Gendering criminal law: sentencing a mothering person with dependent children to a term of imprisonment[1]

Abstract

Few would dispute that dependent children suffer hardship when a parent, particularly a sole parent or substitute, is imprisoned. This paper focuses on how some Western Australian criminal law courts have dealt with hardship suffered by offenders' dependent children. It explores how the judiciary in assessing hardship has applied mercy, the exceptional circumstances test, and a recent legislative provision when considering sentencing a mothering person to a prison term. If found, extreme hardship may mitigate the severity of a prison sentence. This paper argues that gendering processes are at work in criminal law, such as gendering that respects the mothering person-child relationship. The paper concludes by suggesting that gendering processes preserving that relationship has implications for promoting deterrence rather than a term of imprisonment.

Key words: children, criminal law, gendering, sentencing, parent

Introduction

This paper focuses on gender equality in criminal law, but issues of ethnicity feature starkly in shaping how the criminal justice system responds to offenders as indicated by the following statistics. Women now comprise seven percent of Australia's prison population,[2] with an over representation of Indigenous women,[3] as is the case in many parts of the world. However, Western Australian figures stand out inauspiciously with the Northern Territory as having the highest imprisonment rates of Indigenous women.[4] For example, in 2008 in Western Australia, twelve percent of offenders in prisons were women. Over half of these women were Aboriginal women.[5] The median age for women prisoners in Australia is at 34.8 years.[6] It is not surprising then that of the 67 percent of women prisoners with children in Western Australia, the majority, about 74 percent, were caring for them before their arrest.[7] Increasing numbers of Australian women[8] serving prison sentences pose problems not only for the allocation of state Corrective resources but also for prisoners' dependants.

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[2] Australian Bureau of Statistics 4512.0 - Corrective Services, Australia, March 2012

[3] 'The average daily number of full-time Aboriginal and Torres Strait Islander adult prisoners in Australia in the March quarter 2012 was 7,873, comprising 7,194 (91%) males and 679 (9%) females. Aboriginal and Torres Strait Islander prisoners represented 27% of the total full-time prisoner population'. The total Aboriginal and Torres Strait Islander population aged 18 years and over at 30 June 2011 was 2% of the Australian population', - Ibid.

[4] Australian Bureau of Statistics 4517.0 - Prisoners in Australia, December 2011 – [b].

[5] Department of Corrective Service 2009 at 26.

[6] Australian Bureau of Statistics 4517.0 - Prisoners in Australia, December 2011 - [a] .

[7] Government of Western Australia, Department of Corrective Services, Profile of Women in Prison 2008 Final Report August 2009, Section 2.

[8] The female imprisonment rate increased across Australia except for the Australian Capital Territory between 2001 and 2011. Above n 6.

Some prisons accommodate mothers and infants on site. Bandyup prison, Western Australia's maximum security prison for women, accommodates infants up to twelve months of age.[9] Prisons in other States and international jurisdictions accommodate infants and toddlers for varying periods depending on the prison's philosophical position and available resources. For example, in *Carmody*[10], a 1998 Victorian case, a mother was sentenced to imprisonment with a minimum term of two years for drug related offences. Her pre-school aged child, who reacted 'adversely', was allowed to live with his mother in a Women's Correctional Centre.[11] Mercy had been called for.[12] The child's stay may be extended 'after he reaches school age'.[13]

In general, prison facilities for accommodating offenders' dependants are far from adequate.[14] Herein lays a dilemma. If prison facilities were adequate, would alternatives to imprisonment fall away? For now, Australia spends $2.6 billion a year on prisons without curbing an increase in prisoner numbers,[15] despite alternatives such as community based orders[16] and other reforms. Nevertheless, reforms respecting the mothering person-child relationship, however inadequate, point to internal criticism or gendering processes in the criminal law's response to offenders.

Prison accommodation issues aside, gendering processes that pose problems for judges in sentencing decisions can affect offenders who are 'mothering persons'. This predominantly include female parents but males are also affected as anyone with responsibilities for the day to day care of dependent children and has the capacity to carry them out will be equally concerned. A mothering person adheres at the least to a morality of nonviolence to inform their parenting practices.[17] When the mothering person establishes an emotional bond with the dependent child, it is generally considered a necessity for a child's psychological health, and a likely precursor to a non-offending life.[18]

This paper is an enquiry into gendering processes in judicial decisions in the Western Australian criminal law division, although references to other jurisdictions are also considered. Referring to case law, the paper seeks to discover how judges in criminal law courts respond to mothering persons who break the law, and how they assess hardship experienced by their dependent children. The paper focuses on the

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[9] Bandyup home page.
[10] *R v Carmody* (1998) 100 A Crim R 41; BC9801064 at 2.
[11] At 6.
[12] At 7.
[13] At 6.
[14] *Kilroy, Debbie and Anne Warner (2002)* 'Deprivation of Liberty- Deprivation of Rights' in David Brown and Meredith Milkie (eds), *Prisoners as Citizens Human Rights in Australian Prisons* (Sydney, The Federation Press) 40 at 45.
[15] Carrington, Kerry 'Australia's 'irrational' spending on prisons unsustainable' 19 August 2010.
[16] 'Community-based corrections orders are non-custodial orders served under the authority of adult corrective services agencies and include restricted movement, reparations (fine options and community service) and supervision orders (parole, bail, and sentenced probation). In the March quarter 2012, there were 53, 763 persons in community-based corrections in Australia based on first day of the month averages, a decrease of 848 persons (2%) from the December quarter 2011'. Above note 2.
[17] Ruddick Sara Extract from *Maternal Thinking* (1992) in E Frazer, J Hornsby & S Lovibond (eds), *Ethics: A Feminist Reader* (Oxford: Blackwell) at 442.
[18] Hagan, John and Holly Foster (2012) 'Children of the American Prison Generation: Student and School Spillover Effects of Incarcerating Mothers' 46 *Law & Society* 37.

exceptional circumstances test, a recent amendment to the *Crimes Act*[19] and mercy that go to addressing a pressing social need: the care of an offender's dependants. As sentencing principles require that incarceration is justified on the basis of the seriousness of an offence and the need to protect the community, it is likely that judges are dealing with some offenders who have repeatedly committed serious offences. Most cases referred to in this article deal with non-violent offences. It poses the question of how have judges in Western Australia responded to their explicit and implied obligations towards an offender's dependants? How do they consider the mothering person-child relationship when handing down punishment proportionate to the crime committed? What factors are considered serious enough to satisfy the exceptional circumstances' test, and if the test is reached, what would justify suspending a parent's prison sentence? What is it that criminal law has come to value? I also ask the normative question: what is valued *right* or *appropriate*?[20]

Long since recognised is the significance of incarcerating a mother of a dependent child. The relationship is generally considered to be worth preserving. Much academic research particularly from the United States has called for 'individualised determination' or justice, as many incarcerated women have developed significant relationships with their children.[21] Consideration given to an established relationship has implications for rehabilitation,[22] and ultimately deterrence. But dangers lurk in judgments about mothering persons-child relationships, particular if the yardstick is a stereotyped version of white middle-class motherhood.[23] Thus these issues are not straightforward. Re-establishing a relationship following a mother's incarceration period may also prove difficult.[24]

Tensions between the law and the social systems

If we accept that the welfare of the offenders' dependants is a pressing social need, and that judges ought to consider in handing down a prison sentence, questions arise as to how those concerns might fit with sentencing guidelines and decisions. After all, the judges' main concerns lay with legality or illegality issues and an appropriate penalty. Judges may work within a closed, autopoietic and self-referential system;[25] they do not, however, work in a social vacuum. For Luhmann,[26] the legal system is supported, disturbed and even irritated by its social environment. Judges have access

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[19] *1914* (Cth).

[20] Frazer, Elizabeth, Jennifer Hornsby and Sabina Lovibond eds.(1992) *Ethics: A Feminist Reader* (Oxford: Blackwell Publishers) at 1.

[21] Holtz, Katie (2007) 'In Re the Termination of Parental Rights' to Max G.W.: Beginning to Pave the Way for Wisconsin's Incarcerated Mothers to Retain their Parental Rights and Serve the Best Interests of their Children' 22(2) *Wisconsin Women's Law Journal* 289 at 312.

[22] Eady, Carole A (2007) 'One Mother's Experience with the Adoption and Safe Families Act' 29 *Women's Rights Law Reporter* 31 at 37.

[23] Roberts, Dorothy E (1994) 'Foreword: the meaning of gender equality in criminal law' 85 *Journal of Criminal Law and Criminology* 1 at 4.

[24] *Kruttschnitt, Candace and Rosemary Gartner (2003)* 'Women's Imprisonment' 30 *Crime and Justice* 1.

[25] Teubner, Gunther (ed) (1988) *Introduction to Autopoietic Law in Autopoietic Law: A New Approach to Law and Society* (New York: Walter de Gruyter) 1at 6-7; Luhmann, Niklas (1988) 'The Unity of the Legal System' in Gunther Teubner (ed) *Introduction to Autopoietic Law: A New Approach to Law and Society'* Gunter Teubner (Ed) (New York: Walter de Gruyter) at 12-35.

[26] Luhmann, Niklas (1986) *Ecological Communication* (Cambridge Polity Press) at 13.

to expert witnesses' reports. They also have within reach a wealth of information on parenting, child development and developed separation trauma; which represent the state of current thinking. Dias[27] contends that judges have 'a congeries of moral, historical, psychological, political, social and practical factors', that influence legal decision making.

The legal system, according to Luhmann,[28] selects its response to other discipline knowledge depending on what is compatible with law. Law is dynamic.[29] As law shifts, adjusts and changes, it is informed by attitudes from women and men's roles in the care of children and their needs.[30] Consequently, judges have moral obligations in exercising 'very wide 'discretion,[31] to shape the boundaries of law.

The concept of gendering in criminal law

Gendering processes in criminal law that consider pressing social needs pose problems for judges when calculating a penalty, as they have obligations to maintain the proportionality principle, as well as to justify exercising clemency and to deter future offending in the public interest. I will discuss each in turn. But first, following Lovibond,[32] I do not use gendering as a critical or 'corrective process *from outside'* to claim any court decision is wrong, inhumane or sexist. After all, criminal law has a long history of treating some women more leniently than male offenders who commit similar offences, as a UK study had found.[33] However, not all female offenders, in particular those who have 'inappropriate' life styles, are unlikely to be treated leniently.[34]

Two examples of clemency for female offenders are worthy of comment. Defence lawyers in Britain have successfully argued in favour of female offenders on grounds that appear to associate criminal conduct with hormonal dysfunction: murder during the premenstruum and infanticide postpartum.[35] However, two questions arise from these examples. Is such clemency a product of a hostile sexual power structure that reinforces women's subordination?[36] Or, is the act of clemency an outcome of an ethics of care? Despite the favourable outcomes for some individual female offenders, I contend that such decisions point to a case of hostile sexual politics, which considers women's conduct as a product of their biological processes rather than respect for and appreciation of the women's social positioning that is likely to be

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[27] Dias, R W M (1988) 'Concept of Law for a Caring Society' in 'Lectures on the Common Law' Vol 1 (London Kluwer Law and Taxation Publishers) 23 at 28.

[28] Luhmann, Niklas (2006) 'System as Difference' 13(1) *Organization* 37 at 49.

[29] Above note at 38.

[30] Kennedy, Helena (1992) *Eve was Framed* (London, Chatto & Windus) at 31.

[31] Judge Hunt in *R v Herrera* (Unreported, New South Wales Court of Appeal, Hunt CJ, Smart J and Grove J, 6 June 1997)BC9702439 at 4.

[32] Lovibond, Sabina(2001) 'Gendering' as an ethical concept' 2(2) *Feminist Theory* 151 at 153.

[33] Hedderman, Carol and Loraine Gelsthorpe (eds) (1997) *Understanding the Sentencing of Women* (Home Office, London) p vii.

[34] Emmerson, Ben and Andrew Ashworth (2001) *Human Rights and Criminal Justice* (London: Sweet & Maxwell) at 500 cite others.

[35] Easteal, Patricia Weiser (1991) 'Women and Crime: Premenstrual Issues' No 31 *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice* at 2-4.

[36] Above note 32 at 151 questioning in another context.

implicated in the commission of such offences. I hasten to add, I would not advocate harsher penalties for these crimes. Instead, arguments founded on alternative justifications, such as those based on an ethics of care, and sociological and psychological contexts of women's lives for example, rather than biological determinism may be an appropriate or right gendered response.

The concept of gendering also assists in analysing contemporary changes in criminal law. Gendered thought is influenced by critical sexual politics.[37] So, what is gendering, and how does it affect changes in criminal law?[38] In answering these questions, I begin with Lovibond's[39] suggestion in thinking of gendering as those processes where differences are recognised and acted upon, providing social support as required. I hold that law is not independent of feminist, ethical or social understandings in its bid to be just, fair and equitable. Though the legal and social systems grate, boundaries remain between the two (and other) systems. What then does gendering look like in criminal law? How do we know the difference has been considered when judges apply the exceptional circumstances test that affects the mothering person-child relationship? To answer, we know the 'difference' when it appears in how judges justify their decisions in court.

The 'difference' emerges where the trajectory of most people's lives is considered. Do judges consider in their sentencing decisions, '*what changes would be desirable* in the sphere of gender relations' as offenders' children and dependants have needs requiring specific sorts of care?[40] Do judges in criminal law courts stop to consider that children need certain sorts of care that only a mothering person could provide? Has criminal law made way for gendering processes informed by insights from social disciplines? These questions prompt the need for other considerations, such as whether judges in criminal law courts promote a model of care for children that women as well as men recognise.[41]

Gendering is then an internal process where 'the social' disturbs 'the law in enabling changes. Gendering is one of many forms of internal criticism[42] in influencing criminal law. The following sections show that criminal law is ratcheting open a space for gendering in sentencing decisions where discretion is allowed, where it favours preserving the mothering person-child relationship, and where decisions reflect and respect an ethics of care. That space allows for adaptations.

Gendering processes confront the proportionality principle

Gendering poses problems for judges when calculating a criminal penalty appropriate for the mothering person. The severity of the penalty must match the severity of the crime committed (the proportionality principle), one of the three corner stones of retributive justice, together with the guilty should be punished and the innocent should not. Calculating a penalty in the name of justice is complicated. When a mothering parent/person receives a custodial sentence, the effects of

[37] At 153.
[38] At 152.
[39] At 152.
[40] At 154.
[41] At 154.
[42] At 157.

separating her or him from their dependants disrupt the proportionality equation.[43] This insight is recognised in criminal law. In the *Burns*[44] case from 1994, Judge Anderson admits to 'difficulties that can arise when a precise arithmetical approach is attempted in sentencing'. Difficulties arise because although penalties for crimes appear in sentencing statutes, judges exercise discretion in assessing mitigating and aggravating factors associated with a crime. For example, see section 8(1) of Western Australia's *Sentencing Act* 1995 (WA). Questions arise as to how judges assess mitigating factors. What facts in an offender's social and personal circumstances might meet the law's requirements in mitigating the severity of a sentence as well as deter the possibility of future offences? Also, how do such concerns fit with utilitarian principles used to justify punishment on the grounds of the greater good that may overshadow concerns for a child?

The difficulties in balancing the severity of an offence against the effects on an offender's dependants appear in cases such as *R v Cowan*.[45] In this fraud case, a mother of six children, a twelve year old (who had Asperger's Syndrome), a ten year old (who had Autism Spectrum Disorder), a nine year old, an eight year old, a six year old and five years old, had no prior convictions.[46] The court recognised that the husband who also suffers from Asperger's Syndrome would have difficulty caring for six children. Judge Whelan explained that he recognised the offender as well as her family would suffer during her imprisonment, so he would account for that in her favour.[47] Thus Judge Whelan allowed for the offender's additional burden in his sentencing decision.

Gendering accompanies discretion

Judges in assessing mitigatory factors exercise discretion in that grey area that admits variability,[48] and that respects and responds to differences. At this point, gendering processes may intrude. But with an established legal stance, impartiality, must also be satisfied. In 1977, Chief Justice Street explains, it 'is cool reason, not passion or generosity, which must characterize sentencing, as all other acts of judgment'.[49]

However, a cautionary note from Iris Marion Young[50] disrupts the 'taken-for-granted' assumptions about the stance of impartiality. For Young, [51] the ideal of impartiality seeks to reduce differences to a unity to promote the universal over the particular, reason over passion. Exercising 'cool reason' may be the ideal stance, but achieving an impartially judged sentence may be more of a 'fiction'[52] than a possibility. As Judge Owen confirms in the *Burns* [53]case, the 'period may by

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[43] Above note 34 at 501.
[44] *Burns v R* (1994) 71 A Crim R 450; BC9406779 at 3.
[45] *R v Cowan* [2010] VSC 321.
[46] At 20.
[47] At 35.
[48] Durant, Rita A and James F Cashman (2003) 'Theorizing limits: an exploration of boundaries, learning, and emancipation' 16(6) *Journal of Organizational Change Management* 650 at 658.
[49] *Nguyen v The Queen* [2001] WASCA 119 at 30.
[50] Young, Iris Marion (1990) *Justice and the Politics of Difference* (Princeton University Press, 2011 Edition).
[51] At 97.
[52] At 103.
[53] *Burns v R* (1994) 71 A Crim R 450; BC9406779.

ungenerous',[54] but 'in the end it is a value judgment based on the seriousness of the offence, the relevant degree of criminality involved in its commission and a myriad of other factors peculiar to the circumstances or particular to the offender'.[55] Where value judgments intrude in discretionary grey areas, gendering processes then become possible.

Showing Mercy

Mercy is a longstanding admissible criminal law concept which enables judges to exercise individualised discretion on grounds of family hardship to ensure, as far as possible, consistency of treatment.[56] The English case *Vaughan* 1982 [57] exemplifies mercy in action. Three children aged eleven, seven, and 16 months (who was 'backward') were boarded separately with neighbours and friends. On appeal, the prisoner was released. The court in *Markovic*[58] confirms that mercy is exercised, 'where a judge's sympathies are reasonably excited by the circumstances of the case'. Mercy is a long standing proposition according to *Markovic*[59]. 'Reasonably excited' is a long way, though, from 'cool reason'.

Gendering processes intrude on judicial acts of mercy. Judge Murray[60] for example, recognises that mercy is called for where young children need parental care. For him, departing from an appropriate sentence may be humane and necessary as a prophylactic measure against present and future harm. These points suggest that the mothering person-child relationship is protected to some extent. In the *Carmody*[61] case, neither the exceptional circumstances test nor section 16A(2)(p)[62] were applied. However, the head note reads: 'hardship to prisoner's young child taken into account as a matter of mercy only'.[63] Mercy seems to be a reserved position when other positions fail, it is a 'residual' discretion.[64]

Gendering, clemency and the exceptional circumstances test

Gendering poses problems for judges in calculating an appropriate sentence for an offender with dependants. In the principle criminal law test, the exceptional circumstances test must be satisfied for clemency to prevail. In the 1970s, however, Daunton-Fear[65] found that South Australian Supreme court judges paid little attention to an offender's dependants when handing down a sentence. She acknowledges, though, that authorities were divided. The English Court of Appeal

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[54] Above note 44 at 11.
[55] At 11.
[56] *Markovic v R* [2010] VSCA 105 at 19.
[57] *R v Vaughan* (1982) 4 Cr App R (S) 83.
[58] At 1.
[59] At 1.
[60] *Narrier v Fallows and Ors* (Unreported, Supreme Court of Western Australia, Murray J, 11 April 1997); BC9701574 at 13.
[61] *R v Carmody* (1998) 100 A Crim R 41; BC9801064 at 13.
[62] *Crimes Act 1914* (Cth).
[63] At 1.
[64] Above note 56 at 19.
[65] Daunton-Fear, Mary W (1980) 'Sentencing in South Australia: emerging principles' 7(1) *The Adelaide Law Review* at 56.

case that did not take hardship to relatives and dependants into account seems to have been followed.[66] In general, the common law position is that the severity of a sentence has no bearing on any hardship the offender's family may experience.[67] That rule applies unless exceptional or rare circumstances arise.[68] Henham also attempts to formulate a workable definition of exceptional circumstances, with facts that are 'quite *unforeseeable*' and 'very unusual at the very least' need to be present to satisfy the test.[69] By the late 1970s, some South Australian appellate courts were prepared to take into account hardship caused to children though, by no means was that consideration automatic.[70]

To satisfy the exceptional circumstances test, hardship must be extreme and only the offender is able to relieve that hardship. [71] Daunton-Fear identifies three exceptions to the general rule: i) where hardship is exceptional, ii) where a mother of young children is involved and iii) where children are deprived of parental care.[72] A judge assesses an offender's circumstances against what is considered to be the 'usual amount of disruption, anxiety and concern'[73] and any 'exceptional circumstances'. On satisfying the exceptional circumstances test, the severity of an offender's sentence may be reduced. However, the seriousness of the offence may outweigh a dependant's suffering.[74] Where exceptions are found, I suggest that the different, gendering processes are at work.

What is considered as 'very unusual' in someone's life, and how do judges spot it? The authority for the exceptional circumstances test is evident in the Western Australian *Sinclair*[75] case from 1990, which highlights gendering processes at work. Though her honour's decision failed on appeal, Judge Wheeler's comments have relevance here. Charlene Sue Sinclair was convicted following a guilty plea to defrauding the Commonwealth of $59,209.00 over 9 years. Clemency was shown to Sinclair, a mother of children aged eleven and twelve , one of whom was 'retarded'. Judge Wheeler elaborates,

> It also seems to me that the position of the care giver and nurturer must be regarded separately from the position of the bread-winner and father figure. The daily care giver is absolutely essential in the child's life it seems to me and there is that distinction as well as the fact that this has now been enacted into the legislation on a mandatory basis. Plainly the children will be separated from the one adult which has been constant in their lives.[76]

Judge Wheeler acknowledges the 'difference' in focusing on the unique requirements of dependent children. Her Honour also incorporated into her argument information about separating the children, referring also to the 'terrible consequences to your

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[66] At 57.
[67] *New South Wales Law Reform Commission (1996)* Discussion Paper 33 (1996) – Sentencing at153.
[68] At 153.
[69] Henham, Ralph (1998) 'Making Sense of the Crime (Sentences) Act' 61(2) *The Modern Law Review* 223 at 226.
[70] Above note 65 at 57.
[71] At 58.
[72] At 57.
[73] *Burns v R* (1994) 71 A Crim R 450; BC9406779 at 8.
[74] Above note 65 at 58.
[75] *Sinclair v R* (1990) 51 A Crim R 418.
[76] *Sinclair v R* (1990) 51 A Crim R 418 at 16.

children'.[77] Where such facts are accepted as mitigatory, gendering processes are, in fact, at work. Later however the Crown appealed her honour's decision on several grounds, the most significant of which was 'undue weight' (incorrect interpretation) given to the provisions in the new sub-paragraph 16A (2)(p)[78], which is discussed below.[79] The suspended sentence was repealed, requiring Sinclair to serve a further 6 months.[80]

Recognising the 'difference' is contingent upon many factors particularly if the offence involves illegal drugs. For example, in 1994, Judge Anderson argued against an appeal in *Burns v R*, calling for recognising hardship experienced by Burns' children, aged four and ten, (at 9, 6) because,

> [t]his was not a thoughtless, impulsive spur of the moment crime in which there was no time or opportunity to consider the consequences to the children should the parents be caught. Having regard for these features of the case, the Court must be less influenced by considerations of mercy towards the applicant than might otherwise have been the case. When the prison sentence is unexceptional on every other consideration, especially general deterrence and protection of society, there is much less room to be merciful out of regard for hardship to family and dependants in serious crimes involving a definite degree of premeditation and wilfulness... Plainly, the personal circumstances of the applicant and her dependants do not, and could not diminish the seriousness of the crime itself.[81]

The appeal was based on the applicant and her co-offender, her de facto husband, receiving the 'same mitigatory discount'.[82] His honour did not distinguish between the sentences handed down to Burns, the mothering person, and Dawson, father to one child.[83] No attention was paid to men and women's differing roles in caring for the two young children. The seriousness of the offence overrode concerns for the children's welfare.

This outcome is unsurprising given that the legal system has historically deflected blame and responsibility for hardship, so that innocent third parties suffer in sentencing decisions. Kennedy, for example, noted that twenty years ago UK officials in criminal courts blamed female offenders for their children's suffering.[84]

How is the exceptional circumstances test used to mitigate the severity of a sentence in the twenty or so years since the *Sinclair* case for offences other than drug offences? Gendering processes appear to be at work, posing problems, if not in the court of first instance and then onto the court of appeal. Two cases illustrate this point in discussing the plight of the offenders' children. First, Judge Wallwork explains in 2001:

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[77] At 16.
[78] *Crimes Act 1914* (Cth).
[79] *Sinclair v R* (1990) 51 A Crim R 418 at 17.
[80] *A*t 31.
[81] *Burns v R* (1994) 71 A Crim R 450; BC9406779 *at 8*.
[82] At 3.
[83] At 10.
[84] Above note 30 at 79.

> It is not an appropriate response to this family's situation to say, as some courts have said in the past, that the offender should have thought of that beforehand. The children are innocent of any wrongdoing and should not be so gravely disadvantaged. Their rights are most important in a case like this as young children in this society are to be protected as far as possible. Every effort should be made to see that they are not deprived of parental care.[85]

Judge Wallwork's decision would affect four children aged sixteen, fourteen, twelve, and six .[86] An author of the court report had acknowledged that in response to their mother's incarceration and their father's rejection, that the children appeared traumatised, hostile and challenging.[87] It was also mentioned that the children would possibly need state care.[88] The level of suffering on the children's part was considered exceptional.

Second, Egan, who pleaded guilty to one count of aggravated burglary and one count of wilful and unlawful damage, was sentenced to 2 years imprisonment.[89] On appeal in 2007, the judges found a judicial error in assessing the appellant's role in the offence.[90] But Egan was also the sole mothering parent of two girls aged six and fifteen with no relatives living in Western Australia.[91] Her sentence was reduced. Judge Wheeler wrote, 'I would have suspended that sentence for a period of 18 months, had I been imposing it immediately following conviction.[92] She justifies her position:

> I would add only that the psychologist's report indicates that the younger girl is, as one would expect, very seriously affected and distressed by her mother's imprisonment.[93]

Egan was released and awarded a conditional suspended sentence of imprisonment.[94] On appeal, as new information of a child's suffering and hardship comes to light, exceptional hardship becomes easier to establish.

Gendering, social considerations and mitigatory factors pose problems for judges in exercising discretion. What facts are 'clearly exceptional' circumstances that cause an offender's dependant/s to suffer hardship? The *Gillespie v Moffitt*[95] case illustrates how judges speak about the exceptional circumstances test. The appellant, a mother of a two year old boy, pleaded guilty on 8 July 1996 in the Court of Petty Sessions at Midland to eleven counts of stealing and ten counts of burglary.[96] She was sentenced to a total of three years imprisonment with eligibility for parole.[97] Her two year old son, an asthma sufferer, had been

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[85] *Nguyen v The Queen* [2001] WASCA 72 at 71.
[86] *Nguyen v The Queen* [2001] WASCA 119 at 10.
[87] At 13.
[88] At 14.
[89] *Egan v the State of Western Australia* [2007] WASCA 182.
[90] At 14.
[91] At 6.
[92] At 22.
[93] At 21.
[94] At 22.
[95] *Gillespie v Moffitt* (Unreported, Supreme Court of Western Australia, Wheeler J, 18 December 1996); BC9606468.
[96] At 3.
[97] At 3.

hospitalised approximately ten times.[98] His worship (at first instance) justifies his position: 'I am well aware that there is a child involved but that cannot change the sentence that must be imposed as there is a family support…'.[99]

Judge Wheeler justifies supporting the appeal against the prison sentence:

> In the circumstances of this case however it appears to me that his Worship, having balanced up the seriousness of the offences and the personal circumstances of the appellant erred in not going on to consider as a significant factor the hardship to the third party, namely the small child… It may be however that in the **past too strict a test** of what constitutes "exceptional" hardship for a dependant has been on occasions been adopted.[100] (My emphasis)

She adds, 'it is in the long term interests of the community that young children not be deprived of parental care and this factor should carry significant weight in the sentencing process, and not only in the exceptional case'.[101] Judge Wheeler substituted an intensive supervision order for a period of one year and other requirements.[102] These ideas contribute to disturbing the test, agitating from within.

Respect for characteristics that have been devalued or overlooked as 'feminine' are attracting attention. I suggest that arguments that show respect for women's caring role are not informed by a hostile sexual power structure,[103] rather, they indicate an ethics of care. For federal offenders, the Australian Law Reform Commission[104] supports the view of 'allowing the court to take into account factors relating to the personal circumstances of an offender'. The Commission contends that this needs to be done to facilitate 'individualised justice'. Therefore, I suggest that during the 1990s and the first decade of the 21st century in Australia, the exceptional circumstances test appears to be moderating. Criminal law owes this achievement to the concept of gendering.

Gendering and an amendment to the *Crimes Act* 1914 (Cth)

If any doubt remains that gendering is eroding the exceptional circumstances test albeit unevenly, gendering processes are appearing more clearly following the 1990 amendment of the *Crimes Act.*[105] The amendment poses further problems for judges adhering to the 'strict' exceptional circumstances test. Section 16A(2) (p)[106] requires a judge to consider, 'the probable effect that any sentence or order under consideration would have on any of the person's family or dependants' for federal offenders. A similar provision appears in South Australia's *Criminal Law (Sentencing) Act.*[107] Clear tensions appear between provisions in the statute and the

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[98] At 4.
[99] At 7.
[100] At 8.
[101] At 8-9.
[102] At 9.
[103] Above note 32 at 151.
[104] Australian Law Reform Commission (2005) Discussion Paper 70 Sentencing of Federal Offenders at 74.
[105] *Crimes Act 1914* (Cth).
[106] *Crimes Act 1914* (Cth).
[107] *1988* (SA) at s10 (1)(n).

common law positions. Chief Justice Malcolm in the court of appeals cites cases to support his position, "in my view s16A of the Crimes Act was not intended to change the common law".[108] Whatever the legislature's intentions, adjustments to the law are occurring as discussed below.

By the mid-1990s, a Commission notes,

> The Australian Law Reform Commission, however, recommends that impact of a particular sanction on third parties should be made a relevant factor on the ground that the detrimental impact on the offender's family can itself be a form of punishment on the offender. A number of statutory guidelines now appear to have reversed the common law position; but courts in South Australia and Western Australia have not interpreted the provisions in this way.[109]

The elusiveness of the test opens the space for gendering and individualised justice.

Judges have been admonished for overlooking the strictness of section 16A(2)(p).[110] Chief Justice Spigelman in *Togias*[111] states, 'it is of some significance that the Parliament has identified this matter (the matter of s16A(2)(p)[112] that was interpretation as a "possible effect" rather than a "probable effect". Although Judge Spigelman did not elaborate on what 'probable effect' means, the National Judicial College of Australia clarifies this with: 'the court must only take into account the probable effect to the extent that it is relevant and *known*' (italics in the original).[113] The word 'possible' implies that evidence is not required, whereas 'probable' requires evidence of effects such as imprisonment may have on the family or dependants.[114] The National Judicial College of Australia reported also that in 'many of the cases before the courts, there have been a lack of evidence tendered in addressing the probable effect that the sentence will have on the family or dependants'.[115] An error of law could be attributed to some interpretations, but an offender's dependants are likely to be affected favourably with a lower threshold required of 'possible effects'. Gendering processes are at work here even if they are contingent upon interpreting a statute incorrectly.

The application of section 16A(2)(p)[116] was further criticised in its relationship to section 16A (1)[117]. The law commission makes the following points on matters the court must take into account in sentencing, matters relevant both to the circumstances of the offence and of the offender. Section 16A(2)[118] is subject to the overriding requirement in s 16A(1) that in determining a sentence for a federal offence, a court 'must impose a sentence … that is of a severity appropriate in all the

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[108] *Sinclair v R* (1990) 51 A Crim R 418 at 25.
[109] Above note 65 at 153-154.
[110] *Crimes Act 1914* (Cth).
[111] *R v Togias* [2001] NSWCCA 552 at 10.
[112] *Crimes Act 1914* (Cth).
[113] *National Judicial College of Australia, the Commonwealth Director of Public Prosecutions, and the Judicial Commission of NSW (2012) 'Effect on Offender's Family or Dependants'* at 2.
[114] National Judicial College of Australia 2012.
[115] At 2.
[116] *Crimes Act 1914* (Cth).
[117] *Crimes Act 1914* (Cth).
[118] *Crimes Act 1914* (Cth).

circumstances of the offence'. [119] The Commission goes on to ask: does this mean that section 16A(1) limits section 16A(2) by allowing the court to have regard to the matters in section16A(2),[120] (such as the personal circumstances of the offender) only where doing so does not take the sentence out of the range of sentences 'appropriate in all the circumstances of the offence'? If so, the personal circumstances of an offender's personal circumstances will not be considered at all. These sorts of internal challenges, questioning and tensions indicate gendering at work shows respect for the mothering person-child relationship.

Further, gendering has posed problems by exacerbating tensions in practice between the legislative amendments and the common law. How should courts interpret an amendment such as section 16A(2)(p)[121] in relation to the exceptional circumstances test? On the one hand, c**ourts have interpreted section 16A(2)(p)[122] as 'operating alongside the common law principle that any hardship suffered by the person's family and dependants can only mitigate the severity of a sentence in 'exceptional circumstances'.**[123] On the other hand, in practice, the provision appears to have less authority for some judges. Section 16A(2)(p)[124] requires the courts to consider 'the probable effect' of the sentence on family and dependants has been 'construed as subject to the exceptional circumstances test'.[125]

Nevertheless, in the *Nguyen*[126] appeal case of 2001, it was found that the sentencing judge failed to account for, 'the probable effect of the sentence of imprisonment of twelve years imposed on the appellant with a non-parole period of three years and seven months on the appellant's dependent children as required by section 16A(2)(p) of the *Crimes Act 1914* (Cth)'. Nguyen had never used heroin and would not profit from it.[127] She should have served about seven months of the sentence.[128] On appeal, the appellant was released on good behaviour. Chief Justice Malcolm reiterated, 'the learned Judge did not say how he took the effect of the sentence on the children into account or make any inquiry about the fate or future of the children'.[129] The sentence had been imposed without complying with section 16A(2)(p).[130]

In addition, the 'best interests of the child principle' is finding its way into criminal law decisions. Indigenous offenders are often confronted with additional complicating factors. For example, in *Chong*[131] in 2008, an Aboriginal mother of seven children from a remote community was convicted of unlawful wounding and a breach of an intensive correction order. She was sentenced to two and a half years imprisonment with court ordered parole. The judge, however, failed to take into

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[119] *Crimes Act 1914* (Cth).
[120] *Crimes Act 1914* (Cth).
[121] *Crimes Act 1914* (Cth).
[122] *Crimes Act 1914* (Cth).
[123] Above note 111.
[124] *Crimes Act 1914* (Cth).
[125] *Markovic v R* [2010] VSCA 105 at 11.
[126] *Nguyen v The Queen* [2001] WASCA 119 at 1.
[127] At 2.
[128] At 15.
[129] At 7.
[130] *Crimes Act 1914* (Cth).
[131] *R v Chong*; *ex parte A-G* (Qld) [2008] 181 A Crim R 200 QCA 22.

account that Doramie Chong was breast feeding an infant.[132] The baby was not 'permitted on the government aircraft'[133] that would fly Chong to Brisbane to serve her sentence. Once that evidence came into light, the judge ordered immediate parole.[134] Despite an appeal against the sentence that was considered 'manifestly inadequate',[135] the decision to release Chong remained, in the 'best interests of children'.[136]

Given Australia's obligation to uphold international human rights' standards to protect the rights' of children, we may see a more consistent application of this 'best interests of the child principle' than we have seen, since the *Teoh*[137] case of 1995. After all, Australia did ratify the Convention on the Rights of the Child in 1991.

Much research confirms the damage exacerbated when a mother with dependent children is imprisoned. Hagan and Foster's[138] United States research confirms that imprisoning mothers affects all areas of child care including children's physical, social, and emotional lives as well as the communities' social well-being. Thus, imprisoning a mothering person can damage generations to come.[139]

Gendering disrupts public interest concerns

Gendering poses a problem for judges who justify handing down a sentence of imprisonment on the basis of deterrence, that is, deterring the offender and others from future offending. At law, deterrence in the public interest is a mainstay principle. In 1977, Chief Justice Streetin *R v Rushby*[140] explains,

> If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences. On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct of the individual offender, and the effect of the sentence on these, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine that appropriate amount of punishment.

Judge Callaway in 1998 justifies why the test for leniency is high with,

> [C]hildren cannot be used as a form of insurance by parents engaged in criminal enterprises. It is not uncommon in drug trafficking to find persons

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[132] At 13.
[133] At 13.
[134] At 14.
[135] At 15.
[136] At 33.
[137] *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20.
[138] Above note 18 at 38.
[139] At 39.
[140] *R v Rushby* [1977] 1 NSWLR 594 at p598.

> recruited whose antecedents or family circumstances will elicit sympathy if they are convicted.[141]

Deterrence concerns have at times overshadowed other considerations. Judge Owen in *Burns*[142] justifies recognising deterrence as a 'very' important factor in sentencing a person for a drug offence. One explanation could be that judges' sentencing decisions are influenced by perceptions of 'populist punitiveness'.[143]

Further, Judge Pidgeon in dissent in *Nguyen*[144] recognises 'the effect on the children of the imprisonment of both parents would be very damaging', but remained convinced that 'the public interest in deterring the handling of heroin of this amount must .... take precedence over the harmful effect on the children'. This position suggests that deterrence is awarded higher priority than preventing harm to children. The Crown had argued that the community would be outraged if children's needs succeeded as "an excuse" for reducing the severity of a sentence. Doing so would place the interest of the public beneath the interests of the convicted offender and her or his dependants.[145] The existence of dependent children will not automatically rule out a sentence of imprisonment.[146] However, given the offender's mental state among other considerations, Judge Martin stated that personal deterrence would no longer play any part.[147] Implied here is value placed on preserving the mothering person-child relationship for its possible favourable effects on an offender's future behaviour and her rehabilitative prospects.

The effectiveness of sentencing an offender to prison on the basis of deterring offending behaviour is contentious. Over a decade ago, for example, Morgan suggested the Western Australian government had conceded that 'mandatory sentences have no deterrent effect', and there is no evidence that 'they reduce recidivism'.[148] Others claim that, 'there does not yet exist a sound knowledge base about the extent to which incarceration exhibits a criminogenic, deterrent'.[149] Tonry also confirms that criminal penalties may be necessary but have little effect on making societies safer.[150] The question remains as to whether offenders who are mothering persons ought to be in an appropriate medium for communicating general deterrence.

If sentencing an offender has little or no effect on deterring some offenders, to which Australia's rate of recidivism[151] seems to suggest, or others from actually offending,

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[141] *R v Carmody* (1998) 100 A Crim R 41; BC9801064 at 10.
[142] *Burns v R* (1994) 71 A Crim R 450; BC9406779.
[143] Above note 67 at 231.
[144] *Nguyen v The Queen* [2001] WASCA 119 at 43.
[145] At 24.
[146] Judge Martin in *Milosevski v Police* [2000] SASC 342 at 14.
[147] At 13.
[148] Morgan, Neil (2000) 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?' 24(3) *Criminal Law Journal* 164 at 182.
[149] Avinash, Singh Bhati, Alex R. Piquero (2007) Estimating the Impact of Incarceration on Subsequent Offending Trajectories: Deterrent, Criminogenic, or Null Effect? 98 *Journal of Criminal Law and Criminology 207.*
[150] Tonry, Michael (2009) 'The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings' 38 *Crime & Justice* 65 at 91.
[151] The rate of recidivism has not increased in the last five years. However, 'of those prisoners released in 2007–08, 38 percent had returned to prison under sentence by 30 June 2010, while 44 percent

then it seems reasonable to hand down penalties that aim to preserve the mothering person-child relationship. If the relationship provides an offender with some stability and deters him or her from future offences, public interest concerns may go some way to being addressed. Judge Murray reiterates the sentiment contained in a pre-sentence report,

> [A] significant force in producing a change in that pattern of behaviour, however, could be found if there was a genuine change in her attitude so that the appellant accepted that her role as a mother and as the person responsible to care for her children demanded that she be available to provide them with a stable and loving home. Parenthood would then become a factor of some power in preventing the commission of offences.[152]

Taking some responsibilities for the harms done by the criminal justice interventions, sound practical judgments depend not only on judges' and other officials' capacity to apply the law in the public interest, but also on their ability to draw on feminist, moral and social insights in handing down decisions.[153] When the only enduring relationships in the offenders' lives are their children who need them, then it is right to preserve the mothering person-child relationship, notwithstanding that some children may be better off without their mothers. That approach holds promise for personal deterrence where terms of imprisonment have failed. For now, incarceration as a means of deterring would-be offenders and recidivists has not been justified empirically.

Conclusion

Gendering processes respecting the mothering person-child relationship are at work in criminal law. Some judges in criminal law have come to value the mothering person's role in exercising their discretion in moderating the severity of sentences. Some of the judiciary are responding via internal reflection and criticism to a pressing social need in its obligation to protect innocent third parties. Criminal law courts appear to be accepting some responsibility for potential damage to innocent third parties resulting from sentencing a mothering person to imprisonment. Criminal law is recognising not only the special place mothering persons have in the care of children, but also that preserving such relationships may provide leverage against the future need to offend.

The law does not turn a blind eye to the reality of women and men's responsibilities towards dependants. A judge's priority is to hand down, to those who had been found guilty, a penalty that commensurate the severity of the crime. But the exceptional circumstances test, section 16A(2)(p)[154] and mercy considerations enable gendering processes to intervene on behalf of an offender's dependants albeit in an uneven and contingent way. It is during these moments that the law adapts to the social context

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were returned to corrective services (ie prison or non-custodial service orders). Australian Institute of Criminology Australian Crime Facts and Figures 2011 at 123.

[152] *Narrier v Fallows and Ors* (Unreported, Supreme Court of Western Australia, Murray J, 11 April 1997); BC970157 at 11.

[153] Postema, Gerald J (1980) ' Moral Responsibility in Professional Ethics' 55 *New York University Law Review* 63 at 64.

[154] *Crimes Act 1914* (Cth).

in which people's lives are played out, and is made possible when judicial discretion is allowed. Sentencing legislation and policies then require persistent vigilance. The criminal justice system is taking small steps to assist the mothering person to retain responsibility for dependants when calculating a penalty. Criminal law is adjusting its lens to include an ethics of care for offenders and their dependants. The judiciary on behalf of the State is exercising responsibility for limiting damage, which is the right thing to do for the next generation of potential offenders.

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