BIRTH IN PRISON: SYSTEMIC DISCRIMINATION BARRIERS TO ACKNOWLEDGING THE LEGAL PERSONHOOD OF THE CHILD

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Abstract

This Article uses systems theory to outline the problem of automatic rights denial of children born to incarcerated persons. Despite the demonstrated health importance of bonding in early infancy, children are routinely separated from their mothers at birth without due process or consideration of their interests. While this separation is enacted by corrections administrators, it is in fact conduct sent into motion by the earlier decision to incarcerate a pregnant person, even in the knowledge that this will mean automatic separation of the child and mother at birth. This Article argues that such incarceration decisions are communicating a devalued understanding of the pregnant person, labeling her as a worthless mother to her child. By identifying and rejecting discriminatory norms in legal system communications, the rights of children can be better projected.

INTRODUCTION

In both the United States and Canada, there is a dearth of prison nurseries.[1] This means that in the vast majority of cases when a pregnant individual[2] gives birth while

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1 Writing in 2018, Caniglia lists prison nurseries in eleven U.S. states, but this includes one program that only permits infants for thirty days (in South Dakota). John Caniglia, *Growing Up Behind Bars: How 11 States Handle Prison Nurseries*, CLEVELAND.COM (Mar. 4, 2018), https://www.cleveland.com/metro/2018/03/growing_up_behind_bars_how_sta.html [https://perma.cc/84MG-44GW]. Canada permits access to newborn accommodation in three of its fourteen jurisdictions—the federal corrections system, British Columbia, and the Northwest Territories. *See* ROBIN F. HANSEN, PRISON BORN: INCARCERATION AND MOTHERHOOD IN THE COLONIAL SHADOW 18–32 (2024).

2 This Article adopts the inclusive language used by the American College of Obstetricians and Gynecologists. *See, e.g.*, ACOG Committee Opinion No. 830, *Reproductive Health Care for Pregnant, Postpartum, and Nonpregnant Individuals*, 138 OBSTETRICS & GYNECOLOGY e24 (2021), https://www.acog.

under sentenced imprisonment or while in custody without a sentence, the newborn child is automatically separated from its mother and denied the chance for care and bonding. In this scenario, a pregnant person gives birth, usually in a hospital, and then, in many cases, they are discharged back to prison without the child within hours of delivery. As a result, hundreds of children face automatic separation at birth from their mothers every year in the United States and Canada.[3] This denial of a newborn's access to their birthing parent is carried out by state actors with zero individualized consideration of the child's rights or the child's best interests.

Such disregard for the child's interests at birth results from the way in which the legal decision to separate is made *before* the child's birth: the sentencing judge (or another state actor who is directing the imprisonment) implicitly makes this decision. In sending a pregnant woman to a facility knowing that this facility will exclude her child from residence at birth, the judge effectively sentences the newborn, pre-birth, to a denial of their future rights.[4]

What human rights are being stripped from the newborn pre-birth? Two key rights require identification at the outset. First is the universal right under international treaty and custom to be a legal person under the law, namely to be a holder of rights that the rule of law principle gives weight to in the form of state obligations; as is stated in Article 6 of the Universal Declaration of Human Rights, "Everyone has the right to recognition everywhere as a person before the law."[5] Second is the right to justice and fair process

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org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2021/07/reproductive-health-care-for-incarcerated-pregnant-postpartum.pdf [https://perma.cc/W6WH-NJ69].

3 Using annual data collected over 2016 to 2017, which covers population data for 57% of U.S. prisons and only 5% of jails, Advocacy and Research on Reproductive Wellness of Incarcerated People identified 272 births to incarcerated persons, and, of these, in only twenty-one cases did the child remain with their mother. Advocacy and Research on Reproductive Wellness of Incarcerated People, *Incarcerated Pregnant People in a 12 Month Period,* PREGNANCY IN PRISON STAT. PROJ., https://arrwip.org/projects/pregnancy-in-prison-statistics-pips-project/ [https://perma.cc/FZS5-SQYW]; Carolyn Sufrin et al., *Pregnancy Outcomes in US Prisons, 2016–2017*, 109 AM. J. PUB. HEALTH 799, 801 (2019) (identifying 753 live births from pregnant persons in U.S. prisons over an annual period); Carolyn Sufrin et al., *Pregnancy Prevalence and Outcomes in U.S. Jails*, 135 OBSTETRICS & GYNECOLOGY 1177 (2020). In Canada, a minimum of approximately forty-five newborn children a year are automatically separated from their mothers under correctional policies. HANSEN, *supra* note 1, at 32.

4 As an example of future rights, one can consider how a child, once born, can sue for injuries experienced before birth. *See* Dobson (Litigation Guardian of) v. Dobson, [1999] 2 S.C.R. 753 (Can.).

5 G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); *see also* G.A. Res. 2200A, International Covenant on Civil and Political Rights, at art. 16 [hereinafter ICCPR].

under the law, which requires that states do not act in an arbitrary or discriminatory fashion towards individuals in a manner devoid of due process, particularly when such state actors are making decisions with potentially grave health effects.[6]

Denial of access to one's birthing parent as a newborn can mean denial of bonding, denial of sustained and focused care, and denial of breastfeeding. Bonding with a primary caregiver is a vital requirement for an infant's healthy development, and interference with bonding can have lifelong health effects.[7] There exists a significant body of research on the importance of bonding during the "fourth trimester" (i.e., after birth) on a child's physiological, psychological, and emotional development.[8] Denying a child their primary caregiver can have lifelong effects on the child's health and development, including psychiatric illnesses such as Reactive Attachment Disorder and Disinhibited Attachment Disorder that are correlated with a young child's lack of sustained bonding.[9]

Interfering with the provision of infant care by an otherwise available primary caregiver is thus a major health decision regarding the newborn's life and warrants an individualized determination.[10] Routinely placing babies in foster care, or with an otherwise shifting array of caregivers, in situations where the birthing parent is, on the facts, committed and competent to provide sustained care for the child, is clearly a significant health deprivation

6 G.A. Res. 217 (III) A, *supra* note 5, at arts. 7–12; *see also* WILLIAM A. SCHABAS, THE CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS 271–94 (2024).

7 *See* Ilanit Gordon et al., *Oxytocin and the Development of Parenting in Humans*, 68 BIO. PSYCHIATRY 377, 377 (2010); Kayla Johnson, *Maternal Infant Bonding: A Review of Literature*, 28 INT'L J. CHILDBIRTH EDUC. 17, 17 (2013); Jianghong Liu, Patrick Leung & Amy Yang, *Breastfeeding and Active Bonding Protects Against Children's Internalizing Behavior Problem*, 6 NUTRIENTS 76, 77 (2014); Rachel Young, *The Importance of Bonding*, 28 INT'L J. CHILDBIRTH EDUC. 11, 11 (2013); Mary Ellen Symanski, *Maternal-Infant Bonding: Practice Issues for the 1990s*, 37 J. NURSE-MIDWIFERY 67S, 70S (1992); CINDY HAZAN & MARY I. CAMPA, HUMAN BONDING: THE SCIENCE OF AFFECTIONAL TIES 12–33 (2013).

8 *See, e.g.*, Kristin P. Tully, Alison M. Stuebe & Sarah B. Verbiest, *The Fourth Trimester: A Critical Transition Period with Unmet Maternal Health Needs*, 217 AM. J. OBSTETRICS & GYNECOLOGY 37 (2017).

9 *See generally* Carlo Schuengel, Mirjam Oosterman & Paula S. Sterkenburg, *Children with Disrupted Attachment Histories: Interventions and Psychophysiological Indices of Effects*, 3 CHILD & ADOLESCENT PSYCHIATRY & MENTAL HEALTH 1 (2009).

10 Eve G. Spratt et al., *Biologic Effects of Stress and Bonding in Mother-Infant Pairs*, 51 INT'L J. PSYCHIATRY MED. 246, 247 (2016) ("[T]he parent-infant bond provides a foundation for future adaptation, relationships, and mental health for children and adults."); Jayne Barker et al., *Maternal-Newborn Bonding Concept Analysis*, 4 INT'L J. NURSING & CLINICAL PRACS. 1, 1 (2017) ("[T]he connection made after birth directly affects both the mother and newborn physiologically, psychologically and emotionally. A strong bond formed between a mother and infant leads to positive outcomes and impacts the maternal child relationship through the lifespan.").

that the infant has done nothing to deserve. This can constitute a violation of the child's right to health, right to family, and right to be free from discrimination, each protected under treaty and customary international human rights law.[11]

The systemic denial of children's rights that is occasioned by automatic newborn-mother separation can be partially remedied by expanded corrections policies that provide for the accommodation of infants as needed. A paradigmatic United States accommodation example is the Bedford Hills Correctional Facility in New York, which has been in operation for many decades. However, because automatic separation is being driven by the pre-birth decision to incarcerate a pregnant person, even in the knowledge of an imminent and automatic forced separation from their child, prison nurseries themselves fail to address the root cause of this systemic human rights violation.

The root cause of this pervasive human rights violation is the nontransparent and systemic stigmatization of the mother and of the child, denigrations that are then amplified by dehumanizing understandings of prison and its unexamined use. In being sentenced to lose her child, the mother is being painted by the incarcerating authorities and acquiescing bystanders as essentially worthless to her coming child. This portrayal renders it acceptable within the legal system to remove her child from her care at birth. The coming child is also being stigmatized because of their relationship to their mother: it is assumed that the value of punishing the mother is greater than the value of recognizing the child as an inherently separate and innocent person, worthy of due process in major life decisions made by the state. It is considered acceptable for the loss of civil rights—a form of civil death[12]—that comes with incarceration to transfer from mother to child.

In this brief Article, I consider how the communicated understandings of mothers, children, and courts/prisons in the legal system relate to systemic denial of children's rights. I employ a systems theory methodology of legal analysis, which traces the communications

11 On customary rights, see SCHABAS, *supra* note 6, at 222–27 (on family), at 308–10 (on health), and at 166–86 (on discrimination). Treaty protections related to family, health, and discrimination are included under the ICCPR at Articles 17 (family), 24 (discrimination against children), and 26 (discrimination). ICCPR, *supra* note 5. On the right to health, see G.A. Res 2200A (XXI), International Covenant on Economic, Social, and Cultural Rights (Dec. 16, 1966), at Articles 10 (right to health for mothers and children) and 12 (right to health including child development).

12 Civil death refers to how the justice system can render some persons to be persons for the purposes of criminal culpability but also to be dead civilly such that they are incapacitated with respect to their civil status as persons, such as in their inability to vote or hold civil rights. *See* COLIN DAYAN, THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS 40–45 (2011); Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, 549 (Can.).

within a legal system and finds that such communications indeed comprise the legal system. I contend that children born to incarcerated pregnant persons are being systematically denied their rights to personhood and due process because of prejudicial narratives in the legal system. These narratives not only denigrate both mothers and children but also miscast courts and prisons as sites where dehumanization is valid and unfettered. At stake in this process are the personhood rights of hundreds of children each year in the United States and Canada who are arbitrarily denied access to bonding with their mothers at birth, with lifelong ramifications through this mechanism of pre-birth rights denial.[13]

I consider automatic newborn-mother separation as a systemic denial of children's rights in three parts that follow. First, I introduce a systems theory of law and the explanation that it offers regarding how systemic discrimination operates in law.[14] Next, I briefly present scholarship conceptualizing anti-Black and anti-Indigenous systemic discrimination in law and how this relates to systems theory. Finally, I note how the dehumanizing tropes concerning mothers and children, along with dehumanizing understandings of courtrooms and prisons, can be rejected in legal system communications to recognize the legal personhood of the newborn and to prevent human rights violations.

I. Systems Theory and Systemic Discrimination in Law

Here, I am employing German sociologist and lawyer Niklas Luhmann's theory of law as a social system.[15] For Luhmann, the legal system is an essentially amoral coding of rules and is a subsystem within greater society, which is itself a system of communications.[16] Each function of the legal system is a communications event that references both the

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13 *See supra* note 3 and accompanying text.

14 I am in agreement with legal scholar Colleen Sheppard, who discusses systemic discrimination in the following way:

> The problem does not stem from an isolated act of an aberrant individual or from a single policy or rule. It is a broader, dynamic, and institutionalized phenomenon perpetrated, sometimes unwittingly, by individuals who may even endorse the ideals of equality . . . The dynamics of systemic discrimination operate to entrench and perpetuate inequality. Exclusion reproduces itself as inequitable norms and standards become the unquestioned backdrop upon which anti-discrimination laws are required to function.

COLLEEN SHEPPARD, INCLUSIVE EQUALITY: THE RELATIONAL DIMENSIONS OF SYSTEMIC DISCRIMINATION IN CANADA 22 (2010).

15 NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM (Fatima Kastner et al. eds., Klaus A. Ziegert trans., 2004).

16 *Id.* at 284.

norms within the system and the expected rules for changing those norms.[17] When the communicated expectations regarding the system's norms align among actors in the system, the matching expectations form the legal system in a given instance.[18] System content is thus coded along a binary of what is expected to be "legal" vs. "illegal."[19] In addition, the legal system evolves according to the rules that it sets for its own change.[20] Each act of the legal system is a circular reference to the rest of the legal system, as it is perceived as existing from time to time.[21]

To provide a basic example of a systems theory understanding of legal processes, consider the structure of precedent rules within a common law system. Every time a lower court follows the rules set by a higher court's decision, it is likely a result of the counsel communicating before the lower court that such rules form the content of the law, according to the accepted rules for identifying that law. Following the communications, the lower court then conveys its determination of what the law is as regards to that given instance. The mirrored communications of what the law is expected to be, in terms of such rules' statuses within a "legal" versus "illegal" binary, continually form the law and its operation.

Each time a pregnant person is sent to jail and separated from their child at birth, this occurs within the legal system because there is a communicated expectation that it is "legal" to do so, based on the presumption that the woman will be a worthless mother to her coming child. This devaluation of each pregnant person happens in an intersectional manner, specific to the pregnant person's identity.[22] The potent label of the bad mother is versatile and can be applied to many people in specifically tailored ways.[23] The child is also

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17 *Id.*

18 *Id.*

19 *Id.* at 111.

20 *Id.* at 282–83.

21 *See* NIKLAS LUHMANN, A SOCIOLOGICAL THEORY OF LAW 284–85 (Martin Albrow ed., 2d ed. 1985).

22 *See generally* Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (on intersectionality as a concept); Paulina García-Del Moral, *The Murders of Indigenous Women in Canada as Feminicides: Toward a Decolonial Intersectional Reconceptualization of Femicide*, 43 SIGNS 929 (2018) (on intersectionality as is applicable to Indigenous women); Andrea Freeman, *Unmothering Black Women: Formula Feeding as an Incident of Slavery*, 69 HASTINGS L.J. 1545 (2018) (on degradation of Black women's maternity).

23 Michelle Hughes Miller, Tamar Hager & Rebecca Jaremko Bromwich, *The Bad Mother, in Relief*, *in* BAD MOTHERS: REGULATIONS, REPRESENTATIONS, AND RESISTANCE 2–3 (Michelle Hughes Miller, Tamar Hager &

being devalued in legal system communications as someone who is not positioned in the flow of legal process to be able to challenge the actions being taken against them. Instead, the child is a legitimate victim of the legal system who "legally" must suffer simply by association with their mother.[24]

In addition to devaluing the pregnant person (and their coming child) in the courtroom (assuming the incarceration is pursuant to sentence and is not detention without a sentence), there is also a dehumanizing communication circulating in the system in relation to the incarceration process itself. The idea of being sent to prison, or needing to "serve time," is tremendously loaded politically, and it is a very common public opinion to state that all "criminals" deserve whatever punishment that is meted out to them by the state.[25] By extension, children related to such "criminals" must necessarily accept the collateral effects of punishment, even when this means denial of their fundamental legal personhood. The symbolic, rhetorical, and political value of incarceration as a public idea is thus polarizing. Many people, particularly those lacking personal experience with the criminal law, are loath to push back on the notion that prison is a place for "bad" people who deserve whatever pains such imprisonment garners. As a result of these social and political attitudes, there exists in legal system communications relating to imprisonment a sanctioning of the seemingly limitless dehumanization and rights stripping of persons who experience incarceration.[26]

In order to begin to acknowledge the legal personhood of newborns born to incarcerated persons, such that due process can be employed in significant state decisions (such as

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Rebecca Jaremko Bromwich eds., 2017).

24 Credit to Rufus Prince is owed for this "legitimate victim" terminology. Rufus Prince, as quoted in *The Justice System and Aboriginal People*, *in* 1 REPORT OF THE ABORIGINAL JUSTICE INQUIRY OF MANITOBA, ch. 4 (1999), https://ajic.mb.ca/volumel/chapter4.html [https://perma.cc/Q7LW-N8ZL].

25 Milica Vasiljevic & Viki G. Tendayi, *Dehumanization, Moral Disengagement, and Public Attitudes to Crime and Punishment*, *in* HUMANNESS AND DEHUMANIZATION 129–46 (Paul G. Bain, Jeroen Vaes & Jacques Philippe Leyens eds., 2013); see also literature on carceral logics, e.g., Heather Bergen & Salina Abji, *Facilitating the Carceral Pipeline: Social Work's Role in Funneling Newcomer Children from the Child Protection System to Jail and Deportation*, 35 AFFILIA 34 (2020).

26 *See generally* Ethan M. Higgins, Justin Smith & Kristin Swartz, *"We Keep the Nightmares in Their Cages": Correctional Culture, Identity, and the Warped Badge of Honor*, 60 CRIMINOLOGY 429 (2022) (summarizing findings from focus group studies of correctional staff members and arguing that staff regularly dehumanize the incarcerated to construct their identity as protectors); Debra Parkes & Kim Pate, *Time for Accountability: Effective Oversight of Women's Prisons*, 48 CAN. J. CRIMINOLOGY & CRIM. JUST. 251 (2006) (cataloguing the abuses women face in prisons and calling for greater judicial oversight of the system).

denial of maternal bonding and choice of caregiver) that will affect the trajectory of their lives, the dehumanizing communications introduced above must be challenged head on in public discourse surrounding the subject and especially within the relevant legal processes themselves. First, all those involved in the sentencing process must reject the stigmatization of the mother as "worthless" to her coming child. Second, the conceptualization of the child as invisible and irrelevant to the system must also be rejected; there must be space made in the system to consider the child's interests and rights once the child is born. Third, the labeling of prisons as spaces where all pain is acceptable due to the "valid" dehumanization of the prisoner must also be rejected in public and legal discourses surrounding incarceration and pregnancy. So long as it is tacitly accepted that all incarcerated mothers are worthless and that people get what they deserve in prisons, it will be very challenging to have the basic personhood rights of children born to incarcerated persons be respected by state actors, despite the fact that such denial is in patent violation of universally applicable customary international human rights law, which bestows personhood to all people.

Applying a stigma upon someone can stem from both implicit/unconscious bias and conscious bias.[27] It can be understood as either a one-off event or as one of several instances of discrimination that accumulate into systemic discrimination in the legal system. There are hundreds of instances of the legal system's actors degrading mothers and their coming children by automatically separating them.[28] Moreover, well over *a million* mothers are separated from their *already-born* children by imprisonment, affected by the same types of intersectional assumptions related to a lack of value as a mother, introduced above.[29] We can question how fulsomely these children's interests and rights have been considered

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27 *See generally* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007) (on the operation of unconscious bias in the form of misremembering facts).

28 *See* Sufrin et al., *supra* note 3, at 2.

29 An estimated 80% of incarcerated women are mothers. ELIZABETH SWAVOLA, KRISTINE RILEY & RAM SUBRAMANIAN, OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM 7 (2016), https://vera-institute.files.svdcdn.com/production/downloads/publications/overlooked-women-and-jails-report-updated.pdf [https://perma.cc/MZ86-KCBP]. Looking at the numbers of incarcerated women in the United States, it is notable that the number of annual female admissions to local jail custody in 2019 was 2,404,930, while admissions to federal institutions was 6,240; these figures do not appear to include state prisons. Zhen Zeng & Todd D. Minton, *Table 23: Characteristics of the Federal Bureau of Prisons' Detention Facilities and of Local Jails, Midyear 2019*, *in* CENSUS OF JAILS, 2005–2019 – STATISTICAL TABLES, BUREAU OF JUSTICE STATISTICS 46 (Oct. 2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cj0519st.pdf [https://perma.cc/FYP2-T7QL]; *see generally* Aleks Kajstura & Wendy Sawyer, *Women's Mass Incarceration: The Whole Pie 2024*, PRISON POLICY INITIATIVE (Mar. 5, 2024), https://www.prisonpolicy.org/reports/pie2024women.html [https://perma.cc/9D6Y-VZNJ] (compiling data on women's incarceration from several studies).

by sentencers in the legal system when deciding whether and how their mothers should be imprisoned.

As explored below, systemic discrimination in the law serves as a manifestation of oppressive ideologies that perpetuate violence and deny persons the full benefit of the law. Oppressive ideologies become infused into legal system communications, namely into definitions communicated regarding the types of people and spaces being communicated about. In this way, ideals from belief systems like white supremacy, heteropatriarchy, and entitled colonial domination are either directly propagated by players in the legal system or enacted through those players' silence and complicity in the system, allowing them to circulate unchallenged, with discriminatory outcomes.[30]

II. Anti-Black and Anti-Indigenous Systemic Discrimination in the Legal System

In this Part, I discuss systemic discrimination in Canadian and American legal systems and how systems theory can provide one explanation for how such discrimination operates within these systems. In particular, the (implicit or explicit) communication of dehumanizing meanings of legal system norms circulates amongst legal system actors with dire results. Systemic discrimination in the American and Canadian legal systems is manifested by various well-known indicators, including disproportionate over-policing and police violence against racialized persons; disproportionate over-incarceration and apprehension of racialized and poor persons; and prevalent violence against women and gender-diverse persons (which is highly underreported and under-investigated).[31]

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30 *See* Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMANS. 161 (1996); Maile Arvin, Eve Tuck & Angie Morrill, *Decolonizing Feminism: Challenging Connections Between Settler Colonialism and Heteropatriarchy*, 25 FEMINIST FORMATIONS 8 (2013).

31 On over-policing, see, e.g., Andrea Huncar, *Indigenous Women Nearly 10 Times More Likely to Be Street Checked by Edmonton Police, New Data Shows*, CBC NEWS (June 27, 2017), https://www.cbc.ca/news/canada/edmonton/street-checks-edmonton-police-aboriginal-black-carding-1.4178843 [https://perma.cc/R7WL-HB2T]. On police violence, see, e.g., Sarah DeGue, Katherine A. Fowler & Cynthia Calkins, *Deaths Due to Use of Lethal Force by Law Enforcement: Findings from the National Violent Death Reporting System, 17 U.S. States, 2009–2012*, 151 AM. J. PREVENTIVE MED. S173 (2016). On disproportionate over-incarceration, see generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN AN AGE OF COLORBLINDNESS (2010). On child apprehension, see, e.g., Raven Sinclair, *The Indigenous Child Removal System in Canada: An Examination of Legal Decision-Making and Racial Bias*, 11 FIRST PEOPLES CHILD & FAM. REV. 8 (2016). On violence against women as well as underreporting, see, e.g., Karen Bellehumeur, *Systemic Discrimination Against Female Sexual Violence Victims,* 11 CAN. J. HUM. RTS. 131 (2023). On violence against gender-diverse persons, see, e.g., Sandy E. James et al., *Early Insights: A Report of the 2022 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. (2024), https://ustranssurvey.org/report/safety/ [https://perma.cc/4Q4X-VGWL].

Systemic discrimination can be evidenced by statistics, yet it can also be seen in traceable communications in the legal system that can become infused with oppressive and discriminatory ideology. For example, every time a Black person is unduly characterized as a "threat" so as to justify violence or containment against them, and this discriminatory characterization circulates without challenge in the system, a weaponized communicated definition linked to racist ideology is being used, one that denigrates Black persons and dates back to enslavement by whites who justified their dominance through racism.[32]

Systemic discrimination in the legal system is achieved by formal reduction in personhood by specific legal mechanisms, such as denial of felons' right to vote in the United States, or the state wardship created by the Canadian Indian Act, which denied the vote to many Indigenous persons in Canada.[33] However, this Article focuses on how systemic discrimination is *also* achieved by the ways in which persons whose humanity is being reduced by the system become implicitly labeled, treated, understood, and even described by actors in the system through the communication of discriminatory tropes.[34]

For example, scholar Sherene Razack identifies two types of dehumanizing tropes that are often applied to Indigenous persons with discriminatory results as a manifestation of anti-Indigenous racism and settler colonial ideology.[35] These two tropes are the "dying" and the "savage" Indigenous person, examined below.

A "dying" Indigenous person is one who is socially constructed as naturally dying or disappearing due to their own deficiency, a label used to mask deaths, including those from police/prison violence or healthcare neglect, one that includes the "drunken" Indigenous person stereotype.[36] Once a "dying" label is applied to an Indigenous person in legal system

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32 *See* Mary Beth Oliver, *African American Men as "Criminal and Dangerous": Implications of Media Portrayals of Crime on the "Criminalization" of African American Men*, 7 J. AFR. AM. STUD. 3 (2003).

33 *See* ALEXANDER, *supra* note 31, at 2; Indian Act 1876, c 18, § 12 (Can.) (defining a "person" as an individual who was not an Indian).

34 *See* PATRICIA COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 65–96 (2d ed. 2000) (examining the "controlling images" employed to oppress Black women, including the "mammy," "matriarch," "welfare mother," and "jezebel").

35 *See* Sherene H. Razack, *Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George*, 15 CAN. J.L. & SOC'Y 91 (2000).

36 *See* SHERENE H. RAZACK, DYING FROM IMPROVEMENT: INQUESTS AND INQUIRIES INTO INDIGENOUS DEATHS IN CUSTODY 3–4 (2015); *see generally* RACE, SPACE, AND THE LAW: UNMAPPING A WHITE SETTLER SOCIETY (Sherene H. Razack ed., 2002).

communications, it is almost impossible to see them as a full person who merits full rights, including investigations into the factual causes of their death. This dehumanization as naturally "dying" relates to the foundational colonial concept of *terra nullius,* suggesting that the land was "empty" since Indigenous people were and are disappearing anyway.[37] It also relates to the phenomenon of murdered and missing Indigenous women, girls, and gender-diverse persons, which has seen hundreds of murders and disappearances remain unsolved and under-investigated for decades,[38] with the subtext being that it is "natural" for some people to disappear.

The other trope, or "spatial category," that Razack points to is the "savage" Indigenous person who necessarily merits violence and is an inherent threat, both physically and to the colonial order.[39] When understood as a "savage," an Indigenous person requires containment (namely in jail) and/or physical violence. Communicating directives to control Indigenous persons in this fashion has resulted in extreme overincarceration of Indigenous persons in Canada (at 8.9 times the non-Indigenous population for provincial incarceration rates using 2020–2021 Statistics Canada data[40]) and dates from laws passed in the 1800s that created specific offenses for Indigenous persons, including the offense of gathering in groups of three or more.[41] Just like the "dying" trope, the "savage" trope is dehumanizing towards Indigenous persons. A mother can be seen as unfit and "savage," and a child can be seen as unworthy of consideration since they are deemed to be "dying" and "disappearing" anyway.

Systemic discrimination against Indigenous, Black and other racialized persons is often combined with oppressive and exclusionary concepts of valid motherhood in a courtroom when a pregnant person is sent to jail, with all involved knowing that this will mean the child's automatic separation from their mother. This is "intersectional discrimination": when all of the characteristics of a person's constructed status intersect to present them as

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37 *See* ROBERT J. MILLER ET AL., DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES 131 (2010).

38 *See generally* RECLAIMING POWER AND PLACE: THE FINAL REPORT OF THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS 2 (2019), https://www.mmiwg-ffada.ca/final-report/ [https://perma.cc/A953-DXBP].

39 RAZACK, *supra* note 36.

40 Paul Robinson et al., *Over-Representation of Indigenous Persons in Adult Provincial Custody, 2019/2020 and 2020/2021*, STATISTICS CANADA (July 12, 2023), https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2023001/article/00004-eng.pdf?st=LaFKZqIh [https://perma.cc/28A8-TYRT].

41 An Act to Further Amend "The Indian Act, 1880," 1884, c 27, § 1 (Can.).

exposed to a specified form of discrimination.[42] This means that Indigenous, Black, and otherwise racialized mothers are often the ones being assumed to be worthless to their children, without a fair investigation at the time of their child's birth—the point at which the child becomes a legal person. That said, anyone who gives birth, regardless of race, can be dehumanized in legal system communications that are informed by the "good mother" construct that accepts only entirely pure and selfless mothers as being valid;[43] this construct is a manifestation of misogynistic ideology and perpetuates systemic discrimination in relation to gender. Combine intersectional discrimination with the great deference awarded to state decision-makers in incarceration matters, and we have a seemingly unreviewable situation where a decision made before someone's birth marks them for lifelong differential treatment.[44]

III. Rejecting Dehumanizing Tropes in Legal System Communications

In order to remedy this grave rights violation and halt the momentum of systemic discrimination within American and Canadian legal systems, three ideas must be presented by actors in the legal system. First, a mother or birthing parent must not be automatically regarded as worthless to her child(ren) just because she is having an interaction with the criminal law. All implicit and express denigration of a pregnant person regarding their parenting value, including any insinuation that someone is pregnant "on purpose," must be rejected outright. If someone is pregnant, they may well be of great value to their coming child, and this must be fairly determined in due course. Therefore, the system must afford the mother a fair opportunity to actually care for the child if a review of the child's best interests supports it. Seeing the pregnant person as having the capacity to be a valuable caregiver to her child may entail rejecting pervasive racist, anti-poor, and other oppressive notions, but it can be done by focusing on the valued personhood of the pregnant person.

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42 GRACE AJELE & JENA MCGILL, INTERSECTIONALITY IN LAW AND LEGAL CONTEXTS, WOMEN'S LEGAL EDUCATION AND ACTION FUND 12 (2020), https://www.leaf.ca/wp-content/uploads/2020/10/Full-Report-Intersectionality-in-Law-and-Legal-Contexts.pdf [https://perma.cc/S7RA-E6BF].

43 *See* Evelyn Nakano Glenn, *Social Constructions of Mothering: A Thematic Overview*, in MOTHERING: IDEOLOGY, EXPERIENCE, AND AGENCY 1 (Evelyn Nakano Glenn, Grace Chang, & Linda Rennie Forcey eds., 1994) (describing how the conceptualization of motherhood in labor-love and public-private dichotomies reinforces the expectation that "mothers should be endlessly self-sacrificing").

44 *See* Lisa Kerr, *Contesting Expertise in Prison Law*, 60 MCGILL L.J. 43, 56–74 (2015) (describing the deference Canadian and American courts provide to prison administrators in rights complaints brought by prisoners).

The second idea that must be presented in the legal system is the full and valid legal personhood of the child at birth. This person does not deserve to be arbitrarily denied access to bonding, focused care, and vital nurturing from a mother who is keen to provide this to them. The infant's rights to health must be front and center in decisions related to their care. Access to a key caregiver, rather than instability and uncertainty in care arrangements, is of vital importance, as is the child's right to family.

The final idea that must be presented in order to allow the personhood of the child to be recognized relates to the concept of criminal sanctions and the path to imprisonment itself. Many mothers are imprisoned because they cannot afford bail,[45] and bail and other remand decisions must be approached with express consideration of their effects on mothers and children. Guidelines on sentencing processes in Canadian and American jurisdictions should also be altered such that no one is sent to jail without express consideration of the effects of such imprisonment on any children for whom the person has sole caregiving responsibilities. Moreover, sentencing guidelines must directly consider pregnancy. As an instructive example, the U.K. Sentencing Council recently amended their sentencing guidelines, noting that "[t]he impact of custody on an offender who is pregnant or postnatal can be harmful for both the offender and the child including by separation, especially in the first two years of life."[46]

The criminal courtroom cannot become a place of reflective and habitual application of incarceration as the only or most appropriate recourse in many cases. If rehabilitation is truly an objective of sentencing, there should be no instances of a woman being sent to give birth in jail without acknowledgement or consideration of the automatic separation from her child that this decision will bring. Not only is it profoundly counterproductive because it will likely traumatize the mother, but it is a violation of the child's rights, which have not been adequately considered.

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45 *See* Wendy Sawyer, *How Does Unaffordable Money Bail Affect Families?*, PRISON POLICY INITIATIVE (Aug. 15, 2018), https://www.prisonpolicy.org/blog/2018/08/15/pretrial/ [https://perma.cc/4NXC-YXMN] (estimating that, in 2002, 54% of people who were in jail because they could not afford bail were parents with minor children and that 150,000 children had a parent in jail who could not afford to post bail).

46 Sentencing Council, *Miscellaneous Amendments to Sentencing Guidelines* (Apr. 1, 2024) (U.K.), https://www.sentencingcouncil.org.uk/wp-content/uploads/2024-03-20-Log-of-changes-for-publication.pdf [https://perma.cc/4XNR-G3KW]; *see also* Sentencing Council, *Sentencing Pregnant Women and New Mothers* (Apr. 1, 2024) (U.K.), https://www.sentencingcouncil.org.uk/news/item/sentencing-pregnant-women-and-new-mothers/ [https://perma.cc/2SXC-54A3] (announcing and discussing the rationale behind the changes in the General Guideline regarding sentencing pregnant and new mother offenders).

Unless valid unlimited suffering in prisons is rejected as a concept, and relatedly a court or other actor's right to inflict this upon someone is rejected, it will be very difficult to acknowledge the rights and legal personhood of the child once born. Therefore, a construction of the prison (and the court or other process that leads someone there) as being inherently dehumanizing must also be rejected. The U.N. Bangkok Rules give helpful guidance on the matter, encouraging courts to seek non-custodial options for mothers with children whenever possible, allowing a child's personhood to be seen by the system.[47] Yet only when the complete devaluing of mothers in conflict with the law is rejected by actors within the legal system will the basic rights of their children be seen and respected by this legal system. Until then, these children will have their rights systemically ignored and denied in a patently unjust fashion by a system that purports to be fair to all.

47 *See* G.A. Res. 65/229, annex, ¶ 64, United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the "Bangkok Rules") (Dec. 21, 2010) ("Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate."); *see also* G.A. Res. 64/142, annex, ¶ 48, Guidelines for the Alternative Care of Children (Dec. 18, 2009) ("When the child's sole or main carer may be the subject of deprivation of liberty as a result of preventive detention or sentencing decisions, non-custodial remand measures and sentences should be taken in appropriate cases wherever possible, the best interests of the child being given due consideration. States should take into account the best interests of the child when deciding whether to remove children born in prison and children living in prison with a parent. The removal of such children should be treated in the same way as other instances where separation is considered.").