 2010, 395–415.

interpretations by sentencing courts on what constitutes an ‘extraordinary’ or ‘exceptional’ circumstance. Yet, there is clear empirical evidence that preserving the family environment and maintaining family relations, when not detrimental to the safety and wellbeing of a child, can produce positive outcomes not only for the child (reduced state intervention, increased positive adjustment), but also for the parent (reduced recidivism, increased employment prospects). Ideally, the goal is to strengthen the protective environment offered by a community to the children affected by their parent’s conflict with the law.¹⁶ The criminal justice system can play an important role in that process, for example by recognizing and considering the best interests of the child when making decisions about parents with dependent children or by adopting family-focused policies and practices at all key decision-making stages.¹⁷

We may therefore ask why sentencing courts do not routinely take a child’s rights into account when sentencing one of their parents. Indeed, ignoring the rights of children in the sentencing of a parent is somewhat perplexing given that many countries take a child’s best interests into account as a *paramount consideration* when parents voluntarily separate or divorce, yet do not routinely take a child’s best interests into account when a child is deprived of parental care and his/her family environment due to forcible state separation by means of imprisonment. This situation is even more perplexing given some empirical research evidence that the deprivation of parental care through imprisonment has a *more detrimental* effect on a child’s wellbeing and behaviour than other forms of parental loss or separation, likely because of the social stigma and marginalization that often accompanies parental criminal justice involvement. As we discuss below, various mechanisms can be used to routinely provide family impact assessment information to sentencing courts.

¹⁶ On potential protective factors and strengthening children’s resilience, see, e.g., AD Jones and AE Wainaina-Woźna (eds.), *COPING: Children of Prisoners: Interventions and Mitigations to Strengthen Mental Health*, University of Huddersfield, 2013. Available at: <http://childrenofprisoners.eu/wp-content/uploads/2013/12/COPINGFinal.pdf>.

¹⁷ Feig, at 13–26. A McCormick, H Millar, G Paddock, at iv. See especially A Gardner, *Framework for the Support of Families Affected by the Criminal Justice System*, Community Justice Authorities, 2015. Available at: <https://www.familiesoutside.org.uk/content/uploads/2016/03/Families-Framework-FINAL-July-2015-v3.pdf>. See also: International Association of Chiefs of Police, *Safeguarding Children of Arrested Parents*, Bureau of Justice Assistance, US Department of Justice, 2014. Available at: <https://www.bja.gov/publications/iacp-safeguardingchildren.pdf>.

2.2 *In the Context of High Rates of Imprisonment*

The question of sentencing decisions and their impact on children and families must be situated in the broader context of the increasing use of imprisonment in many common law countries and the differential impact of this trend on women who more often than men are primary caregivers for their dependent children.

The growth in global imprisonment rates is especially concerning for women and girls, whose penal population numbers have doubled or tripled in some countries.¹⁸ Globally, it is estimated that 700,000 women and girls were remanded or sentenced to custody, representing a growing proportion of the world's prisoners from 5.4% in 2000 to 6.8% by mid-2015.¹⁹ Indeed, women have been identified as the fastest growing inmate population in some countries, including the USA and Canada.²⁰ Much like the global prison population more generally, the female prison population has increased on all five continents, especially in Asia and Europe.²¹ From both a gender and a child rights perspective in view of the growing number of children who are likely to be affected by parental incarceration, the increasing number and proportion of women prisoners is particularly concerning because of gender-linked parenting responsibilities, where imprisoned women are more likely than imprisoned men to be the sole or primary caregiver for their dependent children. In addition to unique gendered offending and offence patterns,²² imprisoned women are also more likely than their male counterparts to be incarcerated at greater distances from their children due to their smaller carceral numbers and a fewer number of detention facilities, with consequent

¹⁸ See, e.g., G Eljdupovic and RJ Bromwich (eds.), *Incarcerated Mothers: Oppression and Resistance*. Bradford, Ontario: Demeter Press, 2013, at 7.

¹⁹ R Walmsley, 2015a, at 2.

²⁰ On increases in the number of women sentenced to imprisonment in the USA see: R Walmsley, *World Female Imprisonment List* (3rd Edition), London: International Centre for Prison Studies, 2015b, at 2. Available at: https://www.prisonstudies.org/sites/default/files/resources/downloads/world_female_imprisonment_list_third_edition_0.pdf.

²¹ Walmsley 2015b, at 2.

²² The proportion of females differs by offense type, and in comparison to males, is generally much lower for violent and especially for sexual offenses than for non-violent property and increasingly illicit drug offences. Gendered offending patterns for women and girls often include common pathways into crime in relation to poverty, traumatic histories of sexual and/or physical violence, mental health and/or addiction issues, and low levels of education and employment.

financial implications for the affected families.²³ In these respects, the effects of maternal imprisonment are often regarded as being more severe and destabilizing for their dependent children than paternal imprisonment, even if the effects of the latter are also generally significant and clearly more widespread. Notably, the global pattern of women's imprisonment also disproportionately affects ethnocultural minority and Indigenous women and their children.²⁴

In light of these trends, there is increasing recognition that mass imprisonment is not sustainable in relation to its direct economic costs and questions about its effectiveness in reducing prisoner reoffending, with a number of countries making significant efforts to reduce their prison populations through evidence-based or 'smart sentencing' reforms. Such reforms are designed to limit the use of imprisonment to instances of violent and other serious offences and to expand the availability and use of community-based alternative sanctions where sentences are determined based on an assessment of criminogenic risk in relation to reducing the chances of recidivism and protecting society from harm.²⁵

In many common law countries, custody is overused with respect to female offenders and prison sentences often fail to address the multiple and complex needs of female offenders; women are also frequently inadequately prepared for their release from prison.²⁶ As argued by Roberts and Watson, sentencing strategies are required to reduce the number of women in prison "on the grounds that their experience of the sanction is disproportionality severe".²⁷ There are also convincing legal arguments in favour of expanding or at least clarifying the definition of mitigating factors in sentencing so as to include gender as an important consideration in a manner consistent

²³ See, e.g., D Dickie, *The Financial Implications of Imprisonment on Families*, Edinburgh: Families on the Outside UK, 2013, at 13–15 on the travel and other associated costs for family members travelling long distances to prison and visiting or communicating with a person in prison.

²⁴ R Allen, at 16.

²⁵ See, e.g., RE Redding, R.E., 'Evidence Based Sentencing: The Science of Sentencing Policy and Practice', 1(1) *Chapman Journal of Criminal Justice*, 2009, 1-19, at 2-4.

²⁶ F Gerry and L Harris, 2014.

²⁷ JV Roberts and G Watson, 2017, at 1.

with traditional sentencing principles such as proportionality and equality.²⁸

Certainly, at both the global and national levels, there is growing attention to the ‘collateral’ or indirect consequences of imprisonment, including both the short and long-term economic and social consequences for prisoners, their families, their communities and society at large, including potential inter-generational criminality.²⁹ Indeed, in view of the differential gendered effects of sentencing and imprisonment, a number of scholars and advocacy organizations are now calling for the use of imprisonment to be severely curtailed for women engaging in property and drug offences and used only as a last resort for serious and violence offences.³⁰

Interest in reducing the use of imprisonment extends to measures to reduce the collateral effects on the children of prisoners. This is evidenced by a burgeoning academic literature, intensifying non-governmental advocacy efforts by national, regional and international non-government agencies, and high-level political interest in

²⁸ There is an emerging body of scholarship about the differential gendered impacts of sentencing and imprisonment and the need for substantive equality (equity) in sentencing for women. Recommendations include strong presumptions against imprisoning women except for the most serious and violent offences and that gender should be a significant factor in mitigation. These recommendations are based on the rationale that: (1) women commit less crime and less serious crime than men and are less likely to reoffend than men; (2) the impact of imprisonment on women is greater than for men because it can negatively affect a woman’s procreation rights and because women suffer more in prison in relation to mental health issues and exposure to sexual abuse, (3) removing women from the community can have harmful impacts on their children and other dependents, and (4) in view of histories of violence and trauma. See: M Bagaric and B Bagaric, ‘Mitigating the Crime that is the Over-Imprisonment of Women: Why Orange Should Not Be the New Black’, *Vermont Law Review*, 41, 2017, 537–602, at 538–542. See also JV Roberts and G Watson, 2017, at 3, on sentence impact mitigation. Both articles make similar arguments in different national contexts (USA and Australia versus UK) and in relation to the sentencing principles of proportionality and equity. See also: C Piper, ‘Should Impact Constitute Mitigation: Structured Discretion versus Mercy’, *Criminal Law Review*, 2007, 141–155.

²⁹ See, e.g., J Hagan and R Dinovitzer, 1999. See also R Mangat, *More Than We Can afford: The Costs of Mandatory Minimum Sentencing*, Vancouver: British Columbia Civil Liberties Association, 2014, at 31–32, 34–35, 40–44. Available at: <https://bccla.org/wp-content/uploads/2014/09/Mandatory-Minimum-Sentencing.pdf>.

³⁰ See, e.g., JV Roberts and G Watson, at 1–22; E Swavola, K Riley and R Subramanian, *Overlooked: Women and Jails in an Era of Reform*, New York: Vera Institute of Justice, 2016; R Moshenska, *International Good Practice: Alternatives to Imprisonment for Women Offenders*, London: Prison Reform Trust, 2013.

several countries concerning child rights and wellbeing at their parents' arrest, bail, sentencing, imprisonment and release stages of the criminal justice process.³¹ There are many reasons for this mounting interest, including the influence of developmental criminology recognizing the importance of parenting in a child's development and social adaptation, and of the family as a potential protective factor.

III EMERGING INTERNATIONAL LEGAL STANDARDS ON CHILD RIGHTS

The impact of criminal justice decisions on children of parents in conflict with the law is not always sufficiently considered. In particular, the principle of the best interests of the child as a primary consideration in all decisions that directly and indirectly affect children is not always explicitly considered. As Flynn, Naylor and Arias observed, courts can play a role in responding to the needs of children of parents in conflict with the law.³²

From the perspective of parental (prisoners) rights, there is relatively longstanding recognition of the gendered and racialized impacts of sentencing, including on prisoners' children, at least since the 1990s, and there is ongoing scholarly and government interest in these differential social impacts as discussed below.³³ However, a child rights approach to adult criminal justice decision-making is more recent and arguably represents a jurisprudential shift in criminal sentencing,³⁴ appearing to emerge at the international level

³¹ For example, a Google search of 'children of incarcerated parents' generated about 2.3 million hits (accessed on 19 July 2016). There has been considerable academic interest from a wide range of disciplines, including social work, sociology, criminology, psychology, and law. Examples of advocacy organizations include Pillars in New Zealand, the Annie E. Casey Foundation in the USA, the Howard League for Penal Policy Reform in the UK, Children of Prisoners Europe, Penal Reform International, and the Quaker United Nations Office. A number of countries including Australia, England, Scotland, and the USA have exhibited high-level political interest in the effects of parental incarceration on children.

³² C Flynn, B Naylor, P F Arias, Responding to the Needs of Children of Parents Arrested in Victoria, Australia. *The Role of the Criminal Justice System*, Australian and New Zealand Journal of Criminology, 49(3), 2016, 351-369, at 355.

³³ See, e.g., E.L. Bush, Not Ordinarily Relevant: Considering the Defendants Children at Sentencing, *Federal Probation*, 54, 1990, at 15.

³⁴ A Skelton, 'Severing the Umbilical Cord: A Subtle Jurisprudential Shift Regarding Children and their Primary Caregivers', *Constitutional Court Review*, 1, 2008, 351-368.

mainly from 2005 onwards.³⁵ An array of international norms and standards are increasingly interpreted to affirm that criminal courts should explicitly consider the best interests of the child in all decisions affecting the child, extending to decisions about their parents or primary caregivers in adult criminal proceedings, especially in relation to arrest, remand and sentencing decisions. In particular, the *United Nations (UN) Convention on the Rights of the Child*³⁶ and the *UN Guidelines for the Alternative Care of Children*³⁷ provide a strong international legal foundation to argue that domestic criminal courts are obligated to routinely and independently consider the best interests of a dependent child when a parent is involved in criminal justice proceedings. At the regional level, the *African Convention on the Rights and Welfare of the Child* (article 30) supports the judicial recognition of the best interests of the child principle in sentencing caregiving parents with dependent children, while the *European Convention on Human Rights* (article 8) and the *Charter of Fundamental Rights of the European Union* (article 7) on the right to respect for privacy and family life provides a separate, but equally compelling, child-rights argument.³⁸

3.1 *The Principle of the Best Interests of the Child*

The *Convention on the Rights of the Child* does not explicitly address the rights of children whose parents are in conflict with the law, other than article 9(4) which recognizes a child's right to information about the whereabouts of a detained, imprisoned, exiled, deported, or executed parent unless contrary to the child's well-being.³⁹ However,

³⁵ See: L Townhead, 'Briefing Paper: Children of Incarcerated Parents International Standards and Guidance, Quaker United Nations Office, 2015. Available at: <https://www.quno.org/sites/default/files/resources/QUNO%20-%20Children%20of%20Incarcerated%20Parents%20International%20Standards.pdf>.

³⁶ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989.

³⁷ UN General Assembly, *Guidelines for the Alternative Care of Children: resolution/adopted by the General Assembly*, 24 February 2010, A/RES/64/142.

³⁸ See, especially, C Boudin, 'Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship', *The Journal of Criminal Law and Criminology*, 101(1), 2011, 77–118, at 88-90 for in depth analysis, who at 90 characterizes legal and policy developments in Europe as providing "...an explicit, but underdeveloped, judicial recognition of children's rights and family interests as a factor in the criminal justice processing of their parents".

³⁹ Article 9(1) is important in recognizing that a child will not generally be separated from their parent except in accordance with law and when separation is in the best

among several applicable rights and protection provisions,⁴⁰ article 3(1) of the *Convention*, the “principle of the best interests of the child”, specifically provides that the best interests of the child shall be a primary consideration in all state actions that affect the child, including those undertaken by courts of law.

In its General Comment on article 3(1), the Committee on the Rights of the Child expressed its opinion that the principle applies to ‘children affected by the situation of their parents in conflict with the law’ and has indicated that, in its view, the reference to ‘courts of law’ extends to criminal court proceeding matters with a direct *or* indirect impact on children.⁴¹ The Committee also indicated that when a parent or primary caregiver commits a criminal offence, alternatives to detention should be considered on a case-by-case basis, “... with full consideration of the likely impacts of different sentences on the best interests of the affected child or children”.⁴²

Footnote 39 continued

interests of the child. Article 9(3) of the *CRC* is also important in emphasising the right of a child who is separated from their parent to regularly maintain direct contact and personal relations unless contrary to the child’s wellbeing. This right has been invoked to argue for a child’s right to visit and communicate with a parent in prison.

⁴⁰ These potentially include: article 2 (non-discrimination), article 3 (best interests), article 5 (parental guidance), article 6 (survival and development), article 7 (registration, name, nationality, care), article 8 (preservation of identity), article 9 (separation from parents), article 12 (respect for the views of the child), article 16 (right to privacy), article 18 (parental responsibilities, state assistance), article 19 (protection from all forms of violence), article 20 (children deprived of family environment), article 21 (adoption), article 25 (review of treatment in care), article 26 (social security), article 27 (adequate standard of living).

⁴¹ UN Committee on the Rights of the Child (CRC), General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14.

⁴² UN Committee on the Rights of the Child (CRC), *General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration*, at para 69 in relation to preserving the family environment and maintaining family relations. See also UN Committee on the Rights of the Child (CRC), *Report and Recommendations of the Day of General Discussion on “Children Of Incarcerated Parents”*, 30 September 2011, para 30, which forms the basis of this interpretation. Since 2005, the Committee has increasingly addressed the situation of children of incarcerated and administratively detained parents as part of its concluding observations, either as a standalone item or in relation to the best interests of the child, early childhood development, separation from parents, children deprived of a family environment, birth registration and nationality, or as the children of migrant workers. These now more than 50 concluding observations, 40 of which

Additionally, article 2 of the *CRC* presumably protects a child against discrimination based on the alleged or assessed criminal status of their parent, while article 12 relating to the child's 'right to be heard' likely encompasses criminal courts considering the direct or indirect views of the child in situations where a court is remanding or sentencing their parent to imprisonment.⁴³ Moreover, article 20 of the *CRC* pertaining to children deprived of their family environment, especially if read together with guideline 48 of the *UN Guidelines for the Alternative Care of Children*, arguably requires a criminal court to ensure that appropriate alternative care arrangements are in place when remanding or sentencing a primary or sole carer with dependent children to imprisonment.⁴⁴ Articles 5 and 18 on parenting responsibilities are also potentially relevant in relation to ensuring that all *CRC* provisions are interpreted in a way that would usually allow parents to assist their children in exercising their rights and in stressing the importance of parents having primary responsibility for their child's upbringing and development focusing on the best interests of the child.⁴⁵

Footnote 42 continued

were made in 2010 or after, have instructed domestic courts to consider the best interests of the child principle when remanding or sentencing a parent to custody, emphasizing the use of alternative sanctions where possible and appropriate.

⁴³ UN Committee on the Rights of the Child (CRC), *General Comment No. 14 (2013)*, paras 43–45, 53–54 and UN Committee on the Rights of the Child (CRC), *Report and Recommendations of the Day of General Discussion on “Children Of Incarcerated Parents”*, para 41. See also: J Tobin, 'Judging the Judges: Are they adopting the Rights Approach in Matters Involving Children', *Melbourne University Law Review*, 33, 2009, 579–625 at 588, 605.

⁴⁴ Specifically, guideline 48 provides that when a child is to be deprived of a sole or main carer because of a sentencing decision, non-custodial sentences should be used where possible and appropriate following an assessment of the best interests of the child. See also UN Committee on the Rights of the Child (CRC), *Report and Recommendations of the Day of General Discussion on “Children of Incarcerated Parents”*, at para 42.

⁴⁵ On parenting responsibilities, Article 5 states that “States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”

The UN Committee on the Rights of the Child⁴⁶ and other human rights bodies like the UN Human Rights Council⁴⁷ and the Council of Europe⁴⁸ have recognized the dependent children of parents involved in criminal proceedings as a particularly vulnerable group of children, emphasizing the importance of alternatives to incarceration for parenting mothers and fathers or other primary caregivers—subject to the seriousness of the offence, the need to protect the public, and an assessment of the child’s wellbeing—in recognition of a child’s right to development being adversely affected (e.g., article 6 of the CRC). Other United Nations bodies such as the General Assembly⁴⁹ and the Human Rights Council⁵⁰ have adopted resolutions directly addressing the situation of children affected by their parents’ criminal justice system involvement extending to matters of sentencing. These resolutions have stressed the importance of UN member states: (1) prioritizing non-custodial measures when remanding or sentencing a pregnant woman or a dependent child’s sole or primary caregiver to imprisonment, (2) recognizing and protecting the rights of a child affected by parental incarceration, especially to have their best interests be an important consideration in decisions affecting them and not to be discriminated against because of the actions or alleged actions of one or both of their parents; and, (3) paying greater attention to the effects of parental imprisonment on children.

At the regional level, the *African Charter on the Rights and Welfare of Children (ACRWC)* article 30 on ‘Children of Imprisoned Mothers’, which was adopted by the Organization of African Unity in 1990, affirms that criminal courts in African member states must independently recognize and consider the best interests of a dependent child when remanding or sentencing their parent to custody.⁵¹ In

⁴⁶ See: Townhead, at 2 discussing the Committee’s *General Comment No. 7 (2005): Implementing Child Rights in Early Childhood*, CRC/C/CG/7/Rev.1 of 20 September 2006, para. 31(b).

⁴⁷ UN Human Rights Council. A/HRC/25/L.10, Rights of the Child, Access to Justice, 25 March 2014, para 5(a).

⁴⁸ Council of Europe Strategy for the Rights of the Child (2016–2021), 2013, para 13. See also: Council of Europe Recommendation 1469, “Mothers and Babies in Prison”, 2000.

⁴⁹ Data on file with the authors.

⁵⁰ Data on file with the authors.

⁵¹ Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990). See especially the

relation to sentencing, article 30.1 specifically provides that African states should always first consider a non-custodial sentence when sentencing mothers with children. Additionally, Article 30.1 provides that member states should establish and promote alternative treatment measures for women offenders consistent with the restorative aims of punishment.

In its general commentary on article 30, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) has provided a comparatively expansive interpretation of its definition of ‘mother’, which extends to children affected by the incarceration of their sole or primary caregiver so as to encompass fathers and other caregivers (including extended family members such as grandparents) who have custody of the child.⁵² According to the ACERWC, Article 30 is envisaged as encompassing all stages of criminal proceedings, from arrest through to release and reintegration, and not just sentencing a parent or carer to imprisonment.⁵³ The ACERWC has been equally clear there is a state obligation to create and implement laws and policies to ensure the best interests of the child are a primary consideration throughout the criminal justice process, whether the child is affected *directly or indirectly* by state actions.⁵⁴ Member states are expected to ensure there are available alternatives to incarceration for expectant prisoners and prisoners with children and that courts prioritize non-custodial measures in sentencing, subject to the seriousness of the offence and the need to protect the public and the child.⁵⁵ State parties should also consider the views of the child, whether directly or indirectly, and give due weight to those views, extending to providing children with an opportunity to take part in sentencing procedures and if necessary to have legal representation or a guardian to ensure their participation.⁵⁶ In relation to implement-

Footnote 51 continued

African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the rationale for article 30 (children of imprisoned mothers) of the *African Convention on the Rights and Welfare of the Child* Available at: ACERWC *General Comment No. 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) On “Children of Incarcerated and Imprisoned Parents and Primary Caregivers”*, 2013, para 7.

⁵² ACERWC, 2013, para 13.1.

⁵³ *Ibid.* at para 11.

⁵⁴ *Ibid.* at paras 7, 22–23.

⁵⁵ *Ibid.* at para 24(a), 41–49.

⁵⁶ *Ibid.* at para 24(d), 30–32.

ing Article 30, the ACERWC has recently affirmed the judicial sentencing guidelines developed by the South African Constitutional Court in *S v M* in 2007 setting forth a five part test, calling on Member states to review and amend their sentencing procedures accordingly.⁵⁷

In the Americas, the Organization of American States has also focused some attention on the best interests of the child and a child's separation from their parents more generally in relation to the *American Convention on Human Rights* (especially articles 17 and 19 concerning protection of the family and special human rights protections for children and adolescents).⁵⁸ More recently, the Inter-American Commission on Human Rights received a petition about the situation of children of persons deprived of their liberty highlighting the many ways that deprivation of liberty impacts children.⁵⁹ Within this context, the Special Rapporteur for Children's Rights has emphasized the need for alternative sentencing options for prisoners with children.⁶⁰

⁵⁷ *Ibid.* at para 36. The sentencing court guidelines stipulate that: "(a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so; (b) The court should also ascertain the effect on the children concerned of a custodial sentence if such a sentence is being considered; (c) If the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated; (d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the best interests of the child; (e) Finally, if there is a range of appropriate sentence, then the court must use the principle of the best interests of the child as an important guide in deciding which sentence to impose".

⁵⁸ For example, Organization of American States (OAS), The Inter-American Commission on Human Rights (IACHR), *The Rights of the Child in the Inter-American System* (second edition), OEA/Ser.L/V/II.133, Doc. 34, 2008. See also, the OAS/IACHR/UNICEF report on the *Rights of Boys and Girls to a Family. Alternative care. Ending Institutionalization in the Americas*, in particular at 66–76 on the best interests of the child as interpreted and applied in the Americas, OEA/Ser.L/V/II. Doc. 54/13, 2013. Available at: <https://www.oas.org/en/iachr/children/docs/pdf/Report-Right-to-family.pdf>.

⁵⁹ A Flynn-Schneider, *Human Rights Brief, Situation of Children of Persons Deprived of Liberty in the Americas*, 28 October 2015, para 3. Available at: <http://hrbrief.org/hearings/children-deprived-of-liberty-in-the-americas/>.

⁶⁰ *Ibid.* at para 5.

3.2 *The Right to Respect for Privacy and Family Life*

As a separate consideration from the best interests of the child, various international and regional treaties protect the right to privacy and family life, including articles 17 and 23(1) of the *International Covenant on Civil and Political Rights*,⁶¹ article 10 of the *International Covenant on Economic, Social and Cultural Rights*,⁶² and article 8 of the *European Convention on Human Rights*.⁶³ While not directly addressing the rights of a child to family life, the European Court of Human Rights evidently has interpreted the *ECHR* article 8 right to afford prisoners some protections in maintaining familial contacts and relationships.⁶⁴ On the other hand, domestic criminal courts in

⁶¹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, articles 17 and 23(1). Article 17 protects against arbitrary or unlawful interference with privacy and the family, while article 23(1) recognizes the family as the fundamental social unit that is entitled to social and state protection. For insightful legal analysis, see: M Bagaric and T Alexander, 'First-Time Offender, Productive Offender, Offender with Dependents: Why the Profile of Offenders (Sometimes) Matters in Sentencing', *78 Albany Law Review*, 2015, 397–446, at 432–435.

⁶² UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations. Article 10(1) recognizes the family as the fundamental social unit that is entitled to broad protection and assistance, while article 10(2) recognizes the right of mothers to special protections before and immediately after childbirth. Article 10(3) recognizes that special protection and assistance measures should be taken on behalf of all children and that children should not be subject discrimination based on their parentage.

⁶³ Article 8 on the Right to respect for private and family life provides: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". Other relevant European standards include the *Charter of Fundamental Rights of the European Union* article 7 "Respect for private and family life" and article 24 rights of the child (including protection and care for their wellbeing, a child's right to be heard, to have their best interests be a primary consideration, and to maintain a relationship and have direct contact with their parents). See, e.g., R. Wolleswinkel, 'Child rights in post-Lisbon Europe, what about children of imprisoned parents?' *European Journal of Parental Imprisonment: An Evolving Child Rights Agenda*, Spring 2015, at 7.

⁶⁴ See M van der Meij, *Children of Prisoners and Human Rights: The Forgotten Victims*, LLM in International and European Public Law International Law and Human Rights, Tyilburg University, 2013, at 11, 14. Available at: <http://arno.uvt.nl/show.cgi?fid=132394>.

England and Wales have been willing to directly consider a child's right to family life as being engaged when a parent is being criminally sentenced and the appellate courts have developed a range of judicial guidance on this issue.⁶⁵ Moreover, in 2014, the European Parliament explicitly recognized children of imprisoned parents in its resolution 2014/2919(RSP) on the 25th Anniversary of the UN *CRC*, calling on the Commission "... to assess the impact of detention policies and criminal justice systems on children".⁶⁶

3.3 *The Gendered and Racialized Effects of Sentencing and Imprisonment*

In addition to the foregoing, several international instruments recognize the differential, and especially the gendered and racialized, impacts of sentencing and imprisonment for many parents and their dependent children. In particular, the *UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules)* prioritize non-custodial measures when criminal courts are sentencing a pregnant woman or a dependent child's sole or primary caregiver where possible and appropriate, with custodial sentences to be limited to serious and violent offences or offenders who represent some danger, "after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children" (emphasis

⁶⁵ See especially the work of Rona Epstein who has published a series of research articles on sentencing and child rights in the UK, including 'Mothers in Prison: The Sentencing of Mothers and the Rights of the Child', *Coventry Law Journal: Special Issue Research Report*, 2012. Shona Minson has also published several studies on sentencing mothers, including: S Minson, *Mitigating Motherhood: A study of the impact of motherhood on sentencing decisions in England and Wales*, London, The Howard League, 2014; S Minson, R Nadin, R and J Earle, *Sentencing of Mothers: Improving the sentencing process and outcomes for women with dependent children: A Discussion Paper*, London, Prison Reform Trust, 2015. See also F Donson and A Parkes, 'Changing Mindsets Changing Lives: Increasing the visibility of children's rights in cases involving parental incarceration', *International Family Law*, 4(6), 2012, 408–413.

⁶⁶ *European Parliament resolution on the 25th anniversary of the UN Convention on the Rights of the Child (2014/2919(RSP))*. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B8-2014-0285+0+DOC+XML+V0//EN>, para 13.

added).⁶⁷ The *Bangkok Rules* also encourage states to develop gender-specific sentencing alternatives⁶⁸; ensure that women are not separated from their families without due consideration to their background and family ties⁶⁹; and authorize their sentencing courts to consider a range of mitigating factors when sentencing women offenders, including a women's caretaking responsibilities.⁷⁰ As well, the *Bangkok Rules* provide that women sentenced to prison should be afforded an opportunity to make childcare arrangements and appear to anticipate deferred or suspended sentencing options based on an assessment of the best interests of a child.⁷¹

At the regional level, several European Parliament resolutions and recommendations also expressly acknowledge the gendered and adverse effects of imprisonment for women and their children and advocate the use of community based alternatives to prison.⁷²

Finally, for countries like Australia, Canada, New Zealand, and the USA that have exceptionally high and disproportionate rates of Indigenous persons remanded in custody or sentenced to imprisonment, many of whom are parents, the *UN Declaration on the Rights of Indigenous Peoples (UNDRIP)* is likely relevant to the rights of Indigenous children in their parents' adult criminal proceedings if such children are to be forcibly separated from their parents due to state-imposed imprisonment.⁷³ The effects of parental incarceration on Indigenous children is a particularly important consideration for countries like Australia and Canada in view of the ongoing inter-generational trauma and other adverse effects associated with very

⁶⁷ UN General Assembly, *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)*, Rule 64. 6 October 2010, A/C.3/65/L.5.

⁶⁸ *Ibid.* rule 57.

⁶⁹ *Ibid.* rule 58.

⁷⁰ *Ibid.* rule 61.

⁷¹ *Ibid.* rule 2.

⁷² See, for example, European Parliament resolution of 13 March 2008 on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life (2007/2116(INI)). Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0102+0+DOC+XML+V0//EN>.

⁷³ Consider the recognition in preambular paragraph 13 of "the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child" and operative provisions contained in articles 7, 8, 9, 21 and 22 of the Declaration.

troubling histories of colonization and policies of forcible state separation of children from their parents by means of residential schools and the child welfare system.⁷⁴

IV STATE PRACTICES

In accordance with these international and regional standards, and alongside common law principles and recognized mitigating factors pertaining to the personal circumstances of offenders in sentencing, countries like Australia, Canada, England and Wales, New Zealand, South Africa, and the USA have adopted varying legislative and judicial approaches to recognizing the best interests of the child or family rights when remanding and/or sentencing a dependent child's parent or primary caregiver to imprisonment. However, policy guidance in these matters has often been interpreted quite narrowly, applying only in exceptional circumstances. Moreover, policy guidance has tended to be seen as non-binding and is not always followed consistently by the courts. It is therefore often suggested that a statutory requirement or more formalized protocols should be established for criminal justice decision-makers, especially at the levels of arrest, remand decisions and sentencing, to routinely enquire about and consider the effects of criminal justice decisions, especially detention or imprisonment, on dependent children. This requirement likely should extend to the police and courts routinely inquiring about alternative care arrangements for dependent children and/or permitting parents time to make these arrangements in situations where there is no viable alternative but to detain or imprison the parent, especially when a sole or primary caregiver.

As well, it cannot be assumed that judges always have the information they need to consider the parental obligations of an offender at the time of sentencing or when making other decisions that may impact the defendant's children or family. One may expect that this kind of information would be presented by defence counsel, when one is present, but this is not necessarily the case. In the case of self-represented defendants, the judge may seek that information but have no immediate means to ascertain its veracity. In the case of problem solving courts, such as Indigenous courts and drug courts, the

⁷⁴ See especially the comments of Madam Justice Ross in *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, at para 15. She recognizes this principle in relation to the circumstances of Indigenous mothers in Canada who face higher rates of incarceration and a history of familial dislocation due to state action.

information may be obtained as part of preparing a healing plan for the offender, but this is not always the case.⁷⁵ Finally, relying on the defendants or offenders to disclose their parental situation and responsibilities is often unrealistic, as these parents will not necessarily consider it to be in their best interest or that of their children to do so in relation to the potential risks of state apprehension of their children and/or the termination of their parental rights. Accordingly, there is still a need to carefully consider what works best in routinely getting information about dependent children before a remand or sentencing court, including consideration of the privacy rights of the defendant/offender and their children.

4.1 *Australia*

In Australia, the appellate courts have long-recognized the common law principles of ‘excessive hardship’ and ‘mercy’ as mitigating factors in sentencing and there is a considerable body of case law and a number of authoritative decisions on the excessive hardship to family/dependents principle.⁷⁶ There is also some federal and state level legislative recognition of the hardship caused to an offender’s dependent children by imprisonment as a potential mitigating factor in exceptional circumstances reducing the severity of the sentence. Specifically, for Commonwealth or federal offences, section 16A(2)(p) of the *Crimes Act 1914* (Cht), as amended in 1990, legislatively *requires* courts to take into account the ‘probable effect’

⁷⁵ A number of common law countries like Australia, Canada and the USA have developed specialized problem-solving courts, many of which operate using therapeutic or restorative principles. Canada has, for example, developed domestic violence courts, mental health courts, drug treatment courts, community courts and Indigenous courts to divert criminal offenders with particular needs from the criminal justice system. These courts typically operate using collaborative inter-agency teams (for example, court personnel and mental health or addiction experts) and specialized court personnel (for example, Indigenous judges, lawyers, elders, and probation officers for Indigenous courts) who seek to assist the offender in addressing underlying problems relating to their criminal behaviour.

⁷⁶ See T Hannon, *Children: Unintended Victims of Legal Process – A review of policies and legislation affecting children with incarcerated parents: Discussion Paper*, Flat Out Inc. and the Victorian Association for the Care and Resettlement of Offenders, Melbourne, Victoria, 2006, at 41–52; A Larsen, ‘Gendering criminal law: sentencing a mothering person with dependent children to a term of imprisonment’, *Australian Journal of Gender and Law*, 1(1), 2012, 21–42, at 28–37; T Walsh and H Douglas, ‘Sentencing Parents: The Consideration of Dependent Children’, *Adelaide Law Review*, 37, 2016, 135–161. The courts evidently use the principle of ‘mercy’ in cases where excessive hardship cannot be established.

of any sentence on a family or dependents where this information is ‘relevant and known to the court’. Both the Australian Capital Territory (ACT)⁷⁷ and South Australia⁷⁸ have enacted similar legislative ‘probable effect’ provisions for state-level offences.

According to Walsh and Douglas, nothing in s.16A(2)(p) or in its equivalent in South Australia or the Australian Capital Territory laws suggests that the effect of the sentence on an offender’s family or dependents must be exceptional to be taken into account.⁷⁹ However, the wording and elements of the *Crimes Act 1914* (Cht) 16A(2)(p) provision (‘probable effect’, ‘where relevant and known’) have generally been interpreted by the courts as requiring cogent evidence of extreme hardship and as operating alongside the common law principle that any hardship suffered by a defendant’s family and dependents can only mitigate a sentence in ‘exceptional circumstances’, such as both parents being imprisoned or a single parent leaving a child without parental care or in relation to disabled or severely ill dependent children.⁸⁰ As well, whether the provision carries any weight at all depends on the objective seriousness of the offence and the circumstances of each case.⁸¹ For example, in *Markovic v. The Queen*,⁸² the Victorian Court of Appeal was specifically asked to consider the “circumstances in which an offender can legitimately seek to cause hardship to members of his/her immediate family or other dependents”.⁸³ In this case, the court observed that imprisonment almost inevitably causes hardship for dependents and that, since this is to be expected, hardship must have an exceptional character in

⁷⁷ *Crimes (Sentencing) Act 2005* (ACT) s.33 (r)(o).

⁷⁸ *Criminal Law (Sentencing) Act 1998* (SA) s. 10(1)(n)(o).

⁷⁹ T Walsh and H Douglas, at 138.

⁸⁰ See, for example, A Renieris, *The Effects of Parental Imprisonment on Children: Sentencing Factors, Guidelines and Options, A Background Paper*, Clinical Legal Education placement at the West Heidelberg Community Legal Service, La Trobe University Law School, 2006, at 2, 4. See also A Larsen, at 25–35; T Walsh and H Douglas, at 146–159. See especially National Judicial College of Australia, Commonwealth Sentencing Database ‘Offender’s Family and Dependents’ paras 2-6 and especially 3.1. Available at: https://njca.com.au/sentencing/principles-practice/general_sentencing_principles/s16a_specific_relevant_factors/dependants/.

⁸¹ See especially National Judicial College of Australia, paras 2-6 and especially 3.1.

⁸² (2010) 30 VR 589 (“*Markovic*”).

⁸³ T Walsh and H Douglas, at 139.

order to have an impact on the sentence.⁸⁴ On the other hand, in some other cases, it has been held that even if exceptional circumstances are not present, the effect of the sentence on the offender's children could still attract leniency under the court's residual "mercy discretion".^{85, 86}

It is noteworthy that in some of these cases the courts have also been willing to consider the UN *CRC* article 3(1) principle of the best interests of the child as a relevant circumstance in accordance with legislative sentencing guidelines that permit judges to consider "any other relevant circumstance".⁸⁷ Moreover, some state-level sentencing councils are attentive to gendered differences in sentencing outcomes, especially in relation to women who are sole caregivers for dependent children.⁸⁸ Additionally, like Canada and New Zealand, there is some state-level legislative recognition requiring sentencing courts to consider the cultural backgrounds of Aboriginal and Torres Strait Islanders, but limited analysis of the application of these requirements to parenting defendants or offenders with children.⁸⁹

In view of the relatively narrow interpretation and inconsistent application of the hardship principle, the Australian Law Reform Commission, along with several Australian academics and non-government organizations, have strongly advocated that the effects of sentences for sole or primary caregivers with dependent children should routinely be a significant consideration "without the need to establish exceptional circumstances".⁹⁰ Moreover, it has been rec-

⁸⁴ T Walsh and H Douglas, at 139.

⁸⁵ E.g., *R v. Carmody* (1998) 100 A Crim R 41, 45. See also the discussion in Walsh and Douglas, at 139–141.

⁸⁶ *Ibid.*, at 140–142.

⁸⁷ See especially T Walsh and H Douglas, at 152, 154. See also Larsen, at 34–35.

⁸⁸ See, e.g., State of Victoria, Sentencing Advisory Council, 2010, at 4, 15–16, 39–40, 46–49, 56. Available: <https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Gender%20Differences%20in%20Sentencing%20Outcomes.pdf>.

⁸⁹ A Walters and S Longhurst, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*, Australia: Human Rights Law Centre and Change the Record, 2017, at 42–46.

⁹⁰ As cited by T Walsh and H Douglas, at 139. See also: C Flynn, B Naylor, and PF Arias, at 364; L Feig, at 17; A Renieris, at 8; C Trotter, C Flynn, B Naylor, P Collier, D Baker, K McCauley and A Eriksson, *The Impact of Incarceration on Children's Care: A Strategic Framework for Good Care Planning*, Monash University, Criminal Justice Research Consortium, 2016, at 62; A Walters and S Longhurst, at 6–8, 46.

ommended at the state-level that the best interests of the child principle should be routinely considered when sentencing adult parents with dependent children.⁹¹ Combining these recommendations, Walsh and Douglas suggest: "...the probable impact of a sentence on the offender's dependants should be a significant factor that is weighed with other factors in the process of 'instinctive synthesis' applied by Australian sentencing judges. We suggest that the notion of 'exceptionality' may not be a useful concept in determining the appropriate outcome in any given case, given its vagueness and openness to different interpretations. In our view, when a parent is being sentenced, the best interests of the child should always be considered."⁹²

4.2 *Canada*

In Canada, the objectives and principles of sentencing are explicitly stated in the *Criminal Code*. Section 718.2(d) of the *Code* states that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances". Canadian courts are required by section 718.2(e) of the *Criminal Code* to "consider all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders". However, Canadian sentencing policy on mitigating factors does not expressly recognize the 'excessive hardship to dependents' principle (Australia) or include a list of enumerated mitigating factors such as family ties (some American states). While criminal sentencing courts may consider an offender's dependent children as a mitigating factor,⁹³ the available jurisprudential evidence suggests that criminal courts do not *routinely* consider the potential effects of a parent's carceral sentence on their dependent children.⁹⁴ There are also cases where a sentencing

⁹¹ Anti Discrimination Commission Queensland, *Women in Prison Report*, 2006, para 10.4.1. Available: https://www.adcq.qld.gov.au/__data/assets/pdf_file/0018/5148/WIP_report.pdf.

⁹² T Walsh and H Douglas, at 161.

⁹³ Section 718.2(a), *Criminal Code*.

⁹⁴ *R. v. Hamilton*, 2003 CanLII 2862 (ON SC) at para 197. See also the legal factum prepared by West Coast LEAF as an intervener in the Supreme Court of Canada *Lloyd versus the Queen* case challenging the constitutionality of mandatory minimum sentences in relation to the hypothesized negative gendered effects for women at 23.

court has refused to take a defendant's caregiving obligations in mitigation.⁹⁵

Caregiving obligations and the principle of the best interests of a child have been judicially recognized in relation to Canada's remedial sentencing provisions, encompassing section 718.2(e) of the *Criminal Code* and related trial and appellate jurisprudence, to address the historical and intergenerational legacies of discrimination and socio-economic disadvantage experienced by many Indigenous and black persons.⁹⁶ In the renowned *Gladue* (1999) decision concerning whether section 718.2(e) of the *Criminal Code* applied off-reserve, the Supreme Court of Canada in recounting the judicial history of the case recognized trial level mitigating factors, including that Gladue had two dependent children. At the same time, it is noteworthy that the trial court largely discounted Gladue's pregnancy with a third child at the time of her sentencing, which was treated as a neutral factor.⁹⁷ In the *Hamilton and Mason* (2003) case, the Ontario Superior Court expressly recognized the differential circumstances—including, racial and gender bias and poverty—experienced by black women offenders operating as transnational drug couriers, many of whom are single parents, stating that: "As a general rule, the sentencing function should take account of the best interests of an

⁹⁵ See, e.g., *R. v. Estrella*, [2011] O.J. No. 6616 (OSCJ), at para 16.

⁹⁶ Various Supreme Court of Canada decisions such as *R v Gladue* (1999) and *R v Ipeelee* (2012) have clarified and expanded this sentencing obligation and the applicable principles, or so-called Gladue factors, that sentencing—and now in some provincial/territorial jurisdictions bail—courts are required to consider.

⁹⁷ *R. v. Gladue* [1999] 1 S.C.R. 688, para 15. In view of Canada's troubling history of forcibly separating Indigenous parents and children through state-imposed Indian residential schools and child welfare policies, with profoundly adverse, including inter-generational, consequences for affected children, it is intriguing how little emphasis was placed on Gladue's child caring responsibilities and that there was no separate consideration of the best interests of her children. Neither the Gladue principles nor Gladue reports appear to specifically reference the best interests of Indigenous children affected by their parents' incarceration. Instead, Gladue factors and Gladue reports seem to focus more on criminogenic risk factors such as prior residential school experiences, adoption or experiences in the child welfare systems as opposed to protective or resilience factors associated with desistance from crime, including whether the offender has dependent children and primary caregiving obligations. Additional systematic analysis of the extent to which parenting obligations and the interests of dependent children are considered in Gladue reports and Gladue-related bail and sentencing proceedings would be beneficial.

offender's wholly dependent children.”⁹⁸ However, it remains unclear whether the 2003 *Hamilton and Mason* judgment will influence other courts to consider the best interests of dependent children affected by maternal (or paternal) incarceration since the trial judge was severely criticized on appeal for leading the evidence on systemic discrimination and overstepping the bounds of a sentencing court.⁹⁹

Also directly relevant to the rights of children with respect to criminal proceedings concerning one of their parents, the best interests of the child was a significant legal consideration in a 2013 British Columbia (BC) Supreme Court decision, *Inglis versus British Columbia (Minister of Public Safety)*, successfully challenging the province's unilateral cancellation of a residential mother-child program at a provincial prison for women.¹⁰⁰ The constitutional challenge, asserting unjustifiable infringements of section 7 (right to life, liberty and security of the person), section 12 (cruel and unusual punishment), and section 15 (equality) *Charter* rights, was brought by two former inmates and their children on behalf of themselves and other provincially incarcerated women.¹⁰¹ The court found that the province's decision to cancel the program unjustifiably violated the plaintiffs' section 7 rights to security of the person and section 15 equality rights.¹⁰²

⁹⁸ *R. v. Hamilton*, 2003 CanLII 2862 (ON SC) at para 197. For an in depth analysis of the *Hamilton and Mason* cases, see especially: C Murdocca, *To Right Historical Wrongs: Race, Gender and Sentencing in Canada*, Vancouver: UBC Press, 2013.

⁹⁹ *R v. Hamilton et al.* Ontario Court of Appeal, 72 O.R. (3d) 1, [2004] O.J. No. 3252. The *Hamilton* case raises a question of whether defence or intervener led evidence on systemic discrimination and sole caregiving may be accepted. Notably, though, the Ontario Court of Appeal has recognized the legitimacy of remedial sentencing to address the systemic discrimination experienced by black Canadians in other cases (*R. v. Borde*, 2003 4187 (ONCA)).

¹⁰⁰ The *Inglis* decision, affirming the section 7 and 15 rights of incarcerated mothers and their children, is not only important as a matter of domestic law, but is promoted by research and advocacy organizations such as the Quaker United Nations Office and Prison Reform International as an international best practice in relation to the judicial recognition of the rights of children of incarcerated parents.

¹⁰¹ *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, paras 1–3.

¹⁰² *Ibid.* at paras 10–17. In particular, the court concluded that the interests of mothers and infants to remain together is an aspect of security of the person (for both the mother and the child in relation to the benefits of staying together and the risks of separation, including potential state apprehension of a child through closure of the program) and that a decision to cancel the mother-baby program cannot be

4.3 *England and Wales*

In England and Wales, the ‘care of dependent children’ is a well-established mitigating factor in sentencing, especially if sentencing a sole or primary care giver to prison. Since 2011, there has been increasing national policy-level recognition of a defendant’s responsibility as a ‘sole or primary carer for dependent relatives’ as a potential mitigating factor, which is being directly incorporated in offence-specific sentencing guidelines for a growing number of criminal offences including assault, drugs, burglary, robbery, theft, as well as fraud, bribery and money laundering offences.¹⁰³ The Equal Treatment Bench Book that provides guidance to judges and magistrates on implementing the *Equality Act* of 2010 also recognizes the significant adverse effects of custodial sentences on children and references Sentencing Guideline recommendations that sentencing judges should be aware of the differential impacts of sentencing and imprisonment on women and men, especially in relation to caregiving responsibilities.¹⁰⁴ Much like in Australia and Canada, there is also a legal presumption that prison is to be used as a last resort and only for the most serious offences in situations where an alternative sanction cannot be justified, although there is mounting concern that this legal presumption is ineffective in light of the growing numbers of particularly women who are being imprisoned.¹⁰⁵

Since 2000, the appellate courts for England and Wales have recognized a child’s *ECHR* Article 8 right to family life as being engaged when sentencing a parent, with the right applying equally to

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based on a blanket exclusion and removed from an individualised process of determining the best interests of the child (paras 10–17). The court also found provincially sentenced mothers and their babies to be members of a vulnerable and disadvantaged social group, with cancellation of the program contributing to further disadvantage of the group, noting in particular the experiences of Indigenous women and their children in relation to overrepresentation in prison and a history of cultural dislocation imposed by the state (para 15).

¹⁰³ See, e.g., U.K. Sentencing Council, *Assault: Definitive Guideline*. Available at: https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault_definitive_guideline_-_Crown_Court.pdf. But see J Roberts and G Watson, at 14, who critique the impact of these offence-specific guidelines in practice.

¹⁰⁴ Judicial College (2013), *Equal Treatment Bench Book*, para 46. Available at: https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB_all_chapters_final.pdf.

¹⁰⁵ S Minson, R Nadin, and J Earle, at 5–10.

a mother or father. Importantly, the *ECHR* article 8 right to privacy and family life is considered by the sentencing courts as being conceptually distinct from the best interests of a child principle envisaged by the *CRC* (Article 3) and article 24.2 of the *European Union Charter of Fundamental Rights*.¹⁰⁶ It also extends beyond the criminal justice context and is a factor in other court decisions (e.g., deportation of irregular migrants, extradition) involving parent–child separation, which is important in view a growing number of foreign nationals being detained and imprisoned globally.¹⁰⁷

With respect to this Article 8 obligation to consider the interests of a dependent child and the consequences of a custodial sentence on family life, Minson, Nadin and Earle summarize as follows the four guiding principles emerging from the case law:

The sentencing of a parent for a criminal offence engages the right to family life of both the parent and the child (...); (2) Any interference by the state with a person's right to family life must be in response to a pressing social need, and proportionate to the legitimate aim pursued; (3) The more serious the interference the more compelling must be the justification, and it cannot be much more serious than the act of separating a mother from a very young child; (4) Non-custodial sentences are preferable for women with dependent children, with custodial sentences to be considered when the offence is serious or violent or the woman represents a continuing danger. Even when that is the case, a custodial sentence should only be given after considering the best interests of the child or children, whilst ensuring that appropriate provision has been made for their care.¹⁰⁸

As observed by the Court of Appeal in *Petherick*: "... a criminal court ought to be informed about the domestic circumstances of the defendant and where the family life of others, especially children, will be affected" and must take it into consideration: "It will ask whether the sentence contemplated is or is not a proportionate way of balancing such effect with the legitimate aims that sentencing must serve".¹⁰⁹

Petherick provides additional judicial guidance on how courts should apply these principles in practice; for example, sentencing

¹⁰⁶ See *R v Petherick* [2012] EWCA Crim 2214. See also Boudin, 2011, at 88–90 who considers the *ECHR* article 8 recognition a 'less explicit' recognition of the rights of dependent children of offenders.

¹⁰⁷ See, for example, *HH v Deputy Prosecutor of the Italian Republic*, Genoa [2012] UKSC 25, concerning a request for extradition.

¹⁰⁸ S Minson, R Nadin, R and J Earle, at 10.

¹⁰⁹ *R v Petherick* [2012] EWCA Crim 2214, at para 20.

courts should balance the impact of a sentence on dependent children against the need to punish the offender, and the court should ask for additional information about a defendants' primary caregiving responsibilities if the information before it is insufficient.¹¹⁰ In the words of the Court: "... in a case where custody cannot proportionately be avoided, the effect on children or other family members *might* (our emphasis) afford grounds for mitigating the length of sentence If it does ... it is a factor which is infinitely variable in nature and must be trusted to the judgment of experienced judges".¹¹¹ As well, in a threshold case, the impact of a custodial sentence on dependent children may shift the balance to a non-custodial or suspended sentence based on judicial assessment of the principle of proportionality.¹¹²

Notwithstanding superior and appellate court direction on the *ECHR* right to family life in relation to considering the rights of dependent children when sentencing their parents, various academics and advocacy organizations have observed that both magistrates and crown courts are inconsistently applying the applicable sentencing principles to defendants with children. This inconsistent application has prompted calls for clear legislative guidance to the courts to investigate the caregiving responsibilities of defendants and consider such responsibilities in custodial and non-custodial sentencing.¹¹³

4.4 *New Zealand*

In New Zealand, legislative and jurisprudential measures have attempted to address high rates of Indigenous (Māori) incarceration.¹¹⁴ In 2002, New Zealand introduced a new *Sentencing Act* that directs sentencing courts to take an offender's personal, family, whanau, community, and cultural background into account when imposing a

¹¹⁰ *Ibid.* paras 20–21.

¹¹¹ *Ibid.* para 24.

¹¹² *Ibid.* para 22. See also: S Minson, R Nadin, and J Earle, at 10–11.

¹¹³ See, e.g., R Epstein, 'Sentencing mothers: the rights of the child and the duties of the criminal courts', *Contemporary Social Science: Journal of the Academy of Social Sciences*, 8(2), 2013, 130–140, at 139; S Minson, R Nadin and J Earle, at pp. 12–18.

¹¹⁴ S Jeffries and P Stenning, 'Sentencing Aboriginal Offenders: Law, Policy, and Practice in Three Countries', *Canadian Journal of Criminology and Criminal Justice*, 56(4), 2014, 447–494, at 474–477.

rehabilitative sentence, as part of the principles of sentencing.¹¹⁵ When appearing before a sentencing court, section 27 of the *Sentencing Act* also permits an offender to request the court to hear witnesses who can speak on their behalf on these five factors; how these five factors are related to the commission of the offence; any restorative processes that are available or have been used to resolve issues related to the offence, including those that involve the offenders' family; how available family, whanau and community support may prevent further offending by the offender; and how these five factors may be relevant in relation to possible sentences.¹¹⁶ Still, as Jeffries and Stenning observe, despite being operative for more than 10 years, there has been little systematic assessment of the use or effect of these provisions.¹¹⁷ Moreover, the provisions are not specific to minority or disadvantaged offenders, but apply to all convicted offenders.¹¹⁸ It thus remains unclear whether having dependent children—and considering their interests in relation to possible sentences for a Māori or non-Māori parent—might intersect with these provisions.

4.5 *South Africa*

Of the six countries reviewed, South Africa provides the clearest example of judicial recognition of the best interests of a child in the context of sentencing their parent. In fact, South Africa has received international attention for its landmark 2007 *S v M* Constitutional Court ruling on the duty of a sentencing court to recognize and consider the best interests of a child in relation to sentencing their primary or sole caregiver to prison.¹¹⁹ In *S v. M* the Constitutional Court of South Africa directly addressed the role of the courts in considering the paramountcy of the best interests of the child when sentencing a primary caregiver of dependent children to imprisonment. In this case, a recidivist 35-year-old single mother who was the sole and main care provider for her three boys aged 8, 12 and 16 pleaded guilty to multiple

¹¹⁵ Section 8(i). Available at: <http://www.legislation.govt.nz/act/public/2002/0009/latest/versions.aspx>.

¹¹⁶ S Jeffries and P Stenning, at 476–477.

¹¹⁷ *Ibid.* at 477.

¹¹⁸ *Ibid.*

¹¹⁹ *S v M* (CCT 53/06) [2007] ZACC 18. See: A Skelton, at 363–367; E Coetzee, 'Can the Application of the Human Rights of the Child in a Criminal Case Result in a Therapeutic Outcome, *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 13(3), 2010, 125–154, at 136–139.

counts of fraud and theft and was sentenced to 4 years direct imprisonment. This sentence was imposed despite submissions by the offender's lawyer for correctional supervision, resulting in a constitutional challenge of the child's right to parental care (section 28(1)(b)) and the best interests of the child (section 28(2)).¹²⁰ The main constitutional question before the Court was whether the sentencing court had paid "sufficient attention to the constitutional provision that in all matters concerning children, the children's interests shall be paramount?"¹²¹ In considering the duties of a court when sentencing a primary caregiver with dependent children, Mr. Justice Sachs, in his majority judgment for the Court, allowed the appeal and substituted a suspended sentence for the balance of the sentence (45 months) and a correctional supervision order for 3 years combined with restitution.¹²² In his judgment, Mr. Justice Sachs stated:

Thus, it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have special regard for the children's interests that threatens to do so. The purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm.¹²³

Mr. Justice Sachs also outlined guidelines for the courts to follow, which the ACERWC adopted in their *General Comment No. 1*.¹²⁴

In assessing South African jurisprudential developments since the landmark *S v M* case, Skelton and Mansfield-Barry have observed that the judgment has had a considerable impact on South African sentencing courts. Specifically they note that 17 judgments have now applied the *S v M* approach mainly at the appellate level, including courts recognizing appellants who are co-parenting and courts ensuring that arrangements are in place for the safety and proper care of children when a custodial sentence is the only appropriate op-

¹²⁰ *S v M*. at paras 2–9.

¹²¹ *Ibid.* at para 1.

¹²² *Ibid.* at para 77.

¹²³ *Ibid.* at para 35.

¹²⁴ *Ibid.* at para 36.

tion.¹²⁵ In addition to also influencing international and regional instruments, they further note that the *S v. M* principles now extend beyond sentencing to South African bail proceedings.¹²⁶

4.6 *United States of America*

In comparison with the other five countries, the USA is arguably least well positioned to have its sentencing courts consider the *CRC* article 3 best interests of the child principle when sentencing parents with dependent children given that the USA has not ratified the *Convention*. As well, the USA has adopted a highly structured approach to sentencing via mandatory sentencing guidelines and other restrictive sentencing policies, such as mandatory minimums, over the past 40 years at both the federal and state levels.

There is some state-level legislative recognition of family ties in bail and sentencing.¹²⁷ However, several in depth legal and empirical analyses of ‘downward sentencing departures based on family ties’ suggest that ‘family ties’ are not ordinarily relevant in allowing a departure from mandatory federal or state sentencing guidelines, with departures limited to ‘extraordinary circumstances’ and with wide judicial variation in what constitutes extraordinary circumstances.¹²⁸

¹²⁵ A Skelton and L Mansfield-Barry, ‘Developments in South African Law Regarding the Sentencing of Primary Caregivers’, *European Journal of Parental Imprisonment (Child Impact Assessments and Sentencing)*, Winter 2015, 14–15.

¹²⁶ *Ibid.* at 15.

¹²⁷ See, e.g., USA, Alabama Criminal Procedure Rule 7.2 on family ties permitting a court to take into account the age, background and family ties, relationships and circumstances of the defendant, available at: http://judicial.alabama.gov/library/rules/cr7_2.pdf; USA, Florida 2013 Statutes 903.046 requiring a court to consider a defendant’s family ties, length of residence in the community, employment history, financial resources, and mental condition when determining whether to release the defendant on bail with or without conditions. New South Wales, Australia has a comparable provision in its *Bail Act*, 1978 (s.32.1). Moreover, in Fiji, the High Court has been willing to consider the best interests of the child principle in bail proceedings for a parent in certain circumstances. See *Devi v The State*, [2003] FJHC 47 and *Yuen v The State*, [2004] FJHC 247.

¹²⁸ See especially: S Abramowicz, ‘Rethinking Parental Incarceration’, *University of Colorado Law Review*, 82, 2011, 793–875, at 817–823; EW Andersen “Not Ordinarily Relevant”: Bringing Family Responsibilities to the Federal Sentencing Table, *Boston College Law Review*, 56, 2015, 1501–1536, at 1508–1512; TL Leinwand, ‘Family Matters: The Role of “Family Ties and Responsibilities” in Sentencing’, *Stanford Journal of Criminal Law and Policy*, 2, 2015, 63–84, at 68–74. But see also Y Dandurand 2016, *Exemptions from Mandatory Minimum Penalties: Recent Development in Selected Countries*, 2016, Ottawa: Department of Justice Canada, who

For example, the courts have not usually viewed circumstances in which a parent has been a sole caregiver and had a sick dependent child or a dependent child with a disability as an 'extraordinary circumstance'. Like the Australian sentencing courts' in interpreting the common law and legislative 'hardship to dependents' principle, there seems to be an expectation by American courts that parental imprisonment will bring about some level of disruption to a family up to the point of family disintegration.¹²⁹ In this regard, the courts have not generally viewed sentencing a sole or primary caregiver to imprisonment resulting in the formal state care of a child as exceptional.¹³⁰

However, with state and federal guidelines being ruled advisory in 2004 and 2005, and especially post 2007, there was growing optimism that the American courts would be willing to consider 'family ties' more frequently, although to date there is limited evidence the courts have been willing to do so ostensibly because of a fear of reversal on appeal.¹³¹ At the same time, a number of scholarly legal analyses have persuasively argued the constitutional relevance of dependent children as a factor in sentencing based on freedom of association and a due process liberty interest as the legal bases for a child's right to a relationship with their convicted parent in the context of criminal law.¹³² Such commentaries have also argued the growing intersections between family and criminal law utilising the construct of immediate and future third party harms in relation to a child's right to development.¹³³ As well, there has been high level political recognition and growing judicial interest in the adverse effects of parental (and especially maternal) imprisonment on children at both the state and federal levels in what appears to be an increasingly receptive policy environment focusing on 'smart' or evidence-based sentencing reforms, which are manifesting in innovative family fo-

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observes that parents with dependent children in the context of 'substantial assistance departures' has led to reduced sentences for some offenders facing mandatory minimum penalties in the USA.

¹²⁹ Abramowicz, 2011, at 818, note 100.

¹³⁰ *Ibid.* at 817–823, especially 821.

¹³¹ *Ibid.* at 824–835.

¹³² Boudin, at 105–112, 118; MS Raeder, Gender-Related Issues in a Post-Booker Federal Guidelines World, *McGeorge Law Review*, 37, 2006, 1–66, at 2.

¹³³ See especially S Abramowicz, 'Beyond Family Law', *Case Western Reserve Law Review*, 63(2), 2012, 293–379; T Lerer, 23–57.

cused sentencing practices that are garnering international attention such as family impact statements,¹³⁴ gender responsive supervision and re-entry,¹³⁵ and the Washington State Parenting Sentencing Alternative.¹³⁶ Much like Australia there also seems to be growing momentum arguing for clear legislative direction requiring federal and state sentencing courts to consider the effects of sentencing a parent to prison on their dependent children, extending to recognizing the best interests' of the child principle.¹³⁷

V OPTIONS FOR SENTENCING REFORMS

Criminal courts likely need to consider at least three main questions: (1) whether the courts can deal with the rights of children who are directly and indirectly affected by the criminal proceedings of their adult parent, especially in bail and sentencing decisions involving the potential detention or imprisonment of a parent; (2) the extent to which the impact on dependent children should be a factor in remand or sentencing decisions about a parent; and, (3) how the court can actually or practically take into account an individual's parental responsibilities and the rights of the child in remand or sentencing.

When courts consider the probable hardship of a custodial sentence for the offender's dependent children, should this be as a mit-

¹³⁴ For a summary of the literature on various approaches to family impact assessments, see H Millar and Y Dandurand, *The Impact of Sentencing and Other Judicial Decisions on the Children of Parents in Conflict with the Law*, School of Criminology and Criminal Justice, University of the Fraser Valley and International Centre for Criminal Justice Reform, *An Analysis* submitted to the Department of Justice Canada, February 2017, pp. 30–32. See also: Andersen, at 1512–1520, 1526–1528, 1533–1535 on 'impact assessments and third-party rights in sentencing'.

¹³⁵ See especially: E Swavola, K Riley and R Subramanian, at 18, 33 on various gender responsive and re-entry options for women with dependent children in the USA.

¹³⁶ On family-focused interventions and the Family Offender Sentencing Alternative, see especially: KL Eitenmiller, 'Bending the Bars for Mothers: How Prison Alternatives Can Build a Stronger Oregon', *Oregon Law Review*, 92, 2014, 755–781; L Feig, at 13–24; CM Agular and S Leavall, 'A Statewide Parenting Sentencing Alternative Program: Description and Preliminary Outcomes', *Smith College Studies in Social Work*, 87(1), 2017, 78–93, at 79–80. See also Millar and Dandurand, 2017, 32–37.

¹³⁷ See generally: S Abramowicz, 2011, 793–875; EW Andersen, 1501–1536; M Bagaric and T Alexander, 397–446; M Bagaric and B Bagaric, 537–602; N Gertner, 'Women Offenders and the Sentencing Guidelines', *Yale Journal of Law & Feminism*: 14, 2002, 290–305; TL Leinwand, 63–84; T Lerer, 23–57; MS Raeder, 1–66.

igating factor, as a justification for a form of leniency or mercy, or by reference to broader objectives of offender rehabilitation or public safety? Where exactly does the principle of the best interests of the child intervene in all this? Arguing that some offenders deserve leniency because of personal circumstances is not the same as arguing that certain individuals should be afforded a measure of compassion because their sentence could cause harm to others.¹³⁸ Leniency is perhaps not the best way to approach or to characterize such an exercise of judicial discretion. Indeed, some legal scholars are now questioning whether the differential, and especially gendered and racialized, impacts of imprisonment should be more routinely considered in mitigation of sentence, extending to both the adverse effects for an offender and their dependent children.¹³⁹ In a context where judges typically enjoy a considerable amount of discretion in crafting an appropriate sentence, is it possible for them in appropriate circumstances to construct sentences that mitigate the anticipated negative impact of a custodial sentence on the offenders' dependent children, especially from the perspective of assessing the child's best interests as a separate consideration from the personal mitigating circumstances of their parent?¹⁴⁰ In a context, where formal sentencing guidelines exist, should these guidelines be amended to include a consideration of the best interests of dependent children who may be affected by the sentence? These are all questions that have not yet found very satisfactory answers.

5.1 Restricting the Use of Custody for Children's Primary Caregivers

Many countries already have legislative or judicial directions or custody thresholds suggesting or requiring judicial restraint in the use of imprisonment as a sanction of last resort for the most serious offences.¹⁴¹ However, such directions and thresholds appear to be

¹³⁸ See, e.g., RG Fox, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing', 25 Monash University Law Review, 1999, 1–28.

¹³⁹ See, especially C Piper, 141–155.

¹⁴⁰ The issue of leniency or compassion extends also to the administration of the sentence. For example, in the USA, the amended guidelines of the Federal Bureau of Prisons concerning compassionate Release/Reduction in Sentence program (Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g)) allows a compassionate release to be considered for prisoners whose children are cared for while in prison by a family member who becomes unable to continue to care (death, serious illness, serious incapacity). Available at: https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf.

ineffective in limiting imprisonment to the most serious offences in view of growing prison populations, especially sharply rising numbers of female prisoners who are being remanded and sentenced to custody. Roberts and Harris (and numerous other scholars) have observed the compelling arguments for the use of restraint in imprisonment including its direct economic costs and evidence suggesting that imprisonment increases rather than reduces reoffending risks in comparison with community based sanctions.¹⁴² They (and others) have noted, as well, the disruptive and collateral effects to prisoners and their families, limited prospects for prisoner rehabilitation, and comprised life outcomes for prisoners.¹⁴³

As discussed above, there are compelling substantive equality arguments for restricting the use of imprisonment for female offenders, especially those with dependent children,¹⁴⁴ and evolving legal standards recognizing the rights of the child to be routinely and independently considered by sentencing courts in the context of sentencing their parents. Accordingly, there are various proposals to either abandon or to further constrain the judicial use of custody as a sentencing disposition extending to sentence impact mitigation for female offenders and third party impact of incarceration for dependent children.¹⁴⁵ For example, Roberts and Watson suggest that the most promising policy option for England and Wales would be to strengthen the presumption against the use of custodial sentences for women by amending the custody threshold statutory provisions or adjusting sentencing guidelines.¹⁴⁶ Imprisonment would thus only be authorized where no other sanction could be justified and the con-

¹⁴¹ For example, section 718.2(e) of the *Canadian Criminal Code* on 'Other Sentencing Principles' provides that: "A court that imposes a sentence shall also take into consideration the following principles: all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders". On custody thresholds in England and Wales, see: JV Roberts and L Harris, *Reconceptualising the Custody Threshold in England and Wales*, *Criminal Law Forum*, 2017, 1–23; JV Roberts and G Watson, 1–22.

¹⁴² JV Roberts and L Harris, at 1–2.

¹⁴³ *Ibid.*

¹⁴⁴ See especially: Roberts and Watson, at 4–5 on 'sentencing women and the principle of equal impact' in relation to England and Wales. See also: M Bagaric and B Bagaric, at 540–545.

¹⁴⁵ Roberts and Watson, at 3, 7, 10.

¹⁴⁶ *Ibid.* at 17.

victed offender represents a serious threat to the community.¹⁴⁷ This would create a two-tier test for the imposition of custody based on offence severity and offender risk consistent with both the retributive and preventive aims of punishment that would primarily benefit women offenders who are less likely to pose a threat to community safety based on their presenting offence, criminal histories, and other factors.¹⁴⁸

A related proposal suggested by Roberts and Watson and other scholars is to limit the role or weight of prior convictions as an aggravating factor in sentencing for determining the quantum of a sanction, but that could not be used to justify the nature of a sanction (in this case, imprisonment) unless exceptional circumstances warranted such a disposition.¹⁴⁹

5.2 *Amending Statutory Sentencing Principles*

Another option proposed by Roberts and Watson would be to limit or structure judicial discretion legislatively or through other guidance to consider impact mitigation in relation to the special circumstances of female offenders paralleling similar to remedial legislative sentencing provisions designed to reduce the overrepresentation of Indigenous offenders in Australia, Canada and New Zealand.¹⁵⁰ Using the Canadian model for ‘other sentencing principles’ as an example, sentencing courts would be legislatively encouraged or required to consider all available sanctions other than imprisonment when reasonable and appropriate ‘with particular attention to the circumstances of female offenders’.¹⁵¹ From a child rights perspective, an extension of this proposal might be to direct sentencing courts to consider all available sanctions ‘with particular attention to the best interests of the child in instances involving parents who are sole or primary caregivers’.

¹⁴⁷ *Ibid.* at 7, 10. See also: AN Doob, A Values and Evidence Approach To Sentencing Purposes and Principles, Research and Statistics Division, Department of Justice Canada, 2016, at 14–16 who makes a similar proposal for Canada in relation to strengthening restraint in the use of imprisonment by either changing the statutory language from a suggestion to a rule or specifying circumstances in which imprisonment can be used.

¹⁴⁸ Roberts and Watson, at 10.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.* at 12.

¹⁵¹ *Ibid.*

5.3 *Expanding or Clarifying Mitigating Factors or Sentencing Departures*

Yet another option that already exists in some countries is to ensure that legislative sentencing provisions and/or sentencing guidelines explicitly recognize and promote gender equity and child rights as personal mitigating factors in sentencing.¹⁵² For example, as discussed above, a number of offence-specific sentencing guidelines in England and Wales already recognize sole or primary caregiving for a dependent relative, although as a secondary personal mitigation factor.¹⁵³ Accordingly, it has been suggested that the current guideline should either be strengthened advising sentencing judges of the potential serious adverse consequences for children when their primary or sole carer is sentenced to prison, especially if the child is placed in formal state care, or that a separate generic personal mitigation guideline should be created for sentencing sole or primary caregivers.¹⁵⁴

As also elaborated above, Australian federal and some state-level laws recognize the probable effect of any sentencing option and the mitigating factor of hardship to dependents, while some American federal and state-level sentencing guidelines recognize family ties, although these provisions have generally been interpreted by the courts in both jurisdictions relatively restrictively as only applying in exceptional circumstances. Accordingly, recommendations for both countries have suggested that both federal and state laws and/or sentencing guidelines should be revised to explicitly recognize the likely impact of a sentencing option on an offender's dependents irrespective of whether the circumstances are exceptional.¹⁵⁵ In relation to the USA and other countries that rely on risk assessment instruments in the context of pre-trial detention and sentencing, it has also been proposed that risk scales could also be revised to explicitly recognize and promote gender and child rights responsive sentencing.¹⁵⁶ A related proposal might be to allow for gender responsive and/or parental caregiving exceptions to mandatory minimum sen-

¹⁵² Roberts and Watson, at 13–14.

¹⁵³ See especially: Roberts and Watson, at 14 for a critique of this provision.

¹⁵⁴ *Ibid.*

¹⁵⁵ Australian Law Reform Commission, *Same Crime, Same Time Sentencing of Federal Offenders*, Australian Government, 2006, para 6.126 at 190. See also: Walsh and Douglas, at 161; M Bagaric and T Alexander, at 446.

¹⁵⁶ JV Roberts and G Watson, at 11–12.

tences given the growth of mandatory minimum sentences in many common law countries like Canada and the USA.¹⁵⁷ For example, Andersen argues that American Federal Sentencing guidelines should be amended to require a consideration of family ties, and that assessments of the impact of sentences on defendants' families should be provided to sentencing courts in all federal crimes.¹⁵⁸

5.4 *Expanding Diversionary Options*

It has been proposed that pre-trial diversionary options be developed or expanded to respond to the gendered and third-party impacts of the arrest and pre-trial detention of women, including those with caregiving responsibilities. Such options might include allowing the police to issue cautions, warnings or citations, as is commonly done in many jurisdictions for youth who are in conflict with the law.¹⁵⁹ Other suggestions include encouraging police agencies to adopt policies not to arrest for certain low-level offences or to divert women who are in conflict with the law to appropriate community support resources, especially for low-level offences related to poverty, mental health crises and/or addictions.¹⁶⁰ Similar policies can also be developed in relation to declining to prosecute low-level offences and/or promoting prosecutorial diversion measures, including the use of problem solving courts.¹⁶¹

5.5 *Expanding the Use of Alternatives to Imprisonment*

Sentencing policies in all six countries considered in this article officially support the greater use of community-based sentences. However, an emphasis on alternatives to imprisonment, assumes that such alternatives are available and can be used, that judges are aware of what the alternatives are, and that such alternatives are appropriate and effective for parenting offenders and promote the safety and

¹⁵⁷ See generally Y Dandurand.

¹⁵⁸ EW Andersen, 2015.

¹⁵⁹ Gerry and Harris, at 30-34. See also E Swavola, K Riley and R Subramanian, at 29-31 on the importance of gender responsive risk assessment instruments.

¹⁶⁰ E Swavola, K Riley and R Subramanian, at 25. See also: Walters and Longhurst, at 6-8 who make similar recommendations in relation to reducing the over-imprisonment of Aboriginal and Torres Strait Islander women in Australia.

¹⁶¹ *Ibid.*

wellbeing of their children.¹⁶² The administration of community-based sentences and the enforcement of the conditions attached to them can also be a source of hardship for the families. In many jurisdictions, a large percentage of prisoners are serving short sentences of imprisonment as a result of a so-called administrative offence or a breach of the conditions attached to their community-based sentence. Advocating for the greater use of community-based sentences to mitigate the negative impact of the parents' imprisonment is of little use unless there also measures to support the rehabilitation of the parents, especially the complex needs of many parenting offenders, and assist them and their family during these circumstances.

5.6 *Expanding Gender-Responsive Alternatives to Incarceration*

Numerous proposals have also been advanced to expand gender-responsive alternatives to incarceration in relation to encouraging greater use of suspended sentences and conditional sentences that are served in the community.¹⁶³ In this regard, several countries (e.g., Algeria, China, Italy, Kazakhstan, Norway, Russian Federation, Sweden, and Ukraine) have statutory provisions that allow sentencing courts to defer or suspend sentences for pregnant women and/or persons with caregiving responsibilities.¹⁶⁴

From a best interest of the child perspective, one of the most promising initiatives are family-focused interventions that seek to

¹⁶² Imposing a duty on a sentencing court to routinely inquire about dependent children and consider the best interests of a child when their parents are sentenced to prison presupposes there are alternatives to prison and that these alternatives are safe and effective. As the Kimberly Rogers case in Canada suggests, this assumption may not always be accurate. Rogers was convicted of welfare fraud and sentenced to a six-month conditional sentence (house arrest), 18 months' probation, and restitution, but tragically died of a prescription drug overdose while 8 months pregnant during her house arrest in extreme summer temperatures. See: DE Chunn and SAM Gavigan, 'From Welfare Fraud to Welfare as Fraud: The Criminalization of Poverty, in G Balfour and E Comack (ed), *Criminalizing Women: Gender and (In)Justice in Neoliberal Times (2nd edition)*, Halifax: Fernwood Press, 2014, 217–235. See also: Swavola, Riley and Subramanian, at 32–33, on the importance of gender-responsive community-based alternatives.

¹⁶³ See: JV Roberts and G Watson, at 16–17. In this regard, E Swavola, K Riley and R Subramanian, at 32, provide important insights on the need for gender-responsive community-based alternatives.

¹⁶⁴ Data on file with the authors. See also Abramowicz, 2011, at 868–871 who considers deferred sentencing for the USA.

expand sentencing options in the form of community-based alternatives for non-violent offenders with minor children in order to facilitate family preservation. Preservation of family ties and parent–child involvement are perceived as likely to increase the resilience of both the parent (reduced recidivism, increased employment prospects) and the child (reduced state intervention, increased positive adjustments), while also achieving cost savings for the state (diverting children from state care and reducing the costs associated with community supervision rather than incarceration).¹⁶⁵ Some American cities and states are developing family focused sentencing alternatives commensurate with guidelines for fair and effective criminal sentencing.¹⁶⁶ Other countries are developing variations of some of these policies and practices as well. Additionally, several American states (via re-entry courts) and countries such as Australia and England have developed innovative community-based sentencing alternatives, including residential treatment alternatives, for mothers with dependent children.¹⁶⁷

At the same time, some degree of caution is needed in developing and using community-based alternatives for women and their children in relation to ensuring that the conditions are not too onerous and/or that failure to comply with community-based conditions does not unnecessarily result in breaches and the amplification of the risks of imprisonment for women, keeping in mind that administrative offences are typically one of the main reasons in most jurisdictions why adult women find themselves in detention.

¹⁶⁵ A particularly promising American initiative is Washington State’s Parenting Sentencing Alternative law for eligible nonviolent inmates with minor children. The state-wide Parenting Sentencing Alternative consists of a Family Offender Sentencing Alternative (FOSA), which is a court-mandated sentencing alternative that allows a judge to waive a potential prison sentence and impose 1 year of intensive community supervision and support for eligible parents with custody of dependent children instead of prison. See especially: KL Eitenmiller, at 779; Feig, at 18. The state law (*Substitute Senate Bill 6639*) is available at: <http://lawfilesexternal.leg.wa.gov/biennium/2009-10/Pdf/Bills/Senate%20Passed%20Legislature/6639-S.PL.pdf>. See also: CM Agular and S Leavall at 79-81 for a comprehensive overview of the program’s design, implementation and assessment.

¹⁶⁶ L Feig, at 16; CM Agular and S Leavall, at 78.

¹⁶⁷ See: R Moshenska, *International Good Practice: Alternatives to Imprisonment for Women Offenders*, Prison Reform Trust. Available at: <http://www.prisonreformtrust.org.uk/portals/0/documents/international%20good%20practice%20final.pdf>.

5.7 *Restricting or Eliminating the Use of Short Sentences of Imprisonment*

One of the most compelling suggestions is to restrict or eliminate the use of short sentences for offenders with caregiving obligations. For example, in Canada, most custodial sentences for both men and women in 2013–2014 were under 6 months, with a median length of 30 days custody, and only a very small proportion (3%) of all offenders sentenced to federal sentences of two or more years imprisonment.¹⁶⁸ For provincially/territorially sentenced women in Canada, who comprise the vast majority of sentenced women (vis-à-vis federally sentenced women who receive a sentence of two or more years imprisonment), the median sentence length is typically about 30 days.¹⁶⁹ Women also received comparatively shorter sentences than men for offences against the person (30 versus 60 days) and offences against property (30 versus 45 days).¹⁷⁰ Likewise, in England and Wales, Roberts and Watson have documented similar short sentencing patterns for women and observe that over half of all sentences for immediate custody are under 6 months and about one third of all custodial sentences were 3 months or less.¹⁷¹ Eliminating such sentences and allowing offenders to serve their sentences in the community so that they can live with or be close to their children, especially if there are available gender-responsive and/or family focused interventions, arguably would be beneficial for most of the affected children, their parents, their communities and society.

5.8 *Requiring Family or Child Impact Assessments*

It cannot be assumed that judges have the information they need to consider the parental obligations of an offender at the time of sentencing or when making other decisions that may impact the defendant's children or family. One may expect that this kind of information would be presented by defence counsel, when one is present, but this is not necessarily the case. In the case of self-represented defendants, the judge may seek that information but have no

¹⁶⁸ A Maxwell, *Adult Criminal Court Statistics in Canada, 2013/2014*, Ottawa: Canadian Centre for Justice Statistics (Juristat), 2015, at 3.

¹⁶⁹ Council of Elizabeth Fry Societies of Ontario. Available: <http://www.cefso.ca/facts-figures.html>.

¹⁷⁰ R Kong and K AuCoin, *Female Offenders in Canada*, Ottawa: Canadian Centre for Justice Statistics (Juristat), 2009, at 11.

¹⁷¹ JV Roberts and G Watson, at 17.

immediate means to ascertain its veracity. In the case of problem solving courts, the information may be obtained as part of preparing a healing plan for the offender, but this is not always the case. Finally, relying on the defendants to disclose their parental situation and responsibilities is often unrealistic, as these parents will not necessarily consider it to be in their best interest of that of their children to do so in view of their children being taken into state care and the possible termination of parental rights.

Thus, another pivotal recommendation is to require child or family impact assessments as part of presentence reports since we cannot assume that courts have information on dependent children.¹⁷² Some American cities (San Francisco and New York City) and states (New York) have experimented with child or family impact statements¹⁷³ as part of pre-sentence investigation reports developed by probation departments.¹⁷⁴ These statements generally include questions about a defendant's dependent children and the defendant's family role and responsibilities and aim to minimize trauma to children in relation to the adjudication, detention and sentencing of their parent by ensuring that public defenders, prosecutors, judges and probation officers make family-informed sentencing and supervision decisions. The family impact statements also aim to improve judicial decision-making by identifying how various sentencing and supervision options may affect a defendants' child or children.¹⁷⁵

In addition to the child or family impact statement approach, one American state (Oklahoma) has legislatively prescribed that its district court judges routinely inquire if a defendant who is being sentenced to imprisonment is a sole caregiver for dependent children and

¹⁷² See: JV Roberts and G Watson, 2017, at 10–11; EW Andersen, at 1526–1528.

¹⁷³ L Cramer, B Peterson, E Kurs, and J Fontaine June 2015, *Toolkit for Developing Family Impact Statements Children of Incarcerated Parents Project*, Washington, DC: Urban Institute, June 2015, at 3. Available at: <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000253-Toolkit-for-Developing-Family-Impact-Statements.pdf>.

¹⁷⁴ See also the Osbourne Association, *Family Impact Statements: Considering the Needs of Children in Criminal Justice Decision-Making about their Parent*. Available at: http://www.osborneny.org/images/uploads/printMedia/FamilyImpactStatementFactSheet_Osborne.pdf.

¹⁷⁵ *Ibid.* While not yet formally evaluated, some key challenges observed with the development of these statements, include probation officer resistance to the new practice and confusion between family and victim impact statements.

whether there are adequate alternative care arrangements in place.¹⁷⁶ If a parent has not made care arrangements or the judge perceives such arrangements to be inadequate, the judge is required to refer the case to social services.¹⁷⁷ As noted above, English and South African court decisions suggest a similar obligation on the part of a sentencing court to inquire about a defendants' sole caregiving status for dependent children and to ascertain whether alternative care arrangements are in place when sentencing a sole caregiver to prison. In this regard, the available empirical evidence on how varying adult criminal justice proceedings affect a parents' capacity to make alternative care arrangements should inform such policies. For example, Flynn, Taylor and Arias have observed that parents facing imprisonment often face the dual challenges of limited time and a lack of preparation in making child care arrangements, especially in what may be chaotic or crisis circumstances such as arrest or remand.¹⁷⁸

Other avenues to ensure that courts consider a child's interests and/or family impact in the process of adjudicating and sentencing parents with dependent children might include child legal advocates¹⁷⁹ views of the child reports,¹⁸⁰ and/or video mitigation evidence.¹⁸¹ However, this requirement needs to be balanced against the privacy rights of the parenting offenders and their children. Indeed, the idea that a court should be presented with more information about children and the parenting duties of a defendant in order for

¹⁷⁶ USA, Oklahoma, 2014, Title 22, section 22–20, Criminal Procedure, Incarceration of single custodial parents – Child placement. Available at: http://oklegal.onenet.net/oklegal-cgi/get_statute?99/Title.22/22-20.html.

¹⁷⁷ See: 22 OK Stat § 22–20, 2014, available at: <http://law.justia.com/citations.html>.

¹⁷⁸ C Flynn, B Naylor, and PF Arias, at 355. See also: Trotter, Flynn, Naylor, Collier, Baker, McCauley, Eriksson, 2015.

¹⁷⁹ Child advocates can take a number of forms, but might extend to family justice centers or child advocacy centers that support children that are being used in other contexts, especially domestic violence. See, e.g., Department of Justice Canada, *Report of the Federal-Provincial-Territorial (FPT) Ad Hoc Working Group on Family Violence, Volume 1*, at 141–145. Available at: <http://www.canada.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mlfvc-elcvf/mlfvc-elcvf.pdf>.

¹⁸⁰ See, e.g., N Bala and C Houston, *Article 12 of the Convention on the Rights of the Child and Children's Participatory Rights in Canada*. Family, Children and Youth Section, Department of Justice Canada, 2015, at 12–25. Available: <http://www.justice.gc.ca/eng/rp-pr/other-autre/article12/index.html>.

¹⁸¹ R Austin, *Not Just a Common Criminal: The Case for Sentencing Mitigation Videos*, *Scholarship*. Paper 1232. University of Pennsylvania Law School, 2014. Available at: http://scholarship.law.upenn.edu/faculty_scholarship/1232.

the court to make a decision that considers the best interests of the child may also involve delays that might lead to unnecessarily prolonged pre-trial detention and greater disruption in a child's life. Moreover, it is equally important to consider the complexities of gathering and sharing additional information on children through available or specialized or problem-solving courts' mandated processes in relation to potentially contributing to further costs and delays in the legal process.

Related to these proposals for family impact statements is the need for training and/or continuing education for judges and other criminal justice professionals to raise awareness of the gendered and third-party impacts of sentencing and imprisonment.¹⁸²

5.9 Other Ways Forward

In instances where there is no alternative but to sentence a primary or sole caregiving parent with dependent children to prison, other suggestions include: (1) encouraging or requiring judges to sentence a parent close to their child/children,¹⁸³ (2) ensuring that criminal justice decision-makers allow parenting offenders the time to properly plan for child care before detention or a prison sentence commences,¹⁸⁴ and (3) providing parenting offenders with exemptions to the automatic legislative termination of their parental rights.¹⁸⁵ Fi-

¹⁸² See especially: S Minson, R Nadin, R and J Earle, at 4, 15, 17 who make extensive training recommendations.

¹⁸³ Some American States (Hawaii, New York, New Jersey) have enacted laws requiring correctional authorities to place or transfer incarcerated parents with minor children to facilities close to their families to maintain family bonds. Notably, the New York law is based on evidence that maintaining or strengthening family bonds leads to desistance from crime and lower recidivism rates. Denmark and Poland have similar types of laws or legal principles on the right of a parent to serve their sentence close to family.

¹⁸⁴ C Flynn, B Naylor, and PF Arias, at 355. See also: Trotter, Flynn, Naylor, Collier, Baker, McCauley, Eriksson, 2015.

¹⁸⁵ The *Adoption and Safe Families Act* requires states to seek termination of parental rights when a child has been in foster care for the past 15 of 22 months. Another major initiative in the USA have been state-level efforts (e.g., Washington State and Nebraska) to legislatively restrict the involuntary termination of parental rights for the children of imprisoned parents in response to the federal *Adoption and Safe Families Act*. The Washington State, *Children of Incarcerated Parents Law* (2013), HB1284, 2013–14 applies to incarcerated parents and to parents in residential substance abuse treatment programs. It grants courts the discretion to delay termination when a parent 'maintains a meaningful role' in the child's life. Available at: <http://lawfilesexternal.wa.gov/biennium/2013-14/Pdf/Bills/House%20Passed%20Leg>

nally, a number of commentators have highlighted the importance of ensuring cross-sectoral cooperation since the children affected by parental criminal justice involvement typically fall outside the mandate of any one given agency unless there are child custody interests, child protection concerns, or the child is a direct victim of their parents' criminal behaviour.¹⁸⁶ In this regard, some of the available empirical research on the impact of integrated domestic violence courts has identified distinct mandates, differing legal standards and procedures, and varying types of legal expertise in criminal versus family and child protection matters as impediments to information sharing.¹⁸⁷

All of these approaches appear to be consistent with the evolving international legal standards discussed above in relation to the best interests of the child principle and a child's right to family life, advocating alternatives to custody for pregnant women and sole or primary caregivers with dependent children where possible and appropriate, with custodial sentences to be limited to serious and violent offences and offenders who represent some clear danger to the community, "after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children".¹⁸⁸ Such approaches also appear to be consistent with a growing body of empirical evidence that preserving the family environment and maintaining family relations, when not detrimental to the safety and wellbeing of a child, can produce positive outcomes not only for the child (reduced state intervention, increased positive adjustment), but also for the parent (reduced recidivism, increased employment prospects) and for the state (increased cost savings associated with community based alternatives

Footnote 185 continued

islature/1284-S.PL.pdf;The Nebraska: Neb. Rev. Stat. § 43–292.02(2) (Reissue 2004) limits termination when the sole reason for termination is parental incarceration. Available at: <http://nebraskalegislature.gov/laws/statutes.php?statute=43-292.02>.

¹⁸⁶ Trotter et al; C Flynn, B Naylor, and PF Arias, at 355.

¹⁸⁷ See: D Martinson and M Jackson, *Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Courts*, FINAL Research Report, Research Project – Canadian Observatory on the Justice System's Response to Intimate Partner Violence, 2016, at 19–22, 33–47. Available at:<http://www.fredacentre.com/wp-content/uploads/2016/01/Observatory-Martinson-Jackson-Risk-Report-FINAL-January-14-2016.pdf>.

¹⁸⁸ Bangkok Rules, Rule 64.

instead of prison or the reduced replication of programs and services).¹⁸⁹

VI CONCLUSION

The need to consider the rights of children at the time of sentencing a caregiving parent raises many practical and legal issues, particularly when a custodial sentence may be involved.¹⁹⁰ There are obviously different issues involved in recognizing a child's rights and interests when a parent is being accused or convicted of a domestic violence or violence against children offence. There are also legal and procedural complications when the parents are involved in concurrent family law or child protection proceedings.

Some may argue that it is unnecessary for a sentencing court to separately consider the wellbeing of a dependent child when such interests are already considered in the complex balancing exercise of weighing the offender's personal circumstances (for example, with family ties and the excessive hardship to dependents as a potential mitigating factor) against the seriousness of the offence and societal interests. Others may note that there is a lack of a theoretical legal rationale in relation to the purpose (retribution, deterrence, denunciation, incapacitation and societal protection, rehabilitation) and principles of sentencing (especially proportionality) and that taking such interests into account can undermine the fairness and legitimacy of the sentencing process. Some scholars have opined that a sentencing court taking a child's interests into account could encourage parents to commit more crime or encourage childless persons who engage in criminal behaviour to have children to avoid criminal responsibility.¹⁹¹ Yet other observers may suggest that taking the views and interests of a child into account at the level of sentencing a parent could contribute to further inefficiencies by slowing down an already encumbered criminal justice process and to sentencing dis-

¹⁸⁹ L Feig, at 17.

¹⁹⁰ For a summary of these arguments, see: e.g., D A Berman, 'Addressing Why: Developing Principled Rationales for Family-Based Departures', *Federal Sentencing Reporter*, 13(5), 2001, pp. 274–280; JM Collins, E J Leib, and D Markel, 'Punishing Family Status', *Boston University Law Review*, 88, 2008, pp. 1327–1423; S Abramowicz, '2011, at 835–842; C Boudin, at. 112–117; M Bagaric and B Bagaric, at 588–600.

¹⁹¹ JM Collins, EJ Leib, and D Markel, at 1327–1423.

parity based on gender and parental status by providing preferential treatment to women and those with parenting responsibilities.

While these arguments may seem persuasive, there are equally compelling reasons for criminal courts to consider children's best interests and their right to family life when sentencing one of their parents, especially when the parent is a primary or sole caregiver, and where a separation is likely to adversely affect the child's healthy development. As we have seen, there is an emerging international recognition that a dependent child has a right to have his or her rights and interests specifically and independently considered by a sentencing court when their parent, especially a sole or primary caregiver, is being sentenced to prison precisely because this decision is likely to adversely affect their immediate and long-term wellbeing. The interpretation represents a 'subtle jurisprudential shift'¹⁹² in criminal law from state and adult centric sentencing practices where the circumstances of the children were viewed only as an extension of their parents' personal circumstances. Certainly, taking a child's rights into account is a complex matter for criminal law because it requires sentencing courts to take third party and *indirect and anticipatory* victim harms into account.¹⁹³ This is arguably why the various international bodies that have supported this notion have also been careful to stress that the impact of a sentence on the offender's dependent child is an important but *not determinative* factor to be considered. It is only one of many factors that a sentencing court must balance. For the impact of parental imprisonment on dependent children to be considered, several countries are developing innovative procedures, such as family impact assessments or child advocates, to ensure that it can be routinely considered by criminal courts.

Requiring a sentencing court to consider a child's best interests does not exempt a parent from criminal responsibility or from prison. In fact, such a requirement is consistent with an era of sentencing reforms where the economic and evidentiary benefits of alternatives to imprisonment for prisoners, families, communities and society are being considered. Moreover, as opposed to encouraging crime, as a preponderance of empirical research evidence suggests that maintaining rather than sev-

¹⁹² A Skelton, at 363.

¹⁹³ See, especially S Abramowicz, 2011 who develops a family law argument about child development to justify why criminal courts should consider the best interests of a child when sentencing their parent. See also: M Bagaric and T Alexander, at. 397–398, 446; M Bagaric and B Bagaric, at 570–574; JV Roberts and G Watson, at 5, 16–17.

ering family ties not only reduces parental recidivism, but also reduces state costs associated with formal state care and inter-generational criminality. Thus, in relation to the traditional aims of punishment and sentencing, there is in fact a compelling societal or public interest objective in ensuring that the rights of children are properly considered in relation to *preventing* future inter-generational criminality and in relation to the *rehabilitative and restorative aims* of punishment.¹⁹⁴

Finally, in relation to concerns about fairness and treating similarly situated offenders alike, criminal penalties do not have the same effect on those with parenting responsibilities as those without such responsibilities. Rather than contributing to producing inequality, one can argue that consideration of a child's best interests contributes to reducing inequalities for already disadvantaged or vulnerable groups based *inter alia* on race, ethnicity, nationality, social class and gender.

¹⁹⁴ Abramowicz, 2011, at 835–840; R Manning, 'Punishing the Innocent: Children of Incarcerated and Detained Parents', *Criminal Justice Ethics*, 30:3, 267–287, 2011, 279–283.