

The Sentencing Principles of Equality and Proportionality from a Feminist Perspective: Exploring Positive Gender Discrimination at Sentencing

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Abstract

Feminism revolutionized criminology. Important issues were questioned within the feminist agenda, such as (in)equality in the criminal justice system and the disproportionate impact of imprisonment on women. In a scenario of worldwide increasing female incarceration, gender-differentiated sentencing regimes have been discussed, aiming at reducing prison sentences. In the present study, we set out to answer the following question: from a feminist criminological perspective, is it possible to reconcile the idea of a differentiated sentencing regime for women and the fundamental rights to equality and proportionality in sentencing? Building upon the feminist analytical categories of domination and patriarchy (Gerda Lerner, Catharine MacKinnon, and Sylvia Walby), our goal is to break the logic of gender neutrality/insensitivity at sentencing. Equality and proportionality cannot be the only relevant considerations in sentencing. On the contrary, positive gender discrimination is a requirement of substantive justice. The study explores some possibilities, such as introducing a mitigating circumstance due to womanhood, or when a woman offender does not pose a significant risk to society or when she is the primary caregiver of dependents, especially children. Such discussion necessarily involves empirical data from countries like Brazil, where the growth of female imprisonment has been particularly alarming, and the rights of women are often violated within the criminal justice system. More importantly, we suggest defining a new purpose for sentencing: emancipation or female empowerment. As a result, prison sentences for women should be seriously treated as *ultima ratio*, applicable only in exceptional cases (violent and sexual crimes).

Keywords

Criminology, Feminism, Sentencing, Equality, Proportionality

1. Introduction

Criminology is essentially sexist. For a long time, women were ignored by criminological positivism. The production of criminological knowledge has always been dominated by men and male discourses. Since the classic Lombrosian construction of the “criminal man”, criminality has been studied as a typically male phenomenon. When women were the object of any attention by criminologists, they were generally portrayed in a stereotyped way, as if, when committing crimes, they were biologically or psychologically abnormal. The socially constructed roles surrounding the female gender also significantly influenced the way of understanding female criminality and the corresponding State response: women should be passive, sensitive, and docile, so if they commit a crime, it is considered a double violation—of the criminal law and of the social (gender) rules. As a result of their double deviance, they should be punished with equal or greater severity than men who commit similar crimes. Criminological research has always failed to fit women to essentially male frames of analysis and criminological references.

Feminist criticism revolutionized criminology. Important issues were questioned within the feminist agenda, such as: the differences between male and female criminality, even in quantitative terms (the so-called “gender gap”); the issue of equality in the criminal justice system and the disproportionate impact of imprisonment on women. As for the latter, the feminist perspective applied to criminology allowed for an in-depth investigation of the various effects associated with the incarceration of women, such as inadequate prison conditions and gender violence; physical and mental health of inmates; sociation and identity; pregnancy, prenatal care, and childbirth in prison; and the effects of motherhood within prisons for women and their children.

In a scenario of worldwide increasing female incarceration (Walmsley, 2017), gender-differentiated sentencing regimes have been discussed, aiming at reducing prison sentences (Bagaric & Bagaric, 2016; Roberts & Watson, 2017). This discussion is complex for at least two reasons: first, there is possibly no consensus among feminist criminology(ies) about the suitability of a gender-differentiated sentencing regime. There are those who argue, for instance, that men and women should receive the same treatment from the criminal justice system, taking responsibility for crimes committed under equal conditions. This same position observes that the effects of imprisonment are seriously negative for women but does not argue that the solution is to increase sentences equally for all, regardless of sex/gender, but rather to reduce sentences for both men and women. Second, any debate around a differentiated sentencing regime requires an answer to the following important question: if defendants in criminal proceedings have a fundamental right to equal treatment (principle of equality), which means receiving a similar sentence for identical crimes, and if sentences should be proportional to the seriousness of the crimes committed, how can such rights (equality and proportionality) be reconciled with proposals for differentiation between men

and women?

Thus, the present study sets out to answer the following question: from a feminist criminological perspective, is it possible to reconcile the idea of a differentiated sentencing regime for women and the fundamental rights to equality and proportionality in sentencing?

Building upon a feminist approach focused on the analytical categories of domination and patriarchy, developed by feminists such as Gerda Lerner, Catharine MacKinnon, and Sylvia Walby, the hypothesis to be verified in this study is that, in the current stage of feminist criminology(ies), we should theorize the ideas of equality (i.e., equal treatment) and proportionality in sentencing from a female standpoint. That means to recognize that sentences can be applied differently, reflecting important differences between sex/gender, not only biological but mainly related to the empirically proven disproportionate impact of criminal justice on women. We argue that MacKinnon's feminist perspective of domination, which aims at reducing power differences between men and women, usually through substantive justice policies, allows for positive forms of gender disparity ("gender justice").

Although not unprecedented, this issue still needs further development, especially in our home country, Brazil, but also anywhere else. For this very reason, our study explores some possibilities for differentiated sentencing to women based on a feminist perspective which necessarily pays heed to Brazilian social reality—for example, the impact of anti-drug penal policies on female incarceration must be considered. We intend, therefore, to bring the long-standing debate around equality and difference to the core of statutory criminal laws and, thus, break with the gender neutrality/insensitivity of criminal law.

Methodologically speaking, inductive reasoning allows us to formulate some proposals of a gender-differentiated sentencing regime deriving from our analysis of the most relevant national and international empirical data, as well as from criminological studies that prove the disproportional impact of the use of prison sentences upon women. Feminist theories and their respective analytical categories are the tools deployed to link all data considered and our conclusions.

This study adopts a feminist perspective and the categories of "woman" and "gender" to re-think sentencing alternatives that go beyond traditional masculine references. Such methodological decision could be criticized in the light of a postmodern feminist perspective, which questions the essentialism of the category "woman" and considers the multiple identities found among women and the necessary intersectionalities with other categories (race and class, e.g.). To be true, other gender identities are not the object of our investigation, therefore the contributions of transgenderism and queer theories to criminology fall outside the scope of this study. This limitation is partially a result of the scarcity of empirical data, especially in Brazil, regarding the impact of criminal justice on LGBTQIAPN+ people. We expect, in the future, to expand the object of our research to include the experiences of the greatest possible diversity of genders and sexualities within the criminal justice system.

2. The Feminist Contribution to Science and Criminology

The historical development of criminology can be described in two major stages or phases: a first stage, which began with Lombroso's studies of criminal anthropology and Ferri's criminal sociology, a time when criminology, called "orthodox" (Carvalho & Weigert, 2020: p. 1787), was fundamentally a causal-explanatory science of criminality (Mendes, 2017), and its object of study was the offender, which lasted until around the 1960s; and a second stage, from the 1960s onwards, when critical approaches such as "labelling theory" shifted the axis of criminological investigation from the offender to criminalization processes and the reaction of the criminal justice system to crime (Mendes, 2017). The transition from an etiological paradigm, clearly positivist, to a new paradigm of social reaction represented, for some scholars, a true "epistemological and methodological rupture" (Andrade, 1995: p. 31). Especially in Latin American countries like Brazil, one of the results of the labeling theory was the blossoming of "critical criminology", responsible for broadening the focus of the discipline, to include structural and institutional violence and the vulnerability and selectivity factors that operate in criminalization processes (Andrade, 1995; Baratta, 1999; Carvalho & Weigert, 2020).

The transition from a micro to a macro-criminological perspective (Carvalho & Weigert, 2020) was followed *pari passu* by another significant shift in criminology: the feminist criticism. To be true, not only criminology but science in general needed to be reconstructed from a feminist perspective. Founding assumptions of modern science, such as neutrality and objectivity, began to be discussed, and its androcentric character was also unveiled. Perhaps the most important contribution of feminist criticism to scientific knowledge has been the following: "(...) feminist criticism evidenced a new dialectic by deconstructing the supposed biological basis of male and female behavior, stating that gender results from social and cultural constructions" (Bandeira, 2008: p. 222). From an epistemological point of view, the main analytical category for feminism(s) has always been the relational concept of "gender", which serves the purpose of clarifying that many differences between women and men are not the result of real biological phenomena, that is, of the "sex" category (Nicholson, 2000). The expression "sex/gender system" was coined in the 1970s to emphasize the relationship between the biological aspect and the culturally constructed meanings (Rubin, 1975). Over the years, the very notion of gender began to be questioned in the face of postmodernism and the acknowledgment of the impossibility of a "universal woman", both in Brazil (Campos, 2020; Leite et al., 2013; Macedo, 2006; Machado, 1998) and in the rest of the world (Butler, 2022; Harding, 1991; Lauretis, 1994; Scott, 1988). There are even those who defend the instability of the analytical categories of feminist theory (Harding, 1993). In any case, although there are significant internal divergences within the feminist movement itself, criminology still needs further studies on the condition of women, from an essentially feminist perspective, which works with the dichotomy between the

male and female genders.

The typology of feminist epistemologies formulated by Sandra Harding in the early 1990s has become famous. “Feminist empiricism”, for [Harding \(1991, 1993\)](#), consisted in the advancement of knowledge through the elimination of sexist and androcentric biases, “correcting”, but not transforming, the methodological rules of science. It can be considered a conservative epistemological strategy, as it suggests the correction of “bad science”, paradoxically, through stricter adherence to the current scientific method. This was the dominant position in feminist social sciences, including criminology, in the 1970s ([Daly, 1997](#)). Still according to [Harding \(1991\)](#), the “feminist standpoint”, on the other hand, emphasizes the need for scientific research to start from the life experiences of women, and not of men from dominant groups. Women’s positions (subordination) allow for a more accurate, less distorted, and partial understanding of the world and social relations. Science produced based on women’s points of view has the potential to be better science than that traditionally produced by (and for) men. Undoubtedly, it is a model with greater transformative capacity. In our study, we investigate the problem of sentencing women from a feminist perspective, seeking to adopt women as a necessary reference to criticize and reform statutory laws, which is roughly equivalent to the Sandra Harding’s feminist standpoint ([Harding, 1991, 1993](#)). We prefer, however, to speak from a feminist perspective, and not in terms of a proper feminist epistemology, especially because it is controversial whether feminism(s) helped create a new knowledge paradigm (epistemology) ([Machado, 1998](#)).

Specifically in criminology, starting in the 1970s and 1980s, feminists drew attention to the problem of gender bias in mainstream criminological theories and pointed out how women have historically been ignored in research on crime and the criminal justice system ([Gelsthorpe, 2003; Heidensohn, 2006](#)). Criminology, then, awoke from its “androcentric slumber” ([Daly & Chesney-Lind, 1988: p. 507](#)). In fact, traditional criminology has excluded women as an object of criminological research, on the grounds that they commit significantly fewer crimes than men ([Chesney-Lind, 1986; Renzetti, 2013](#)). The gender gap between male and female criminality, until then little investigated, became of interest to feminist criminologists. In 1977, Carol Smart exposed the underdevelopment of criminological knowledge about the nature of female criminality, which, at the time, was not considered a serious and urgent social problem, thus being irrelevant ([Smart, 1977](#)). It is observed that, until the 1960s, the attempt to understand the female offender merely adapted, in a simplistic way, the criminological type of Lombroso’s criminal man, thus starting from the perspective of an anomalous nature of female criminality ([Carvalho & Weigert, 2020; Renzetti, 2013](#)). The positivist paradigm of criminology included, therefore, the incipient studies on female criminality ([Pollak, 1950](#)).

From the 1960s on, however, more sophisticated explanations about the participation of women in criminal matters, of a sociological nature, began to emerge. Freda Adler and Rita Simon associated the increase of women crimina-

lization and the resulting reduction in the gender gap to the feminist movement itself and to the greater participation of women in public life, including the commission of crimes (Adler, 1975; Simon, 1975). The “emancipation thesis”, evidently, suffered severe criticism (Chesney-Lind, 1986; Daly & Chesney-Lind, 1988, Gelsthorpe, 2004; Smart, 1977), for suddenly treating female criminality as the “shady side of liberation” (Chesney-Lind, 1986: p. 79). Another attempt to explain the differences between male and female criminality were the so-called “role theories”, with emphasis on the different socialization processes of boys and girls, from birth to adulthood (Hagan, 1990; Hoffman-Bustamante, 1973). Haphazardly, traditional criminology began to coexist with feminine and feminist knowledge about crime and punishment, reaching undeniable advances. We are interested in the criminological research that has investigated, in recent decades, the State response to female offending, with special attention to the (excessive) use of custodial sentences and the resulting problems.

3. The Impact of Criminal Justice on Women in Brazil and around the World

The feminist perspective has cast a new light on the problems faced by women in the criminal justice system all around the world. Relatively recent criminological studies point to various problems associated with the imprisonment of women (Bartels & Gaffney, 2011; Chies, 2005; Colares, 2011; Easteal, 2001; França, 2014; Granja et al., 2012; Helpes, 2012; Herbert, 1985; Jenness & Gerlinger, 2020; Lemgruber, 1983; Lima, 2013; Priori, 2011; Rowe, 2011; Samaranch et al., 2012; Santoro & Peeira, 2018; Thomaz et al., 2016), such as the inadequate conditions of prisons and gender violence (Federici et al., 2017; Lago, 2017; Rodrigues et al., 2012; Smith, 2006; Wolff et al., 2006, physical and mental health of prisoners (Lima, 2013), sociation and identity (Colares, 2011; Priori, 2011; Rowe, 2011), sexuality (Granja et al., 2012), issues related to pregnancy, prenatal care and childbirth in prison (Abbott et al., 2020; Ferszt & Clarke, 2012; Roth, 2010; Sufrin et al. 2019), and the effects of motherhood inside prisons for women and their children (Dallaire et al., 2015; Epstein, 2014; Flynn, 2014; França, 2013; Hanlon et al., 2005; Leal et al., 2016; Macharia, 2021; Matos et al., 2019; Millar & Dandurand, 2018; Minson, 2020; Murray & Farrington, 2008). The major concern of current feminist criminology, therefore, involves female incarceration and its complexities. Interestingly, however, the issue is not usually addressed by criminal statutory laws in most civil law jurisdictions, including in Brazil.

Some national empirical data help to understand the problem of the use, which we consider excessive, of imprisonment and the impact of criminal justice on women. In 2000, Brazil had 174,980 prisoners, of which 169,379 were men and 5601 were women (Departamento Penitenciário Nacional, 2014). From 2000 to 2022, the female population increased by 712.17%, while the average male population growth was 363.58%. The same trend can be observed at the global level: the most recent edition of the World Female Imprisonment List reveals

that, since 2000, the number of women in prisons has increased by about 53%, while, in the same period, the total increase in the world's incarcerated population has not exceeded 21% (Walmsley, 2017). Such data clearly reflect an upward curve of mass incarceration that is more pronounced for women than for men, in Brazil and worldwide.

Figure 1 illustrates the evolution of prison populations of men and women in Brazil, between 2000 and 2022.

More to the point, while in 2000 women represented 3.2% of the Brazilian imprisoned population (Departamento Penitenciário Nacional, 2014), in 2022 they amounted to 5.47% of the total number of incarcerated people (Ministério da Justiça e Segurança Pública, 2022b). Worldwide, only 6.9% of people incarcerated are women (Walmsley, 2017). The lower proportion of women imprisoned, compared to men, is not a recent trend. In fact, numerous criminological studies suggest that women commit significantly less crimes than men (Chesney-Lind, 1986; Steffensmeier & Allan, 1996), which is reflected in the composition of national and international prison populations. However, in recent decades, such gender ratio has been changing, with a significant growth in the number of imprisoned women.

Additionally, while the incarceration rate (i.e., inmates per 100,000 inhabitants) increased by 287.46% between 2000 and 2022 for men and women, the increase in the female incarceration rate was 563.33% over the same period, jumping from 3.30 female prisoners for every 100,000 inhabitants in 2000 to 21.89 in 2022 (Figure 2). Therefore, there is a clear general trend towards an increase in incarceration in Brazil and in the world; for women, however, the increase is disproportionate and alarming.

It should be noted that female incarceration in Brazil necessarily involves a phenomenon which has already attracted a significant volume of scholarly attention: the disproportionate impact of drug-related crimes in the composition of female prison populations (Bagaric & Bagaric, 2016; Colares, 2011; França, 2014;

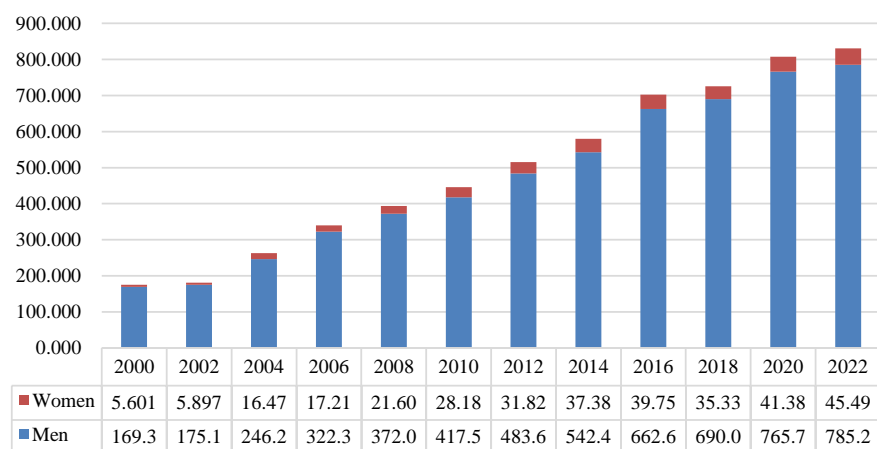


Figure 1. Evolution of the prison population, by gender, in Brazil (2000-2022). Data source: Departamento Penitenciário Nacional (2014); Ministério da Justiça e Segurança Pública (2022a).

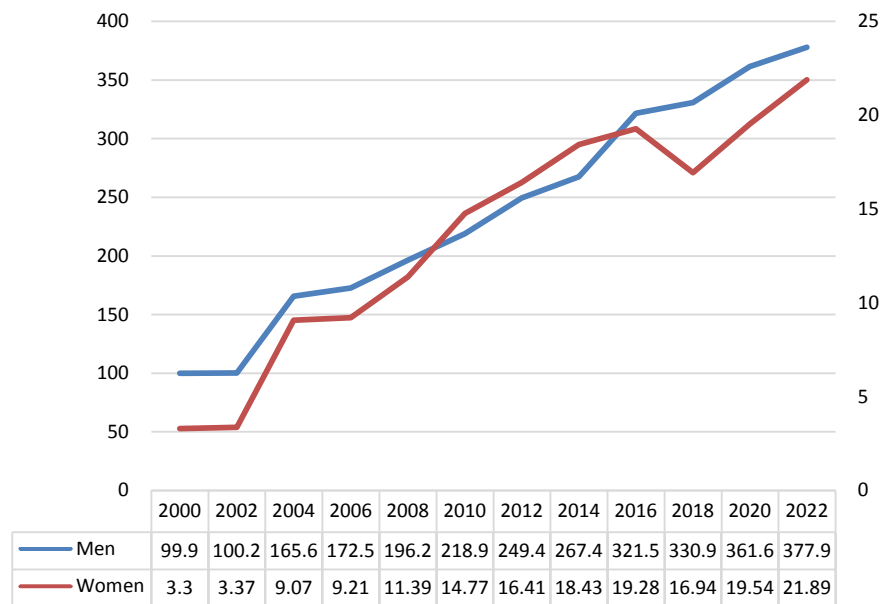


Figure 2. Evolution of the prison population per 100,000 inhabitants*, by gender**, in Brazil (2000-2022). Data source: Departamento Penitenciário Nacional (2014); Instituto Brasileiro de Geografia e Estatística (2018); Ministério da Justiça e Segurança Pública (2022a). *To calculate the incarceration rate, population projections published periodically by the IBGE were used. **The calculation of the incarceration rates of men and women did not take into account the national population disaggregated by gender, but the total national population (men and women), following the example of the methodology internationally adopted by the *World Female Imprisonment List*.

Penal Reform International, 2020). According to official data from 2022, the most common offenses committed by women are Drug Act offenses (Law No. 11.343/2006), with 54.85%; in second place, property crimes represent 23.9% of women prisoners. Among men prisoners, 41.07% committed crimes against property; drug-related offenses represent about 27.65% of incarcerated men (Ministério da Justiça e Segurança Pública, 2022c). Therefore, the impact of Brazil's criminal drug policy, focused on repression, is even more severe with women than with men.

It is also known that the involvement of women in drug-related crimes tends to be mainly as consumers, who are employed as small sellers in drug trafficking activities and national and international transporters (Lima, 2015). Leadership positions in drug trafficking tend to be predominantly held by men. Furthermore, empirical studies show that female trajectories in the drug trafficking world are often initiated by male influence (a boyfriend, a husband, or a partner), in addition to other socio-economic factors (França, 2014; Santoro & Pereira, 2018; Thomaz et al., 2016), especially the so-called “feminization of poverty” (Nielsson, 2019: p. 168).

Thus, the relationship of women with drug trafficking, based on the Brazilian experience, is a specially perverse one: first, their entry into this form of criminality occurs in many cases through the influence of men, especially their own partners, revealing a position of women's social and family submission that, if

not able to eliminate their criminal blameworthiness and make them mere victims (Granja et al., 2012), at least proves the adversity of their living conditions in the face of crime; second, once inside drug trafficking, the role of women is hardly ever highlighted, being limited to functions of lesser importance and usually subordinated to men, reflecting a common patriarchal pattern in society; and third, when taken to criminal justice, women end up being punished more harshly than men, in a visible paradox, given the secondary role of women in trafficking.

Although the analysis of women's relationship with drug trafficking is not the focus of our study, it is such an essential issue for understanding the serious problem of female incarceration and the disproportionate impact of criminal justice on women in Brazil that, in the final part, we will make specific proposals for drug policy reform from a feminist perspective.

Alongside the expressive and growing numbers of women prisoners, the conditions of female incarceration in Brazil are also worth mentioning. Official data show that, in 2022, there were 1,112 male prisons in the country (76.26%), 218 mixed establishments (14.95%), and only 128 female prisons (8.77%) (Ministério da Justiça e Segurança Pública, 2022b). The separation of women in their own establishment is foreseen in criminal law (art. 82, Section 1, of Law No. 7.210/84), although in criminology, segregation generates divergent opinions, pointing out that, in exclusively female prisons or in separate blocks of mixed prisons, female prisoners end up having less access to rehabilitation programs (Herbert, 1985). The low number of prisons exclusively for women, however, causes numerous difficulties in their imprisonment experiences, especially the loss of contact with partners and family members, including children, as a result of the geographical distance between their home and the female prison (França, 2014; Herbert, 1985).

In prison, women suffer many deprivations because of the loss of freedom itself. In a pioneering work in Brazil, Lemgruber already reported in the early 1980s that female prisoners are deprived of material goods and services and of their own autonomy, sometimes being infantilized by security teams; they lose family life, getting fewer visits than male prisoners; it is common for them to suffer abandonment by husbands and partners; as a consequence, they lose the free exercise of sexuality, resorting to homosexual relationships inside the prison (Lemgruber, 1983).

International studies also suggest that women prisoners are sexually abused more often than men (Smith, 2006; Wolff et al., 2006), in addition to presenting higher levels of mental/physical health issues and drug abuse (Plugge et al., 2006).

Of all the effects of a prison sentence, possibly the most harmful to women is the violation of their reproductive rights and the exercise of motherhood in the prison environment. Women who need to give birth to their children in prison face precarious conditions: inadequate prenatal care, failure to provide the recommended nutritional diet, violence (verbal, psychological or physical) during

the hospitalization period, low social/family support, insufficient psychosocial support and even the use of handcuffs during hospitalization for childbirth (Abbott et al., 2020; Ferszt & Clarke, 2012; Leal et al., 2016; Roth, 2010). After birth, women prisoners can stay with their children for a certain period of time, typically two years. An interesting national study suggested that the interaction between mothers and children in the prison environment is positive, especially for children, as it enables the development of “attachment”, which will be the basis for future social and affective relationships (Zem, 2020). On the other hand, there is criticism about keeping children with their mothers in prison, due to the harsh penitentiary environment and the potential harm to child development (Galloway et al., 2014; Macharia, 2021).

Especially in Brazil, the infrastructure of prisons causes a series of violations of women prisoners’ rights, such as motherhood in the prison environment. Prisons hardly offer desirable equipment and spaces: in 2022, less than half of female prison units had a cell/dorm suitable for pregnant women (46%); just over 36% had a nursery and/or maternal-child reference center; and only 9% offered daycare (Ministério da Justiça e Segurança Pública, 2022b).

Women remain predominantly the primary caregivers of children, consequently, their incarceration is more harmful to children than the incarceration of men/fathers (Dallaire, 2007; Minson, 2020). When mothers are arrested, it is usually not the fathers who take care of the children, but another relative (Dallaire, 2007). Therefore, prison clearly disrupts family life. According to international empirical data, only 9% of children are left to the father’s care and only 5% continue to live in the same house after the mother’s arrest (Corston, 2007; Macharia, 2021).

The separation caused by imprisonment harms both mothers and their children: for women, the main drawback is the loss of contact when in prison, as visits are rare (Flynn, 2014; Johnston & Carlin, 2004; Macharia, 2021); for children, common negative consequences are poor psychological adaptation and antisocial behavior (Dallaire et al., 2015; Murray & Farrington, 2008), developmental concerns (Santa Rita, 2009; Stella, 2006; Torres, 2010), problems related to mental health and drug abuse (Epstein, 2014; Murray & Farrington, 2008), damage to the child’s ability to build new social bonds and relationships in the future (Ainsworth, 1989), among others.

4. Equality and Proportionality as Fundamental Rights in Sentencing: A Feminist Critical Perspective

That like cases should be treated alike is a commonsensical requirement of justice at sentencing. Offenders who commit crimes under similar conditions should receive approximately similar sentences. Extralegal factors such as race, gender, and socio-economic status should not impact the final sentence imposed by courts or judges. Equality is a fundamental value in sentencing or, to put it differently, a sentencing principle. Equal treatment at sentencing can be de-

scribed as a fundamental right of offenders in criminal proceedings. When like cases receive different treatment, disparities in sentencing arise, a phenomenon widely investigated in criminological scholarship. Empirical research has developed appropriate methodologies to measure sentencing disparities (Krasnostein & Freiberg, 2013; Pina-Sánchez & Linacre, 2016; Tata & Hutton, 1998).

In addition to equality, another fundamental sentencing principle is proportionality. Proportional sentence is one that appropriately reflects the level of seriousness of the crime committed and the offender's culpability. Unlike equality, which seems to be an intuitive principle of justice, proportionality at sentencing is a more complex idea. Although it was originally conceived by Cesare Beccaria in 1764, proportionality only reached the status of a sentencing guiding principle, especially in Anglo-Saxon countries, from the 1970s onwards. Andrew von Hirsch's "desert theory" encompassed a strong anti-utilitarian logic, according to which a fair sentence should be essentially retributive and proportionally imposed upon an offender in accordance with the seriousness of the offense. Consequentialist considerations should have only limited impact on sentencing levels of severity (Von Hirsch, 1976). In common law jurisdictions, desert theory and the idea of proportionality have become predominant today, decisively influencing statutory laws and sentencing guidelines (Ashworth & Roberts, 2013; Campos, 2021; Carvalho, 2020; Frase, 2005; Quirós, 2017; Roberts, 2017; Tonry, 2016; Wasik, 2008). On the other hand, in civil law countries, like Brazil, proportionality does not play such a crucial role in sentencing, although there are important opinions in its favor (Stoco, 2014, 2019; Teixeira, 2015). In any case, the understanding that punishment should be somehow proportionate to the offense committed seems to have great appeal in any jurisdiction.

A feminist perspective offers a genuine revolution in scientific research and in the formulation of public policies related to sentencing. Particularly, our proposal is to discuss the fundamental right to equality and the proportionality of sentences from a female point of view.

Indeed, the equality versus difference debate has always been central to the feminist movement. However, there has never been unanimity on the subject. A first approach ("first wave" feminism), sought to make men and women equal. In legal terms, such an approach meant gender neutrality or formal equality. A second approach ("second wave" feminism) sought to highlight the differences between men and women. In law, the acknowledgment of difference is called special treatment (or protection) or substantive equality (Campos, 2020). The two approaches to the claim for equality between the sexes are antagonistic: the first defend treating the problem of sameness, while the second adopts a perspective obsessed with differences.

In the field of penology, feminism has always criticized formal equality as a synonym for identical treatment between men and women. Starting from a masculine reference, criminal law establishes identical punishment for women who commit the same offenses as men, disregarding their life circumstances and

peculiar characteristics of their criminality that they face simply for being women (Hudson, 2002). Equality means ruling out differences in sentencing. A sentencing system built around gender neutrality emphasizes formal justice (treating everyone equally) over substantive law (finding the most appropriate sentence for the case at hand). Another problem with the discourse of equality is that it can result in harm, not benefit, to women, increasing the sentences applied to them. Daly had already observed, decades ago: “In the name of a restricted notion of equality with men, more women may lose their freedom” (Daly, 1994: p. 271). The growing female incarceration proves the failure of gender-neutral policies and the idea of “identical treatment”.

In any case, in the “age of proportionality” (Hudson, 2002: p. 36), identical treatment is favored as opposed to greater individualization of sentences. The greater the search for a strict proportionality between sentence and the offender’s guilt, the smaller the space to consider, at sentencing, important personal circumstances, such as the fact that women tend to have dependent children, in addition to having a history of physical and sexual abuse, for instance. The idea of substantive law, in the case of female offenders, implies considering the disproportionate impact of punishment, especially prison sentences, on women.

The great feminist legacy in the field of sentencing is the understanding that equality and proportionality are not the only relevant considerations for courts and sentencing judges. Feminist perspectives focused on the idea of difference usually defend the possibility of modified rules for sentencing women, through the following arguments: 1) low risk to society, both in qualitative terms (in relation to the seriousness of the crimes committed) as quantitative (in relation to the probability of reoffending); 2) disproportionate impact of prison on women’s lives (distance between home and prison, making visitation difficult; primary care for children; violation of women’s reproductive rights; and history of mental health problems and sexual abuse in prisons); and 3) impact of imprisonment on others, especially young children (Bagaric & Bagaric, 2016; Carlen, 2000; Roberts & Watson, 2017). The creation of specific rules for sentencing women seeks to equalize the impacts of punishment for men and women. The so-called “principle of equal impact” is a logical result of the adoption of an ideal substantive (real) law, and not merely formal equality.

Without denying the importance of the debate between equality and difference and its practical implications (legislative reforms, for instance), we prefer to adopt a broader perspective, capable of supplanting the equality-difference dichotomy. Catharine MacKinnon (1987) developed a feminist approach centered on the following categories of analysis: domination, power, hierarchy, and patriarchy. She proposes to simultaneously break with the patterns of similarity and difference, pointing out that both adopt the man (and not the woman) as a reference. MacKinnon’s perspective of domination starts from the following fundamental concept: equality is, in reality, a question of power distribution. Gender issues are issues of power, specifically male supremacy, and female sub-

ordination. MacKinnon works with an important concept: hierarchy. The hierarchy of power in society, which has always favored men, produces real differences between the sexes, which are inequalities. Such inequalities constitute the most fundamental form of oppression; they are deeply rooted in society and therefore predate the differences. The problem with the discourse on gender differences is that it neutralizes and covers up power disparities, even when it appears to criticize them (Campos, 2020). In MacKinnon's thinking, patriarchy is understood as the main enemy of women. Gender inequalities result from systematic male domination, which not even the differential approach (gender as difference) can correct (MacKinnon, 1987).

The practical consequence of MacKinnon's perspective of domination is to state that legal protection or special treatment for women is not enough, as only true social change can make equality between the sexes possible. As a lawyer and activist, however, MacKinnon has always excelled in criticizing female oppression on legal issues such as sexual harassment, rape, prostitution, and pornography (MacKinnon, 2005, 2019). Modifying sexist laws that perpetuate the oppression of women is a step to be taken from any feminist perspective. It is often acknowledged that MacKinnon is one of the representatives of radical feminism, belonging to the second wave of feminism (Campos, 2020; Carvalho & Weigert, 2020; Renzetti, 2013).

Gerda Lerner was one of the pioneer feminists to explore patriarchy. In "The Creation of Patriarchy", written in 1986, Lerner proposed that the male domination system preceded the formation of private property and class society. Gender inequality resulting from the patriarchal structure of societies is, therefore, prior to other inequalities (of class, for instance) (Lerner, 2019).

Walby (1990) has also devoted herself to the analysis of patriarchy as an important analytical category within feminist knowledge. Walby's identification of six patriarchal structures through which men exercise domination and oppression of women became famous: paid work, domestic work, culture, sexuality, violence, and the State itself. Despite being autonomous, each of these spheres is related to the others, in a dynamic process that can culminate in the transition from a private to public patriarchy (Walby, 1990: p. 173; Bandeira, 2006). Our particular interest is in patriarchal relations within the State, precisely in law. Although not mentioned by Walby, criminal laws in general and prisons represent an important sphere of public patriarchy, marked by the perpetuation of male domination over women.

The feminist perspective of domination and patriarchy is the one that best acknowledges the structural and institutional dimensions of violence against women and the social processes of oppression to which they have always been subject (Carvalho & Weigert, 2020). It allows us to understand the "gender structure" in which men dominate women, creating a differentiation in the value of one gender (masculine) to the detriment of the other (feminine) (Renzetti, 2013: p. 8). It is the closest approach to criminology based on the paradigm of social

reaction, concerned not only with the offender (etiological paradigm), but also with the processes of criminalization and the reaction of the criminal justice system to the commission of offenses.

It is true that the approach centered on differences and on the acknowledgment of “special treatment” attained significant achievements in terms of women’s rights in criminal justice, in the world and in Brazil. Criminological studies on the negative effects of women’s imprisonment led to a series of important reforms: in the international level, the creation of the UN Bangkok Rules, establishing a series of basic rights for women prisoners, such as hygiene and material assistance (Rule 5), visitation (Rule 28), and diet for pregnant and postpartum women (Rule 48); the adaptation of prisons, originally for men, to meet in a minimally adequate way the specific needs of women, related, for example, to pregnancy, childbirth and staying with children for breastfeeding; in Brazil, the enactment of Laws No. 13.257/2016 and 13.769/2018, which amended the Code of Criminal Procedure to allow judges to replace pre-trial detention with house arrest when the defendant is pregnant or a woman with a child up to twelve years old (art. 318, IV and V), except in the case of a violent offense or offense committed against their own child or dependent (art. 318-A); also in Brazil, the edition, by the National Council of Justice (*Conselho Nacional de Justiça*), of Resolutions No. 252/2018 and 254/2018, which deal, respectively, with guidelines for monitoring mothers and pregnant women deprived of liberty and the National Judicial Policy to fight violence against women; finally, the inclusion of a statutory provision in Brazilian Code of Criminal Procedure that prohibits the use of handcuffs on pregnant women during medical-hospital preparatory acts for delivery and during labor, as well as on women during the immediate postpartum period (art. 292, added by Law No. 13.434/2017), among other advances.

From the feminist perspective we adopt, however, it is essential to understand that the criminal justice system and, in particular, prison sentences operate in favor of maintaining patriarchy, in at least three dimensions: 1) at sentencing, with more severe punishment for women who dare to violate “gender rules”, failing to fulfill their roles traditionally imposed by male domination, such as being good mothers and honorable, submissive and docile wives; 2) while serving the sentence, through the disproportionate impact caused to women by prisons, which impose on them the deprivation not only of liberty, but also of the free enjoyment of their reproductive rights, their sexuality and, when applicable, the dignified exercise of motherhood; and 3) the reproduction, in the prison environment, of the gender stereotypes to which women have always been subjected, making it difficult for them, upon release, to emancipate themselves from male domination.

Feminist criminological research has already proven the strong influence of patriarchy over criminal justice and the prison system. First, despite the gender neutrality of criminal laws in general, in practice, men and women do not seem to receive identical treatment by courts and sentencing judges. Empirical studies

of actual sentencing practices found contradictory results. Part of the research has proven the “chivalry hypothesis” or judicial paternalism, that is, judges tend to be much more lenient towards women (Bontrager et al., 2013; Doerner & Demuth, 2014; Hedderman & Gelsthorpe, 1997; Nagel & Johnson, 1994; Pina-Sánchez & Harris, 2020; Starr, 2015). However, some researchers point out that not all women get favorable treatment from judges. There is, in fact, a bifurcated sentencing system for women (Gelsthorpe, 2007), according to which women who do not follow gender stereotypes and established behavior patterns as feminine, such as homosexuals and single mothers, receive more severe punishment (Baratta, 1999; Carlen, 2000; Chesney-Lind, 1986; Eaton, 1986; Gelsthorpe, 2007; Hudson, 2002). Married women, for example, would get lenient sentences, revealing the “dominance of a familial ideology” by the criminal justice system (Gelsthorpe, 2007: p. 41). The concept of “double deviance”, according to which, when committing crimes, women simultaneously violate the criminal law and gender rules, influences their sentences (Carvalho & Weigert, 2020; Gelsthorpe & Sharpe, 2015; Heidensohn & Silvestri, 2012; Larrauri, 1992).

Second, once sentenced to custody, women’s experiences in prison are significantly more deleterious than those of men. Women are disproportionately affected in areas such as mental health and drug abuse (Plugge et al., 2006), physical/psychological violence and sexual abuse (Smith, 2006; Wolff et al., 2006) and abandonment of partners and family members (França, 2014; Herbert, 1985; Lemgruber, 1983). Violations of their reproductive rights and challenges to the exercise of motherhood in the prison environment had also been empirically shown (Abbott et al., 2020; Ferszt & Clarke, 2012; Leal et al., 2016; Roth, 2010). Imprisonment causes harm not only to mothers, mainly the separation from their children and loss of contact (Flynn, 2014; Johnston & Carlin, 2004; Macharia, 2021), but above all to children, under different aspects: behavioral problems in childhood (Dallaire et al., 2015; Murray & Farrington, 2008), damage to development (Santa Rita, 2009; Stella, 2006; Torres, 2010), problems related to mental health and drug abuse (Epstein, 2014; Murray & Farrington, 2008), damage to the ability to build relationships in the future, etc.

And finally, third, while serving a prison sentence, women are subjected to gender stereotypes, which reproduce in the penitentiary environment male domination over their lives and bodies. There are studies that suggest, for instance, that female job opportunities within prisons are usually limited to essentially domestic tasks such as sewing, cleaning, and cooking. Other types of opportunities are offered to men. In Brazil, it has been estimated that 75% of women prisoners work only in internal activities, in the kitchen or cleaning the prison itself (Departamento Penitenciário Nacional, 2014). The traditional and stereotyped role of women in society is thus reinforced (Smart, 1977; Priori, 2011). The “sexual division of labor” in prison reinforces the hierarchy between genders (Helpes, 2012).

Therefore, following Walby (1990), we define the criminal justice system and

prisons as patriarchal structures responsible for the perpetuation of men's domination over women, as they reproduce gender stereotypes that attribute to women a hierarchical position of subordination before men and, consequently, aggravate power inequalities between the genders that still prevail in society.

Based on the perspective of domination and oppression exerted over women through the criminal justice system, we defend not only specific legislative reforms to minimize/avoid certain negative effects of imprisonment on women and even third parties, especially their children, but also to question in a broader and deeper way the adequacy of custodial sentences for women.

5. Proposals for a Differentiated Sentencing Regime for Women

Our hypothesis that it would be possible, from a feminist perspective, to think about equality (equal treatment) and proportionality based on a female reference, acknowledging that sentences can be applied differently, is not unanimous in criminological scholarship. Indeed, there are opposing opinions, with an emphasis on the fact that special treatment of women in sentencing would undermine the principles of justice, equity, and proportionality, in addition to perpetuating stereotypes related to female weakness and the moral inferiority of women (Nagel & Johnson, 1994). On the other hand, a growing number of studies understand that a particular treatment towards women is legitimate. The main arguments are usually the following: low risk to society and better rehabilitation prognosis for women, as their reoffending rates are lower; the effects of imprisonment (reduced childbearing capacity; greater victimization by violence, including sexual violence, within prisons; higher rates of mental illness; loss of family contact) affect women disproportionately; women tend to be primary caregivers of children, relatives, and other dependents more often than men, so incarceration would impact the lives of others; and the acknowledgment of the criminogenic effect of the history of child sexual abuse of many female offenders (Bagaric & Bagaric, 2016; Carlen, 2000; Gelsthorpe & Morris, 2002; Roberts & Watson, 2017).

Worldwide, specific proposals have already been formulated, such as: 1) sentence mitigation due to reduced risk of recidivism (20% decrease), the negative effects of imprisonment (50%), specific cases of child sexual abuse (25%) and women with dependents (20%) (Bagaric & Bagaric, 2016); 2) a law reform in order to establish two simultaneous requirements for the use of custody sentences against women: seriousness of the offense and risk to the community; 3) prohibition of prison sentences if they create particular and serious difficulties for dependent children or may harm their future natural development; and 4) restricting the importance of criminal records in sentencing (Roberts & Watson, 2017).

In the specific case of Brazil, the methodology established by the Penal Code to guide courts and judges at sentencing could also undergo specific reforms, in

order to contemplate some differentiated rules for female offenders, from a feminist perspective. For example, *de lege ferenda* there could be a statutory provision allowing the consideration of a general mitigating factor in article 65 of the Brazilian Penal Code related to womanhood. Another possibility would be that statutory laws allowed courts and judges, when adjudicating the case at hand, to mitigate sentences under the following conditions: low risk to society, especially in the case of first-time females offenders; when imprisonment conditions are proven to be harmful when the female offender was under pre-trial detention during the course of the police investigation or criminal proceedings; when the female offender is responsible for caring for dependents (children or others).

The question underlying this first legislative reform suggestion is: should the differentiated sentencing regime be applicable to all women without distinction or only when the case at hand involves any of the reasons in favor of special treatment, such as, for instance, pregnancy or dependent children? Although it is not easy to find an answer, we think, with [Bagaric and Bagaric \(2016\)](#), that it is possible to draw an analogy between sentencing for women and the special punitive regime for children and adolescents (Juvenile Criminal Law). Just as Brazilian law provides that, due to the peculiar condition of a person under development, minors under 18 (eighteen) years old cannot be criminally punished, subjecting them to a different accountability regime, in the form of socio-educational measures (Law No. 8.069/90), all women should have the right to sentence mitigation, without needing to prove any special life condition (pregnancy, primary care for children, etc.). The automatic application of differentiated sentencing rules is the best alternative for positive gender discrimination in view of the main findings of feminist criminological research, especially the disproportionate impact of criminal justice, and prison sentences, on women.

Another possibility would be to automatically replace incarceration with alternative sentences like community service (art. 44 of the Brazilian Penal Code), with or without the possibility of conversion in case of unjustified non-compliance of the imposed restriction (art. 44, Section 3). In this case, a presumption against the use of custody to women would be reinforced ([Roberts & Watson, 2017](#)), with the potential effect of reducing female incarceration.

However, in addition to such proposals, we agree with feminist criminologist Kathleen Daly, when she states that it is necessary to discuss what should be the purposes and principles of sentencing women and what types of punishment are appropriate for them ([Daly, 1995](#)). We ought to re-think the entire sentencing regime from a female point of view. Such an approach leads us to the following two reflections:

The first fundamental reflection questions the possible sentencing purposes or, as critical criminologists would rather put it, “discourses to legitimize the criminal sanction” ([Carvalho, 2020: p. 63](#)), traditionally identified as retributivist (retribution for the harm caused by the offense) or consequentialists (deterrence,

prevention, rehabilitation/resocialization). In general, the emphasis that is given today in most national legal systems to the proportionality of sentences reflects a contemporary preference for retribution: punishing the offender would be a simple matter of justice, without involving any positive social effect. This is the case in countries such as, for example, England and Wales, where the proportionality of sentences is legally foreseen (Criminal Justice Act of 2003) and in the sentencing guidelines edited by the Sentencing Council (Campos, 2021). In Brazil, retribution is combined with crime prevention (deterrence), as per article 59 of the Penal Code.

However, it is evident that the proportionality of sentences reduces the space for other considerations about the purposes of punishment, such as, for example, the idea of treating offenders and their criminogenic needs. Based on a female reference, it seems clear that the life trajectories that lead women to criminality and their special criminogenic needs (physical and sexual abuse, including child abuse, for instance) prevent punishment (retribution) from being the only State response to offenses. Nor is crime prevention a strong justification for punishing women, given their low propensity for recidivism, widely documented in the literature (Bagaric & Bagaric, 2016). It is necessary to reconcile the basic concepts of retribution and prevention with a strong purpose of rehabilitation/resocialization, which, in the particular case of women, means providing them with emancipatory capacities that allow them to break the cycles of criminality and male subordination and domination, both closely linked, as evidenced in drug-related offenses. Therefore, we dare to suggest a new sentencing purpose, in view of the female life reference and their experiences in criminality and in the criminal justice system: emancipation/empowerment.

A second reflection from the feminist perspective adopted by us involves the inadequacy of prison sentences for women offenders. As already mentioned, the prison experience is more harmful for women than for men, for a series of reasons: they suffer abandonment from their husbands/partners more often than men in prison, who continue to receive visits, including intimate ones, from their partners; women prisoners become more often victims of sexual abuse in prison than men (Smith, 2006; Wolff et al., 2006), in addition to presenting higher levels of mental and physical health problems and drug abuse (Plugge et al., 2006); for women of childbearing age, imprisonment sometimes means the loss of reproductive rights, while for men, the ability to procreate is only suspended in prison; women who need to give birth to their children in prison face precarious general conditions: inadequate prenatal care, improper nutritional diet, violence (verbal, psychological or physical) during the hospitalization period, low social/family support, insufficient psychosocial support and even the use of handcuffs when hospitalized for childbirth (Abbott et al., 2020; Ferszt & Clarke, 2012; Leal et al., 2016; Roth, 2010). All these effects suggest that, although prison is not a healthy environment for men either, women disproportionately suffer the negative consequences of prison sentences.

More to the point, the entire family group, especially dependent children, ends up suffering negative effects from prison. Indeed, women continue to be the primary caregivers of children and, consequently, their incarceration is more harmful to children than their fathers' (Dallaire, 2007; Minson, 2020). When mothers are arrested, it is usually another relative, and not the fathers (men), who takes care of the children (Dallaire, 2007). Prison, therefore, unsettles the whole family. Less than 10% of children remain under the primary care of their fathers after their mothers' arrest, and only 5% continue to live in the same household (Corston, 2007; Macharia, 2021). Due to the separation from their mothers, children suffer severe consequences: antisocial child behavior (Dallaire et al., 2015; Murray & Farrington, 2008), developmental issues (Santa Rita, 2009; Stella, 2006; Torres, 2010), problems related to mental health and drug abuse (Epstein, 2014; Murray & Farrington, 2008), damage to the child's ability to build new social ties and relationships in the future (Ainsworth, 1989), among others.

The empirical demonstration, by feminist criminological studies, of the disproportionate impact of incarceration on women allows us to define as the main objective of the gender-differentiated sentencing regime the maximum reduction of prison sentences. With this objective in mind, however, strategies may vary (Roberts & Watson, 2017).

In our opinion, the implementation of a specific sentencing regime for women in Brazil would depend on a profound and non-specific legal reform, guided by two essential principles: the definition of a specific sentencing purpose, different from retribution and crime prevention (article 59 of the Brazilian Penal Code), such as emancipation or empowerment; and the adoption of alternative sentences as preferable to custody, which should be considered as a last resort (*ultima ratio*), applicable in exceptional cases, such as violent and sexual crimes and, perhaps, female recidivism. Women would have to serve community-based sentences rather than terms of imprisonment. Psychosocial programs aimed at the rehabilitation and emancipation of women would necessarily be part of the sentence passed upon female offenders.

Again, there is no consensus around the possibility of creating a new sentencing system for women, entirely different from the traditional one. The major criticism involves an alleged violation of the principle of equality and the consequent threat to the legitimacy of such a differentiated regime (Roberts & Watson, 2017). While recognizing the complexity of the topic, we think that replacing merely formal equality (identical treatment) with substantive equality as a fundamental right in sentencing opens up space for positive gender discrimination and, therefore, differentiated treatment. In addition, the issue of the disproportionate impact of criminal justice and prison sentences on women needs to be understood from the perspective of female domination by men, inserting criminal laws in the sphere of patriarchal structures in force in practically all societies. It is necessary to break with this logic of women's subordination in the

field of penology.

Unfortunately, male domination will not be overcome as long as women who commit offenses continue to be sentenced, for the most part, by male judges. In Brazil, only 36% of State-level judges are women. Male judges, therefore, represent 64% of the entire Judiciary (*Conselho Nacional de Justiça*, 2018). The low female representation in criminal justice contrasts with the composition of the Brazilian population, which has more women than men (51.1% against 48.9%), according to official data (*Instituto Brasileiro de Geografia e Estatística*, 2022). In such a scenario, it is essential to create courts specialized in female criminality, headed by female judges.

Lastly, drug trafficking deserves special attention. As seen before, it is alone the main cause of female incarceration in Brazil. More than half of all women arrested in the country have committed crimes provided for in Law No. 11.343/2006. Paradoxically, women's participation in drug-related crimes is negligible compared to men's participation. Rarely do women involved, in any way, with drug trafficking pose a real threat to society. Most perform tasks of lesser importance in the criminal hierarchy (small drug sellers or transporters), but of high risk for themselves. Drug trafficking is a predominantly male criminal activity, that is, dominated by men, where women occupy a secondary role, making it evident the asymmetry of gender relations between men and women (*Giacomello*, 2013). In fact, gender relations constitute a causal element of women's involvement in drug trafficking: many of them are co-opted by drug trafficking based on their romantic relationships with male traffickers (*França*, 2014; *Santoro & Pereira*, 2018; *Thomaz et al.*, 2016). Therefore, there is no doubt that the current drug penal policy ends up disproportionately affecting women.

No proposal to reduce the use of prison sentences and, consequently, the decarceration of women prisoners in Brazil can set aside the criminal drug policy. It is urgent to reform Law No. 11.343/2006, to include the provision that, for the offenses provided for in this law, when committed by women, in co-authorship or participation, a prison sentence will not be applicable. Women should serve community-based sentences only. The national policy on drugs itself, established in Law No. 11.343/2006, which dual focus is the prevention of misuse, care, and social reintegration of drug users and addicts, as well as the repression of unauthorized production and illicit trafficking of drugs (Article 3, I and II), should include activities related to the rehabilitation and emancipation of women convicted of offenses provided for by law. It is up to the legislators to reverse the repressive nature of the Brazilian drug policy on women, not only initiating a process of female decarceration but also recognizing the importance of providing women with conditions to live their lives free of the oppression imposed by men in the world of drug trafficking.

6. Conclusion

"Feminism is not dead. (...) Feminism is a success, although many gender inequalities remain" (*Walby*, 2011: p. 1). This is how the British feminist Sylvia

Walby opens her book “The Future of Feminism”, emphasizing the strength and relevance of feminism. It seems to have lost visibility, but in fact, it has changed its profile, ceasing to be just a social protest movement and becoming part of institutions of power, whether in civil society or in the state structure. Feminism certainly faces new challenges, such as the advance of neoliberalism and the increase in socioeconomic inequalities (Walby, 2011). But it remains intact, vibrant, and increasingly necessary. In countries like Brazil, where women’s fundamental rights are still frequently violated, the formulation and implementation of public policies need a feminist perspective. In the criminal field, the great contribution of feminist criminology was to denounce the disproportionate impact of female incarceration. In fact, it is past time to establish alternatives to the (excessive) use of prison sentences for women who commit offenses as a priority for criminal policy. There is no lack of international studies suggesting some gender differentiation in the sentencing system, with the aim, in general, of reducing the use of custody.

We argue that Brazil needs to become more directly involved in the global debate on the use of prison sentences for women and its alternatives. The country has one of the largest prison populations in the world. The growth in the number of women arrested has been more pronounced than men. Notably, the sad reality of the involvement of a large number of women in drug trafficking in the country is an example of the contribution that national studies can bring to the ongoing debate.

A major controversy involves the fundamental rights to equality (equal treatment) and proportionality of sentences, which, in a traditional view, would be compatible only with a sentencing regime based on gender neutrality. However, we try to think about punishment from a feminine perspective, sustaining that sentences should be applied differently, mainly due to the disproportionate impact of criminal justice on women. We argue that Catharine MacKinnon’s feminist perspective of domination presents the best conditions to argumentatively justify policies of substantive justice. We conclude, therefore, that equality and proportionality cannot be the only relevant considerations in sentencing, and room must be made for positive gender discrimination. Differentiated rules may include, for example, mitigating circumstances due to womanhood, or when the female offender does not represent any significant risk to society or is the primary caregiver of dependents. We dare to go further: the entire system needs to change radically, establishing a new sentencing purpose, which would be emancipation or female empowerment, something much broader than retribution and crime prevention, as under Brazilian criminal law (Article 59 of the Penal Code). As a result of such specific sentencing purpose, incarceration should be a last and extreme resort, applicable only in exceptional cases (violent and sexual crimes).

Obviously, our study has limitations. It was necessary, from the outset, to make an important methodological decision, defining the universal “women” category as the research object. From this option, it was possible to raise and analyze em-

pirical data on female incarceration and propose possibilities for a gender-differentiated sentencing regime, even knowing that women do not constitute a homogeneous group (Roberts & Watson, 2017). The negative consequence is that the experiences of a multitude of women were left out. Future criminological research on sentencing may explore relevant intersectionalities, such as race, class, and gender identity, among others.

In addition, although it is in line with Criminal Law, this is essentially a criminological study, so the suggestions to apply a differentiated sentencing system for women can be, in the future, discussed within the strict scope of Criminal Law. For example, the proposal to mitigate a sentence due to womanhood would have to be reconciled with the notion of culpability, central to Criminal Law. It would also be possible to question whether such personal mitigation factor (womanhood) would subvert the logic of the so-called “Criminal Law of the Enemy” (Zaffaroni et al., 2011) or *Feindstrafrecht*, characterizing a position of advantage that would bring female offenders a mitigated sentence entirely unrelated to the offense committed (“Criminal Law of the Citizen” or *Bürgerstrafrecht*).

Finally, we acknowledge that some arguments favorable to the existence of differentiated sentencing rules for women would also apply to men, such as, for instance, a mitigating factor related to the primary care of children. Indeed, this was the logic adopted by the Brazilian legislature, in 2016, when it began to authorize judges to replace pre-trial detention with house arrest in case of offenses committed by women or men primarily responsible for children up to twelve years of age (art. 318, V and VI, of the Penal Code), although it is women who most routinely assume this position.

The critique of the excessive use of prison sentences from the feminist perspective of domination, power, and patriarchy could also benefit men, leading to a comprehensive and gender-independent decarceration. By no means this would be an unprecedented outcome. As feminist criminologist Kathleen Daly has already stated, “it would not be the first time that men could benefit from hiding behind women’s petticoats” (Daly, 1995: p. 167). Nor would there be any contradiction or inconsistency, but rather an understanding of the complexities of feminism itself, as a theory and social movement fighting for recognition, claiming rights and structural change in society.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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