



the **Howard League** for **Penal Reform**

# Mitigating Motherhood

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A study of the impact of motherhood on sentencing  
decisions in England and Wales



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A report for the Howard League for Penal Reform by Shona Minson, based on  
her John Sunley Prize winning masters dissertation



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## Foreword

In recent years the Howard League for Penal Reform has invested in commissioning and supporting post-graduate research to further our charitable and strategic objectives. As part of the strategy, the Howard League's [John Sunley Prize](#) celebrates excellence and the impact of post graduate research into penal issues. This annual award rewards and encourages Masters students who generate outstanding research dissertations that are both topical and original; and can also offer genuine new insights into the penal system and further the cause of penal reform. Peer reviewed versions of the winning dissertations will be published by the Howard League throughout the year in an abridged format.

We are delighted to publish a version of one of the three 2013 winning dissertations here. In this paper, Shona Minson, who completed her Masters at the University of Surrey, explores the impact of motherhood as a mitigating influence on sentencing decisions in England and Wales.

The study investigates whether the caring responsibilities of a defendant mother are treated as personal mitigation to reduce sentence length, using a combination of textual analysis of secondary data (transcripts of Crown Court sentencing remarks) and interview data. The research found that there is inconsistency in the application of personal mitigation to sentencing due to the exercise of judicial discretion. Judges with a greater understanding of the impact of prison on women are more likely to order pre-sentence reports, and if a judge has a pre-sentence report the defendant's motherhood has a greater likelihood of mitigating the sentence.

The third prizewinning dissertation will be published later in 2014.

Anita Dockley

Research Director, the Howard League for Penal Reform

# Abstract

This is an exploratory study of the impact of motherhood on mitigation in sentencing decisions in England and Wales. Previous studies have explored the influence of personal mitigation on sentencing decisions but little is known about the way in which judges interpret motherhood in this context.

A growing number of children are separated from their mothers by imprisonment, and the state has a duty to protect them from discrimination or punishment suffered as a consequence of the actions of their parents. This study is a preliminary study exploring the visibility of these children in the sentencing process, and examining whether the caring responsibilities of a defendant mother are treated as personal mitigation to reduce sentence length. The study adopts a qualitative and mixed methods approach, combining semi-structured interviews with sentencing transcripts analysis to provide a multi-faceted view of this complex area.

The findings highlight that discretion in the application of mitigation leads to inter and intra judge inconsistency. Personal factors including knowledge and experience influence a judge's use of pre-sentence reports. The defendants' sentence was more likely to be mitigated by motherhood if the judge had considered a pre-sentence report, regardless of whether the judge agreed with the recommendations of the report.



# 1. Introduction

The imprisonment of women who offend has received increasing attention since the publication of the Corston Report (2007). The report acknowledged that women in the criminal justice system have particular vulnerabilities and are at risk of ‘multiple harms’ (Sentencing Advisory Panel, 2009). The female prison population increased by 60 per cent between 1997 and 2007 (Ministry of Justice (MoJ), 2007) and despite the rate of increase slowing down since 2008 the general prison population continues to grow at around 1 per cent per year (MoJ, 2012). On 11 October 2013 80,126 men and 3,952 women were in prison (MoJ, 2013a) and in the twelve months to December 2012 9,832 women were received into prison (MoJ, 2013b).

In 2010, 17,240 children were separated from their mothers by imprisonment (Wilks-Wiffen, 2011). The only figures available indicate that a third of mothers in prison are lone parents (Social Exclusion Unit, (SEU) 2002: 137). Only 9 per cent of those children are cared for by their father during their mother’s imprisonment (Prison Reform Trust, 2013) and only 5 per cent remain in the family home (Caddle and Crisp, 1997; Prison Advice and Care Trust, 2011). The impact of imprisonment on the children of female prisoners has largely remained unstudied (Liebling and Maruna, 2005), and may not be considered by sentencers when dealing with female defendants. Although feminist criminology has done much to reduce the invisibility of women in the criminal justice system (Heidensohn, 2006), the secondary victims, those brought in by kin relationships (Condry, 2006), remain largely invisible (Codd, 2008). It is known that the incarceration of a parent, particularly a mother, causes attachment problems for a child (Murray, J., Murray, L., 2010). While the impact remains largely unknown, the state operation of power through imprisonment risks overriding the state’s duty to protect children from discrimination or punishment in accordance with their Article 2 rights (UN Convention on the Rights of the Child). Under Article 8 of the Human Rights Act a child has a right to family life which should be protected by the state. The Court of Appeal have passed judgments which enshrine the principle that the courts should consider the Article 8 rights of the child before sentencing a mother or primary carer to a period of imprisonment,<sup>1</sup> but Epstein’s research indicates that this practice is not being followed by the courts (2012). Within the Corston Report (2007) Baroness Hale noted that ‘[t]o become a prisoner is almost by definition to become a bad mother’ raising questions about the courts’ construct of motherhood, and the potential influence this has on sentencing decisions (Easton, 2008) and outcomes for children.

Judicial discretion remains a key tenet of sentencing in England and Wales, and is exercised through the consideration of personal mitigation (Jacobson and Hough, 2007). Set against the background of an increased female prison population and consequently an increased number of children affected by their mothers’ imprisonment, this study seeks to understand how sentencing judges regard the defendant’s status as a mother of dependent children.

This research is exploratory, and is interested in the understandings, interpretations, motivations and ideas of the judges involved in the social process of sentencing (Mason, 2002). By analysing their decisions and listening to their personal accounts

<sup>1</sup> see *R (on the application of P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151, at para 79 and *R v Rosie Lee Petherick* [2012] EWCA Crim 2214, (3 October 2012).

the research aims to gain better insight into the complex balancing exercise judges undertake when dealing with women who offend. The study set out to answer the following questions:

- *How does personal mitigation affect sentencing?*
- *In what circumstances is the fact that a defendant is the mother of dependent children taken into consideration as mitigation when sentencing?*
- *To what extent is there inter and intra judicial consistency regarding the impact of motherhood on sentence?*
- *How do factors personal to a sentencer influence a judge's approach to sentencing mothers?*

## 2. Sentencing practice and the impact of imprisonment on women

The passing of a sentence concludes criminal proceedings and determines what punishment the state believes to be appropriate to the defendant, punishment being the 'expression of moral condemnation, in response to rule infringements' (Easton and Piper, 2008: 4). Traditionally, in England and Wales sentencing has been at the discretion of the judge and judges were free to adopt the sentencing approach which they felt best suited offence and offender (Wasik, 2001: 44).

The main theories of sentencing are deterrence, rehabilitation, incapacitation, retribution and reparation, which has become an important theory more recently (Ashworth, 2010: 78). These five rationales are not complementary; deterrence and incapacitation push sentencing in a more punitive direction while rehabilitation and reparation are less concerned with punishment and more concerned with change and restoration. Occupying the middle ground is retributivist sentencing, which requires punishment, but only that which is proportionate for the particular offence and its circumstances.

### **Changes to sentencing policy over the past 25 years**

Historically, little guidance was given as to which rationale should be given priority and it was for the judge on each occasion to decide which sentencing aim to pursue. The Court of Appeal provided guideline judgments but these covered only a small range of offences and the Court of Appeal were constrained by the material on which they could rely to provide those judgments. The Crime and Disorder Act 1998 created the Sentencing Advisory Panel (SAP) to draft and consult on proposals for guidelines. These were then referred to the Court of Appeal for consideration and, in that way, they informed the issuing of a guideline judgment. The Court of Appeal was not obliged to accept the Panel's recommendations but in most cases did so, sometimes with modifications. The important feature was that the laying down of guidelines remained under the control of the senior judiciary.

In *Crime, Justice and Protecting the Public*, the 1990 white paper, the government promised that it would establish 'a new and more coherent statutory framework for sentencing' (Home Office, 1990: para.1.5), one which would be 'based on the seriousness of the offence or just deserts' (ibid.: para.2.3). 'Just deserts' theory would make retributivist justice the main thrust of any sentencing decision. Unfortunately the 1991 Criminal Justice Act was not clearly drafted and 'nowhere was desert or proportionality proclaimed as the primary rationale' (Ashworth, 2010: 100). The judiciary had not supported the 1991 Act, nor did it support the government introduction of mandatory minimum sentences in 1997 (ibid.). In 2001 the Halliday Report (Home Office, 2001), commissioned by the Labour Government, recommended a move towards a proportionality rationale: sentences should be proportionate to the seriousness of the offence and the seriousness of the criminal record, and emphasis should no longer be placed on deterrence and incapacitation

(Ashworth, 2010: 100). The Criminal Justice Act 2003 came into force following that report but contrary to the conclusions reached in the Halliday report it introduced an ambiguous sentencing provision in s.142:

*Any court dealing with an offender [aged 18 or over] in respect of his offence must have regard to the following purposes of sentencing –*

- a) The punishment of offenders*
- b) The reduction of crime (including its reduction by deterrence)*
- c) The reform and rehabilitation of offenders*
- d) The protection of the public*
- e) The making of reparation by offenders to persons affected by their offences*

Section 142 left judges to once again balance five different sentencing rationales of equal importance. However one of the outcomes of the Halliday report was the establishment of the Sentencing Guidelines Council (SGC) which was established in 2003 to give guidance on sentencing. The SAP continued to exist but it was the SGC, rather than the Court of Appeal who then became responsible for the issuing of guidelines. In turn the Court of Appeal focused on construing the guidelines and on determining specific appeals. The SGC was chaired by the Lord Chief Justice and established with eight members of the judiciary and four others, the Director of Public Prosecutions, a senior police officer, a defence solicitor and a representative of victims groups. The Chairman of the SAP attended as an observer (Sentencing Council Website, 2012). For the first time non-judges were involved in setting sentencing guidelines. The SGC publication *Overarching Principles – Seriousness* (2004) removed the ambiguity of section 142 and returned sentencing to the previously intended rationale of just deserts and proportionality by re-stating that the sentencer must start by considering the seriousness of the offence and:

*In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused. (s.143(1))*

In 2009 part four of The Coroners and Justice Act created the Sentencing Council (comprised of 8 judicial members and 6 non-judicial members) which replaced both the Sentencing Advisory Panel, and the Sentencing Guidelines Council. Its function is to 'promote greater consistency in sentencing, whilst maintaining the independence of the judiciary' (Sentencing Council, 2012), an aim which is of 'major importance in most Anglo-American jurisdictions' (Monsieurs et al., 2011: 12). It produces guidelines on sentencing for the judiciary which must be followed unless 'it is in the interest of justice not to do so' (Sentencing Council Website, 2012). Since 2009 the process of sentencing in England and Wales has moved increasingly to a tariff based system, the backbone of which is the 22 definitive sentencing guidelines published by the Sentencing Council which 'provide a structured approach to determining the appropriate sentence while still allowing for judicial discretion' (ibid.). This continuing emphasis on judicial discretion and judicial independence remains an important part of the criminal justice system of England and Wales, and it is this which means that sentencing continues to be an interpretative and subjective process.

## The role of judicial discretion

*There's a subjective element to it starting from an objective basis.  
(Millie et al., 2007: 249)*

Sentencing guidelines set out the boundaries within which a judge should sentence, but judges exercise discretion in the consideration of personal mitigation. At sentence, a judge is fully aware of the circumstances of the offence and whether or not the defendant has admitted their guilt. They know of the defendants' previous convictions, if any. In every case a judge can ask for a pre-sentence report (PSR) to be prepared by the probation service which can provide the judge with information about the defendants' background, home life, health issues and employment status and gives the probation service's view on the defendants' suitability for a non-custodial sentence. The defence lawyer will present a 'plea in mitigation' in which they will set out the mitigating circumstances, both offence mitigation and personal (or individual) mitigation. Offence mitigation is that which makes the offence less serious, while personal mitigation is mitigation relating to the impact of sentence upon the individual (Easton and Piper, 2008: 210). After considering the mitigation the judge will sentence.

A 2007 study found a greater use of custodial sentences in England and Wales than in Scotland and suggested the sentences tended to be more punitive because greater attention was being paid to sentencing guidelines, and less to mitigation (Millie, Tombs and Hough, 2007: 261).

Jacobson and Hough's 2007 study on personal mitigation used sentencing observations and judicial interviews to look at mitigation. It found that personal mitigation was an evident factor in just under fifty per cent of observed cases (ibid.: 14). In 43 of 127 observed cases the judges said that the offence merited custody but mitigation pulled it back from immediate custody (ibid.: 12); In 61 of 162 cases mitigation led to a shorter custodial sentence, however there was significant variation between the judges in the impact that mitigation had on sentence. In interview the judges were asked to consider sentencing exercises (see Appendix 1) including one exercise where the mitigation was that the defendant was a mother with three dependent children. Of 39 judges, those who thought it would reduce the sentence from custodial to non-custodial or halve the sentence length numbered the same as those who determined it would have no impact on sentence (ibid.: 16) thus illustrating the subjectivity of the process. The study concluded:

*the significance of mitigation in sentencing is not recognised by policy... the researchers suggest that there is a need for guidance, for example by the Sentencing Guidelines Council, on the principles of personal mitigation that should and should not be incorporated into sentencer's decision making  
(2007: vii)*

## Impact of sentence on the defendant: does impact constitute mitigation?

In deciding whether guidelines should be established regarding personal mitigation it is necessary to consider whether equality of impact in sentencing is an achievable or desirable aim of sentencing. The principle of equal impact is that in circumstances where an individual is likely to suffer from the sentence to a significantly different degree than most other people, there is a case for

reducing its length (Ashworth, 2010: 185). Wasik (2001: 216) identified that the guidelines provide for an 'equal decision making process in determining a sentence' rather than providing for an equal outcome. In her 2007 article Piper argued for equality of impact at a time when the factors which influence sentencing policy – political initiatives, and the groundswell of public opinion (Easton and Piper, 2008: 10), seemed to be placing significant emphasis on victim impact (Piper, 2007: 141). Her paper argued that courts were only taking impact into account if the offending was less serious, and that 'innocent others' e.g. children, should be taken into account. Piper referenced the case of Mills [EWCA 2002]<sup>2</sup> which stated that a court should where possible take into account whether the individual is a primary carer for a child. Piper recognised that this approach could be problematic if defendants with children received more lenient sentences. However she argued that it is better to apply 'retributivist principles to impact factors' as a matter of principle (ibid.: 155), rather than leaving it to the courts' mercy.

Others too have argued for the development of principles, over 'mercy' (Ashworth, 2010: Easton and Piper, 2008). Ashworth has written of the courts 'drifting into the blancmange of mercy' when they should be dealing with mitigation as matters of principle (2010: 187). Easton (2008) did not disagree with Piper's premise that there was inequality of impact, but instead argued for the difference to be made not at the point of sentence but at the point of punishment. She too had found that the impact of dependent children was sometimes taken into account but not always (2008: 112). Easton cautioned against idealising family life, and attempting to apply a sentencing philosophy which would require the courts to make judgments about good and bad mothers and which would create absurd and unfair results (ibid.: 113). Her proposed solution to the problem of differentiated impact would be to address the inequality in punishment at the point of punishment. This could be done, for example, by giving more support to prisoner's families, or following the Corston report's recommendation to house women in smaller local units (2007: 5), thus removing the issue of distance from home to prison which has a greater adverse impact on women. Addressing difference in impact at the point of punishment would be a positive step, but even Easton recognised that it was not the whole answer. She wrote that there should be justice in sentencing, and that disparate impact should be avoided (2008: 114).

Piper called for the development of 'acknowledged sentencing principles in relation to the impact of personal factors on the individual's experience of punishment' (Piper, 2007: 150). Roberts (2008), also argued for a move towards greater consistency of application of mitigating factors, and called for more attention from the Sentencing Guidelines Council (ibid.: 275), due to the 'considerable variation in the judicial response to some sentencing factors' (ibid.: 264). However neither Piper nor Roberts made any attempt to develop new principles.

Loureiro conducted research in Scotland on the possible introduction of Child or Family Impact Statements in court. Such statements provide judges with an understanding of the impact their decisions are likely to have on an individual's family (2009: 2). The research found that participants (key stakeholders) thought that there should be an assessment made of the impact on all minor children when their primary caregiver is sentenced and

<sup>2</sup> Mills [2002] EWCA Crim 26; [2002] 2 Cr.App.R.(S.) 52 at 232-233, [12] and [15]-[17].



that the government should standardise (i.e. through legislation) how that impact should be taken into consideration (ibid.: 57). If these statements were to be adopted a judge could still exercise discretion in the balancing exercise but their provision would ensure that all judges were equipped with the relevant information on that particular aspect of mitigation.

The issue however may not always be that judges do not have the information about impact of sentence, rather that they choose to 'justify and legitimate' their decision to imprison (Tombs and Jagger, 2006: 809). The 2006 study found that judges used strategies such as 'routinisation' and 'moral prioritising' in order to continue to use prison as a punishment, despite being

*aware of prison's futility as a deterrent, of its detrimental and brutalizing regime, of its negative social and far-reaching consequences for future lives, and of the warehousing role that it has in 'managing society's problems'.*  
(2006: 809)

Routinisation (2006: 811) was employed where they followed a sentencing routine, or believed that they knew the individual or offences so well that they did not need any extra information about the case. Moral prioritising took the form of viewing their most important job as upholding the criminal law through using their power to punish. This they could not accomplish effectively if they thought too long and hard either about the people concerned or about the ramifications of their practices. As one sentencer expressed it:

*if you started looking at the consequences for relatives all the time sentencing would become impossible.*  
(ibid.: 814)

The study suggested that what needed to be addressed was not a lack of information per se but judicial stereotyping and the unquestioning nature of judicial subjectivity.

### **Development of mitigation guidelines**

Since the publication of the Jacobson and Hough study and those mentioned above (Piper, 2007; Easton, 2008; Roberts, 2008; Tombs and Jagger, 2006; Millie et al., 2007), the Sentencing Council has published sentencing guidelines setting out non-exhaustive categories of mitigation which should be considered within different offence categories. Prior to the promulgation of the sentencing guidelines the Sentencing Advisory Panel (2009) conducted a public consultation on the overarching principles of sentencing, and then published an advice to the then Sentencing Guidelines Council. In that advice they identified a list of factors in mitigation, and recommended that they be considered in every case, although:

*the degree to which they influence the severity or choice of sentence, if at all, will depend on the nature and seriousness of the conviction offence(s) and the degree to which failing to adjust the sentence would be likely to result in a disposal that is unduly harsh in the particular circumstances of the individual offender.*  
(Recommendation 11: 2009: 49)

Although not all of the recommendations have been adopted by the Sentencing Council, a list of mitigation to be considered has been included in the guidelines for offences published since 2009. However, neither ranking

nor relative importance have been given to the mitigation factors, so whilst providing some guidance, the problem of judicial subjectivity and sentencing inconsistency remains. Since the recommendations have been made, both Australian (Lovegrove, 2010; 2011) and British academics (Roberts, 2008; Roberts, Hough and Ashworth, 2011) have proposed that more guidance on mitigation could be provided, such as statements about the relative weight to be attached to different principles (Roberts, Hough and Ashworth, 2011: 530). To date, no efforts have been made to produce a principled sentencing structure which rates mitigation and improves sentencing consistency without removing judicial discretion.

There is broad agreement within the literature that greater consistency in sentencing would lead to improved sentencing practice, but as yet there are no clear proposals as to how this should be achieved. The Sentencing Council has moved the debate forward by defining categories of mitigation, but has not provided guidance for their principled application. Unlike in the US, the judiciary of England and Wales does not wish to move to a grid sentencing system, but more work is needed to understand the process of sentencing and the impact of mitigation in particular, in order to move towards the principled sentencing which has been proposed.

### **The impact of changes in sentencing policy on women**

Despite the move to a just deserts rationale, the sentencing of women has been dominated by a deterrence or incapacitation rationale. Following the Halliday Report (Home Office, 2001) women's 'need' became classed as 'risk', and therefore high-need became high-risk, causing sentencers to impose more custodial sentences on women (Worrall, 2002: 63; Evans and Walklate, 2011: 10). Carlen (2002: 7) suggested that certain types of women are more likely to receive custodial sentences, 'those brought up in care, those with transient lifestyles, who have children in state guardianship, living without family or members of ethnic minorities.' The characteristics of the female prison population suggest a particularly high-need group. A quarter have spent time in care as a child and over half report having suffered domestic violence while one in three has experienced sexual abuse (SEU, 2002). Nearly 40 per cent have low educational attainment having left school before the age of 16 (SEU, 2002: 137). They are five times more likely to have a mental health concern than women in the general population and many will also have problems with drug use (Plugge et al., 2006 in Prison Reform Trust, 2013: 34). Forty-one per cent say they have attempted suicide at some time in their life (MoJ, 2013c). In comparison to the male prison population, women prisoners have more psychotic disorders, fewer qualifications and a less stable background (SEU, 2002: 18).

Adopting the Halliday report recommendations meant that persistent offending was viewed as 'dangerous', and there was no longer consensus that non-violent, less serious property offences should not result in custodial sentences (Hudson, 2002: 32). These changes had a disproportionate effect on women. More than double the number of women than men in prison have no previous convictions (MoJ, 2013d), and 81 per cent of women are in prison for non-violent offences, a higher percentage than the 71 per cent of men imprisoned for similar offences (MoJ, 2013e). Women convicted for the offence of 'theft and handling stolen goods', a non-violent, less serious



property crime, account for 38 per cent of all women sentenced to immediate custody (ibid.). Women in prison for breach of a court order (which could be civil rather than criminal) account for 13 per cent of all women under an immediate custodial sentence (MoJ, 2010a in Prison Reform Trust, 2013: 32). It is likely that prior to Halliday many of these women would have been given non-custodial sentences. However policy changes alone are unlikely to account for the changes as some critics think that women are not being sentenced according to the 'just deserts' rationale:

*the sentencing of women seems to show a much looser correlation to the supposed aims of sentencing than does that of men. Sentencing of women offenders also shows far less correlation to the offences they commit than does that of men.*  
(Hudson, 2002: 22)

The changes in sentencing policy correspond with an increasing prison population. Women have represented one of the fastest growing populations within the prison estate, despite no corresponding increase in the figures or seriousness of women's offending. Between 1997 and 2007 the female prison population rose by 60 per cent (MoJ, 2007) and there was a general increase in the numbers of women sentenced for all offences, rising by 12 per cent from 258,600 in 2002 to 289,500 in 2007 (MoJ, 2009). This at a time when there was a decrease for men of 3 per cent (ibid.). The mid-year figures continued to show an increase over a 15 year period; in 1995 the mid-year population was 1,979, in 2000 it was 3,355 and in 2010 although the rate of growth had become slower, the population was 4,267 (MoJ, 2013d). Since that time the female prison population has decreased year on year, as a percentage of the overall prison estate, and in the week ending 14 February 2014 3,973 women were imprisoned. (MoJ, 2014). It is worth noting, however, in relation to the percentage decrease, that shorter sentences mean a higher turnover of females than males in custody (Criminal Justice Joint Inspection, 2011).

The size of the female prison population is of concern as there is a significant body of work on the negative impact of imprisonment on women including the government commissioned Corston Report (2007). The Corston report highlighted the issues for women in the prison system, and more recently other bodies such as the Women's Justice Taskforce have contributed to the available information (Prison Reform Trust, 2011). The Sentencing Council has conducted a consultation exercise on the issue. As a consequence the 2009 Advice to the Sentencing Council, 'Overarching Principles of Sentence', included a section on 'Women offenders and other equality and human rights issues.' The section began by referencing the debates that had taken place over the sentencing of women, and the (then) recently published study on the particular characteristics and needs of women who offend (Social Exclusion Task Force, 2009), and the Government sponsored independent review into the courts and sentencing (Commission on Women and the Criminal Justice System, 2009). The Advice to the Sentencing Council acknowledged that sentencing should be gender neutral but stated:

*it is recognised that many women offenders are particularly vulnerable and that sentencing them within a criminal justice system that primarily has been developed to deal with the majority of offenders, who are male, may sometimes result in unfair treatment and outcomes.*  
(para. 218: 68)

The guidance went on to make four recommendations specific to women, two of which are pertinent to this paper:

Recommendation 20:

*The statutory requirement that a custodial sentence must not be imposed unless the offence is so serious that neither a fine alone nor a community sentence can be justified has a special force in relation to women offenders because of the multiple harms that are likely to result from incarceration.*

The issue of 'multiple harms' is explored in the next section.

Recommendation 21:

*A court always must obtain a PSR before sentencing a woman offender to custody; wherever possible, the defendant should be granted bail whilst the PSR is being prepared.*

This recommendation is in accordance with the research previously referenced by Piper, Easton, and Loueiro but it has not yet been implemented by the Sentencing Council, and the situation remains that it is for a judge to determine whether or not to order a pre-sentence report (Criminal Justice Act 2003, s.156(4)).

### **The impact of imprisonment on women**

Incarceration as a woman is a more dangerous state than for men; only four women's prisons were judged to be 'fundamentally safe' at their last inspection (MoJ, 2010b: 26). Literature on female imprisonment uses Sykes' 1958 'pains of imprisonment' description of the impact of imprisonment and defines it specifically for women as being the loss of liberty; loss of possessions and loss of autonomy (Genders and Player, 1987: 168).

Loss of liberty is felt by women in the loss of relationships (Ibid.: 170) and 66 per cent of imprisoned women are mothers of children under 18 (Liebling and Maruna, 2005: 159). Of those women 34 per cent have children under 5 and a further 40 per cent have children aged between 5 and 10. The SEU report found that women often have no opportunity to discuss how they are going to address childcare issues before they are taken to prison (SEU, 2002: 112) and the impact of this on women and children is severe. This contrasts with fathers whose children are in most cases cared for in the family home by the mother during the period of imprisonment (Gampell, 2003 in Mills, 2007: 686). Additionally it is difficult for women to receive visits from their children as on average women are placed 60 miles from their home (Women in Prison, 2013). It has been reported that only half of the women who had lived, or were in contact with, their children prior to imprisonment had received a visit since going to prison (SEU, 2002 in Prison Reform Trust, 2013: 29). This is due to the dual impact of their distance from home, and the lack of family/parent carers, neither of which tend to impact so severely on men. Maternal imprisonment affects a large number of children in England and Wales each year. In 2010, 17,240 children were separated from their mothers by imprisonment (Wilks-Wiffen, 2011). A third of these mothers are lone parents (SEU, 2002: 137), only 9 per cent of those children are cared for by their father during their mother's imprisonment (Corston 2007) and only 5 per cent remain in the family home (Caddle and Crisp, 1997). Out of 1400 women serving a first sentence in Holloway prison, 42 did not know who was looking after their children (Corston, 2007: 16).

Loss of possessions, particularly home and property, impacts women more significantly than men too as most men have a partner or other female family member who takes care of their property and possessions while they are in prison (SEU, 2002: 104, Corston, 2007: 21). Housing benefit stops at sentence if a prisoner is going to be in prison for more than 13 weeks, so properties are repossessed while women are serving their sentence, and often the possessions found at the house are destroyed. Women come out to find themselves 'intentionally homeless' with no personal possessions (SEU, 2002: 104, Corston, 2007: 20). If children have been taken into local authority care they will not be returned to the mother until she has suitable housing, and without children she is not prioritised (SEU, *ibid.*). Housing can also be lost because of poor communication with landlords and this is more likely to affect women as they are held further away from their homes (SEU, *ibid.*).

Dobash (1986) and Genders (1987) suggested that loss of autonomy is felt in both the areas outlined above as women are powerless to make arrangements about these key areas of their lives and are dependent on others to make arrangements on their behalf. They note that there is a fundamental conflict in the approach to incarcerated women in the expectation that they will use imprisonment to 'take responsibility and yet the level of control prohibits them from having sufficient autonomy to be self-determining' (Dobash, 1986: 141; Genders, 1987: 170).

## Summary

This review has drawn attention to previous pertinent research and has identified specific gaps in understanding. It has shown how changes in sentencing practice have attempted to increase consistency in sentencing by providing greater guidance to judges, while maintaining judicial discretion. However, the prison population has increased throughout this period of change and the female prison population has increased disproportionately. The research into the gendered nature of the impact of imprisonment, and the increased impact felt by women as mothers, has so far not brought about any change to the established norms of sentencing and imprisonment. Judicial reasoning in the application of mitigation remains under-researched. Fielding's 2011 study on judicial sentencing found that research on sentencing:

*largely addresses outcomes, employing statistical analysis, simulations and econometric modelling. Such research offers limited insight into the play of motivations and values.*  
(2011: 97)

There is therefore a need to try to understand the influences on judges in the operation of their reasoning as they balance guidelines and discretion in reaching sentencing decisions. The 2007 study by Jacobson and Hough provided a helpful overview of judicial interpretation of personal mitigation, but there has been little research on the impact of motherhood on sentence, nor on how judges balance that factor in sentencing decisions. Set against the background of an increasing female prison population, and consequently an increased number of children impacted by maternal imprisonment this study will, through the exploration of the interpretation of motherhood in mitigation, try to understand the influences on judges in the operation of their reasoning as they balance guidelines and discretion.

### 3. Methodology Overview

The study is a qualitative, mixed-methods study combining textual analysis of secondary data (transcripts of Crown Court sentencing remarks) with interview data in order to reveal ‘the complexity of social phenomenon’ and increase ‘the credibility and external validity of the work’ (Green et al., 2001). Using Mason’s six questions<sup>3</sup> a framework was developed to investigate the understandings, interpretations, motivations and ideas that judges have when sentencing defendant mothers. The study design anticipated that the knowledge or evidence for these would be found in the sentencing decisions which judges made and the personal accounts which they were able to give.

The interviews with the judges focused on their approach to personal mitigation and sentencing and explored the way in which they balanced different factors in mitigation, including motherhood and their understanding of the impact of imprisonment on mothers of dependent children. The interviews used a mix of stimuli to increase the breadth of the data. Triangulation of the data assisted in the analytic process. Noting the concerns frequently expressed about triangulation (Fielding, N., and Fielding J., 1986; Fielding, 2012; Richards, 2009: 148) a finding did not achieve validity through being found in different data sets. Instead each data set was treated as if it were a facet of a complicated whole which could never be fully understood, but each view might help determine where one should look to see other parts of the whole. In this study the ‘intertwined sets of findings’ provided ‘evidence of the nature of the phenomenon under investigation, including the contexts and situations in which it emerges, as well as insights into the cultural frames people use to make sense of their experiences’ (Miller and Glassner, 2011: 145). Through the analysis of the sentencing transcripts and the interview data an analytical model was created which placed emphasis on certain themes and provided further insights into the phenomena of sentencing. The research was undertaken with full regard to ethical considerations and compliance with the Ethical Practice statement of the British Sociological Association (British Sociological Society, 2002) and the Guidance for Researchers (Judicial Office, 2012).

#### **Data collection: Sentencing transcripts and interviews**

Transcripts for this study were taken from a collection of transcripts from sentencing hearings that took place between 2003 and 2011, which had been sourced by a researcher conducting research on mothers in prison. The transcripts selected for analysis were cases in which mothers were sentenced to imprisonment by Crown Court judges or recorders (this was to ensure consistency with the interviews in the second part of the study).

As the sentencing transcripts provided no insight into reasoning, expert interviews with five judges were conducted in order to further understand the way in which judges balance mitigating factors and assess the impact of sentence on defendant mothers. Thinking critically about the parameters of the population being studied – the professional judiciary sentencing in criminal cases – purposive sampling was used (Silverman, 2010: 141). As both circuit

3 Mason suggests that the qualitative researcher ask six questions to provide a framework for the research. What is the nature of the phenomena or social ‘reality’ to be investigated? What might represent knowledge or evidence of that entity? What topic is the research concerned with? What is the intellectual puzzle which the researcher wishes to explain or explore? What are the research questions and finally, what is the purpose of the research? Mason, 2002: pp. 14–21.

judges and recorders sit in the Crown Court, four of the sample were full time circuit judges, and one was a part time Recorder. Gender was another relevant parameter, and of those recommended for judicial appointment at the last selection exercise 61 per cent were male and 33 per cent were female (with the remainder unknown) (Judicial Appointments Committee, 2012). The sample consisted of four men and one woman. It was a very small sample, but one which within the methodological framework and through access to an 'elite', provided sufficient data for this exploratory study in which a process rather than a population was being studied (Mason, 2002: 135).

### Interview Structure

The interviews were semi-structured and explored four areas pertinent to the research questions:

- Personal mitigation and its role within sentencing decisions
- Factors which a judge considers when sentencing a mother who is the primary carer of dependent children when a custodial sentence is an option, including the use of pre-sentence reports
- Whether the concept of equal impact of sentence plays any part in sentencing decisions
- Whether judges have knowledge about the 'gendered pains of imprisonment' and the particular impact for mothers.

In developing the interview schedule consideration was given as to how to elicit the most open information from the judges and four different techniques were used within the interview to allow for triangulation of the data. Firstly, open questions were used at the start of the interview, and were also used at other appropriate points during the interview to allow the judges to focus on that which they thought was significant. Secondly the judges were asked to undertake a mitigation 'weighting' exercise which was developed using the list of personal mitigation taken from the Sentencing Council Guidelines on Assault 2011 (Appendix 2), in order to ascertain how judges thought about personal mitigation when it was not linked to a specific individual or the specific circumstances of an offence. They were asked to number each category on a list of mitigation, representing the weight that they would give to it in sentencing decisions, (1 being minimum and 10 being maximum weight). The same number could be used multiple times and it was not a ranking exercise. Thirdly, the judges were asked to undertake a series of three sentencing exercises from *Mitigation: the role of personal factors in sentencing* (Jacobson and Hough: 2007) reproduced without alteration (Appendix 1). The purpose of using these exercises was to understand how the judges responded to personal mitigation in a sentencing scenario, so that by looking at it alongside their responses to the weighting exercise it could be ascertained how much the influence of personal mitigation was case and context specific rather than being an objective standard. It was hoped that by using scenarios the risk of producing 'socially desirable answers' would be reduced (Hughes, 2002). Finally, on the issue of equal impact of sentence and the particular issues around the impact of imprisonment on women and mothers the judges were asked to read and comment on four statements (Appendix 3). The purpose of this section of the interviews was to elicit from the judges their views on gendered sentencing policy and impact, and so it was essential that there were no leading questions



in the interview, and the propositions to be discussed were not initiated by the interviewer, but introduced by the stimuli.

### **Data analysis**

A table of information relevant to the study was created from the sentencing transcripts (Table 4). The relationships between factors in the sentencing process were examined to see whether any of the variables (either individually or in alliance with other variables) influenced a judge to mention the defendants' children in sentence, and whether that impacted on sentence length.

The main body of the interviews were analysed using thematic analysis, examining the data for recurring patterns. The analysis was deductive (Fielding, 2008: 334), with four themes: the influence of personal mitigation in sentencing, judicial reasoning, awareness of impact of sentence, and gender issues in sentencing. These were generated initially from the literature and the exploratory work conducted on the sentencing transcripts.

The results of the mitigation weighting exercise and the sentencing exercises (when similar categories of mitigation were involved) were analysed together to allow a direct comparison of the interviewees' responses to mitigation in isolation and when set within a particular offence and individual context.

The sentencing exercises took the form of sentencing scenarios with pre-determined response categories allowing comparisons to be drawn between the responses of each interviewee. The results of these were tabulated and it was possible to make intra and inter judicial comparison of the results, and to compare them with the weighting exercise scores. Additionally by using the same conversion equivalents as the 2007 study from which they were taken, the alphabetic answers were converted into numeric results. This facilitated the ranking of the mitigation factors, which enabled comparison with the original study.

## 4. Research findings

### 1. Judicial approaches to personal mitigation

When the interviewees were asked what types of personal mitigation most often influenced them in sentencing they touched on issues such as a guilty plea, remorse, personal background, age, character and family. It was clear that this was not something that had been thought about as a distinct area before, as the responses were prefaced with pauses, or comments such as:

*I hadn't actually thought of this, as it were as a separate topic.*  
(Judge 2)

The judges were asked to complete the mitigation weighting exercise and the three sentencing exercises taken from the Jacobson and Hough 2007 study. The results of these exercises are shown in Tables 1 and 2 below.

**Table 1: Inter judicial comparison of mitigation weighting exercise**

	Judge 1	Judge 2	Judge 3	Judge 4	Judge 5	Range	Range Total
No previous/ no relevant convictions	6	6	10	4,8	10	4 10	6
Lapse of time	2	1	4	5	7	1 7	6
Remorse	3	6	6	6	10	3 10	7
Good character/ exemplary conduct	6	7	8,9	4,8	10	4 10	6
Steps taken to address offending behaviour	6	5	3	8	8	3 8	5
Sole or primary carer for dependant relatives	5	2	7	4	7	2 7	5
Serious medical condition	2	4	6,7	4	5	2 7	5
Isolated incident	5	5	2	6	8	2 8	6
Age/ and or lack of maturity	5	4	7	6	8	4 8	4
Mental disorder or learning disability	5	4	7,8	6	7	4 8	4

Table 1 shows that there was not consensus among the judges about which were the most important categories of mitigation when considered objectively. Although they generally gave higher scores to 'good character', 'no previous convictions' and 'steps taken to address offending behaviour', the ranges of scores in each category were up to six points different. This showed that when judges consider mitigation objectively there is inconsistency between them.

The judges' responses to mitigation within the weighting exercise (Table 1) were then compared to their responses to context specific mitigation in the sentencing exercises (Table 2). It was found that there was little correlation between the objective weighting of factors and the weight given to them in a subjective, multi-faceted sentencing exercise. For example in Table 1 'isolated incident' is given an objective weighting of between 2 and 8 by the judges,

indicating that although some thought it would have almost no impact on sentence, others thought it would result in a significant reduction in sentence. Yet when it appeared in Scenario 3 (v), 'Offence out of character. Isolated incident', all the judges categorised it as a 'B'. Within a case context they were consistent in their view of its importance and all of them viewed it as mitigation which would merit some reduction in sentence length. It was apparent that particular factors in the individual scenarios influenced them strongly:

*as I've said each case is going to be individual and there are things that are of vital importance in some cases and of minimal importance in others.*

*(Judge 1)*

**Table 2: Inter judicial comparison of three sentencing exercises**

	Judge 1	Judge 2	Judge 3	Judge 4	Judge 5
<b>Scenario 1, early guilty plea, previous shoplifting offences, burglary</b>					
Physically and emotionally abusive parents, childhood mainly in care	B	B	C	B/C	B/C
20-year-old girlfriend and 18-month-old child. Devoted father	B/C	C	B/C	B/C	B
Dependent on heroin 5 years. Started drug programme	A/B	B/C	B/C	B	A/B
Functionally illiterate, mother discouraged school attendance	C	C	C	C	C
18 months in same job	B/C	C	B/C	B	B
<b>Scenario 2, early guilty plea, previous good character, death by dangerous driving</b>					
Victim's family support and forgive and don't want prison	B	A	A/B	A/B	B
Married with 3 children, 8, 10, 13 years of age	B	B	B	A/B	C
Intensely remorseful. Suicidal	B	A	A/B	A/B	B/C
<b>Scenario 3, early guilty plea, previous good character, ABH (s.47)</b>					
Clinically depressed at time of offence	A/B	B	A/B	B	B/C
Family supportive	B	B/C	B	B	B/C
Regret, written letters to court and victim	B/C	B	B	B	B
Respected individual with responsible job. Stress of prosecution high	A/B	B/C	B/C	B/C	A/B
Offence out of character. Isolated incident. Just broken up with girlfriend	B	B	A/B	B	B

**A:** mitigation would have a big impact on sentence e.g. It would move the sentence from custodial to non-custodial, or it would halve the sentence length; **B:** mitigation would have some impact e.g. some reduction in sentence length; **C:** mitigation would have minimal or no impact.



In a case specific context a number of other factors interact with the mitigation causing judges to re-evaluate their objective view of mitigation categories. In Table 1, Judge 3 weighted 'good conduct' very highly (8/9) but only gave 'steps taken to address offending behaviour' a weighting of 3. However in the sentencing exercises when they appeared in Scenario 3(iv) and Scenario 1(iii) they were both given the same B/C rating by that judge indicating that the other influencing factors had caused them to both have the same, minimal impact on sentence, and confirmed the statement made by that judge that:

*these things are not easy, and are very, very case specific.*  
(Judge 3)

The judges showed themselves to be broadly similar to the judges in the 2007 study in the way in which they approached personal mitigation. They were reluctant to generalise about the influence of mitigating factors and were unwilling to think in terms of general principles (2007: 14). Common to both studies was a view that sentencing was a 'context specific' exercise (Judge 3). The categories producing the widest range of responses in this study, 'married with three children' and 'intense remorse' (Table 2 Scenario 2 (ii), Scenario 2 (iii)) were also within the most varied responses in the 2007 study (2007: 18). Both sets of judges had similar responses to the sentencing exercises, with a common approach to what was more or less significant in mitigation, although with a different ordering of the top and bottom five mitigating categories (see Table 3).

**Table 3: Comparison of the 2007 and 2012 judges: Ranking of Mitigation Factors**

	2012 study	2007 study
Factor	Rank	Rank
Support from victim's family	1	=2
Intense remorse	2	4
Severe clinical depression	=3	1
Isolated incident	=3	=5
Motivated to get drug treatment	5	=2
Respected individual	=6	9
Profound regret	=6	=5
Married with three children	=6	7
Support from defendant's family	9	10
Steady job	=10	8
Abused and in care as a child	=10	13
Partner and young child	12	=11
Functionally illiterate	13	=11

The comparisons between the 2007 and 2012 judges showed that the judges in this study could be thought to be broadly reflective of judges as a whole in their responses to personal mitigation.

## 2. Sentencing decisions when motherhood is a factor

Against the background of a general understanding of judicial interpretation of mitigation the sentencing remarks provided evidence of decision making in which the outcomes were measurable and the impact of motherhood on mitigation could be explored.

### Overview of the data

In the eleven transcripts analysed all of the defendants were the mothers of dependent children, and two were also pregnant. Five of the defendants were single parents as they were not in a relationship or because the father of the children was in prison, or was sentenced to imprisonment on the same occasion. The sentencing took place at eleven different courts with eleven different judges. Six defendants were sentenced for their first offence, and for ten it was their first custodial sentence. The offences included five cases of financial dishonesty, two drug offences, two offences of perverting the course of justice, one offence of threatened violence and a breach of a community sentence. The sentences ranged from sentences of twelve weeks suspended for one year, to six years immediate imprisonment, with seven defendants being sentenced to between six and eighteen months custody (Table 4).

**Table 4: Defendant and sentencing information from the sentencing transcripts**

Defendant	A	B	C	D	E	F	G	H	I	J	K
<b>Number of children</b>	1	4	2	1/p	4	3/p	3	4	2	2	1
<b>Age of children</b>	2 yrs	4-14 yrs	young	2 yrs	19,9, 7,4 yrs	young	13,16 yrs	7,5,5,1 yrs	4,14 yrs	3,12 yrs	7 mths
<b>Single parent</b>	UN	No	Yes	Yes	Yes	No	No	No	UN	UN	Yes
<b>Guilty plea</b>	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	n/a	Yes
<b>Previous convictions</b>	Yes	No	Yes	Yes	No	Yes	No	No	No	Yes	No
<b>Previous imprisonment</b>	Yes	No	No	UN	No	No	No	No	No	UN	No
<b>PSR considered</b>	Yes	Yes	Yes	Yes	No	Yes	Yes	UN	Yes	No	Yes
<b>Judge goes against PSR</b>	No	Yes	UN	UN	n/a	Yes	UN	n/a	UN	n/a	Yes
<b>Judge acknowledges children</b>	No	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	No	Yes
<b>Sentence reduced because of children</b>	No	Yes	Yes	Yes	UN	No	Yes	No	Yes	No	UN
<b>Sentence</b>	18 mths	9 mths	12 mths	56 wks	6 yrs	6 mths	6 mth susp 2 yrs	6 mths	12 wks susp 1 yr	6 mths	14 mths

P: pregnant; UN: unknown; n/a: not applicable; susp: suspended

The data was used to try to answer three questions.

1. In the sentencing remarks, did the judges acknowledge that the defendant was the mother of dependent children?

In eight of the cases the judges acknowledged that the defendant was a mother of dependent children.

2. What other factors in the case influenced the likelihood that the defendants' motherhood would be considered in mitigation?

The range of factors considered were measurable in all of the eleven cases and were the consideration of a pre-sentence report (PSR); the judges' agreement or disagreement with the recommendations of the pre-sentence report; a guilty plea by the defendant; and the defendant being sentenced for their first offence. Each of these will be examined in turn.

The preparation of a PSR was found to have a significant impact on whether the mothers caring role had an impact on mitigation. In eight of the cases the judge had requested a PSR, and in seven of those cases the children of the defendant were acknowledged, while in five of those cases the judge explicitly stated that the sentence was shortened due to the defendant having dependent children. In the three cases without PSRs the sentence was not shortened because of the defendants' motherhood, and in two of them no mention was made of the defendants' children who were in one case two children aged three and twelve, and in the other, four children ranging from one to seven years of age.

When PSRs were requested it was important to note whether the judges agreed or disagreed with the recommendations. In most of the cases it was not clear from the sentencing remarks whether the recommendation had been followed but in two of the cases, the judges made it clear that they were giving custodial sentences despite the recommendation in the PSR that it should be a non-custodial sentence – however, in both instances the sentence was still reduced because of the mitigation of the children.

The impact of a guilty plea by the defendant was difficult to assess as all but one of the defendants in the sample pleaded guilty. In such a small sample it is impossible to make a finding regarding the influence of this factor on the judges' approach to mitigation, but it is of note that the 'not guilty' plea in this sample received the harshest sentence. This accords with the Jacobson and Hough study in which a judge said:

*the defendant who pleads guilty not only can claim remorse, but also engages the courts sympathy much more readily.*  
(2007: 44)

The fact that it was a first offence seemed to have little impact on the defendant's role as mother being acknowledged. Six of the cases in the sample were first offences while five had previous convictions. The only noticeable difference was that suspended sentences were only given to those being sentenced for a first offence.

3. Did the acknowledgement of the defendant mothers' caring responsibilities lead to a reduction in sentence length?

In eight cases the judge acknowledged the defendant mothers' caring responsibilities, and in five of those cases it was treated as mitigation which then reduced the length of custodial sentence. In the other three cases there were significant aggravating factors and the defendant mothers' caring responsibilities were not taken into account as mitigation.

### *Summary of the findings from the sentencing transcript analysis*

The fact that a mother is of previous good character has little influence on whether motherhood will be considered as mitigation, and a defendant's carer status will not be brought to the attention of the judge or acknowledged by the judge in all sentencing hearings. However if a PSR has been prepared for a judge a defendant mother is more likely to have her role as the carer of dependent children acknowledged and given weight as a mitigating factor. It is not necessary for the judge to concur with the recommendations made in the report for motherhood to have an impact on sentence. It is of note that in the sentencing which followed a trial, despite the defendant's motherhood and previous good character, there was no request for a PSR before she was sentenced to a significant period of imprisonment.

In the light of these findings the interview data was explored to gain further insight into the factors which influence judges in their sentencing.

### **3. Factors influencing a judge when considering motherhood as mitigation**

As the relationships between the data were explored it became apparent that two factors have significant influence on a judge's consideration of motherhood as mitigation. The first is the judge's knowledge of the gendered pains of imprisonment, and the second is the importance that a judge gives to the impact of a sentence.

#### *Judicial knowledge of the gendered pains of imprisonment*

The interviews provided evidence that judicial understanding of the gendered issues of imprisonment were varied. Two judges brought a depth of knowledge to the subject. The first made reference to women being imprisoned more often for first offences, being in prison further from home, suffering from more mental health issues and separation from children, all of which can mean

*that picking up the threads again is harder when they re-emerge.*  
(Judge 3)

The second judge quoted figures for suicide and self-harm among the female prison population, and concluded by saying that:

*putting them inside, while it has to happen and they should be sentenced properly for the offence they committed, can be an extremely harmful thing for them.*  
(Judge 4)

As explanation for their understanding, one of the judges had studied the topic at an academic level (Judge 4) whilst the other said:

*I think I am again, fairly alive to the knock on effect of this and how destructive short term, multiple foster care situations can be for children so this plays pretty strongly with me, partly because of a good deal of family law experience.*  
(Judge 3)

The fact that the others did not mention relevant experience or knowledge did not mean that they did not have any, but it may be that it had influenced them less.

The two judges who spoke of their previous knowledge and experience also seemed to approach this area of sentencing with some level of emotional response, reflected in their very similar use of language:

*Of course the reality is if someone is a carer on the day **we are straining every sinew** not to punish the children indirectly through the sins of the parents. No the reality is all the time*

*we are looking, even in serious cases we are looking to give the maximum achievable weight to those mitigating factors. [Author's emphasis.]*

*(Judge 3)*

*So it [motherhood] does have an impact and it makes, and it **makes me strain** to see if there's an alternative. [Author's emphasis.]*

*(Judge 4)*

These judges also talked in terms of being “desperate to avoid a situation where a parent goes inside”, and the sentencing of parents being a “troubling” thing to have to do which could be “painful and distressing”.

The other judges seemed to have less awareness citing separation from children as the main issue for women in prison. Even when they had awareness there were occasions when they lacked confidence in the information. A judge spoke of imprisonment being more difficult for women psychologically, but couched the knowledge in very oblique terms, saying:

*it is well known, isn't it, whether rightly or wrongly but I mean conventional wisdom is that prison is much harder on women than it is on men. I don't really understand why that should be but it is thought that a prison sentence is much harder than it is for a man.*

*(Judge 2)*

It became clear that some judges had a reluctance to engage with the notion that gender might make a difference. Although all the judges agreed that a potential harm suffered by a woman could be the loss of her children, it was suggested that that should not be given special consideration for women as:

*let's not forget fathers lose children too, so you know let's equal it up a bit and not make a sexist point.*

*(Judge 2)*

And:

*I generally try to be gender neutral because there are always going to be individual considerations and they are not purely on a gender basis.*

*(Judge 1)*

This approach is contradicted by the literature which highlights the differences, such as the loss of one's children, that occur when mothers are imprisoned, and from which imprisoned fathers are normally shielded (Caddle and Crisp, 1997; Corston, 2007).

Even when the existence of special harms to women were accepted, the judges claimed sentencing regulations prevented them from taking them into account. The distance from home to prison impacts on the number of visits a prisoner will receive, and this tends to impact women disproportionately as there are fewer women's prisons. When this was raised with a judge they responded saying:

*I doubt again that it would be appropriate to depart from general guidelines, general principles, just because there are going to be difficulties visiting.*

*(Judge 1)*

Another expressed an inability to consider gendered harms in terms of the custody threshold being reached:

*if I get to the point that the offence is so serious that only a custodial sentence is justified, i.e. I've gone up the league table already, then the offence is so serious, so I'm not actually so concerned about, ... at that point..., impact of multiple harm.*  
(Judge 5)

These responses mirrored those found in Millie's 2007 study in which judges were so conscious of the attention that must be paid to sentencing guidelines that they focused on that and paid less attention to mitigation.

***The importance that a judge attributes to impact when considering sentence***

Among the judges there was an acknowledgement that their appreciation of impact is subjective:

*I suppose the point is that some people may be less aware than others as to what potential impact is; for example a sole carer.*  
(Judge 4)

All of the judges recognised that children were impacted in some way when their mother went to prison but their understanding of the nature of that impact varied. One judge took the view that if extended family or people within the community took the children in then the children:

*don't suffer much.*  
(Judge 1)

For another judge separation between mother and child was significant regardless of who took on the care of the child:

*I had to send her inside immediately, she had a one year old daughter and I felt terrible, she was going to miss 6 months of development of her daughter.*  
(Judge 4)

For another, although the impact might be understood the effect on the children was not of sufficient importance to make a difference to sentence:

*I've not ever before weighted that particularly in terms of reduction anywhere.*  
(Judge 5)

There was also variation in whether impact should be treated as mitigation:

*in any sentencing exercise across a range of judges certain factors will appear as mitigating elements to some more than others...Some people will take a much tougher line on the sort of actions have consequences. You've hurt your family but that is part of the responsibility you must bear. Others may take the view that I do not want the system to disadvantage these children in the longer term so I'm therefore going to very significantly mitigate the sentence with the children in mind.*  
(Judge 3)

In order to try to gauge the judges' particular understanding of the impact of imprisonment on mothers they were asked directly about the length of time that housing benefit would continue to be paid following a prison sentence, as loss of housing while in prison is an issue which has a greater impact on women than men. Only one judge (Judge 4) knew the correct timeframe, while others thought that the 'safe' period was four times greater than it in fact is.



*The influence of these factors upon the requesting of pre-sentence reports*

The sentencing transcript analysis indicated that the ordering of a pre-sentence report is a significant factor in whether motherhood is treated as mitigation, but gave no explanation for this. To explore this question further the interviewees were asked in what circumstances they would ask for a pre-sentence report to be prepared. From the literature it was anticipated that there would be variation between the judges with some, as in Piper's 2007 study, using it only when the offending was less serious, while others might have adopted the 2009 recommendation from Advice to the Sentencing Guidelines Council (Sentencing Advisory Panel, 2009) that PSRs should be requested in all cases when a woman is sentenced.

Judges 3 and 4 reported that they asked for PSRs in all cases when a custodial sentence was a possibility for a mother. Judges 1, 2 and 5 took the view that PSRs were only necessary if the case was on the edge of the custody threshold:

*if it is at a level where they will be going inside, for example because of statute for a minimum term it may be obvious from the beginning that it is not necessary to make those enquiries because those consequences are going to flow.*

(Judge 1)

*I would not order a pre-sentence report if it's a very, very serious case when, um, prison is inevitable.*

(Judge 2)

*you would generally have a pre-sentence report where there's a custody or no custody issue.*

(Judge 5)

Each judge expressed a pre-determined and fixed position on their use of PSRs with women. Those who reported a routine ordering of pre-sentence reports for female defendants when custody is a possibility were the judges who showed the greater awareness of the gendered pains of imprisonment. They were also the two judges who showed the greatest understanding of the impact of imprisonment on a mother, one of them being the judge who knew for how long housing benefit would remain payable.

Sentencing guidelines and tariffs also affected the use of judicial discretion:

*very often the difficulty is that you are into an area where the tariff sentencing and the sentencing guidance all but ties your hands.*

(Judge 3)

Minimum custody terms meant for some that:

*their personal mitigation is of minimal significance; the only thing that really counts is the guilty plea.*

(Judge 1)

While for others the reaching of the custody threshold limited the impact that personal mitigation had on their sentencing decisions:

*anything with a statutory minimum, or murder, or a sentence that is lengthy custody with guidelines anyway then I don't think it comes into it because there's no bit of a sentence you can adjust to fit with the mitigation.*

## 5. Discussion and conclusions

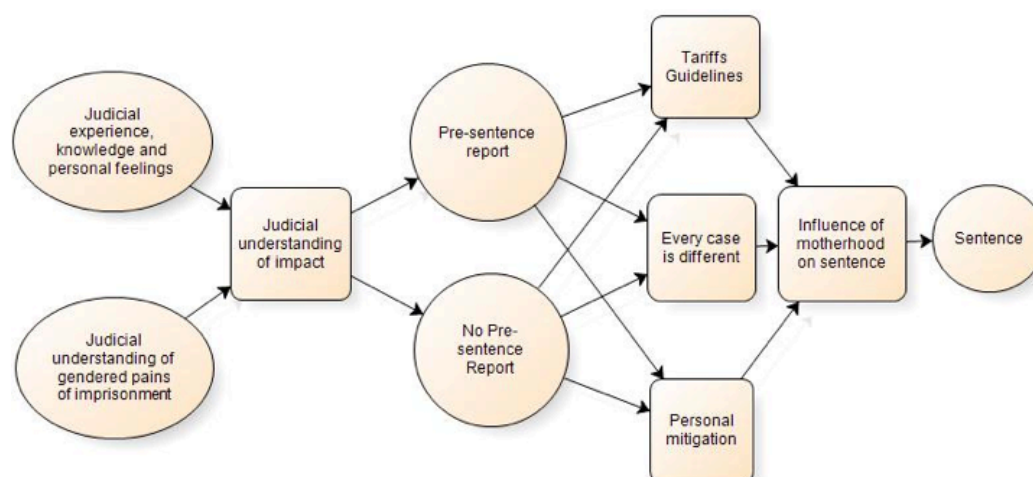
The findings need to be interpreted in light of the literature in order to assess their implications for the understanding of judicial decision-making.

### 1. Key Findings

#### *i) Judges apply a series of filters to their sentencing decisions, whether consciously or subconsciously*

The model below was created to summarise the findings of the study in relation to the process of sentencing mothers, and incorporates 'the knowledge produced by the different methods blending it into a coherent whole' (Moran-Ellis et al., 2006).

**Figure 1: Factors influencing the sentencing of a mother with dependent children**



From the interview data the sentencing process can be understood to pass through the filters set out in the model. Judges use their discretion, influenced by their personal knowledge and understanding, to determine whether or not to use a PSR to inform the sentencing process. After that decision judges are influenced by case context and their own view of personal mitigation and they must work within the boundaries set by sentencing tariffs (and their interpretation of the limits of their discretion) to sentence a defendant mother.

#### *ii) There is inconsistency in the application of personal mitigation to sentencing due to the exercise of judicial discretion*

As the literature on the subject suggests (Millie, 2007; Jacobson and Hough, 2007; Lovegrove, 2011; Roberts, Hough and Ashworth, 2011) there is both inter and intra judicial inconsistency in the application of mitigation to sentencing. This is due to case context, as well as judicial variation. However, analysis of the vignettes and weighting exercise showed commonality between the judges with regard to their general approach to personal mitigation and the constraints which influence its application. Although the literature cited above called for guidance to be given on the relative weight to be attached to different principles, this study and its comparison with the 2007 Jacobson and Hough study have shown that the judges gave the same weight to the top five and



bottom three categories of mitigation. This suggests that judges already do give weight to mitigation in ways similar to each other, and further guidance in that area would not make significant difference to sentencing inconsistencies.

*iii) The interpretation of impact as mitigation is determined by a judge's own knowledge and understanding*

Judges with greater understanding of impact believed that mitigation was relevant even if they intended to give a custodial sentence, as they knew that the impact was not only the loss of children at the point of sentence (Corston, 2007; Genders and Player, 1987; Social Exclusion Task Force, 2009; Wilks-Wiffen, 2011). In contrast, those who had a lesser understanding of the impact of sentence did not consider mitigation once the custody threshold had been reached which accorded with Piper's 2007 study. Contrary to Tombs and Jagger (2006) it was not found in this study that the judges had information about impact but chose to 'justify and legitimate' their decision to imprison (2006: 809), rather the judges had differing knowledge about impact.

*iv) Judges with a greater understanding of impact are more likely to order pre-sentence reports for all women and the requesting of reports is not influenced by case context*

The judges with greater understanding of impact request pre-sentence reports even when the likelihood is that the sentence will be custodial, whereas the judges with a lesser understanding of sentence impact do not request reports once the custody threshold has been reached. Each judge had a pre-determined position on this issue which was not influenced by case context, and this was the only factor in the study which had intra judicial consistency.

*v) If a judge has a pre-sentence report the defendant's motherhood has a greater likelihood of mitigating the sentence, even if the judge does not agree with the recommendations of the report*

The transcript analysis showed that a defendant's family circumstances as a mother of dependent children was more likely to mitigate the sentence if the judge had seen a pre-sentence report, whether or not the judge agrees with the recommendations of the report. This is not something that is mentioned in the literature on personal mitigation.

## **2. Implications of the findings**

*i) Mothers appearing before judges who have a lesser understanding of impact are less likely to have their sentence mitigated by their motherhood*

In the study it was apparent that the judges who lacked knowledge of impact did not seek PSRs because they did not know what information they were lacking. This left the women sentenced by them doubly disadvantaged, firstly by their lack of primary knowledge and secondly by the lack of a pre-sentence report.

These concerns have previously been raised by respondents to Loueiro's research in Scotland (2009) where key stakeholders wanted a standardisation of the information which courts had on the impact of sentence on all minor children when their primary carer was sentenced.

The findings of this study confirm that standardisation of approach in this area is important and support Recommendation 21 from *The Advice to the Sentencing Council – Overarching Principles of Sentencing* (Sentencing Advisory Panel, 2009), that a pre-sentence report should always be prepared when sentencing a woman.

*ii) If recommendation 21 is not adopted as a guideline there is a need for judicial education on the impact of imprisonment on mothers, to provide judges with the same level of understanding*

The study has shown that judicial knowledge on this area varies between judges and in order to provide more consistent sentencing for women, and in the absence of pre-sentence reports being considered in all cases, it is important that judges are all similarly well informed when they come to sentence. The focus on equality has had the effect of discouraging judges from noting gender difference in areas where it has been well documented and its effects are known and unchallenged (Corston, 2007; Codd, 2008). Greater consistency could be achieved by sentencing judges if judicial education covered in greater depth the relevance of gender and caring responsibilities to sentencing and imprisonment.

### **3. Limitations of this study**

Methodologically there are limitations to this piece of research.

*i) Sample size*

The sample size means that this study is not generalisable. Given the variation that has been found between judges it would be necessary to look at a larger sample before generalising from any pattern that emerged in sentencing practice. This is not a significant limitation as it was designed as an exploratory study and the findings raise questions for further research.

*ii) Sample composition*

The composition of the study included more than one judge who had a background in family law giving them increased knowledge of the impact on families of imprisonment. Within a larger sample there would be more diversity in background which could make a difference to the findings.

*iii) Transcript selection*

The transcripts selected for analysis only represented women who were sentenced to imprisonment, and therefore cases in which mitigation resulted in a non-custodial sentence are not part of this sample. This gives an incomplete picture, as it does not take into account cases where the judges were so influenced by mitigation that they did not sentence to imprisonment, and it is therefore impossible to know whether it is offence seriousness or mitigation that makes a difference in those instances. However as this study is interested in whether motherhood as mitigation has been raised for women sentenced to imprisonment it is appropriate to have a biased sample.

*iv) Interviewer effect*

The interviewer had a pre-existing relationship with four of the interview participants, and therefore there is the possibility that the relationship affected the quality of the interviews. Efforts were made to mitigate the potential impact by using a script for the interviews, and holding all but one of the

interviews in the formal context of the judges' chambers. As a result the negative impact on results is expected to be minimal.

***v) Use of sentencing exercises***

It was not possible to use real sentencing decisions by the interview judges; the study relied on their responses to sentencing exercises. Judges may be influenced differently by mitigation in a real case. This is not a significant limitation as it still allowed for comparison with the responses to the sentencing exercises in the 2007 Jacobson and Hough study, but if further research were to be undertaken it would be important to include sentencing decisions of participants.

**4. Suggested further research**

***i) The impact of pre-sentence reports on sentencing decisions***

The finding relating to the impact of a pre-sentence report on the sentencing of mothers is of such potential significance that it is important to undertake research involving a larger sample of judges in different areas of the country to see if the findings are replicated. If they are this would provide further evidence to the Sentencing Council to reconsider their inclusion of Recommendation 21 as part of the Sentencing Guidelines in the future.

***ii) The impact of maternal imprisonment on children***

There is a need for further research on the impact of maternal imprisonment on children so that the state can understand what it should do in order to fulfil its duty under the UN Convention on the Rights of the Child to protect children from discrimination or punishment which they suffer due to the actions of their parents. Little is known about the impact on children, and that which is known indicates that children's lives are significantly disrupted (Wilks-Wiffen, 2011). This study has shown that some judges do not consider the impact on children, and that may be because insufficient information is available to them at present.

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# Appendix 1

## Sentencing exercises

### Scenario 1: Burglary

#### Offender

22-year-old man; several previous shoplifting  
Early guilty plea to burglary

#### Victim

76-year-old woman  
Alone in the house

Mitigation		A	A/B	B	B/C	C
i)	Physically and emotionally abusive parents. Childhood mainly in care.					
ii)	Lives with 20-year-old girlfriend and daughter of 18 months. Has shown himself to be a devoted father.					
iii)	Dependent on heroin for 5 years. Now highly motivated to get treatment; started on a drug programme following arrest.					
iv)	Functionally illiterate (mother discouraged school attendance) and never had a regular job.					
v)	Has had same job for 18 months. Letter of support from employer confirming prospect of promotion.					

Each factor has to be scored as follows:

A: a big impact e.g. shift from custodial to non-custodial sentence, or halving of sentence length

B: some impact e.g. some reduction in sentence length

C: minimal or no impact

### Scenario 2: Death by dangerous driving

#### Offender

45-year-old woman of previous good character  
Early guilty plea to causing death by dangerous driving  
Lost control on motorway, distracted by radio

#### Victim

Her passenger  
A personal friend



Mitigation		A	A/B	B	B/C	C
i)	Letter from victim's family saying they forgive the offender & don't want her sent to prison. Are in court to support her.					
ii)	Defendant married with children aged 8, 10 and 13.					
i)	Defendant intensely remorseful; attempted suicide.					

Each factor has to be scored as follows:

A: a big impact e.g. shift from custodial to non-custodial sentence, or halving of sentence length

B: some impact e.g. some reduction in sentence length

C: minimal or no impact

### Scenario 3: Assault occasioning actual bodily harm

#### Offender

*35-year-old man of previous good character*

*Early guilty plea to assault occasioning ABH (Sn 47)*

*Dispute over change*

#### Victim

*Bus driver*

*Received facial cut requiring stitches & severe bruising*

Mitigation		A	A/B	B	B/C	C
i)	Psychiatric report indicates severe clinical depression; offender under treatment at time of offence.					
ii)	Defendant's family have attended all court hearings, & offer practical, financial & emotional help.					
iii)	Defendant has expressed profound regret. Has written to the court to stress his remorse and has written to the victim and victim's family.					
iv)	Defendant is a respected individual with responsible job. Stress of prosecution extremely high.					
v)	Offence utterly out of character: a 'moment of madness'. Under stress after break-up with girlfriend.					

Each factor has to be scored as follows:

A: a big impact e.g. shift from custodial to non-custodial sentence, or halving of sentence length

B: some impact e.g. some reduction in sentence length

C: minimal or no impact

## Appendix 2

### Mitigation weighting exercise

#### Personal mitigation

Please put a number between 1 – 10 beside each factor, to indicate how much weight they would bring to bear in a sentencing decision; 1 being the least weight and 10 being the most. The same number can be applied to more than one statement

- No previous convictions or no relevant/recent convictions
- Lapse of time since the offence where this is not the fault of the offender
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps taken to address addiction or offending behaviour
- Sole or primary carer for dependent relatives
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Isolated incident
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability, where not linked to the commission of the offence

## Appendix 3

### **Stimuli statements for interviews**

A

The statutory requirement that a custodial sentence must not be imposed unless the offence is so serious that neither a fine alone nor a community sentence can be justified has a special force in relation to women offenders because of the multiple harms that are likely to result from incarceration.

*(Overarching Principles of Sentencing – Advice to the Sentencing Guidelines Council, 2009)*

B

Where an offender is likely to suffer from the sentence to a significantly different degree than most other people, there is a case for reducing its length.

*(Ashworth, 2010)*

C

Of course, women in prison have different relationships with their family than men. These range from all the issues surrounding pregnancy and mothers and babies in custody, to the disruption of many women's role as the primary carer when they are taken into custody, to contact with family once a women is in prison. These issues are vastly different in type and scale to those experienced by men.

*(Hardwick, 2011)*

D

It is disproportionate to impose a short custodial sentence on a parent where this will lead to the loss of a home and possible custody of children, in addition to the punishment imposed by the court for the offence.

*(Women's Justice Taskforce, 2011)*

## **Acknowledgements**

I would like to express my thanks to the members of the judiciary who gave up their time to participate in this research and championed my cause with the Judicial Office. Thanks also to Rona Epstein who provided me with the sentencing transcripts.

I am grateful to my supervisor Ian Brunton Smith for his advice throughout the project.

## **About the author**

After graduating from St. Anne's College, Oxford with a degree in law, Shona Minson was called to the Bar of England and Wales and practised criminal and family law from 1 King's Bench Walk, London (as Shona Mulholland). Her professional experience has led to her research interest in the points of intersection between family and criminal law. She is undertaking ESRC funded DPhil research on the impact of short term maternal imprisonment on children, supervised by Dr Rachel Condry at the Centre for Criminology at the University of Oxford. This research builds on her Masters research and explores the status of children of imprisoned mothers in English law and whether current sentencing policy protects children from 'all forms of discrimination or punishment on the basis of the status or activities... of the child's parents' (Article 2 United Nations Convention on the Rights of the Child). The research will engage directly with children and their carers to explore the nature of the impact of maternal imprisonment, and with the judiciary to examine sentencing practice.

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ISBN 978-1-905994-76-2



9 781905 994762 >

ISBN 978-1-905994-76-2

**2014**