

COLUMBIA
JOURNAL *of*
GENDER & LAW

2025 | Issue 46.1

COLUMBIA
JOURNAL *of*
GENDER & LAW

Issue 46.1

The spacious home of today's feminist movement.

The *Columbia Journal of Gender and Law (CJGL)* is published by students at Columbia University School of Law. Please direct general correspondence to the following addresses:

Columbia Journal of Gender and Law
Columbia University School of Law
435 West 116th Street
New York, NY 10027

Email: jrngen@law.columbia.edu

Subscriptions: Subscriptions are \$65 per volume for institutions, \$50 per volume for public interest organizations, \$40 per volume for individuals, and \$20 per volume for current students. For international subscribers, please add \$10. Individual issues may be purchased for \$20, subject to availability.

Email: jrngen@law.columbia.edu

Submissions: *CJGL* welcomes unsolicited submissions of articles, book reviews, essays, comments, and letters. Please note that due to the volume of materials received, submissions to *CJGL* will not be returned to the author.

Email: columbia.jgl.submissions@gmail.com

Copyright © 2025 by the *Columbia Journal of Gender and Law*.

The *Columbia Journal of Gender and Law (CJGL)* is an interdisciplinary journal designed to address the interplay between gender and sexuality law, and its effects at the personal, community, national, and international levels. The articles we publish reflect an expansive view of gender and sexuality law—embracing issues related to feminism and gender and sexuality studies that cut across all races, ethnicities, classes, sexual orientations, gender identities, and cultures. *CJGL* also publishes articles that merge and blend disciplines—revealing the connections between law and philosophy, psychology, history, religion, political science, literature, and sociology.

CJGL operates by consensus and welcomes all law students at Columbia Law School to apply, regardless of status as a first-year law student, J.S.D. student, or LL.M. student. All editors and staff members are involved in *CJGL*'s decision-making process with respect to selection and editing of articles. Members work in teams and follow articles from acceptance to publication.

In fostering dialogue, debate, and awareness about gender-related issues, our goal is to advance feminist scholarship and gender and sexuality studies at Columbia Law School. We strive to break through traditional legal and academic confines, and serve as both a community and an outlet for interested students, faculty members, and practitioners.

CJGL publishes issues in both the fall and spring semesters. The size of our issues depends upon the number of articles our members vote to accept. We traditionally publish two issues per volume.

The editors and staff members of *CJGL* are grateful for your support. We look forward to your continued readership and welcome your contributions and responses.

ADVISORY

Jessica Bulman-Pozen

Betts Professor of Law
Director, Center for Constitutional Governance
Columbia University School of Law

Elizabeth F. Emens

Thomas M. Macioce Professor of Law
Columbia University School of Law

Susanne B. Goldberg

Executive Vice President for University Life
Herbert and Doris Wechsler Clinical Professor of Law
Director, Center for Gender and Sexuality Law
Columbia University School of Law

BOARD

Jamal Greene

Dwight Professor of Law
Columbia University School of Law

Scott E. Kessler

Lecturer in Law, Columbia University School of Law

Dr. Christine A. Ryan

Associate Director for Religion and Reproductive Rights
Law, Rights, and Religion Project
Lecturer in Law, Columbia University School of Law

SENIOR EDITORIAL BOARD

Editor-in-Chief

Aysha Tabassum

Executive Editor

Sarah Geller

Executive Managing Editor

Pamela Chen

Managing Notes Editor

Tessa DeFranco

EDITORS

Business & Digital Editor

Maddie Everett

Notes Editors

Nicole Koonce • Tia Meriyanda

Symposium & Special Projects Editor

Sarah Hubner

Submissions Editors

Harper Lane • Adara Rosenbaum

Article Editors

Carly Feldman • Alexander Hempel • Rebecca Ju
Ellisa Kim • Hannah LeBaron • Kylie Regan

Production Editors

Yiwen Bao • Isabella Husein • Omar Kassam
Samuel Pittman • Kylie Regan

STAFF MEMBERS

Nur Bookwala • Margaret Broihier • Claire Caroli
Manasi Chande • Will Damarjian • Shenel Ekici-Moling
Brandon Eliason • Andrew Hong • Chloe Hu
Annie Isabel • Alex Jacobson • Keren Katz
Joseph Kelly • Olivia Kim • Naomi Koo
Anna Kramer • Olivia Li • Katie Lutz
Annie McGovern • Ishani Mehta • Duohao Miao
Ashley Morales • Eliza Namnoum • Diana Nerangis
Vanessa Nguyen • Linh Nguyen • Astrid Obadia
Gaby Pesantez • Charlotte Rezak • Michael Rones
Madi Ruch • Brooke Schwind • Liel Sterling
Madison Tammaro • Amy Tang • Serra Tickey
Krithika Vasireddy • Reece Walter • Jinghan Wang
Isabella Weiner • Zora Williams • Lauren Young
Jennifer Zhang • Andy Zheng • Maeve Zhou

TABLE OF

1

Birth in Prison: Systemic Discrimination
Barriers to Acknowledging the Legal
Personhood of the Child

Robin F. Hansen

15

To Prison, With Mom: International Due
Process Issues for Children and Mothers
Posed by Prison Nurseries

Alexa Johnson-Gomez & Julie Matonich

35

Mitigating Motherhood: Centering the
Rights of Children and Mothers in Criminal
Sentencing in England and Wales

Dr. Shona Minson, Maya Sikand, & Pippa Woodrow

CONTENTS

The Early Punishment of Accused Women:
Experiences of Pretrial Detention of Mothers
and Children in a Maternal Child Unit in
Chile

62

Catalina Rufs, Victoria Osorio, Francisca González,
& Pablo Carvacho

Accidental Carceral Subjects: Reassessing
the Prison Nursery Model in India

103

Stuti Shah

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

ROBIN F. HANSEN*

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 individual² gives birth while

© 2025 Hansen. This is an open access article distributed under the terms of the Creative Commons Attribution License, which permits the user to copy, distribute, and transmit the work provided that the original author(s) and source are credited.

* Associate Professor, College of Law, University of Saskatchewan, Saskatoon, Canada. All errors are my own.

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.org>.

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

[org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2021/07/reproductive-health-care-for-incarcerated-pregnant-postpartum.pdf](https://www.acog.org/clinical/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 death¹²—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

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

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 Femicides: 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

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/volume1/chapter4.html> [<https://perma.cc/Q7LW-N8ZL>].

25 Milica Vasiljevic & Viki G. Tendayi, *Dehumanization, Moral Disengagement, and Public Attitudes to Crime and Punishment*, in HUMANNES 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

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.svcdn.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

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

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 data⁴⁰) 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

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.

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.

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.").

TO PRISON, WITH MOM: INTERNATIONAL DUE PROCESS ISSUES FOR CHILDREN AND MOTHERS POSED BY PRISON NURSERIES

ALEXA JOHNSON-GOMEZ* & JULIE MATONICH**

Abstract

Some jurisdictions automatically permit infants born in custody to stay with their mothers, while others enforce immediate separation. Both practices contradict the United Nations Convention on the Rights of the Child's best interests standard and violate general notions of due process. By comparing automatic actions in Mexico, India, and Canada with the United Kingdom's multi-agency admissions boards and Australia's Living with Mum Program, this Article demonstrates how transparent, case-by-case decision-making upholds the human rights of both mother and child. We recommend that each case be thoroughly assessed by an interdisciplinary team to ensure the child's voice is heard and their best interests are prioritized. Decision-makers must weigh the risks and benefits of placing a child in prison with a parent, considering factors such as the child's age, maturity, and the conditions of both the prison and alternative placements. The decision-making process should be transparent, with written findings and an opportunity for judicial review. Meanwhile, governments must systematically collect data and support longitudinal research to ensure policies truly prioritize the human rights of both mother and child.

INTRODUCTION

The term "prison nursery" is something like an oxymoron, merging the stigma-laden environment of incarceration with the innocence of new life. For an incarcerated mother, a prison nursery can mean the difference between getting to be with her child or enduring

© 2025 Johnson-Gomez & Matonich. This is an open access article distributed under the terms of the Creative Commons Attribution License, which permits the user to copy, distribute, and transmit the work provided that the original author(s) and source are credited.

* Legal Fellow, Children of Incarcerated Caregivers. At CIC, I seek to expand international advocacy efforts for children residing in prison with their parent and develop creative research initiatives that drive advocacy. Thank you to CIC team members Barb Frey, Olivia Hudson, Carley Mossbrook Addy, and Anya Lindberg for their research, wisdom, and edits that helped create this article.

** Julie Matonich is a trial attorney and the Board President of Children of Incarcerated Caregivers, where she co-directs the Global Prison Nursery Project.

separation.¹ However, few countries have implemented due process to assess whether such a placement is in the child’s best interest or for how long it should last.²

A child may live in custody with their mother under multiple circumstances:³ in “prison nurseries,” in “mother and baby units” within or adjacent to prisons (units that house mothers and infants separately from the general population), or even in arrangements where mothers and children live among the general population, sometimes with access to a separate childcare center or “crèche.”⁴ In the United States, prison nurseries are relatively unknown to the general public, as only eight states have such programs,⁵ and the federal program is small.⁶ Across the country, these programs tend to be underutilized,⁷ most likely due to women’s lack of awareness and strict eligibility criteria.⁸ The best estimate of the

1 See Mary W. Byrne, Lorie Goshin & Barbara Blanchard-Lewis, *Maternal Separations During the Reentry Years for 100 Infants Raised in a Prison Nursery*, 50 FAM. CT. REV. 77, 83 (2012).

2 See discussion *infra* Parts III.A, III.C.

3 In this issue area, gender-neutral language like “caregiver” over “mother” is typically preferable to promote inclusivity and reduce stigma. However, this Article explicitly focuses on how due process surrounding prison nurseries poses unique issues for women as mothers in this situation. It is also true that in nearly all cases, a child residing with a parent in prison is almost always with the mother; baby-father programs are exceedingly rare. See Emily Bauer, *Infant Inmates: An Analysis of International Policy on Children Accompanying Parents to Prison*, 27 MICH. STATE INT’L. L. REV. 93, 97 (2018). The use of “mother” or “woman” also reflects the phrasing of existing laws, policies, and cultural narratives, but is not meant to exclude or erase people outside the gender binary.

4 See, e.g., Jennifer Warner, *Infants in Orange: An International Model-Based Approach to Prison Nurseries*, 26 HASTINGS WOMEN’S L.J. 65, 66 (2015); PRISONERS’ ADVICE SERVICE, MOTHER AND BABY UNITS (MBUs) 3 (2017), [<https://perma.cc/Y63Y-2EXX>]; Diana Mellow, *Inside Pollsmoor’s Special Baby Mother Unit*, GROUNDUP (Oct. 10, 2016), <https://groundup.org.za/article/babies-prison/> [<https://perma.cc/PNN5-A5PP>]; STUTI SHAH, 2024 INDIA PRISON NURSERY REPORT 6 (2024), [<https://perma.cc/44RP-YSC5>].

5 See Joseph R. Carlson, *Prison Nurseries: A Way to Reduce Recidivism*, 98 PRISON J. 760, 762 (2018). The eight states are Illinois, Indiana, Ohio, Nebraska, New York, South Dakota, West Virginia, and Washington. See *id.*

6 See U.S. OFF. OF THE INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS’ MANAGEMENT OF ITS FEMALE INMATE POPULATION 26 (2018), [<https://perma.cc/HJA5-39ZB>].

7 See *id.* at 28 (explaining that low participation is “likely due to BOP staff members’ failure to fully communicate program opportunities and eligibility criteria to staff and pregnant inmates and to collect relevant data to assess pregnant inmates’ interest and participation in the MINT program and the Residential Parenting Program”).

8 See *id.*

number of children living with a parent in prison worldwide is around 19,000,⁹ though this is likely an underestimate since some countries' prisons do not accurately report on the number of children living inside.¹⁰ Approximately ninety-seven countries allow young children to live with an incarcerated parent.¹¹

In some countries, having a baby in prison results in no official review procedure, and the child remains with the mother by default.¹² In other countries, children are separated from their mothers immediately after birth despite the availability of prison nurseries in certain regions.¹³ Both practices contradict the United Nations Convention on the Rights of the Child ("CRC" or the "Convention"), which mandates that any state action affecting a child must prioritize the child's best interests.¹⁴ One potential reason for the disconnect between this mandate and practice is the vague language of the CRC,¹⁵ which makes the best interests standard open to interpretation and difficult to apply. Given the significant number of children and mothers affected, the lack of process for considering the child's best interests is alarming.¹⁶

Deciding whether a child should reside in prison with their mother raises complex questions about the human rights of both the mother and the child. Ensuring due process

9 *Children of Imprisoned Parents*, PENAL REFORM INT'L, <https://www.penalreform.org/issues/children/what-were-doing/children-incarcerated-parents/> [https://perma.cc/33ZB-TXEV] [hereinafter PENAL REFORM INT'L].

10 Marie Claire Van Hout et al., *Children Living with Incarcerated Mothers: Invisible, Undocumented, and Neglected*, 8 THE LANCET 317, 317 (2024) ("Global data on the number of pregnant women in prison or on children born or living in prison with their mother are unreliable.").

11 The best index of how many countries have some sort of prison nursery or mother-baby unit ("MBU") program comes from LIBR. OF CONG., LAWS ON CHILDREN RESIDING WITH PARENTS IN PRISON (2014), [https://perma.cc/8PCK-Y9SE]. However, more up-to-date research is needed.

12 See discussion *infra* Part III.

13 See discussion *infra* Part III.

14 G.A. Res. 44/25, Convention on the Rights of the Child, art. 3 (Nov. 20, 1989) [hereinafter CRC].

15 Many scholars have opined on the generality of the "best interests" standards as articulated by the CRC. See generally Wouter Vandenhoe & Gamze Erdem Türkelli, *The Best Interests of the Child*, in THE OXFORD HANDBOOK OF CHILDREN'S RIGHTS LAW 204–21 (Jonathan Todres & Shani M. King eds., 2020); Jean Zermatten, *Best Interests of the Child*, in CHILD-FRIENDLY JUSTICE: A QUARTER OF A CENTURY OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD 30–42 (Said Mahmoudi et. al. eds., 2015).

16 See PENAL REFORM INT'L, *supra* note 9.

for the child is closely tied to ensuring due process for the mother.¹⁷ In some cases this is literally true, as certain countries consider the child's best interests during the mother's sentencing process.¹⁸ The absence of a legal or administrative process for deciding the child's placement affects the human rights of both mother and child.¹⁹

Ensuring the rights and welfare of children in cases involving parental incarceration requires a careful and individualized approach.²⁰ First and foremost, countries must prioritize preserving the family unit by developing and using community-based alternatives to incarceration—when it is in the best interests of the child. When a non-custodial alternative is impossible, governments must afford due process to children when deciding if they will reside in prison with a parent. We recommend that each case be thoroughly assessed by an interdisciplinary team to ensure the child's voice is heard and their best interests are prioritized. Decision-makers must weigh the risks and benefits of placing a child in prison with a parent, considering factors such as the child's age, maturity, and the conditions of both the prison and alternative placements. The decision-making process should be transparent, with written findings and an opportunity for judicial review.

17 See, e.g., Rona Epstein, *Mothers in Prison: The Sentencing of Mothers and the Rights of the Child*, 2012 COVENTRY L.J. 1 (2012) (arguing that the rights of the child must be explicitly considered in judicial decisions regarding the imprisonment of mothers, underscoring the interconnected nature of the rights of both mother and child).

18 See discussion *infra* Part III.B.

19 See M. A. Mitchell, S. K. Yeturu & J. M. Appel, *Incarceration Postpartum: Is There a Right to Prison Nurseries?*, J. BIOETHICAL INQUIRY 1 (2024) (arguing that the lack of standardized legal or administrative frameworks governing prison nurseries creates arbitrary and inconsistent decision-making, which can undermine the human rights of both incarcerated mothers and their children by failing to protect the child's best interests or the mother's parental autonomy).

20 See, e.g., Committee on the Rights of the Child, General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration, Art. 3, ¶ 76, (May 29, 2013) [hereinafter CRC General Comment No. 14] (explaining that a best interests assessment for “a child in a specific situation of vulnerability will not be the same as those of all the children in the same vulnerable situation,” which mandates “individualized assessment of each child's history . . . with regular reviews by a multidisciplinary team and recommended reasonable accommodation throughout the child's development process”).

I. Moms and Kids in Prison

A. Incarcerating Mothers

Globally, the number of women incarcerated has risen by an alarming 60% since 2000.²¹ About 740,000 women and girls are currently incarcerated worldwide.²² The United States, which incarcerates more women than any other country, had roughly 190,000 to 200,000 women incarcerated as of 2024.²³ As the number of *women* incarcerated rises, more *mothers* are locked up; around 60% of women incarcerated in prisons in the U.S. are mothers to a child under the age of eighteen.²⁴

Children are at serious risk of harm from a parent's incarceration, including psychological effects of separation, damage to family relationships, financial difficulties, higher likelihood of facing neglect or abuse, and vulnerability to stigma.²⁵ Parental incarceration has the potential to pass criminality intergenerationally, as a child of an incarcerated parent is much more likely to be charged with a crime in their lifetime.²⁶ Meta-analyses indicate a strong correlation between parental incarceration and the development of antisocial behavior in children.²⁷

21 *World Female Prison Population Up by 60% Since 2000*, INST. FOR CRIM. POL'Y RSCH. (Oct. 19, 2022) <https://www.icpr.org.uk/news-events/2022/world-female-prison-population-60-2000> [https://perma.cc/45FA-VJGK].

22 HELEN FAIR & ROY WALMSLEY, *WORLD FEMALE IMPRISONMENT LIST 2* (5th ed. 2022), [https://perma.cc/BDE8-DU99].

23 Aleks Kajstura & Wendy Sawyer, *Women's Mass Incarceration: The Whole Pie*, PRISON POL'Y INITIATIVE (Mar. 5, 2024), <https://www.prisonpolicy.org/reports/pie2024women.html> [https://perma.cc/CM7F-EH8D].

24 LAURA M. MARUSCHAK, JENNIFER BRONSON & MARIEL ALPER, *PARENTS IN PRISON AND THEIR MINOR CHILDREN: SURVEY OF PRISON INMATES, 2016* 3 (2021), [https://perma.cc/DGH4-2NCQ].

25 *See* COMM. ON THE RTS. OF THE CHILD, *REPORT AND RECOMMENDATIONS OF THE DAY OF GENERAL DISCUSSION ON "CHILDREN OF INCARCERATED PARENTS" 2* (2011), [https://perma.cc/R2H3-XT7V] [hereinafter *CRC REPORT ON CHILDREN OF INCARCERATED PARENTS*].

26 *See* Christopher Wildeman & Bruce Western, *Incarceration in Fragile Families*, 20 *FUTURE CHILD* 157, 168 (2010).

27 *See* Joseph Murray et al., *Children's Antisocial Behavior, Mental Health, Drug Use, and Educational Performance After Parental Incarceration: A Systematic Review and Meta-Analysis*, 138 *PSYCH. BULL.* 175, 177 (2012).

B. Children in Prison with Their Mothers

Given the negative impacts of parental incarceration,²⁸ the existence of prison nurseries can seemingly make sense—but no broad consensus has been reached on whether prison nurseries are a net good.²⁹ Proponents of prison nurseries would advocate that maintaining the bond between mother and child can foster secure attachment, which is critical for children to grow into healthy, independent, and resilient adults.³⁰ Additionally, prison nurseries have been shown to have positive effects on the mothers who participate in them, improving parenting skills and reducing recidivism rates.³¹

On the other hand, there is no demonstrated consensus regarding the impacts on the development and well-being of children who have lived in prison.³² Most human rights advocates would agree that prisons are not appropriate environments for children and can result in trauma and stigmatization.³³ Yet forced separation of a baby or child from their incarcerated mother has the potential to lead to worse outcomes for the child if the community care arrangement is inadequate.³⁴ One longitudinal study did indicate that a child who previously resided in a prison nursery as an infant/toddler will have better mental health outcomes at the preschool age than their counterpart who was separated from

28 See *id.*; Wildeman & Western, *supra* note 26, at 168; CRC Report on the Children of Incarcerated Parents, *supra* note 25, at 2.

29 See MANFRED NOWAK, THE UNITED NATIONS GLOBAL STUDY ON CHILDREN DEPRIVED OF LIBERTY 344 (2019) (expressing that the “scope, extent, rationale and possible benefits and/or adverse effects” of prison nurseries “are not well documented”).

30 See Robert Winston & Rebecca Chicot, *The Importance of Early Bonding on the Long-Term Mental Health and Resilience of Children*, 8 LONDON J. PRIMARY CARE 12, 12–14 (2016).

31 See Mary W. Byrne, Lorie S. Goshin & Sarah S. Joestl, *Intergenerational Transmission of Attachment for Infants Raised in a Prison Nursery*, 12 ATTACHMENT HUM. DEV. 375, 377 (2010).

32 See Jo Taylor et al., *Are Custodial-Based Mothers and Children’s Units Evaluated, Effective and Aligned with a Human Rights-Based Approach? – A Systematic Review of the Evidence*, 69 eCLINICALMEDICINE. 1, 9 (2024).

33 See, e.g., Marie Claire Van Hout et al., “*Children in the Prison Nursery*”: *Global Progress in Adopting the Convention on the Rights of the Child in Alignment with United Nations Minimum Standards of Care in Prisons*, 134 CHILD ABUSE & NEGLECT 1, 15 (2022) [hereinafter Van Hout et al., *Children in the Prison Nursery*].

34 See COUNCIL OF EUR., RECOMMENDATION CM/REC(2018)5 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES CONCERNING CHILDREN WITH IMPRISONED PARENTS (2018) 1, 22 (“A transnational psychological study of children separated from a parent in prison in four European countries found that 25 per cent of prisoners’ children are at greater risk of mental health difficulties.”).

their incarcerated mother.³⁵ Overall, more research is needed across a variety of contexts and disciplines to better inform the implementation of prison nurseries.

More complicated still is the situation when a child will age out of the prison nursery program prior to the end of their mother's incarceration and be separated from her some months or years after bonding together.³⁶ Concerns about such separation after bonding have led some jurisdictions to only allow a child to reside with their mother in prison when the mother's term of incarceration is of short enough duration that she and the child can leave the prison together.³⁷

II. Existing Framework in International Human Rights Law

The human rights norm that is most relevant to this issue area comes from Article 3 of the CRC.³⁸ The CRC is considered "universally adopted," as only one country has failed to ratify it—the United States.³⁹

Article 3 of the CRC is also referred to as the best interests of the child standard (abbreviated henceforth as "BIC").⁴⁰ Article 3 states, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the *best interests of the child shall be a primary consideration*."⁴¹ In simpler terms, action taken by the government involving a child must have *someone* consider the child's best interests.⁴² However, there is no

35 See Lorie S. Goshin, Mary W. Byrne & Barbara Blanchard-Lewis, *Preschool Outcomes of Children Who Lived as Infants in a Prison Nursery*, 94 PRISON J. 139, 147 (2014).

36 See Byrne et al., *supra* note 1, at 80.

37 E.g., S.D. DEP'T OF CORR., POL'Y NO. 300-25, MOTHER-INFANT PROGRAM (2024), [<https://perma.cc/37DN-ZT99>] (establishing that only mothers whose initial parole eligibility date or next review date is within 30 months of their child's birth are eligible for program participation, ensuring the mother can care for the child post-incarceration).

38 CRC, *supra* note 14, art. 3.

39 See *View the Ratification Status by Country or by Treaty*, U.N. HUM. RTS. TREATY BODIES, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC [<https://perma.cc/27VB-4V4B>].

40 CRC, *supra* note 14, art. 3.

41 *Id.* at art. 3 (emphasis added).

42 *Id.*; see also G.A. Res. 65/229, at 17 (Dec. 21, 2010) ("Decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children.").

universal definition of BIC to guide this consideration.⁴³ The Committee describes BIC as a “dynamic concept that requires an assessment appropriate to the specific context,”⁴⁴ indicating that it is an adaptable concept determined on a case-by-case basis. Essentially, the core understanding of BIC relies on common sense;⁴⁵ the human rights or liberty of a child should not be altered by the government without a meaningful opportunity to consider what is best for the child.

Article 3 also requires that all signatories to the Convention ensure children receive the necessary “protection and care as is necessary for his or her well-being” and “take all appropriate legislative and administrative measures” to achieve this goal.⁴⁶ The combination of prioritizing BIC and taking all appropriate legislative and administrative measures to ensure necessary protection and care of the child underscores the importance of children’s rights in any decision affecting their welfare. Conversely, Article 3(2) of the CRC stipulates that countries must also respect “the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her.”⁴⁷ This means that while the child’s best interests are a “primary consideration,”⁴⁸ the rights of caregivers must also be factored into any decision concerning a child. Thus, there should be significant overlap in considering the rights of the child and the mother when determining if the child will live with her in prison. Other elements of the CRC—outside of Article 3—layer on top of the BIC standard. Article 7 of the Convention states that every child has “the right to know and be cared for by his or her parents,”⁴⁹ which provides some amount of support for arranging for the child to stay with the mother in prison if a community-based alternative to incarcerating the mother is not available.⁵⁰

43 See CRC General Comment No. 14, *supra* note 20, at ¶ 6 (explaining that the “best interests of the child” standard is context-dependent, flexible, and requires case-by-case evaluation, thus lacking a universally fixed definition).

44 *Id.* at ¶ 1.

45 Because of the context-dependent nature of a best interests assessment, decision-makers require judgment akin to “common sense” in determining what is literally best for the child. See *id.* at ¶ 6.

46 CRC, *supra* note 14, at art. 3.

47 *Id.*

48 *Id.*

49 CRC, *supra* note 14, art. 7.

50 *Id.*

The governing body of the treaty, the Committee on the Rights of the Child (“Committee”), has also previously set out minimum obligations for countries to ensure the rights of a child to live with an incarcerated parent.⁵¹ In assessing the best interests of the child, the Committee has previously recommended the involvement of a multidisciplinary team,⁵² as well as that the decision-maker consult a non-exhaustive, non-hierarchical list of elements, including the child’s views; the child’s identity; preservation of the family and maintaining relations; care, protection, and safety of the child; the situation of vulnerability; the child’s right to health; and the child’s right to education.⁵³

Another useful piece of human rights law is the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the “Bangkok Rules”), which derive from a United Nations General Assembly Resolution and are designed to inform countries of the minimally acceptable standards for women as prisoners.⁵⁴ As a General Assembly Resolution, the Bangkok Rules only have the status of soft law and do not bind any governments—yet they are still persuasive. Bangkok Rule 64 sets out, “Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate.”⁵⁵ If a custodial sentence is necessary, the best interests of the child must then be taken into account by the government, “ensuring that appropriate provision has been made for the care of such children.”⁵⁶ Contact being preserved between mothers and their children is also articulated clearly as a substantive right by the Bangkok Rules.⁵⁷ Rule 26 provides that communication between a mother and her child “shall be encouraged and facilitated by all reasonable means.”⁵⁸

In summary, the international legal framework for protecting the rights of children who reside with their mother in prison is primarily rooted in the CRC, with the BIC standard

51 See Van Hout et al., *Children in the Prison Nursery*, *supra* note 33, at 3.

52 See CRC General Comment No. 14, *supra* note 20, ¶ 47.

53 See *id.* ¶¶ 52–79.

54 GA Res. 65/229, *supra* note 42, at 1–3.

55 *Id.* at 19.

56 *Id.*

57 See *id.* at 13.

58 *Id.*

serving as a key guiding principle.⁵⁹ Although the CRC does not define BIC explicitly, it requires that decisions involving children prioritize their well-being and care while also considering the rights of caregivers.⁶⁰ The Bangkok Rules further reinforce this framework by advocating for non-custodial alternatives for mothers with dependent children and emphasizing the importance of maintaining contact between incarcerated mothers and their children, ensuring that children's rights to care, protection, and family unity are upheld in all decisions.⁶¹

III. Examples of Country Practices

In certain countries, laws presume that children will stay with their mothers in prison (e.g., Mexico and India), while other countries enforce automatic separation (e.g., Canada, China, and Slovakia).⁶² Some countries, such as the United Kingdom, have implemented more robust procedures that afford children and their mothers due process for this crucial decision.⁶³ In the U.K., mothers must apply to an admissions board for placement, and the decision is designed to involve a thorough, multi-agency review process.⁶⁴ The program in Melbourne, Australia offers cottage-style units for mothers and their children, with assessments involving input from Child Protection and other relevant agencies.⁶⁵

A. Automatic Actions

In Mexico, the National Law of Criminal Enforcement addresses the rights of incarcerated women, including their right to live with their child born in prison until the

59 See CRC, *supra* note 14, art. 3.

60 See *id.* at arts. 3, 7.

61 See G.A. Res. 65/229, *supra* note 42, at 1–3, 13, 19.

62 See discussion *infra* Part III.A.

63 See MINISTRY OF JUST. & HM PRISON & PROB. SERV., PREGNANCY, MOTHER AND BABY UNITS (MBUs), AND MATERNAL SEPARATION FROM CHILDREN UP TO THE AGE OF TWO IN WOMEN'S PRISONS (2023) (UK), [<https://perma.cc/5DFP-HULF>].

64 See *id.*

65 See *Pregnancy and Childcare in Prison*, CORR. VICT. (Austl.), <https://www.corrections.vic.gov.au/prisons/going-to-prison/pregnancy-and-childcare-in-prison> [<https://perma.cc/M9LD-VSBF>].

child reaches the age of three,⁶⁶ or, in one Mexican state, the age of six.⁶⁷ On the other hand, children not born in prison are not allowed to reside with their mother.⁶⁸ This can lead to a somewhat arbitrary result when an infant born a day before a mother goes to prison is not allowed to live with their mother, but an infant born the day after a mother enters prison is allowed to stay with her. When a child has been born in prison, the Mexican government generally takes no action, and the interests of the child are not considered; they simply stay there.⁶⁹

In India, incarcerated mothers are presumed to be the caretakers of any young children, and they are thus allowed to decide whether to take their children with them to prison.⁷⁰ Children may stay with their mothers in prison until they are six years old.⁷¹ There is no process for assessing alternative placements for children.⁷²

In other countries, children are separated, de facto or de jure, from their mothers with no individualized process for determining their best interests: at the provincial level in Canada, the lack of process results in de facto separation of mother and child wherein infants are taken from a mother after their birth in detention;⁷³ in China and Slovakia, children are prohibited de jure from living with their incarcerated mothers and are placed in orphanages, with other families, or in foster care.⁷⁴

66 See Ley Nacional de Ejecución Penal [LNEP] [National Criminal Execution Law], Artículos 10 y 36, Diario Oficial de la Federación [DOF] 16-06-2016 (Mex.).

67 See Zoom Interview with Isabella Sánchez Di Egidio, Operational Coordinator, Plataforma NNAPES Reinserta México (Oct. 11, 2024).

68 See *id.*

69 See *id.*

70 See R.D. Upadhyay v. State of A.P. & Ors., AIR 2006 SC 1946 (2006) (India).

71 See *id.*; see also SHAH, *supra* note 4, at 2.

72 See *id.*

73 British Columbia and the Northwest Territories have documented that they do not participate in this practice. See Robin Hansen, Associate Professor, Univ. of Saskatchewan College of Law, Lecture on IL and Birth in Prison June 2024 (Jun. 13, 2024), <https://usask.cloud.panopto.eu/Panopto/Pages/Viewer.aspx?id=1ffecac7-e5b9-4e9c-994b-b18e0145bdf5> [<https://perma.cc/GE9Y-XFJW>].

74 See Marie Claire Van Hout et al., *Children Living in Prison with a Primary Caregiver: A Global Mapping of Age Restrictions and Duration of Stay*, 7 LANCET 809, 810 (2023) [hereinafter Van Hout et al., *Children Living in Prison*].

B. Process During Maternal Sentencing

The South African case of *M v. State* is the most notable example of the judiciary considering a child's best interests in the context of maternal sentencing.⁷⁵ The underpinning concern in this case was the significant emotional and developmental consequences for children when their primary caregiver is imprisoned.⁷⁶ The court opined that the best interests of the child must be a primary consideration when the court decides on sentencing the mother, as it acknowledges the profound effect incarceration can have on a child's welfare.⁷⁷

Overall, this case stands for the proposition that a sentencing approach must consider not only the crime and the defendant but also the profound impact on any dependent children to preserve the human rights of both mother and child.⁷⁸ The ruling encouraged exploring alternative sentencing options that would mitigate the adverse effects on the child while still addressing the legal ramifications for the mother; *M v. State* reflects a judicial commitment to integrating children's rights into sentencing decisions, recognizing the way that incarceration has overlapping effects on a mother and her children, too.⁷⁹

C. Examples of More Robust Procedural Safeguards

The United Kingdom offers a set of practices designed to ensure due process for children living with an incarcerated parent.⁸⁰ The mother must submit a written application to an admissions board at her prison to be considered for a mother-baby unit (MBU).⁸¹ The board, composed of an independent chair, the MBU manager, and a community offender manager, gives recommendations to the prison governors/directors who make the final decisions, as well as oversees the "multi-agency" that operates MBUs.⁸² The best interest

75 Also referred to as *S v. M. M v. State* 2007 CC 53/06 ZACC 18 (S. Afr.).

76 See *id.* at 42.

77 See *id.* at 14–16.

78 See *id.*

79 See *id.*

80 See The Prison Rules 1999, c. 12 (Eng.).

81 See MINISTRY OF JUST. & HM PRISON & PROB. SERV., *supra* note 63, at 25.

82 See *id.* at 1, 3.

of the child is the primary—but not only—consideration for the board.⁸³ It is considered alongside the health and safety of other children and women living in an MBU.⁸⁴ Social workers serve as representatives for children and conduct assessments for the boards to consider.⁸⁵ After a mother is approved, a “care plan” will be made for her child within the first few days after admission,⁸⁶ with the placement reviewed no less than every eight weeks.⁸⁷ Mothers whose applications have been denied can appeal their decision to the Head of the Women’s Team in Prison and Probation Services.⁸⁸

In Melbourne, Australia, the Living with Mum (“LWM”) Program allows certain caregivers to live in cottage-style units in two of its prisons.⁸⁹ The program is offered to pregnant women entering custody and to all women in custody—both those sentenced and in pretrial—who are the parent of an infant or preschool-aged child/children before incarceration.⁹⁰ An LWM Program Support Worker conducts a thorough assessment focusing on the mother’s reasons for wanting her child with her in prison, her psychosocial history, prison adjustment, and involvement in rehabilitation programs.⁹¹ The assessment also examines the child’s background, care arrangements, medical conditions, and development.⁹² Input from relevant individuals and agencies, including Child Protection, is incorporated; the mother’s feedback is considered, and the mother may appeal to the Deputy Commissioner for reconsideration of a denial of admission to the program.⁹³ The

83 *See id.* at 25.

84 *See id.* (describing the decision to admit a mother and their child as driven by the “necessity to maintain good order and self-discipline within the prison”).

85 *See id.* at 26.

86 *See id.* at 42.

87 *See* MINISTRY OF JUST. & HM PRISON & PROB. SERV., *supra* note 63, at 45.

88 *See id.* at 37.

89 *See* CORR. VICT., *supra* note 65.

90 *See id.*

91 *See id.*

92 *See id.*

93 *See id.*

Deputy Commissioner may also direct that the child be removed from the prison if it is demonstrated that it is no longer in the child's best interest to reside there.⁹⁴

IV. Discussion

International standards can—and should—be developed to ensure a process for evaluating a child's best interests before placement in prison with their mother. The developmental risks to children living in prisons, ranging from psychological harm, disrupted family relationships, and stigma,⁹⁵ underscore the need for rigorous procedures that determine whether living in a prison nursery is truly in the child's best interest. However, the international community has been relatively silent on this issue thus far,⁹⁶ which begs the question of what its role should be in addressing the rights of this vulnerable population.

Because of the potential developmental impacts of placing children with their mothers in a carceral setting,⁹⁷ countries must establish procedural guarantees for determining the child's best interest on an individualized basis and ensure that such determinations are subject to review. We argue that children are denied access to justice when countries place them in a prison setting without an adequate process to determine whether such a placement would be in their best interest and without a right to administrative or judicial review of this determination. Furthermore, women are denied their rights when, for example, a child is taken away from them without due process, when the child is placed in foster care without due process, or when children are removed from the care of a mother and no lines of

94 See *id.* (“This is most likely to occur if the mother is involved in a serious prison offence, is moved to a hospital, or is transferred to a unit which is not considered suitable for accommodating a child.”).

95 See CRC Report on Children of Incarcerated Parents, *supra* note 25, at 2; Wildeman & Western, *supra* note 26, at 168; Murray et al., *supra* note 27, at 177.

96 The closest an international authority has come to speaking directly on lack of due process for this population comes from the CRC REPORT ON CHILDREN OF INCARCERATED PARENTS, *supra* note 25, at 1, which refers to the “difficulties faced in many countries where the rights of babies and children living with their incarcerated parents have neither been taken into consideration nor respected.” However, this mere mention, not an authoritative source of international law nor interpretive guidance, is potentially the one and only time that this issue has been referenced.

97 See Emily Bauer, *supra* note 3, at 102; Mia van Schalkwyk et al., *An Occupational Perspective on Infants Behind Bars*, 26 J. OCCUPATIONAL SCI. 426, 434–35 (2019).

communication are preserved between mother and child without justification.⁹⁸ It is of vital importance to respect the human rights of both mother and child in these scenarios, yet they could be in tension. When it is not in the best interests of the child to live in prison, where it has been determined through due process that a better alternative exists, the child should not be placed in prison even if it might be preferable for the mother.⁹⁹

A. Challenges in Legal and Administrative Frameworks

While the flexibility of the BIC can be beneficial in some legal frameworks,¹⁰⁰ it often leads to challenges, as there is no clear standard for determining the best interests of a particular child or group of children even if they are in similar circumstances.¹⁰¹ Moreover, the critical notion that children have valid insights about their own well-being, as well as valid solutions to their own problems, is frequently overlooked by government actors.¹⁰² The flexible framework of the BIC standard can arguably be molded to manipulate outcomes; it is difficult to reconcile paternalistic control by parents or the government with the very idea of rights for children.¹⁰³

There are many reasons why a country might have a system that does not include a moment of process to consider the human rights implications of placing a child in prison with their mother, such as the diversity of prison contexts, the variability of countries' policies on placement and duration, the lack of a consensus framework for decision-making (including practice-oriented checklists), and the lack of data.¹⁰⁴ However, in a matter of such vital importance, countries must not let such barriers stand in their way.

98 See G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, art. 16 (Dec. 18, 1979) [hereinafter CEDAW].

99 CRC General Comment No. 14, *supra* note 20 ¶ 38 (explaining that a child's best interests are "not simply to be 'a primary consideration' but 'the paramount consideration'").

100 See Caroline Simon, *The "Best Interests of the Child" in a Multicultural Context: A Case Study*, 47 J. LEGAL PLURALISM & UNOFFICIAL L. 175, 176–77 (2015).

101 See Jean Zermatten, *Best Interests of the Child*, in CHILD-FRIENDLY JUSTICE: A QUARTER CENTURY OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD 30 (Said Mahmoudi et al. eds., 2015).

102 See GERISON LANSDOWN, *THE EVOLVING CAPACITIES OF THE CHILD* 32 (UNICEF Innocenti Rsch. Ctr. ed., 2005).

103 See John Tobin, *Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?*, 33 MELB. UNIV. L. REV. 579, 590 (2009).

104 See Van Hout et al., *Children Living in Prison*, *supra* note 74, at 812–13.

B. The Need for Adequate Due Process

As highlighted *supra* Part III.A, there are instances where children are placed in prisons with their mothers automatically or, conversely, separated from them without adequate process to assess the child's well-being.¹⁰⁵ Such decisions are made without considering the specific needs and circumstances of each child.¹⁰⁶ This lack of procedural guarantees is a violation of a child's human rights under the CRC.¹⁰⁷ And when children are placed in prisons or removed from their mothers without a transparent, individualized process, *both* the child's and the mother's rights may be violated.¹⁰⁸ One factual scenario is a baby is taken from their mother shortly after birth, without due process, and placed in foster care.¹⁰⁹ In a situation like that, the child's right to maintain a relationship with their mother is not respected, while the mother's right to be a parent is taken from her.¹¹⁰

When children are automatically placed with their mothers or automatically separated, there can be an underlying assumption about the mother that has influenced the law or practice. In situations globally where the mother automatically has her child taken with her to prison, the law arguably presumes that the mother is the only one fit to take care of the child and that the father is incapable.¹¹¹ In situations where the child is automatically separated from their mother (and not for the reason that an alternate caregiver lives in the community), the assumption may be that the mother is unfit to take care of her child because she is a criminal.¹¹² These blanket approaches fail to consider the specific circumstances

105 See discussion *supra* Part III.A.

106 See discussion *supra* Part III.A.

107 Any state action affecting a child's life must involve a best interests assessment. See CRC, *supra* note 14, at art. 3 § 1.

108 See CRC, *supra* note 14, at art. 3 § 1, art. 7 §§ 1, 2; CEDAW, *supra* note 98, at art. 16, § 1(d).

109 See generally Christina Scotti, *Generating Trauma: How the United States Violates the Human Rights of Incarcerated Mothers and Their Children*, 23 CUNY L. REV. 38, 65–67 (2020) (explaining that, under the Adoption and Safe Families Act, parents have had their parental rights *expressly* terminated simply because of their imprisonment) (emphasis added).

110 See CRC, *supra* note 14, art. 7 §§ 1, 2; CEDAW, *supra* note 98, at art. 16 § 1(d).

111 See generally Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare Reform Family and Criminal Law*, 83 CORNELL L. REV. 688 (1998) (analyzing presumptions about women as “good” or “bad” mothers based on the ways in which they come into contact with the courts).

112 See, e.g., ROBIN HANSEN, PRISON BORN: INCARCERATION AND MOTHERHOOD IN THE COLONIAL SHADOW 30 (2024) (expressing the observation that many people assume “a woman sentenced for a crime ha[s] no value

and needs of individual mothers and children, an approach essential for safeguarding their human rights.

In some countries, such as South Africa, due process is afforded to children and their mothers by considering the existence of the relationship while the mother is receiving her sentence.¹¹³ This presents another challenge. While this provides the mother with a sentencing regime that considers her holistically, as an individual, this practice could risk artificially “considering” the best interests of a child, as the proceeding is centered around the mother, not the child.¹¹⁴ On the other hand, community-based alternatives to incarceration, as recommended by the Bangkok Rules,¹¹⁵ can only be considered in the context of maternal sentencing.

C. Persuasive Practices and Sources of Authority

Countries with more robust procedural safeguards, like the United Kingdom and Australia, offer models of more nuanced approaches that better balance the rights of both the mother and the child.¹¹⁶ These systems employ judicial review, multi-agency assessments, and opportunities for appeal, which help ensure that the child’s best interests are given due consideration.¹¹⁷ In the U.K., decisions about whether a child can live with their mother in prison are made by a board that considers a range of factors, including the child’s welfare and the conditions of the mother’s imprisonment.¹¹⁸

In establishing the procedural norms concerning the decision about the child’s placement, the Committee would benefit from considering the African Union’s (“AU”)

as a mother”).

113 See discussion *infra* Part III.B.

114 “The very expansiveness of the paramountcy principle appears to ‘promise everything but deliver little in particular’ . . . A truly child-centered approach requires an in-depth consideration of the needs and rights of the particular child in the ‘precise real-life situation’ he or she is in.” Ann Skelton, *Too Much of a Good Thing? Best Interests of the Child in South African Jurisprudence*, 52 DE JURE 557, 565 (2019) (quoting *S v. M. M v. State* 2007 CC 53/06 ZACC 18 ¶ 23 (S. Afr.)).

115 See G.A. Res. 65/229, *supra* note 42, at 19.

116 See discussion *infra* Part III.C.

117 See discussion *infra* Part III.C.

118 See discussion *infra* Part III.C.

approach to this process.¹¹⁹ According to the African Committee of Experts on the Rights and Welfare of the Child's ("ACERWC") General Comment on Children of Incarcerated and Imprisoned Parents and Primary Caregivers, countries "should put in place legislative and administrative mechanisms to ensure that a decision for a child to live in prison with his/her mother or caregiver is subject to judicial review."¹²⁰ "Criteria for taking such a decision should be developed and include consideration of the individual characteristics of the child such as age, sex, level of maturity, quality of relationship with the mother, and existence of quality alternatives available to the family."¹²¹ The ACERWC further recommended that the process be characterized by an "individualized, qualitative approach that is nuanced and based on actual information about incarcerated parents/caregivers and children, rather than a quantitative, categorical approach based on generalized and simplistic assumptions."¹²²

Regional jurisprudence from Africa and Europe, as well as scholarship, supports the following core elements: the administrative procedure for determining whether a child should be incarcerated with a parent should (a) take place on a case-by-case basis;¹²³ (b) include the voice of the child;¹²⁴ (c) be documented in writing; and (d) be subject to judicial review.¹²⁵ Lastly, the procedure must overall take the child's views into account—participating on their own or through representation—at all stages affecting their placement.¹²⁶

D. The Need for More Research and Clear Guidelines

The debate surrounding whether children should live in prison with their incarcerated mothers is complicated by a significant gap in comprehensive research on the long-term

119 See Van Hout et al., *supra* note 33, at 3.

120 African Committee of Experts on the Rights and Welfare of the Child, General Comment No. 1, ¶ 24 [hereinafter ACERWC General Comment No. 1].

121 *Id.*

122 *Id.* ¶ 15.

123 See COUNCIL OF EUR., *supra* note 34, at 39.

124 See CRC General Comment No. 14, *supra* note 20 ¶¶ 43–45; African Charter on the Rights and Welfare of the Child, Art. 4(1).

125 See ACERWC General Comment No. 1, *supra* note 120 ¶ 24.

126 See CRC REPORT ON CHILDREN OF INCARCERATED PARENTS, *supra* note 25 ¶ 41; ACERWC General Comment No. 1, *supra* note 120, at ¶ 31.

outcomes of such placements. While some studies suggest potential benefits, such as improved maternal bonding, mental health, and reduced antisocial behavior in children,¹²⁷ not enough research has been done to demonstrate conclusive results.¹²⁸ This lack of definitive research creates a challenging environment for policymakers, who are left without clear data to guide decisions that genuinely reflect the best interests of the child. More rigorous, longitudinal studies are urgently needed to better understand the developmental and psychological impacts of having a child reside with their mother in prison, as well as to inform evidence-based policy decisions.

In parallel, the current international legal framework, although providing important general principles and recommendations,¹²⁹ falls short in offering specific, standardized criteria for determining the best interests of the child in cases involving incarcerated parents. While instruments like the CRC and the Bangkok Rules advocate for the consideration of children's well-being in such circumstances,¹³⁰ there is no universally agreed-upon process or set of criteria for evaluating these cases in a consistent and transparent manner.¹³¹ To address this gap, there is a pressing need for clearer guidelines to ensure decisions are made based on comprehensive, individualized assessments rather than generalized assumptions.¹³²

These guidelines should mandate assessment by multidisciplinary teams—such as social workers, child psychologists, and legal experts—to provide a holistic assessment of each child's needs. Additionally, judicial oversight must be embedded within the process to guarantee that decisions are subject to review and that both the rights of the child and the incarcerated mother are respected.

127 See Goshin et al., *supra* note 35, at 147. Cf. Murray et al., *supra* note 27, at 177.

128 Goshin et al., *supra* note 35, is one of the only studies that has actually examined longitudinal effects of prison nursery placements.

129 See, e.g., CRC Rep. on Children of Incarcerated Parents, *supra* note 25.

130 See CRC, *supra* note 14, art. 3; G.A. Res. 65/229, *supra* note 42, at 19.

131 See NOWAK, *supra* note 29, at 344.

132 While the Committee has made it clear that the best interests of the child should be considered on a case-by-case basis, this is not so specific that countries are bound to provide a robust, individualized process in the prison nursery context. See CRC General Comment No. 14, *supra* note 20, at ¶ 32.

CONCLUSION

To ensure the rights of the child in these cases, a comprehensive and methodical approach is essential. We recommend that each case undergo an individualized assessment conducted by a multidisciplinary team,¹³³ including a neutral representative (such as a social worker, child welfare representative, guardian ad litem, or similar) to ensure the child's voice is heard. Decision-makers should apply a consistent balancing test to evaluate the potential harms and benefits of such placements versus the potential harms and benefits of available alternatives, considering factors like the child's views, the child's identity, preservation of the family/maintaining relations, care/protection/safety of the child, the situation of vulnerability, the child's right to health, and the child's right to education.¹³⁴

Written findings detailing the factors considered should be documented, and the decision must be subject to timely administrative reconsideration and judicial review. Additionally, ongoing monitoring by child protection agencies is crucial, given that circumstances such as prison conditions and the child's development are dynamic. Extensions should be considered if necessary to find appropriate alternative arrangements when age limits impose separation. Lastly, governments must systematically collect and maintain data on both children residing in prison with parents and those denied such placements, including records of decisions, monitoring efforts, and reentry circumstances. This structured approach ensures that each decision prioritizes the child's welfare and adapts to changing conditions. A mother's rights can also be upheld through the process by recognizing her rights when it comes to any government action involving her child. Prioritizing community-based alternatives to incarceration—so that mothers and children can stay together outside of prisons—may be the best way to promote the human rights of both.

133 See *id.* ¶ 47.

134 See *id.* ¶¶ 52–79.

MITIGATING MOTHERHOOD: CENTERING THE RIGHTS OF CHILDREN AND MOTHERS IN CRIMINAL SENTENCING IN ENGLAND AND WALES

DR. SHONA MINSON,* MAYA SIKAND,** & PIPPA WOODROW***

Abstract

This Article examines the evolving legal and policy frameworks surrounding the sentencing of mothers and pregnant women in England and Wales, focusing on the balance between punitive justice and the rights of children. Tracing two decades of legal precedent, it highlights key milestones, including the landmark case *R v. Petherick*, and subsequent developments in case law and sentencing guidelines. Despite incremental progress, inconsistencies in lower courts persist, with sentencers often failing to adequately weigh the disproportionate impact of imprisonment on dependent children and pregnant women. Notable cases reveal the judiciary's gradual recognition of the unique harms associated with maternal incarceration, underscored by catastrophic events such as infant deaths in prison that have spurred public and professional discourse. This Article underscores the necessity for legislative reforms to prioritize non-custodial sentences for mothers and pregnant women, ensuring a comprehensive assessment of family impacts in sentencing decisions. Recent appeals in 2024 illustrate a growing judicial awareness, though gaps remain in first-instance courts' application of these principles. To safeguard children's welfare and uphold family rights, this Article advocates for statutory presumptions against custodial sentences in these contexts, aligning justice with broader social and developmental outcomes.

© 2025 Minson, Sikand, & Woodrow. This is an open access article distributed under the terms of the Creative Commons Attribution License, which permits the user to copy, distribute, and transmit the work provided that the original author(s) and source are credited.

* University of Oxford.

** K.C. Doughty Street Chambers.

*** Barrister, Doughty Street Chambers.

INTRODUCTION

When a mother or pregnant woman is sentenced in a criminal court, the decision and its outcome may interfere with her child or children's right to family life.¹ In 2001, the civil division of the Court of Appeal of England and Wales formally recognized the need to consider dependent children when sentencing a mother in a public law case that challenged prison policy on the upper-age limit for babies living in prison Mother and Baby Units.² However, it has taken more than twenty years for the criminal courts to catch up and formally recognize the true impact of a sentence on dependent children or a woman's pregnancy as an essential part of the sentencing calculus when a woman is sentenced.³

In this Article, we analyze the development of sentencing practice over the past two decades to understand the process of change. The landmark case of *R v. Petherick*⁴ set out the considerations English courts should give to the rights of dependent children under Article 8 of the European Convention of Human Rights (ECHR)⁵ to respect family life and provide a precedent for maternal sentencing cases. Since *Petherick*, nineteen sentencing appeals from mothers have been reported in the criminal division of the Court of Appeal, and this Article considers each of the decisions in those cases in order to chart the development of legal practice concerning the sentencing of mothers and pregnant women. The case law

1 Human Rights Act 1998, c. 42 pmbl. (UK) (stating that in England and Wales the right to family life as set out in Article 8 of the European Convention of Human Rights is given effect in domestic law by the Human Rights Act 1998).

2 *R (on the application of P and Q) v. SOS for the Home Department* [2001] EWCA (Civ) 1151 (Eng.).

3 See *Sentencing Pregnant Women and Mothers*, SENT'G COUNCIL (Apr. 1, 2024) (UK), <https://www.sentencingcouncil.org.uk/news/item/sentencing-pregnant-women-and-new-mothers/> [https://perma.cc/HHY9-SPZQ].

4 *R v. Petherick* [2012] EWCA (Crim) 2214 ¶ 17 (Eng.) ("First, the sentencing of a defendant who has a family inevitably engages not only her own article 8 right to family life but also that of her family and that includes (but is not limited to) any dependent child or children.").

5 European Convention on Human Rights art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

and sentencing guidelines⁶ have established new principles and created new obligations for the sentencing courts with regard to pregnant women and mothers, but the process of change has been piecemeal and incremental. There have been periods of accelerated activity when policy and practice have been influenced by particular catastrophic events such as the COVID-19 pandemic, prison overcrowding,⁷ and the deaths of two babies in women's prisons in England.⁸ However, application of these principles remains knee-jerk and inconsistent. Without legislative change that significantly limits custodial options, mothers will continue to suffer punishments that cause disproportionate harm to themselves and their children.

I. 2001–2012: *Petherick* and the Right to Family Life

The first reported case to recognize a child's Article 8 ECHR right to family life in the context of maternal sentencing was *R (on the application of P and Q) v. SOS for the Home Department* in 2001.⁹ Lord Phillips stated that the sentencing of a parent for a criminal offense engages the right to family life of both the parent and the child, and the right is not automatically lost by reason of criminal conviction.¹⁰ He noted that Article 8 dictates that any interference by the state with a person's right to family life must be in response to a pressing social need and proportionate to the legitimate aim pursued; the more serious the interference, the more compelling the justification must be; and interference cannot be much more serious than the act of separating a mother from a very young child.¹¹ The following year, a thirty-three-year-old mother of two was sentenced to eight months of

6 The Sentencing Council for England and Wales issues sentencing guidelines for use in the courts. *See* SENT'G COUNCIL (UK), <https://www.sentencingcouncil.org.uk> [<https://perma.cc/7VJT-PJXP>].

7 *See* *R v. Manning* [2020] EWCA (Crim) 592 ¶¶ 41–42 (Eng.); *R v. Seed and Stark* [2007] EWCA (Crim) 254, ¶ 2 (Eng.) (“When considering the length of a custodial sentence it should properly be borne in mind that the prison regime is likely to be more arduous as a result of overcrowding.”).

8 *See* PRISON & PROB. OMBUDSMAN, INDEPENDENT INVESTIGATION INTO THE DEATH OF BABY B AT HMP & YOI STYAL ON 18 JUNE 2020 (2022) (UK) [hereinafter INDEPENDENT INVESTIGATION INTO DEATH OF BABY B]; PRISON & PROB. OMBUDSMAN, INVESTIGATION INTO BABY DEATH AT HMP BRONZEFIELD IDENTIFIES KEY FAILINGS (2021) (UK) [hereinafter INDEPENDENT INVESTIGATION INTO DEATH OF BABY A]; SURREY COUNTY COUNCIL, INQUEST TOUCHING THE DEATH OF AISHA CLEARY: FINDINGS AND CONCLUSION (2023) (UK), https://www.surreycc.gov.uk/__data/assets/pdf_file/0003/346557/A-Cleary-Findings-and-Conclusion-28-July-2023.pdf [<https://perma.cc/QL9M-WTQV>] [hereinafter SURREY CORONER'S COURT].

9 *R (on the application of P and Q) v. SOS for the Home Department* [2001] EWCA (Civ) 1151 (Eng.).

10 *Id.*

11 *See id.* ¶ 78.

imprisonment for two counts of obtaining services by deception.¹² On appeal to the Court of Appeal, the Lord Chief Justice said, “With a mother who is the sole support of two young children . . . the judge has to bear in mind the consequences to those children if the sole carer is sent to prison.”¹³ The Court of Appeal found that it was not necessary for the mother to be sent to prison, and they quashed the original sentence, replacing it with a community rehabilitation order for six months.¹⁴ “The message that this court would like to convey to those who have the difficult task in sentencing in cases of this sort is that a community sentence is normally appropriate but if imprisonment is necessary, the shortest prison sentence possible should be imposed.”¹⁵

The next widely reported case was *R v. Bishop*¹⁶ in 2011, which established that it is the responsibility of the sentencing court to obtain sufficient information to allow it to balance the punishment of the offender against the impact of the offender’s punishment on the child. In the same year, the High Court heard a judicial review challenge to a magistrate court’s decision to commit a mother to prison for non-payment of Council Tax.¹⁷ The decision was made without any consideration of the potential impact on her children, including who might care for them in her absence.¹⁸ She did not expect to be imprisoned and took her children to school on the morning of the hearing, fully expecting to collect them that afternoon. The High Court found:

The existence of children cannot of course keep a person out of prison who should properly be sent to prison, but a sentencing court needs to be able to bear in mind what the effect on the children will be, and, if there are children and if the court does not have the information it needs in order to assess the effect of the parent’s imprisonment on them, then the court must make inquiries so that it is properly informed.¹⁹

12 *R v. Mills* [2002] EWCA (Crim) 26 (Eng.).

13 *Id.* ¶ 15.

14 *See id.* ¶ 19.

15 *Id.* ¶ 18.

16 *R v. Bishop* [2011] EWCA (Crim) 1446 (Eng.).

17 *See R (on the application of Aldous) v. Dartford Magistrates’ Court and Gravesham BC* [2011] EWHC (Admin) 1919 (Eng.).

18 *See id.* ¶ 15.

19 *Id.* ¶ 16.

Despite the cases at the start of the new millennium that drew attention to the relevance of children's rights in maternal sentencing decisions, many sentencers continued to pass sentences that failed to properly balance the harm to children with the need to punish or deter. A review of thirty-three sentencing appeals from mothers who had been sentenced to imprisonment between 2003 and 2011 revealed that in twenty-one of the twenty-seven cases where the sentence was reduced, the consideration of dependent children was a specified factor leading to that reduction, indicating that the lower courts were not affording due weight to that issue when sentencing.²⁰

The issue of dependent children had, however, reached a level of recognition by the Sentencing Council of England and Wales, and this was the next step forward in the incremental change of approach. Judges and magistrates must sentence in accordance with the sentencing guidelines produced by the Sentencing Council of England and Wales unless there is an exceptional reason to depart from them.²¹ Guidelines develop in response to precedents set in case law, relevant research, and social policy considerations. Prior to 2011, the guidelines made no reference to dependent children, but for the first time in 2011, the assault guideline²² included in the list of factors that *could* be considered in mitigation whether "the defendant is the sole or primary carer for dependent relatives."²³ That mitigating factor has been included in every sentencing guideline published since that date. It is significant that the importance of considering dependents reached the Sentencing Council and that they chose to embed it in a guideline.

20 See Shona Minson & Rachel Condry, *The Visibility of Children Whose Mothers Are Being Sentenced for Criminal Offences in the Courts of England and Wales*, 32 LAW CONTEXT 28, 39 (2015); see also Rona Epstein, *Mothers in Prison: The Sentencing of Mothers and the Rights of the Child*, 2012 COVENTRY L.J. 1 (2012). Cases referenced in these papers were found through daily searches of court lists and newspapers and by placing notices in magazines for women in prison. The sample analyzed forty-three appeal cases, ten from the magistrates' court to the Crown and thirty-three in which mothers appealed their custodial sentences from the Crown Court to the Court of Appeal between 2003 and 2011. In seven of the cases appealed to the Crown Court, the Crown Court judge reduced the sentence because the children had not been given sufficient consideration. In twenty of the cases appealed to the Court of Appeal, the appeal court found that the original sentencing court had given insufficient weight to the defendant's motherhood as a mitigating factor.

21 See *About the Sentencing Council*, SENT'G COUNCIL (UK), <https://www.sentencingcouncil.org.uk/sentencing-and-the-council/about-the-sentencing-council/> [<https://perma.cc/L5C9-4GYU>].

22 SENT'G COUNCIL FOR ENG. & WALES, ASSAULT DEFINITIVE GUIDELINE (2011) (UK), [<https://perma.cc/GS36-8QU5>].

23 *Id.* at 5.

The next significant advancement in ensuring judicial consideration of child dependents when sentencing mothers took place in 2012. In the cases of *R v. Solliman*²⁴ and *HH v. Italy*,²⁵ the United Kingdom Supreme Court stated that the rights of children are a distinct consideration that must weigh heavily in decisions about them. Then, in October 2012, in the case of *R v. Petherick*,²⁶ an appeal of the sentence levied on a mother, the Court of Appeal was invited to consider the relevance of the rights of a child to family life under Article 8 of the ECHR. Rosie Lee Petherick was twenty-two years old and the single mother of a sixteen-month-old boy.²⁷ She pleaded guilty to causing death by dangerous driving and driving with excess alcohol and was sentenced to a term of imprisonment of four years and nine months.²⁸ She appealed her sentence to the Court of Appeal on the grounds that her son's right to family life under Article 8 was engaged in the sentencing process.²⁹ The court took the opportunity to set out a number of principles that sentencing courts should apply. They can be summarized as follows:

1. The sentencing of a defendant inevitably engages their own Article 8 right to family life, but also that of their family, including any dependent child or children.
2. Three questions should be asked in any case that impinges on family life:
 - (a) Is there an interference with family life?
 - (b) Is it in accordance with law and in pursuit of a legitimate aim within Article 8.2?
 - (c) Is the interference proportionate given the balance between the various factors?

24 *R v. Solliman* [2011] EWCA (Crim) 2871, ¶ 32 (Eng.) (“[T]he judge failed to consider the consequences of the sentence of imprisonment on the appellant, given that he was the sole carer for the children. The sentence involved serious consequences for the children, breaching their rights . . . This was not an appropriate case for a deterrent sentence.”).

25 *HH v. Italy* [2011] (UKSC) EWCA (Crim) 2871 (Eng.) (“Where the decision directly affects the child's upbringing, such as the decision to separate a child from her parents, then the child's best interests are the paramount, or determinative, consideration.”).

26 *R v. Petherick* [2012] EWCA (Crim) 2214 (Eng.).

27 *Id.* ¶ 2.

28 *Id.* ¶ 1.

29 *See id.* ¶ 15.

3. When there are dependent children, that is a relevant factor in sentencing.
4. A criminal court should be informed about the domestic circumstances of a defendant, and if the family life of others, especially children, will be affected, the criminal court “will take it into consideration.”
5. The legitimate aimso f sentencing need to be balanced against the effect of a sentence on family life.
6. When the case is on “the cusp of custody,” the interference with the family life of children can sometimes tip the scales and make an otherwise proportionate coustodial sentence disproportionate.
7. The likelihood of it being disproportionate is reduced the more serious the offense.
8. Even if custody cannot be avoided, the effect on children might afford grounds for mitigating the length of sentence. There is no standard or normative adjustment.

Ms. Petherick’s sentence was adjusted to “reflect the combined factors of personal mitigation, coupled with the effect upon the child”³⁰ and was reduced to a term of three years and ten months.

II. Following Petherick: 2012–2017

Despite the clarity of *Petherick*, there was not an immediate or discernible change in the principles applied when sentencing mothers of dependent children. Whether the judiciary was unaware of the precedent or failed to apply it properly at the first instance, a series of appeal cases confirmed that even the Court of Appeal was reluctant to give weight to the impacts of a prison sentence on dependent children when sentencing mothers.

In the first appeal from a sentence that cited *Petherick*, *R v. Reasat*³¹ in 2013, a mother appealed her sentence of six months of imprisonment for social security fraud on the grounds that it was manifestly excessive and that the judge failed to pay sufficient attention to the fact that she was the main caregiver for her autistic son. There was evidence at appeal that the sentence had been “life changing” for her son, who, according to a local-authority social worker, was having an “extreme reaction” to his mother’s imprisonment.³² He was

30 *Id.* ¶ 27.

31 *R v. Reasat* [2013] EWCA (Crim) 2124 (Eng.).

32 *Id.* ¶ 16, 19.

displaying suicidal tendencies, had tried to kill himself with an overdose, and had tried to burn himself with an iron.³³ The letter to the court stated that “his behaviours range from despair and sadness to rage and anger.”³⁴ It is hard to imagine a clearer example of a case in which the interference with the family life of children could “tip the scales” and mean that a proportionate sentence would become disproportionate. Shockingly, the Court of Appeal did not grant the appeal; they described the six-month sentence as “merciful.”³⁵ The offense had crossed “the custody threshold,” and they did not believe it was appropriate to suspend the sentence.³⁶ The court did not explain why the sentence could not be suspended despite noting that “the effect of the appellant’s sentence [had] been life-changing on her son.”³⁷

The Court of Appeal’s decision was unsympathetic, and it sent the message that even in a non-violent offense, the impact of a relatively short sentence on a disabled child whose life had been gravely affected by his mother’s incarceration, even to the point of suicidal attempts, is insufficiently serious to make immediate custody disproportionate.

In the case of *R v. H(R)*³⁸ in 2016, a mother appealed a sentence of twenty months of imprisonment on the basis that the sentence was too long and the judge paid insufficient attention to the impact of imprisonment on her child. The Court of Appeal did not seem to think that *Petherick* had established a duty for the court to consider dependent children. Rather, it stated that it was “open to the court” whether to include children as a relevant consideration.³⁹ The court referenced *Petherick*:

This is not a matter of mitigation personal to the offender; rather, it arises from the need for the court to have regard to the interests of a child or children affected. Careful consideration of the principles laid down by this

33 *Id.* ¶ 19.

34 *Id.*

35 *Id.* ¶ 24.

36 *Id.*

37 *Id.* In this jurisdiction, any sentence of up to two years of imprisonment can be suspended for a period of two years. This means that the sentence is a custodial sentence, but it is not activated during the term unless the subject of it breaches the conditions attached or commits another offense, at which point they will be imprisoned immediately to serve their original sentence. Criminal Justice Act 1967, c. 80, § 39 (Eng.).

38 *R v. H(R)* [2016] EWCA (Crim) 1754 (Eng.).

39 *Id.* ¶ 14.

court in *R v. Petherick* . . . is required so that wider public interests and those of a child are dealt with proportionately.⁴⁰

The court described the impact on the child as “a situation which has been caused entirely by the applicant’s own irresponsible and criminal actions which placed her own priorities before those of the child.”⁴¹ They gave no explanation as to how either they or the court below considered the separate rights of the child in the balance and simply said that they were unpersuaded that anything other than the sentence imposed would have been appropriate.

Practice within the judiciary more widely had not caught up with the clear direction set by the Sentencing Council, Supreme Court, and Court of Appeal. Research undertaken with Crown Court judges from 2014 to 2015⁴² found that, as with the Court of Appeal, although there was some awareness of the case law on consideration of dependent children, the judiciary was simply not taking a consistent approach to its application. Each judge was asked, “Do you know of any sentencing guidelines or authorities which you would follow when determining the weight that should be given to a defendant’s primary or sole caregiving status?” The judges demonstrated a striking lack of knowledge of the guidelines, with three saying they “were not aware that the sentencing guidelines contained any guidance on the consideration of dependents in sentencing.”⁴³ In terms of the Court of Appeal authorities on the issue, three were unaware of higher court guidance on this subject; two knew of authorities but did not believe that they needed to be considered in every case; and, most surprisingly, three claimed to know of the authorities and interpreted them to mean that children should not be a factor that mitigated in favor of a shorter or non-custodial sentence.⁴⁴ Just over half the judges “knew that there were Court of Appeal and Supreme Court authorities on the point and understood that these required them to balance the impact on the family with the other factors in the case,” and two mentioned the leading authority of *R v. Petherick*.⁴⁵ However, eleven judges reported relying on their own judgment to determine the relevance of dependents when making sentencing

40 *Id.*

41 *Id.* ¶ 25.

42 See SHONA MINSON, MATERNAL SENTENCING AND THE RIGHTS OF THE CHILD 139–40 (2019).

43 *Id.* at 139.

44 See *id.* at 139–40.

45 *Id.* at 140.

decisions.⁴⁶ Some judges even believed that they should not consider dependent children when sentencing because to do so would be “contrary to justice.”⁴⁷ In terms of the best interests of the child, “[n]o judge said that the interests of the child must always be a consideration . . . nor did any judge refer to the duty on the court to ensure that they have sufficient information about the children to undertake the correct balancing exercise.”⁴⁸

Third-sector organizations turned their attention to these issues, fueled by courts’ continued resistance to recognizing the relevance of motherhood in mitigation and their concern about increasing numbers of women in prison. In 2015, an independent U.K. charity, the Prison Reform Trust, published a paper entitled, “Sentencing of Mothers: Improving the Sentencing Process and Outcomes for Women with Dependent Children.”⁴⁹ The paper developed from research discussed at two roundtable meetings, at the second of which “senior members of the judiciary and legal experts considered ways in which principles of fairness, proportionality and child welfare apply in the sentencing of mothers and others with primary care responsibilities.”⁵⁰ The paper’s proposals included developing a new overarching principle that courts have a duty to determine whether the defendant had dependent children for whom they had sole or primary caring duties before specifying how the children’s rights and well-being were to be taken into account.⁵¹ They suggested that the court would also be directed to ensure that it had all information relevant to such a determination and, if necessary, adjourn the sentencing decision to obtain this.⁵²

The chair of the Sentencing Council attended the roundtable meeting in 2015, and the Sentencing Council published the “Imposition of Custodial and Community Sentences” guideline in 2017.⁵³ It included limited direction on considering dependents, focusing on

46 *See id.*

47 *Id.*

48 *Id.*

49 SHONA MINSON, REBECCA NADIN & JENNY EARLE, SENTENCING OF MOTHERS: IMPROVING THE SENTENCING PROCESS AND OUTCOMES FOR WOMEN WITH DEPENDENT CHILDREN (2015).

50 *Id.* at 3.

51 *Id.* at 15.

52 *Id.*

53 *Imposition of Community and Custodial Sentences*, SENT’G COUNCIL (Feb. 1, 2017) (UK), <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/imposition-of-community-and-custodial-sentences/> [<https://perma.cc/K4WG-PA9U>].

cases where an offender was on the cusp of custody: “For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing.”⁵⁴

The guideline also set out the factors to be weighed when determining whether a custodial term of less than two years could be suspended. One of the three factors that make it appropriate to suspend a custodial sentence is that “immediate custody will result in significant harmful impact upon others.”⁵⁵

The guideline represented notable progress by setting out that the consideration of child dependents was a necessary and reasonable step for sentencers to take. A “Sentencing Decision Flowchart” in the guideline indicated two points at which dependent children should be considered.⁵⁶ First, when determining whether the custody threshold applies, the court should address whether the sentence could in fact be a community sentence because the impact on dependents of a custodial sentence would make custody a disproportionate sentence.⁵⁷ Second, if the sentence was less than two years, the courts should determine whether the sentence could be suspended.⁵⁸ This was a significant change in the procedure and practice of sentencing.

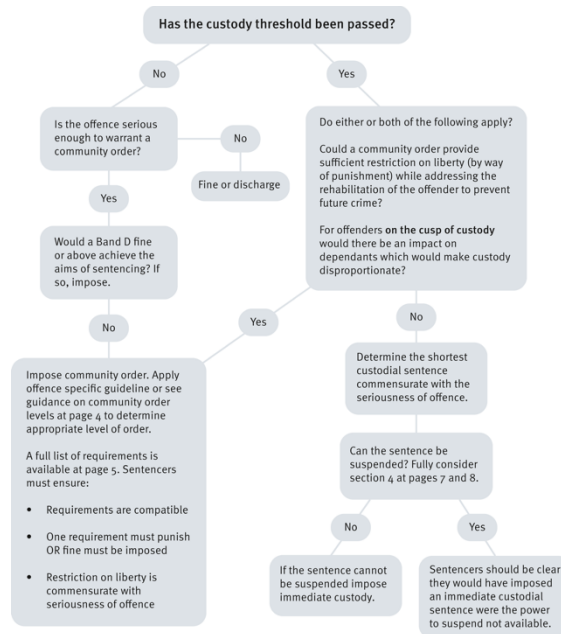
54 *Id.*

55 *Id.*

56 *Sentencing Decision Flowchart*, SENT’G COUNCIL (Feb. 1, 2017) (UK), <https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-decision-flowchart.pdf> [<https://perma.cc/Z82X-48X7>].

57 *See id.*

58 *See id.*



SENTENCING COUNCIL OF ENGLAND AND WALES, *Sentencing Decision Flowchart*

Two months after the *Imposition of Community and Custodial Sentences Guideline* came into force, the use of the guideline was tested in the Court of Appeal in the case of *R v. Modhwadia*.⁵⁹ Ms. Modhwadia, a thirty-six-year-old mother and the sole carer of three children aged five, nine, and fifteen, was sentenced on February 23, 2017, to six months of imprisonment for the offense of assisting an offender.⁶⁰ The pre-sentence report prepared for the judge at the sentencing hearing expressed “grave concern for the care of her three children if an immediate custodial sentence were imposed.”⁶¹ The report recommended a suspended prison sentence with a rehabilitation activity requirement. The judge at first instance acknowledged the mitigating factor but concluded that “when someone accepts that a serious criminal offense which strikes at the route of the criminal justice system has been committed, a custodial sentence is inevitable. When that happens those who suffer most are the nearest and dearest.”⁶² The judge did not specifically address the issue of

59 R v. Modhwadia [2017] EWCA (Crim) 501 (Eng.).

60 See *id.* ¶ 2.

61 *Id.* ¶ 10.

62 *Id.* ¶ 12.

whether the sentence could be suspended, and he was not invited to consider the new guideline. The submission on appeal was that all three factors mitigating in favor of a suspended sentence were present, and it was apparent that immediate custody would result in significant harmful impact upon the children. The appellate court accepted the submissions, followed the new guideline, and concluded that “in all the circumstances . . . the proper outcome would have been to suspend the sentence of imprisonment.”⁶³ The court quashed the sentence of six months’ immediate imprisonment and instead imposed a sentence of six months, suspended for eighteen months.⁶⁴

III. 2018–2020: Political and Policy focus

From 2018 to 2019, more attention was paid to the issue of maternal imprisonment in both policy and political spheres. On June 27, 2018, the government published the *Female Offender Strategy* which aimed to “reduce the female prison population, with fewer offenders sent to custody for short periods.”⁶⁵ There was specific mention of the impact of a custodial sentence on children and the damaging effect of even short prison sentences on women and their families. The publication also emphasized improving the quality and content of pre-sentence reports and a commitment to supporting training material for judges, lawyers, and probation staff.⁶⁶

In 2019, the Parliamentary Joint Committee on Human Rights (“JCHR”) undertook an inquiry on *The Right to Family Life: Children Whose Mothers are in Prison*.⁶⁷ They concluded that urgent change was required in four areas: data collection, sentencing, support for children whose mothers go to prison, and pregnancy and maternity care for women in prison. With regard to sentencing, their recommendations were as follows:⁶⁸

63 *Id.* ¶ 18.

64 *See id.*

65 MINISTRY OF JUSTICE, FEMALE OFFENDER STRATEGY, 2018-6, CM. 9642 (UK).

66 SHONA MINSON, SAFEGUARDING CHILDREN WHEN SENTENCING PARENTS (2018); *see also* Shona Minson, *Safeguarding Children when Sentencing Mothers*, YOUTUBE (Apr. 27, 2020), <https://www.youtube.com/watch?v=XBY7hjsb-O0> [<https://perma.cc/U6VS-D9W6>].

67 JOINT COMMITTEE ON HUMAN RIGHTS, THE RIGHT TO FAMILY LIFE: CHILDREN WHOSE MOTHERS ARE IN PRISON, 2019, HC 160 (UK).

68 *Id.* ¶¶ 46–55.

- The judge must not sentence a primary carer unless a pre-sentence report is available at the hearing. The report must contain sufficient information for the judge to make an assessment of the impact of sentencing on the child.
- Judges should state how they have taken this information into account in their sentencing remarks.
- The duty, established by case law, to keep a child's welfare at the forefront of a judge's mind during sentencing of a primary carer, should be given statutory force.
- If a custodial sentence is given the court must be satisfied that there are care arrangements in place for any children and should defer sentence to allow those arrangements to be made.

There was clearly a growing appreciation of the importance of considering child dependents, and on October 1, 2019, the Sentencing Council published the *General Guideline: Overarching Principles* which provided an “expanded explanation” of the mitigating factor of “sole or primary carer for dependent relatives” that aligned with the recommendations of the JCHR report.⁶⁹ The outcome of many years of dialogue between the judiciary, researchers, lawyers, and parliamentarians, the guideline reflected a growing social awareness of the long-term outcomes children may face as a result of their early-year experiences. The expanded explanation consolidated the principles established in case law and included guidance about the steps the court *should* take to ensure that the impact on children was properly considered in the sentencing process. It included the following principles: for offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing. The court should ensure that it has all relevant information about dependent children before deciding on sentence. When an immediate custodial sentence is necessary, the court must consider whether proper arrangements have been made for the care of any dependent children and, if necessary, consider adjourning sentence for this to be done.⁷⁰ When considering a community or custodial sentence for an offender who has, or may have, caring responsibilities the court should ask the Probation Service to address these issues in a pre-sentence report.⁷¹

69 *General Guideline: Overarching Principles*, SENT'G COUNCIL (Oct. 1, 2019) (rev. Apr. 1, 2024), <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/> [<https://perma.cc/EQ8F-HM77>] [hereinafter *General Guideline*].

70 *See id.*

71 This has now been removed as a consequence of the Sentencing Guidelines (Pre-Sentence) Reports Bill, which is due to come into force in fall 2025.

In addition, when sentencing a pregnant woman, relevant considerations may include “any effect of the sentence on the health of the offender” and “any effect of the sentence on the unborn child.”⁷²

IV. Pregnancy and Postnatal Mothers

Despite evolving perceptions about mothers with dependent children, it was not uncommon to hear judges say that a woman who was pregnant was trying to manipulate the court, and women must not think that pregnancy was a “get out of jail free card.” The provision of Mother and Baby units in some prisons meant that some sentencers viewed prison as a “good” place for pregnant women, despite the fact that a place on such a unit was not guaranteed and mother/child separation might still take place given the upper age limit of eighteen months for babies in the unit.⁷³ Sentencers had no information about the health care available to pregnant women, nor the risks to women and their children of pregnancy and birth when imprisoned. This began to change in 2019 when the expanded explanation in the sentencing guideline included its first mention of pregnancy, advising sentencers that the effect of the sentence on the woman and the unborn children could be a “relevant consideration” in sentencing.⁷⁴

However, incremental change in sentencing considerations was not enough. Pregnant women continued to be sent to prison, and two babies died in tragic circumstances, bringing public attention to the issues in the years following the publication of the revised sentencing guidelines. In September 2019, an eighteen-year-old woman, Rianna Cleary, gave birth to her daughter Aisha (“Baby A”) in a prison cell alone, and Aisha died.⁷⁵ Nine months later, in June 2020, another baby, Brooke Powell (“Baby B”), was stillborn in a different women’s prison in England.⁷⁶ The Prison and Probation Ombudsman (“PPO”) conducted inquiries

72 *Id.*

73 Michelle Conway, *Prison Mother and Baby Units in England and Wales*, BACK INTO SOC’Y (Apr. 12, 2021), <https://backintosociety.co.uk/2021/04/12/prison-mother-and-baby-units-in-england-and-wales/> [<https://perma.cc/MPF5-M7QL>].

74 *General Guideline*, *supra* note 69.

75 See INDEPENDENT INVESTIGATION INTO THE DEATH OF BABY A, *supra* note 8; see also Hamish Mureddu-Reid, *HMP Bronzefield: Mum Whose Baby Died in Jail Says System is Cruel*, BBC (UK) (Nov. 15, 2023), <https://www.bbc.com/news/uk-england-surrey-67421943> [<https://perma.cc/PMZ9-AY26>] (providing the name of the woman who gave birth in a prison cell in September 2019 and her baby’s name).

76 See INDEPENDENT INVESTIGATION INTO THE DEATH OF BABY B, *supra* note 8; see also May Bulman, *Woman Gave Birth to Stillborn Baby in Jail Without Specialist Help After Nurse Said It Was ‘Painful Period’*, Says

into the deaths of both infants, and a coroner's inquest was held into the death of Aisha Cleary.⁷⁷ Critical findings were made by the coroner in 2023 against the prison and the midwifery provision.⁷⁸ The five-week inquest in 2023, which explored how a baby came to die behind a locked prison door, attracted a great deal of publicity and public awareness on ante- and postnatal care in prison.⁷⁹ This led to new public and professional concern about the continuing practice of imprisoning pregnant women. As mentioned, sentencers did not seem to hesitate to imprison women because of their pregnancy, assuming adequate maternity care was available in prisons, but the PPO Report on Aisha Cleary made it clear that prison was not a safe place for pregnant women and their children:

We consider that all pregnancies in prison should be treated as high risk by virtue of the fact that the woman is locked behind a door for a significant amount of time. In addition, there is likely to be a higher percentage of “avoidant” mothers who have experienced trauma and who are fearful of engaging with maternity care.⁸⁰

Once the high-risk nature of pregnancy in prison was established, appellate courts began to scrutinize sentencing decisions more closely. Some of the women whose appeals were heard contacted solicitors after seeing or hearing media coverage of the tragic baby deaths in prison. The public conversation influenced engagement with the courts. Appeals from the Magistrates Court to the Crown Court are not reported, but since 2020, there have been ten reported sentencing appeals from the Crown Court to the Court of Appeal

Report, INDEPENDENT (UK) (Jan. 10, 2022), <https://www.the-independent.com/news/uk/home-news/prison-baby-stillborn-woman-styal-ombudsman-b1990131.html> [<https://perma.cc/CCG3-CG3B>] (providing the name of the woman who gave birth in a prison in June 2020 and her baby's name).

77 See generally INDEPENDENT INVESTIGATION INTO DEATH OF BABY A, *supra* note 8; INDEPENDENT INVESTIGATION INTO DEATH OF BABY B, *supra* note 8; SURREY CORONER'S COURT, *supra* note 8.

78 See SURREY CORONER'S COURT, *supra* note 8.

79 See generally Tanya Gupta, *HMP Bronzefield Baby Death Followed Systemic Failings – Inquest*, BBC (UK) (July 28, 2023), <https://www.bbc.com/news/uk-england-surrey-66339627> [<https://perma.cc/D3KX-RS7K>]; Diane Taylor, “*Serious Failings*” Contributed to Baby's Death in 12-hour Lone Prison Birth, GUARDIAN (UK) (July 28, 2023), <https://www.theguardian.com/society/2023/jul/28/serious-failings-contributed-to-babys-death-in-12-hour-lone-prison-birth> [<https://perma.cc/XFC5-7QMX>]; Channel 4 News, “*Serious Failings*” Contributed to Baby Death in Bronzefield Prison – Inquest, YOUTUBE (July 28, 2023), <https://www.youtube.com/watch?v=bbiIaeFRCNQ> [<https://perma.cc/YA2U-T2PE>]; Bulman, *supra* note 75; Katie Razzall, *HMP Styal: My Baby Died Due to Errors in Prison, Says Former Inmate*, BBC (UK) (Sept. 20, 2021), <https://www.bbc.com/news/uk-england-manchester-58598608> [<https://perma.cc/M6JK-WCHM>].

80 INDEPENDENT INVESTIGATION INTO THE DEATH OF BABY A, *supra* note 8.

from women who were either pregnant or had a very young infant. These cases, which are considered in the next few paragraphs of this Article, have provided the appeal court with the opportunity to utilize the expert information available to develop guidelines for sentencing a pregnant or postnatal mother.

In the case of *R v. Doyle*⁸¹ in March 2020, a woman who had a young child and was pregnant was given an immediate custodial term of six months, despite the pre-sentence report recommending a community sentence. The Court of Appeal allowed the appeal and substituted a suspended sentence, noting that the judge at first instance had not referred to the authorities, guidelines, or the ECHR:

This was a case in which the court could and should have suspended the sentences which it imposed . . . Having regard to the young child and to the fact that the appellant is about to give birth, in our judgment, this was a clear case for suspending the term of imprisonment.⁸²

In June 2020, an appeal was heard in the case of *R v. Cheeseman*.⁸³ Ms. Cheeseman gave birth to a baby nine days after being sentenced to six years in prison.⁸⁴ Her appeal was allowed, and the sentence reduced to four years so that she would be able to leave prison with her baby when her baby was eighteen months old, rather than mother and child being separated at that stage.⁸⁵ The cases of *Petherick* and *Doyle* were relied upon in submissions.

The case of *R v. Charlton*⁸⁶ was the first case to consider the relevance and weight of pregnancy in the context of mandatory minimum statutory provisions. The appellant had committed a “third strike” burglary for which the court was required to impose a minimum sentence of three years⁸⁷ unless satisfied that doing so would be “unjust.”⁸⁸ Ms. Charlton was found to be pregnant with twins once in prison serving a three-year

81 *R v. Doyle* [2020] EWCA (Crim) 429 (Eng.).

82 *Id.* ¶¶ 15–16.

83 *R v. Cheeseman* [2020] EWCA (Crim) 794 (Eng.).

84 *Id.*

85 *Id.* ¶ 32.

86 *R v. Charlton* [2021] EWCA (Crim) 2006 (Eng.).

87 *See* Sentencing Act 2020, c. 7, § 314 (Eng.).

88 *R v. Charlton* [2021] EWCA (Crim) 2006 [7] (Eng.).

custodial sentence.⁸⁹ She was the mother of a ten-year-old, and the pre-sentence report had recommended a community punishment (notwithstanding the statutory provisions).⁹⁰ The appeal in December 2021 was allowed, and the original sentence was substituted with a two-year term, suspended for two years.⁹¹ The Court of Appeal recognized that imprisonment is a “heavier” punishment when a woman is pregnant:

Had the recorder [judge] been aware of that fact, we have no doubt he would rightly have taken it into account and given considerable weight to it, for three reasons. First, because imprisonment would now be a far heavier punishment for this applicant than for most other prisoners; secondly, because the pregnancy and births can be expected to increase her motivation to remain drug free; and thirdly, because it is necessary to have regard to the rights of the children who, as things stand, will be born in prison.⁹²

In October 2022, the sentence of five years of imprisonment in the case of *R v. McGrory*⁹³ was successfully appealed, relying on *R v. Rescorl*. Ms. McGrory was the mother of a young child and had given birth to a baby in prison. Her sentence was reduced to four years on the basis that the sentencing judge had sentenced without having any information about the children, when this information “should have been central to the assessment of her personal mitigation.”⁹⁴ This important development illustrated the importance of considering the impact upon children even in cases where custody was inevitable and the offense was not otherwise on the cusp of the custody threshold or suspension.

In *R v. Stubbs*,⁹⁵ the sentence was allowed to stand because although the nine-month sentence of immediate imprisonment was not suspended and Ms. Stubbs was pregnant, the judge had determined the sentence length as “an act of mercy to reduce the sentence

89 *Id.*

90 *Id.*

91 *Id.* ¶15.

92 *Id.* ¶ 14.

93 *R v. McGrory* [2022] EWCA (Crim) 1361 (Eng.).

94 *Id.* ¶ 18.

95 *R v. Stubbs* [2022] EWCA Crim 1907 (Eng.).

to the extent that the applicant's baby would be born after release.”⁹⁶ The Court of Appeal therefore did not give leave to appeal. That sentence, of course, did not take account of the possibility of the baby arriving early or any of the concerns about antenatal care in prison, which have now come to the fore. It is not clear that the outcome would be the same if that case were heard today. In January 2024, in the case of *R v. Tamang*,⁹⁷ an appeal against a two-year custodial sentence was quashed and substituted with a ten-month sentence, suspended for twelve months, on the basis that the starting point had been too high and the personal mitigation and the impact on a fourteen-month-old child had not been referred to by the judge.⁹⁸ The Court of Appeal noted that the judge failed to refer to the 2017 Imposition Guideline: “A child of just over a year old should not suffer the incalculable harm of its mother being in prison at such a formative stage of its young life.”⁹⁹ The case involved a breach of trust and vulnerable victims, and the court recognized that the “usual” need for immediate custody in such cases could and should nevertheless be modified where there would be an impact on a dependent child.¹⁰⁰

Also in January 2024, the Court of Appeal heard *R v. Bassaragh*,¹⁰¹ the first appeal of its kind since the *Cleary* inquest and findings and the first case to ever consider the impact of pregnancy in the context of mandatory minimum provisions for firearms offenses. The Court of Appeal determined that it was appropriate to depart from such provisions on the grounds of “exceptional circumstances” if “the imposition of the minimum term would result in an arbitrary and disproportionate sentence.”¹⁰² The appellant was pregnant, and the original mandatory minimum term of five years of imprisonment was quashed and substituted with a term of two years, suspended for two years. Importantly, the Court of Appeal admitted expert midwifery evidence¹⁰³ and accepted that the following inescapable risks arise when imprisoning a pregnant woman:

96 *Id.* ¶ 30.

97 *R v. Tamang* [2024] EWCA Crim 62 (Eng.).

98 *Id.* ¶ 25.

99 *Id.* ¶ 23.

100 *Id.* ¶¶ 23–25.

101 *R v. Bassaragh* [2024] EWCA (Crim) 20 (Eng.).

102 *Id.* ¶ 13.

103 *Id.* ¶¶ 19–28 (considering the expert evidence provided by Dr. Laura Abbott).

- Pregnant women in prison are seven times more likely to suffer a stillbirth than women in the community and twice as likely to give birth prematurely.¹⁰⁴
- Over one in five pregnant women in prison miss midwifery appointments, increasing the risk of premature birth, miscarriage, and stillbirth.¹⁰⁵
- One in ten pregnant women in prison give birth in-cell or on the way to hospital.¹⁰⁶
- Between 2020 and 2022, four babies born to women in prison required neonatal unit admission (compared with a national average of one in seven).¹⁰⁷
- Criminal justice proceedings and imprisonment are highly distressing environments for pregnant women, with 82% of women in prison reporting that they have mental health problems.¹⁰⁸ Antenatal stress is proven to increase levels of the hormone cortisol in the mother's body, which, when it crosses the placenta, can affect the health of the baby, their brain development, emotional attachment, and early parenting interactions.¹⁰⁹

By 2024, it was undeniable that pregnancy in prison posed grave risks to both mothers and children. A public campaign, “No Births Behind Bars,” brought attention to the issue with media coverage of babies protesting alongside their mothers outside prisons that held pregnant women. The Sentencing Council launched a consultation process on additional guidance for the sentencing of pregnant women. On April 1, 2024, a new factor was added

104 Hannah Summers & Nic Murray, *Pregnant Women in English Jails are Seven Times More Likely to Suffer Stillbirth*, GUARDIAN (Mar. 25, 2023), <https://www.theguardian.com/society/2023/mar/25/pregnant-women-in-english-jails-are-seven-times-more-likely-to-suffer-stillbirth> [<https://perma.cc/5QYA-EC4Q>] [hereinafter *Pregnant Women in English Jails*]; Nic Murray & Hannah Summers, *Jailed Women in UK Five Times More Likely to Suffer Stillbirths, Data Shows*, GUARDIAN (Dec. 5, 2021), <https://www.theguardian.com/society/2021/dec/05/jailed-women-in-uk-five-times-more-likely-to-suffer-stillbirths-data-shows> [<https://perma.cc/K8P8-EH99>].

105 Press Release, Nuffield Trust, *Ill-Equipped Prisons and Lack of Health Care Access Leave Pregnant Prisoners and Their Children at Significant Risk* (July 19, 2022) (UK), <https://www.nuffieldtrust.org.uk/news-item/ill-equipped-prisons-and-lack-of-health-care-access-leave-pregnant-prisoners-and-their-children-at-significant-risk> [<https://perma.cc/Z8V3-SC89>].

106 Miranda Davies, *Pregnancy and Childbirth in Prison: What Do We Know?*, NUFFIELD TRUST (Nov. 22, 2019), <https://www.nuffieldtrust.org.uk/news-item/pregnancy-and-childbirth-in-prison-what-do-we-know> [<https://perma.cc/3SBD-457X>].

107 *Pregnant Women in English Jails*, *supra* note 100 (discussing a Freedom of Information response to a request from Level Up).

108 SOPHIE ELLIS, PRISON REFORM TRUST, BROMLEY BRIEFINGS PRISON FACTFILE 60 (2024).

109 Alan Stein et al., *Effects of Perinatal Mental Disorders on the Fetus and Child*, 384 LANCET 1800, 1811 (2014).

to the list of mitigating factors in sentencing guidelines.¹¹⁰ As with previous additions to the guidelines, this change embedded many of the principles established through case law and from evidence gathered during the consultation process:

When considering a custodial or community sentence for a pregnant or postnatal offender (someone who has given birth in the previous 12 months) the Probation Service should be asked to address the issues below in a pre-sentence report. If a suitable pre-sentence report is not available, sentencing should normally be adjourned until one is available.¹¹¹

When sentencing a pregnant or postnatal woman, relevant considerations may include:

- the medical needs of the offender including her mental health needs
- any effect of the sentence on the physical and mental health of the offender
- any effect of the sentence on the child

The 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.

Access to a place in a prison Mother & Baby Unit is not automatic and when available, the court may wish to enquire for how long the place will be available.

Women in custody are likely to have complex health needs which may increase the risks associated with pregnancy for both the offender and the child. The NHS classifies all pregnancies in prison as high risk.

There may be difficulties accessing medical assistance or specialist maternity services in custody.

This factor is particularly relevant where an offender is on the cusp of custody or where the suitability of a community order is being considered.

...

For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing.

110 *Sentencing Pregnant Women and New Mothers*, SENT'G COUNCIL (Apr. 1, 2024), <https://www.sentencingcouncil.org.uk/news/item/sentencing-pregnant-women-and-new-mothers/> [<https://perma.cc/KGK8-7SWT>].

111 The requirement for a pre-sentence report was removed on June 16, 2025, due to the Sentencing Guidelines (Pre-Sentence Reports) Bill, which will come into force in fall 2025.

Where immediate custody is unavoidable, all of the factors above may be relevant to the length of the sentence.

The court should address the issues above when giving reasons for the sentence.¹¹²

In the appeals which have followed the new guideline, the Court of Appeal has been very conscious of the risks not only of birth in prison but also of subsequent mother and child separation. In the June 2024 appeal of *R v. Byron*,¹¹³ the Court of Appeal considered Ms. Byron's sentence imposed in January 2024, prior to the pregnancy mitigating factor being in force. She was the sole carer for her fourteen-year-old daughter and, at the time of the plea in November 2023, was twelve weeks pregnant.¹¹⁴ The first instance judge dealt with mitigation briefly, deducting six months "for [her] good character."¹¹⁵ Despite the pre-sentence report recommending a community sentence, the sentencing court passed an immediate sentence of twenty-seven months' imprisonment and implied the mother's pregnancy was an attempt to avoid imprisonment: "She knew that she was facing and she knew that she was going to plead guilty. What does that say about responsibility in a mature woman that she decides, 'I'll tell you what, I'll get pregnant again'?"¹¹⁶ The Court of Appeal "concluded that the risk to mother and baby calls overwhelmingly for a merciful approach."¹¹⁷ Moreover, the court remarked,

The judge's remarks which we have set out above should not have been made. It is inappropriate to pass comment on how or why a female defendant has become pregnant . . . whether a pregnancy is planned or not can be of no concern to a sentencing judge whose focus must be on the risks to mother and baby of pregnancy and birth in custody.¹¹⁸

112 *General Guideline*, *supra* note 69.

113 *R v. Byron* [2024] EWCA (Crim) 818 (Eng.).

114 *See id.*

115 *Id.*

116 *Id.* ¶ 11.

117 *Id.* ¶ 23.

118 *Id.* ¶ 18.

In the end, the court quashed the sentence and replaced it with a sentence of twenty-one months suspended for twenty-four months.¹¹⁹ This case marked an important transition, forbidding courts from treating pregnant women negatively, suspiciously, or as if they are attempting to manipulate the court.

In July 2024 the sentence in the case of *R v. Byrne*¹²⁰ was successfully appealed. Ms. Byrne had a nine-month-old baby who was initially separated from her when she was sentenced to forty-four months of immediate imprisonment in May 2023.¹²¹ It seemed that there had been no arrangements made for the child's care, and he was taken from court by Ms. Byrne's mother.¹²² After problems arose with feeding the baby, he was returned to the mother in prison in August 2023.¹²³ However, the child could only stay in the prison with his mother until September 7, 2024, at which time he was scheduled to be placed in foster care.¹²⁴ Reports available to the Court of Appeal from a psychologist provided the following information:

[P]rison was distressing for her [mother] and was likely to have caused harm both to her and the child over the short and long term. Separation had had a significant negative effect. There would be negative outcomes for both related to behavioural development and emotional problems.¹²⁵

The Court of Appeal found “the interests of the child and the fact that the child will end up in foster care outweigh the factors that justified the length of the sentence that was originally imposed.”¹²⁶ The sentence was reduced to two years and eight months—thirty-two months instead of forty-four—with the aim of ensuring that the mother and child did not face further separation.¹²⁷

119 *See id.*

120 *R v. Byrne* [2024] EWCA (Crim) 801 (Eng.).

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.* ¶ 29.

126 *Id.* ¶ 35.

127 *Id.*

The final postnatal appeal case of 2024 was *R v. Thompson* which came before the Court of Appeal in August 2024.¹²⁸ Ms. Thompson was sentenced to 38 months' imprisonment without a pre-sentence report when her baby was one month old, reduced from an initial fifty-four-month sentence due to her guilty plea. The Court of Appeal substituted a reduced sentence of thirty months, affirming the principle that a pre-sentence report should be considered when a woman is pregnant or has recently given birth.¹²⁹ Regarding the balancing of custody with the impact on a child, the court wrote,

In our judgment, the seriousness of this case does mean that immediate custody cannot be avoided. Sentences must adequately reflect the pernicious influence of Class A drugs on society. But sentencing must also reflect the value that society places on the importance of unfettered family relationships and the rights of a child. In a case such as this, the child is one of the innocent victims of the parent's wrongdoing. Harm to the child is often inescapable. But a custodial sentence that would for as long as this one have such an adverse impact on the relationship between this mother and this baby would, in our judgment, be disproportionate to the legitimate aims pursued by the imposition of a custodial sentence.¹³⁰

The court also found that even if a mother is able to have her baby with her in prison, "it cannot be considered that presence in the mother and baby unit is the equivalent of conducting a mother and child relationship outside the confines of a prison."¹³¹

It is socially significant that the courts have shifted from unwillingness to recognize pregnant or postnatal women as suffering from any additional "pains of imprisonment" to a concern for children's well-being and rights. This shift now encompasses an understanding of the critical nature of the mother-child relationship and the fundamental importance of secure attachment, and beyond that, to the mother's own health and well-being.

However, as pregnancy began to receive greater consideration by the courts, mothers of older children continued to receive prison sentences. Between 2021 and 2024, there were four reported substantive criminal appeals against sentences before the Court of

128 *R v. Thompson* [2024] EWCA (Crim) 1038 (Eng.).

129 *Id.* ¶ 27.

130 *Id.* ¶ 24.

131 *Id.* ¶ 23.

Appeal from mothers with dependent children. In each case, as we will now examine, the Court of Appeal reaffirmed the need for serious consideration of a sentence's impact on all dependent children, not just babies and young infants.

In *R v. Rescorl*, Ms. Rescorl faced the prospect of separation from her eight- and twelve-year-old children when she was sentenced to an immediate term of fifteen months in prison. However, Ms. Rescorl's appeal in December 2021¹³² was successful, and the sentence was suspended for two years on the basis that the sentencing judge lacked sufficient information about how the children would be cared for during the mother's imprisonment. The Court of Appeal judgment noted that "the judge must have the information necessary to reach a fair conclusion."¹³³

In July 2023, the appeal of a sentence in *R v. Foster (Carla)*¹³⁴ was successful, reducing a twenty-eight-month term of imprisonment to fourteen months, suspended for eighteen months. This decision was based in part on the judge's failure to sufficiently consider the effect of the sentence on Ms. Foster's three children. Additionally, concerns about overcrowded prisons following the COVID-19 pandemic influenced the court's decision.¹³⁵ The court also referenced the information in the Equal Treatment Bench Book,¹³⁶ which it said sentencers should consult—in particular the sections entitled "Women as Offenders" and "Dependants and Primary Carers"—and noted that sentencing courts should appreciate that women are often held far from home.¹³⁷ The Court of Appeal sitting on that occasion seemed to have a good understanding of the impacts of mother and child separation.

In *R v. Smethurst*, Ms. Smethurst's successful appeal of her five-year sentence concluded in December 2023.¹³⁸ Ms. Smethurst was the sole caregiver for her five children. Although the judge at first instance had taken the impact on the children into account,

132 *R v. Rescorl* [2021] EWCA (Crim) 2005 (Eng.).

133 *Id.* ¶ 12.

134 *R v. Foster* [2023] EWCA (Crim) 1196 (Eng.).

135 See *id.* ¶ 42 ("Judges can and in our judgment should therefore keep in mind that the impact of a custodial sentence is likely to be heavier during the present circumstances of overcrowding in the female estate than it would otherwise be.").

136 JUD. COLLEGE, EQUAL TREATMENT BENCH BOOK (2024) (UK), <https://www.judiciary.uk/wp-content/uploads/2022/09/Equal-Treatment-Bench-Book.pdf> [<https://perma.cc/2JGV-7NEA>].

137 *Id.*

138 *R v. Smethurst* [2023] EWCA (Crim) 1621 (Eng.).

the Court of Appeal found that the sentence was “manifestly excessive” and reduced the sentence to four years of imprisonment, half of which would be served in custody.¹³⁹ Then, on January 26, 2024, the case of *R v. Williamson*¹⁴⁰ was also successfully appealed, and the original twelve-month custodial sentence was reduced to eight months, suspended for two years. Ms. Williamson was the mother of five children, four of whom were minors, and the pre-sentence report had suggested a community order with an unpaid work requirement because she was found to have a low risk of reoffending, significant time had passed since the offense was committed, and a period of custody could have resulted in the loss of her home and would have had a detrimental impact on her children.¹⁴¹ The judge took the view that the sentence should be a deterrent and was an offense “that can only be marked by the imposition of an immediate custodial sentence.”¹⁴² The Court of Appeal disagreed with this and quashed the original sentence: “[I]n our judgement everything pointed in favor of suspending the sentence.”¹⁴³ This case made it clear that even when there is a public interest reason for deterrent sentencing (for example, drugs being brought into prisons, as in this case)¹⁴⁴ the sentence can still be suspended if the harms to dependent children are properly considered. Suspending the sentence in order to ensure the impact on a child is properly recognized did not “signal any inappropriate lessening of the seriousness with which the courts take the supply of illicit items into prisons.”¹⁴⁵

CONCLUSION

In England and Wales, the approach to sentencing pregnant women and mothers who are sole or primary carers has undergone a transformative shift in the Court of Appeal. After years of piecemeal progress and incremental case law development, the senior judiciary and the sentencing guidelines have established a clear principle: the impact of a sentence on children or a pregnant woman must be a central consideration. Even when the custodial threshold is met, courts are compelled to explore alternatives, including community and

139 *Id.* ¶ 42. In most cases in England and Wales, half of an imposed sentence is served in custody, and the other half is served on license in the community. Criminal Justice Act 2003, c. 44, § 244 (Eng.).

140 *R v. Williamson* [2024] EWCA (Crim) 91 (Eng.).

141 *Id.* ¶ 7.

142 *Id.* ¶ 10.

143 *Id.* ¶ 18.

144 *See id.* ¶ 1.

145 *Id.* ¶ 18.

suspended sentences, to mitigate harm. Deterrence, while significant, cannot overshadow the profound and far-reaching consequences for children whose lives are upended by their caregiver's imprisonment.

The six successful appeals in 2024 underscore a judiciary increasingly attentive to these issues, and yet they also highlight persistent gaps in lower courts' application of the law. Too often, judges fail to fully account for the ramifications of imprisonment on dependent children and pregnant women or wrongly prioritize punitive policies over rehabilitative and socially protective outcomes. These missteps underline the need for continued education and reinforcement of the judiciary's obligations. Unfortunately, the government's Sentencing Guidelines (Pre-Sentence Reports) Bill, due to come into force in fall 2025, has removed the requirements for pre-sentence reports in the case of mothers of dependent children, and pregnant women. This is a backward step.

As the prison system struggles with capacity issues and the efficacy of incarceration is questioned, the Independent Sentencing Review published in June 2025, commissioned by the current government, presents an opportunity to solidify and expand these gains. Unfortunately, it does not recommend a statutory presumption against custodial sentences for mothers, pregnant women, and primary carers of young children, paired with mandatory consideration of the effects of custodial sentences on dependent children and maternal health. However, it does state that there should be a move to imprison fewer mothers and pregnant women. Enshrining this goal in legislation would not only ensure consistency but also align sentencing practices with societal values of justice, family preservation, and child welfare.

England and Wales could lead the way in adopting a humane, evidence-based approach to justice—one that prioritizes the well-being of the most vulnerable and sets a global precedent for safeguarding the rights of children and women in the criminal justice system. Whether they will is yet to be seen.

THE EARLY PUNISHMENT OF ACCUSED WOMEN: EXPERIENCES OF PRETRIAL DETENTION OF MOTHERS AND CHILDREN IN A MATERNAL-CHILD UNIT IN CHILE

CATALINA RUFs,* VICTORIA OSORIO,** FRANCISCA GONZÁLEZ,***
& PABLO CARVACHO****

Abstract

The widespread use of pretrial detention as a response to crime has led to an increase in the population deprived of liberty in Latin America and the Caribbean. This situation has significantly affected women accused of drug crimes, with those accused representing a higher proportion than those convicted of this type of crime in prison. In the face of structural gender inequalities that overburden women's care, this heightened deprivation of liberty implies significant challenges hindering motherhood. As a result, in Chile, as in other countries, infants up to the age of two are allowed to be placed in maternal and child units in prison, both for convicted and accused persons, under the pretense of safeguarding the best interests of the child and strengthening the attachment bond. Based on interviews with accused women living in a mother-child unit with their children in Chile, this Article explores the experiences of mothers and children in the context of pretrial detention. The findings reveal precarious living conditions, difficulties in meeting children's basic needs, and an institutional bureaucracy that contributes little to the well-being of mothers and children. In contrast to convicted women, this situation is exacerbated in the context of pretrial detention. Imprisoned children are deprived of their rights and suffer deficiencies in food, health, education, and recreation. As a result, women experience unique pains of imprisonment associated with the exercise of motherhood and care, such as uncertainty

© 2025 Rufs, Osorio, González, & Carvacho. This is an open access article distributed under the terms of the Creative Commons Attribution License, which permits the user to copy, distribute, and transmit the work provided that the original author(s) and source are credited.

* Corresponding author: Catalina Rufs. Center for Studies on Justice and Society, Pontificia Universidad Católica de Chile.

** Center for Studies on Justice and Society, Pontificia Universidad Católica de Chile.

*** Center for Studies on Justice and Society, Pontificia Universidad Católica de Chile.

**** Center for Studies on Justice and Society, Pontificia Universidad Católica de Chile.

about their child's future. This Article chronicles how pretrial detention is an early sentence that punishes, above all, based on gender and class.

INTRODUCTION

In Chile, as in many other countries, there has been a significant increase in the population deprived of liberty in recent decades, from 142 people per 100,000 inhabitants in 1974 to more than 300 in 2024, fifty years later.¹ In recent years, this rising figure has been even more pronounced in the context of an increasingly punitive criminal justice landscape. In the face of new challenges around criminality and high levels of perceived societal insecurity, the massive use of prison and the strengthening of criminal sanctions has been gaining more publicity and popularity in the government agenda and for citizens.²

A key manifestation of this punitive shift in Chile is the rising use of pretrial detention in recent years. Pretrial detention was a common practice until the inquisitorial procedural system of the last century, but with the modernization of the Code of Criminal Procedure in 2000, pretrial detention became an exceptional regulation.³ Pretrial detention in the modern era should guide a precautionary system in a criminal process that respects individual rights, and, in particular, the presumption of innocence.⁴ However, evidence shows that the

1 *World Prison Brief Data*, PRISON STUDIES, <https://www.prisonstudies.org/country/chile> [<https://perma.cc/L5TF-EZY2>].

2 *65% Cree que Chile está Peor en Comparación al 2000 y 59% Se Siente Pesimista Respecto a la Situación del Mundo en los Próximos 25 Años* [65% Believe that Chile is Worse Compared to 2000 and 59% Feel Pessimistic About the Situation of the World in the Next 25 Years], CADEM RSCH. & ESTRATEGIA (Jan. 5, 2025) (Chile), <https://cadem.cl/estudios/65-cree-que-chile-esta-peor-en-comparacion-al-2000-y-59-se-siente-pesimista-respecto-a-la-situacion-del-mundo-en-los-proximos-25-anos/> [<https://perma.cc/CH5S-935K>]; Latinobarómetro Survey 2023, LATINOBARÓMETRO (Chile), <https://www.latinobarometro.org/latContents.jsp> [<https://perma.cc/73EY-DUPF>].

3 See Mauricio Duce, *Prisión Preventiva en Chile: ¿Uso o Abuso?* [Preventive Detention in Chile: Use or Abuse?], CIPER (Chile) (Jan. 24, 2024), <https://www.ciperchile.cl/2024/01/24/prision-preventiva-uso-y-abuso/> [<https://perma.cc/Z2A3-BF77>]; Mauricio Duce & Cristián Riego, *La Prisión Preventiva en Chile: El Impacto de la Reforma Procesal Penal y de sus Cambios Posteriores* [Preventive Detention in Chile: The Impact of Criminal Procedure Reform and Its Subsequent Changes] 151, 163 (Universidad Diego Portales, 2015) (Chile), https://biblioteca.cejamerica.org/bitstream/handle/2015/1983/estudio_chile_pp.pdf [<https://perma.cc/R454-TWFG>].

4 See *id.*

number of accused persons deprived of liberty has doubled in the last ten years.⁵ We have reached pretrial detention figures similar to those seen in the inquisitorial system, again coinciding with setbacks in the extended duration of the processes.⁶

Women are the group most affected by this growth, despite representing only 8% of the total number of people deprived of liberty.⁷ From 1991 to date, the population of incarcerated women has increased fivefold, in contrast to the population of incarcerated men, which increased by a factor of 2.6.⁸ Chile is the Latin American country with the second highest proportion of women in prison in the region, a position it held at least until the end of 2024.⁹ Concerning pretrial detention, data from the Chilean Penitentiary Services also reflect gender inequality: 46% of the total number of women deprived of liberty have the procedural status of defendants, in contrast to 35% of men.¹⁰

Most women are deprived of liberty for crimes contained in Law No. 20,000, which establishes the sentences associated with drug crimes.¹¹ Of the total population of

5 Mauricio Salgado, *Un Sistema Desbordado: Radiografía al Sistema Penitenciario [An Overwhelmed System: An Overview of the Prison System]*, CENTRO DE ESTUDIOS PÚBLICOS (July 18, 2024) (Chile), <https://www.cepchile.cl/investigacion/voces-del-cep-07-julio-2024> [<https://perma.cc/E8LR-XD8N>].

6 See Duce, *supra* note 4.

7 Gendarmería de Chile, *Caracterización de Personas Privadas de Libertad [Characterization of Persons Deprived of Liberty]* (Dec. 31, 2024) (Chile), https://www.gendarmeria.gob.cl/car_personas_pp.html [<https://perma.cc/962V-8THD>] [hereinafter *Characterization of Persons Deprived of Liberty*].

8 Estimated based on data collected from 1991 to 2023 from Gendarmería de Chile, *Compendios Estadísticos desde 1991 [Statistical Compendia Since 1991]* (Chile), <https://www.gendarmeria.gob.cl/compendios.html> [<https://perma.cc/W47N-44R5>] [hereinafter *Statistical Compendia Since 1991*]; JACINTA RODRÍGUEZ ET AL., *TRAYECTORIAS DE CIDA DE MUJERES PRIVADAS DE LIBERTAD POR LA LEY 20.000: PRESENTACIÓN DE RESULTADOS [LIFE TRAJECTORIES OF WOMEN DEPRIVED OF LIBERTY FOR CRIMES UNDER LAW 20.000]* 4 (Centro de Estudios Justicia y Sociedad, 2024) (Chile), https://justiciaysociedad.uc.cl/wp-content/uploads/2024/07/Presentacion_Mujeres-y-ley-20000_V1_ok.pdf [<https://perma.cc/V9SV-PUEL>].

9 NAT'L INST. OF HUM. RTS., *ANNUAL REPORT 2024: HUMAN RIGHTS SITUATION IN CHILE*, 249 (2024) (Chile), <https://www.indh.cl/informe-anual-situacion-de-los-derechos-humanos-en-chile-2024/> [<https://perma.cc/T6DV-U4NC>] [hereinafter *INDH*].

10 *Characterization of Persons Deprived of Liberty*, *supra* note 7.

11 Law No. 20000, *Sustituye La Ley N° 19.366, que Sanciona el Tráfico Ilícito de Estupefacientes y Sustancias Sicotrópicas [Replacing Law No. 19.366, which Penalizes the Illicit Traffic of Narcotics and Psychotropic Substances]*, February 2, 2005, DIARIO OFICIAL [D.O.] (Chile). See also Biblioteca del Congreso Nacional de Chile, *Historia de la Ley N° 2019.000366 [History of Law No. 20,000]* (Feb. 16, 2025) (Chile), <https://www.bcn.cl/historiadelailey/nc/historia-de-la-ley/5755/> [<https://perma.cc/N5MR-UT8J>].

incarcerated women, 61% are charged with violation of Law No. 20,000, in contrast to 24% of the total population of incarcerated men.¹² In this context, it is essential to note that the proportion of women detained pretrial by Law 20,000 is twenty points higher than the general average—67% of women charged.¹³ This shows a greater use of this type of exceptional punishment for drug offenses than for other crimes. In other words, almost seven out of ten women imprisoned for drug crimes are accused but have not yet been convicted.

The increase in the number of accused women deprived of liberty has prompted critique of prison policy since it has been evidenced, mainly from feminist criminologists, that there are gender inequalities associated with prison that are scarcely considered by the criminal justice and carceral systems.¹⁴ One of the main consequences of a patriarchal structure where care responsibilities fall mainly on women is the hindrance of motherhood.¹⁵ Nine out of ten women in prison are mothers, and 60% of the children are left in a home without a parental figure when they are deprived of their liberty—in contrast to 35% of them when it is the father.¹⁶

To address this issue, Chilean regulations since the 1990s have mandated the creation of maternal-child units within prisons to accommodate pregnant women and mothers with children under two years old. Since then, there have been several changes to the regulations, during which time thousands of children have lived temporarily in these

12 Estimated based on 2023 data from *Statistical Compendia Since 1991*, *supra* note 8.

13 MINISTERIO DE JUSTICIA Y DERECHOS HUMANOS, PLAN DE TRABAJO CONDICIONES CARCELARIAS DE MUJERES PRIVADAS DE LIBERTAD [WORK PLAN FOR PRISON IMPROVEMENTS FOR WOMEN DEPRIVED OF LIBERTY] 19 (2023) (Chile).

14 See, e.g., Carmen Antony, *Mujeres Invisibles: Las Cárceles Femeninas en América Latina* [*Invisible Women: Female Prisons in Latin America*], NUEVA SOCIEDAD 73 (2007) (Arg.), <https://nuso.org/articulo/las-carceles-femeninas-en-america-latina/> [<https://perma.cc/LUM2-238H>].

15 See Eduardo Valenzuela et al., *Impacto social de la prisión femenina en Chile* [*Social Impact of Female Imprisonment in Chile*], in PROPUESTAS PARA CHILE [PROPOSALS FOR CHILE] 279, 295 (Centro de Políticas Públicas, Pontificia Universidad Católica de Chile ed., 2012) (Chile), <https://justiciaysociedad.uc.cl/wp-content/uploads/2023/02/Impacto-social-de-la-prision-femenina-en-chile.pdf> [<https://perma.cc/QP3V-AC88>].

16 Aldo Cortázar et al., *¿Qué asa con los hijos de madres encarceladas? Cómo amortiguar los efectos nocivos para los niños cuyos padres están privados de libertad* [*What Happens to the Children of Incarcerated Mothers? How to Mitigate the Harmful Effects on Children Whose Parents Are Deprived of Liberty*], INSTITUTO DE POLÍTICAS PÚBLICAS 2 (Diego Portales University, 2015) (Chile), <https://www.camara.cl/verDoc.aspx?prmID=117002&prmTIPO=DOCUMENTOCOMISION> [<https://perma.cc/9CTY-B62D>].

sections.¹⁷ These spaces purport to safeguard the best interests of the child by fostering attachment bonds with the mother. However, concerns have been raised by civil society, academia, and international organizations about the living conditions in these units, the caregiving dynamics, and the broader legal and social framework.¹⁸ Part of the challenge in this area is the lack of available information to inform public policymaking regarding women and children.

This Article explores the experiences and narratives of women in pretrial detention with their children, revealing that these women suffer the pains of anticipated punishment in a socio-legal context that criminalizes them based on their class and gender.

The Article aims to investigate and reflect on the pains of anticipated punishment suffered by women who are in pretrial detention with their children in a sociolegal context that criminalizes significantly by class and gender. Our inductive analysis of the content of the interviews with women in prison revealed key categorizations of these women's experiences. Our approach incorporates a mixed methodology with (1) a quantitative introductory analysis that shows the surprising number of women in this condition, which is complemented by an analysis of secondary studies of the subject, and (2) a qualitative analysis based on the interviews conducted with six women serving sentences and six women in pretrial detention at El Centro Penitenciario Femenino de Santiago ("CPF").

There is a dearth of literature examining women who are serving a sentence or pretrial detention in prison with their children. There is even less scholarly analysis of the differentiation between detained women's two experiences: being charged or convicted. This Article aims to fill that gap by examining the impact that more punitive legal frameworks can have on pretrial detention conditions from a gender and human rights perspective.

The structure proceeds as follows. First, we evaluate the legal framework governing maternal-child units and pretrial detentions. Then, we critically examine existing research on motherhood in confinement and the use of pretrial detention. After identifying the gaps in the existing literature that motivated our work, we share key insights from our interviews with women incarcerated at the CPF, highlighting the compounded suffering of mothers

17 See Paola Beatriz Medina Martínez, *Maternidad y Lactancia Materna en la Cárcel: Análisis Desde la Etnografía Institucional* [Motherhood and Breastfeeding in Prison: An Analysis from Institutional Ethnography] 11 (2017) (MGPP Thesis, University of Chile) (Chile).

18 See, e.g., NAT'L INST. OF HUM. RTS., *supra* note 9, at 253.

and children held in pretrial detention. Finally, we offer reflections on our findings and policy recommendations to address the identified gaps and challenges to creating a just system.

I. History of Regulation Regarding Women Who Live in Prison with Their Children: Progress and Legal Discussions

The admission of infants with their mothers to prison in Chile is regulated by minimal legislation.¹⁹ Article 19 of the 1998 Prison Regulations mandates that in Women's Penitentiary Centers, there must be "units that will have adequate spaces and conditions for pre-and post-natal care and treatment, as well as for the care of breastfeeding children of inmates. In those places where these Centers do not exist, the inmates will remain in separate rooms from the rest of the population."²⁰

Allowing children to enter prison with their mothers is intended to safeguard the best interests of the child,²¹ recognize the importance of ensuring the attachment bond, and allow the continuity of breastfeeding, in acknowledgement of how important these factors have proven to be in the biopsychic development of each child.²² The policy also intends to prioritize access to maternal care, especially when there is an absence of networks on the outside that can offer such care—most children are left in a home without a dependent mother or father when the mother is deprived of her liberty.²³

From the policy's implementation until 2005, the care of children inside prisons was implemented through the Provisional Shelter Program for Infants between the Chilean Penitentiary Services and the National Service for Minors, with fifty places available for children. Then, from 2005 until 2014, the policy was implemented through the Transitional

19 See Javiera Cecilia Ramírez Albornoz, *La situación actual que viven niños y niñas menores que residen con sus madres en prisión y su regulación en Chile* [The Current Situation of Children Under the Age of Majority Living with Their Mothers in Prison and Its Regulation in Chile], REVISTA ESTUDIANTEL DE DERECHO PROCESAL [STUDENT J. PROCEDURAL L.] 36, 37 (2022) (Chile).

20 Decree 518, art. 19, Aprueba "Reglamento De Establecimientos Penitenciarios" [Approving "Regulations for Penitentiary Establishments"], Mayo 22, 1998 (Chile).

21 See INDH, *supra* note 9, at 251.

22 See *Lactancia materna y alimentación complementaria* [Breastfeeding and Complementary Feeding], PAN AMERICAN HEALTH ORGANIZATION, <https://www.paho.org/es/temas/lactancia-materna-alimentacion-complementaria> [https://perma.cc/4ZWT-MVDC]; JOHN BOWLBY, 3 ATTACHMENT AND LOSS 201 (1969).

23 See Cortázar et al., *supra* note 16, at 2.

Residency Program between the same institutions, and it was expanded to 110 mother-child places. In 2008, an agreement was signed with the foundation Integra so that infants could be ensured access to food, health, diapers, and preschool education while living in prisons. Between 2014 and 2016, the program was transformed into the Program of Care for Pregnant Women and Breastfeeding Children (“PAMEHL”), in which the limit on maximum places was eliminated, and a transportation service for children to the free environment was added. Eventually, in 2017, this program was incorporated into the Creciendo Juntos program, providing greater health care (pediatricians visited some units), toiletries, diapers, and maternity and parenting items.²⁴

At the end of 2021, the National Service for the Specialized Protection of Children and Adolescents was created, separating from the Servicio Nacional de Menores (“SENAME,” later the National Service for Youth Social Reintegration).²⁵ Beginning 2025, the stay of children in prison is protected under the Abriendo Caminos program of the Intersectoral Social Protection System, which attends to children with a significant adult deprived of liberty abroad.²⁶ While the program provides that only children up to two years of age are allowed to enter, in practice children sometimes stay until they are two and a half years old, which is the maximum age at which they are allowed to be in the available levels of preschool education in prisons.

In 2017, bill Bulletin 11073-07 was promoted and discussed in Chilean Congress from a human rights standpoint. The bill Bulletin proposes a modification of the Code of Criminal Procedure to add a new Article in the Title on the execution of convictions, the “Suspension of the Execution of the Criminal Sentence.”²⁷ In the case of a pregnant woman or mother of a son or daughter under three years of age at the time of the conviction, its execution shall be deferred until the son or daughter reaches three years of age . . . [or]

24 See Medina, *supra* note 17, at 12.

25 U.S. DEP’T OF LAB., 2021 FINDINGS ON THE WORST FORMS OF CHILD LABOR: CHILE (2021), [<https://perma.cc/CS65-LG6B>].

26 *Chile Seguridades y Oportunidades* [*Chile Securities and Opportunities*], MINISTERIO DE DESARROLLO SOCIAL Y FAMILIA [MINISTRY OF SOC. DEV. & FAM.] (Chile), <https://www.chileseguridadesyopportunidades.gob.cl/programa-abriendocaminos> [<https://perma.cc/NQ2H-Z956>].

27 Bill No. 11073-07, Modifica el Código Procesal Penal en materia de procedencia de la prisión preventiva y de suspensión de ejecución de la sentencia, respecto de mujeres embarazadas o que tengan hijos o hijas menores de tres años [Modifies the Criminal Procedure Code Regarding the Propriety of Preventive Detention and Suspension of Sentence Execution for Pregnant Women or Women with Children Under Three Years Old], Enero 4, 2017 (Chile).

in the case of women who become pregnant during the execution of their sentence” and the addition of a new numeral in Article 141 was proposed, which lists the circumstances where it is prohibited to decree preventive detention that “the defendant is pregnant or has a child under three years of age.”²⁸ In the project discussions, suspension was modified by substituting the measure or sentence. To date, it is a project that has not yet been approved.

The Committee that monitors compliance with the provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) expressed its concern about the risks faced by pregnant women in the face of problems of access to obstetric and gynecological health.²⁹ However, as seen through our normative analysis, the discussion and advances on this issue have primarily focused on the well-being of children, without explicitly considering the consequences that all this also has for women. Our study aims to recenter women in this story, analyzing how their unique pains interact with the violations of their children’s rights and pointing toward the need for immediate, systemic reform in the Chilean criminal justice system.

II. Bibliographic and Documentary Review

Recently, there has been an uptick in scholarly attention to the conditions of infants living inside prisons with their mothers who are deprived of liberty in some countries. Most studies on the topic apply the lens of psychology and public health due to the known impact of imprisonment on the development of the infant, the mother’s well-being, and their attachment bond.³⁰ From a criminology perspective, scholars have examined the possible impacts policies may have on deterrence, and the phenomenon has also been discussed from a broader structural, gender, and socio-legal perspective.³¹

28 Ramírez Albornoz, *supra* note 19, at 39.

29 U.N. Convention on the Elimination of All Forms of Discrimination Against Women, *Concluding Observations on the Seventh Periodic Report of Chile*, ¶ 48, U.N. Doc. CEDAW/C/CHL/CO/7 (Mar. 14, 2018).

30 See, e.g., Rachel Dolan, Jenny Shaw & Mark Hann, *Pregnancy in Prison, Mother and Baby Unit Admission and Impacts on Perinatal Depression and “Quality of Life”*, 30 J. FORENSIC PSYCHIATRY & PSYCHOL. 551, 553 (2019); Rachel Dolan et al., *Pregnancy in Prison, Mental Health and Admission to Prison Mother and Baby Units*, 30 J. FORENSIC PSYCHIATRY & PSYCHOL. 448, 449 (2019).

31 See, e.g., Carlo Lai et al., *Motherhood in Alternative Detention Conditions: A Preliminary Case-Control Study*, 19 INT’L J. ENV’T RSCH. & PUB. HEALTH 6000 (2022); Jo Taylor et al., *Rapid Review of the Evidence on Models of Service Delivery for Correctional Centre-Based Mothers and Children’s Units: Does Our Approach Need to Change?*, 9 BMJ GLOB. HEALTH 1 (2024).

However, there is little specific literature on the conditions of women who are in pretrial detention with their children. This may be because the sample is significantly reduced—the proportion of women deprived of liberty who have children, live with their children in prison, and are in the condition of defendants—or because it is a population sometimes characterized by high turnover.

Given this context, the following bibliographic review maps the existing scholarship on the following topics: the pains of the imprisonment of women and their children living in prison, the pains of incarceration in persons deprived of liberty in pretrial detention, and the configuration of the trajectories of women deprived of liberty and their overrepresentation in pretrial detention. Our work fills a gap in the literature, synthesizing these findings to examine the particular pains of mothers held in pretrial detention and concluding that these women and their children suffer unjust anticipatory punishment with wide-ranging social consequences.

A. Pains of the Imprisonment of Women and Their Children Living in Prison

When treating women deprived of liberty, the extant literature usually emphasizes the differentiated gendered consequences of being in prison, both in terms of the pain experienced during incarceration and the unique problems women face.³² Not only are women more likely to have trajectories of greater marginalization and vulnerability,³³ but also, the so-called “pains of imprisonment”³⁴ in women differ. Family relationships and children are among the most central concerns for detained women.³⁵

32 See, e.g., An Nuytiens & Esther Jhaes, *When Your Child Is Your Cellmate: The “Maternal Pains of Imprisonment” in a Belgian Prison Nursery*, 22 CRIMINOLOGY & CRIM. JUST. 132, 132–33 (2022) (“The experience of imprisonment for women is both quantitatively and qualitatively different: not only do women suffer *more* from being imprisoned, they also suffer in *distinctive* ways.”) (emphasis in original).

33 See Pilar Larroulet, *Cárcel, Marginalidad y Delito [Prison, Marginalization, and Crime]*, in LOS INVISIBLES: POR QUÉ LA POBREZA Y LA EXCLUSIÓN SOCIAL DEJARON DE SER PRIORIDAD [THE INVISIBLES: WHY POVERTY AND SOCIAL EXCLUSION CEASED TO BE A PRIORITY] 162 (Catalina Siles ed., 2016) (Chile); Cristina Rodríguez Yagüe & Esther Pascual Rodríguez, *LAS MUJERES EN PRISIÓN: LA VOZ QUE NADIE ESCUCHA. EXPLORANDO NUEVAS VÍAS DE CUMPLIMIENTO DE LAS PENAS IMPUESTAS A MUJERES A TRAVÉS DE LA CULTURA [WOMEN IN PRISON: THE VOICE NO ONE HEARS. EXPLORING NEW WAYS OF SERVING SENTENCES IMPOSED ON WOMEN THROUGH CULTURE]* 51 (2022) 9 (Spain).

34 See GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 63–83 (Princeton Univ. Press rev. ed. 2007) (1958) (coining term “pains of imprisonment”).

35 See SANDRA ENOS, *MOTHERING FROM THE INSIDE: PARENTING IN A WOMEN’S PRISON* 21 (2001).

Another consequence accentuated by gendered realities is the double stigmatization women suffer for being in detainment. Carmen Antony has argued that in prison, women suffer the stigma of breaking not only with the legal norm but also with the gendered norm of their role in society: “A woman who goes through prison is described as ‘bad’ because she contravened her role as a wife and mother, submissive, dependent and docile.”³⁶

In this sense, some authors suggest that in association with this doubled burden, a third distinct sense of social shame emerges: having their children living with them behind bars.³⁷ This situation would not only impact women’s emotional well-being, sense of guilt, shame, and frustration,³⁸ but could also contribute to the disintegration of social support networks from the outside world as an extension of the carceral punishment.³⁹ This phenomena has been recognized as the maternal pains of imprisonment.⁴⁰

Although much of the literature has examined how separation from their children is the primary source of pain for mothers, some authors reflected on the unique pains that can arise from living with children in prison.⁴¹ This experience seems to present dual tensions, as described in the scarce literature on the subject.⁴² On the one hand, there is the positive

36 Antony, *supra* note 14, at 76.

37 See María Florencia Actis, *Un acercamiento a las identidades maternas en contextos carcelarios: sexualidades, disciplinas y deseos* [A Study on Maternal Identities in Carceral Contexts: Sexualities, Disciplines, and Desires], 10 IDENTIDADES 67, 73 (2016) (Arg.); Camila Boza Orellana et al., *Maternidad en privación de libertad: arreglos de Cuidado de infantes en la Unidad Materno-Infantil del Centro Penitenciario Femenino San Joaquín* [Motherhood in Deprivation of Liberty: Infant Care Arrangements in the Maternal-Child Unit of the San Joaquín Women’s Penitentiary Center], 61 PERSONA & SOCIEDAD 47 (2020) (Chile).

38 See Claudiana Perenson, *La maternidad en el encierro: una aproximación a las femeneidades desviadas* [Motherhood in Confinement: An Approach to Deviant Femininities], VI JORNADAS DE JÓVENES INVESTIGADORES DEL GINO GERMANI [CONF. OF YOUNG RESEARCHERS, GINO GERMANI RSCH. INST.] 9 (2011) (Arg.).

39 See Amanda Burgess-Proctor, *Comparing the Effects of Maternal and Paternal Incarceration on Adult Daughters’ and Sons’ Criminal Justice System Involvement: A Gendered Pathways Analysis*, 43 CRIM. JUST. & BEHAV. 1034, 1038 (2016).

40 See ISLA MASSON, *INCARCERATING MOTHERHOOD: THE ENDURING HARMS OF FIRST SHORT PERIODS OF IMPRISONMENT ON MOTHERS* 41 (2019).

41 See, e.g., Nuytiens & Jehaes, *supra* note 32, at 135.

42 See, e.g., Livia Rangel de Christo Nunes et al., *Narrativas sobre as práticas de maternagem na prisão: a encruzilhada da ordem discursiva prisional e da ordem discursiva do cuidado* [Narratives on Mothering in Prison: The Crossroads Between the Prison System’s Discursive Order and the Discursive Order of Care], 36 CADERNOS DE SAÚDE PÚBLICA 1, 5 (2020) (Braz.).

aspect of having the opportunity to exercise the role of mother with their children inside⁴³ and the importance of respecting the naturalness of a baby being with its mother.⁴⁴ Some studies have pointed out that the presence of children makes the stay easier for detained mothers.⁴⁵ However, on the other hand, pain and stress are a transversal finding about the conditions in which they live. Generally prisons offer insufficient resources and access to services, but other harms include the limited possibilities for early socialization, infant and maternal healthcare, and direct exposure to the prison regime.⁴⁶ There is also an overarching sense of discomfort stemming from the mother's how inappropriate it is for their children to be subjected to carceral circumstances with them.⁴⁷ Hence, all the pains associated with that psychological trauma arise as well.

B. Pains of the Imprisonment in Persons Deprived of Liberty in Pretrial Detention

Just as the literature has scarcely delved into women who are deprived of liberty living with their children in prison, it has also only briefly investigated the comparative experience of those who are specifically in jail because of pretrial detention.⁴⁸ While much has been written about the legal consequences of this form of deprivation of liberty, the pain, conditions, and well-being of those who serve have not been considered to the same extent. This measure has also not been approached from a gendered perspective.

A study conducted in the United States concluded that pretrial detention centers have higher turnover rates of both incarcerated persons and staff, more limited resources, and

43 See Boza et al., *supra* note 37, at 59; Nunes et al., *supra* note 42, at 4–8.

44 See Tarja Pösö et al., *Children Residing in Prison with Their Parents: An Example of Institutional Invisibility*, 90 PRISON J. 516, 526 (2010); Jane R. Walker, Eileen Baldry & Elizabeth A. Sullivan, *Residential Programmes for Mothers and Children in Prison: Key Themes and Concepts*, 21 CRIMINOLOGY & CRIM. JUST. 21, 28 (2019).

45 See Ana Maísa Freitas, Ana Risca Inácio & Luísa Saavedra, *Motherhood in Prison: Reconciling the Irreconcilable*, 96 PRISON J. 415, 425 (2016).

46 See Martha Paynter et al., *Mother-Child Programs for Incarcerated Mothers and Children and Associated Health Outcomes: A Scoping Review*, 33 NURSING LEADERSHIP 81, 92 (2020); Lai et al., *supra* note 31, at 5.

47 See Nuytiens & Jhaes, *supra* note 32, at 141.

48 See Claudia N. Anderson, Joshua C. Cochran & Andrea N. Montes, *How Punitive Is Pretrial? Measuring the Relative Pains of Pretrial Detention*, 26 PUNISHMENT & SOC'Y 790, 803–07 (2024).

provide fewer services than postconviction prisons.⁴⁹ These conditions are replicated in Chile, and people in pretrial detention are not eligible for reintegration programs.⁵⁰ Likewise, the literature that has investigated the impact of prison on mental health accounts for two main findings that may suggest how harmful pretrial detention can be to people's well-being. First, it has been shown that the initial phase of confinement presents a greater risk of emotional distress, suicide or self-harm and disruptive behaviors,⁵¹ demonstrating that even brief periods of incarceration severely harm people's mental health. Secondly, uncertainty—a daily state of being in pretrial detention when individuals do not know how long they will be detained and whether they will be sentenced—harms detainees' mental health, causing particular stress and anxiety.⁵² Oleski shows in his study that anxiety levels in those who are in pretrial detention increase over time, unlike those who are serving sentences, where it decreases when adjusted after the initial stress.⁵³ This pain would be exacerbated by heightened uncertainty.

The consequences of pretrial detention can be just as harmful as deprivation of liberty in convicted persons, presenting a greater risk of recidivism, family disruption, damaged work development, and projections of lower income and worse health.⁵⁴ The authors suggest that this could be due to the increased risk of conviction but also because of the same experience during deprivation of liberty with the loss of social ties, victimization, and mistreatment by prison staff.

When comparing people in pretrial detention and those serving sentences, those in pretrial detention are less likely to report that prison staff keep them safe and secure and

49 See Elisa Toman, Joshua Cochran & John Cochran, *Jailhouse Blues? The Adverse Effects of Pretrial Detention for Prison Social Order*, 45 CRIM. JUST. & BEHAV. 316, 318 (2018).

50 See Bernardita Frez Ciscutti, *Preventive Detention: Deepening Gaps*, JUNTOS POR LA REINSECCIÓN (Feb. 6, 2024), <https://www.juntosporlareinsersion.cl/post/columna-de-opinion-prision-preventiva-ahondando-brechas> [<https://perma.cc/G7JS-ASLB>].

51 See Kenneth Adam, *Adjusting to Prison Life*, 16 CRIME & JUST. 275, 300 (1992).

52 See Gary Mason, *Indeterminate Sentencing: Cruel and Unusual Punishment, or Just Plain Cruel?*, 16 NEW ENG. J. CRIM. & CIV. CONFINEMENT 89, 103 (1990).

53 See Merritt S. Oleski, *The Effect of Indefinite Pretrial Incarceration on the Anxiety Level of an Urban Jail Population*, 33 J. CLIN. PSYCHOL. 1006, 1007 (1977).

54 See Anderson et al., *supra* note 48, at 803.

report a more violent environment.⁵⁵ Pretrial detainees are more likely to report concerns about being victimized, to be labelled as exhibiting violent behavior, and to engage in physical fights with prison staff. In this way, pretrial detention is sustained as an anticipated punishment.⁵⁶

C. Status Quo of Women Deprived of Liberty and Inequalities in the Use of Pretrial Detention

National and international literature has shown that, although most of the prison population has trajectories of high levels of adversity and social exclusion, women experience these effects even more acutely.⁵⁷ Although the figures vary by country, it has been shown that in Latin America, the proportion of women deprived of liberty due to drug criminalization ranges between 40 and 80%, while the proportion of men detained on drug charges is significantly lower.⁵⁸

In Chile specifically, this difference between the proportion of women and men is almost forty percentage points, followed by the crime of robbery which has the second largest difference with men leading.⁵⁹ A recent study characterized the trajectory of women deprived of liberty by drug law, providing an account of the various adversities that accumulated in their histories in which class and gender oppressions intersected, generating experiences of acute exclusion.⁶⁰ Many women had suffered various forms of violence, and most became pregnant during adolescence and ended their educational career in a family context without social or economic networks, state support, or the presence of the father.⁶¹ The crimes they were accused of were usually economically motivated, and

55 See *id.*; see also David May et al., *Going to Jail Sucks (and It Really Doesn't Matter Who You Ask)*, 39 AM. J. CRIM. JUST. 250, 260 (2014).

56 See Mikaela Rabinowitz, “*What Will Become of the Innocent?*”: Pretrial Detention, the Presumption of Innocence, and Punishment Before Trial, 7 UCLA CRIM. JUST. L. REV. 1, 26 (2023).

57 See Larroulet, *supra* note 33.

58 COLETTA A. YOUNGERS, *LIBERARLAS ES JUSTICIA: MUJERES, POLÍTICAS DE DROGAS Y ENCARCELAMIENTO EN AMÉRICA LATINA* [RELEASING THEM IS JUSTICE: WOMEN, DRUG POLICY AND INCARCERATION IN LATIN AMERICA] 6–8 (2023), https://www.wola.org/wp-content/uploads/2023/11/Briefing-Paper-Liberarlas-es-justicia_Final_Web.pdf [<https://perma.cc/RN4Q-8FMT>].

59 See RODRÍGUEZ ET AL., *supra* note 8, at 6.

60 See *id.* at 26.

61 See *id.*

except for profiles of acute trauma of lesser prevalence, there was a low level of criminal involvement.⁶² Most of the women worked independently and were usually convicted or charged with micro-trafficking, not as part of an important drug trafficking organization (nor as a leader). The exception to this rule was migrant women who, in the intersectionality of oppression and trajectories of greater economic precariousness, had most often worked transporting drugs as *burreras*.⁶³

In Chile, micro-trafficking is punishable by a medium or maximum term of imprisonment, which implies a time limit of between 541 days and five years in prison.⁶⁴ This legislation makes it difficult for pregnant women or women with breastfeeding children to access the measures contemplated in Law 18.216, which establishes alternative penalties for deprivation of liberty.⁶⁵ Article 4(a) of that law provides that the custodial sentence must not exceed three years to be eligible for an alternative sentence.⁶⁶

This context shows the reasons for the hardening of criminal policies on drugs, specifically in Chile with Law 20,000. The Inter-American Commission on Human Rights (CIDH) has established the obvious: in Latin America, women are more likely to receive the precautionary measure of pretrial detention.⁶⁷ It has also been shown that access to justice and services is worse in the region for those in pretrial detention than for those who are serving sentences,⁶⁸ which would further exacerbate gender inequality in prison conditions that are already inequitable for women. In this way, the tightening of drug policies has generated a severe increase in the levels of female incarceration of both prosecuted and convicted women. In particular, the CIDH warns that this situation occurs in a context that, in addition to a lack of proportionality in the treatment of these crimes, excessive use

62 See *id.* at 23.

63 See *id.*

64 INDH, *supra* note 9, at 262–63.

65 See Law No. 18.216, *Establece Penas que Indica Como Sustitutivas a las Penas Privativas o Restrictivas de Libertad* [Establishes Substitutes for Custodial or Liberty-Restricting Sentences], Febrero 12, 2025 (Chile).

66 See *id.* at art. 4(a).

67 See INTER-AM. COMM’N ON HUM. RTS., *Women Deprived of Liberty in the Americas*, H.R. Doc. 91/23, 24, 26 (2023).

68 See *Uso excesivo de prisión preventiva en A. Latina afecta de manera desproporcionada a las mujeres* [Excessive Use of Pretrial Detention in Latin America Disproportionately Affects Women], DEJUSTICIA (June 3, 2019), <https://www.dejusticia.org/uso-excesivo-de-prision-preventiva-en-a-latina-afecta-de-manera-desproporcionada-a-las-mujeres/> [https://perma.cc/G2QH-PECA].

of pretrial detention, and restrictions on procedural benefits, is characterized by a lack of consideration of the circumstances surrounding the commission of crimes by women and the personal factors that cause their involvement in these activities, on the part of judicial operators.⁶⁹

This evidence, alongside the knowledge gaps regarding the consequences of the use of pretrial detention, Chile's massive reliance on imprisonment, and the lack of a gender, class, and children's perspective on prison policies, motivated our study.

III. Objectives, Methodology, and Contribution

A. Methodology

Our study⁷⁰ sought to investigate the conditions in which women live with their children in prison, both in pretrial detention and postconviction, highlighting the relevant differences between these experiences. To achieve this objective, a mixed methodology was applied. First, we conducted a quantitative analysis of administrative records of the Chilean Penitentiary Services of Chile that recorded how many pregnant women or women with infant children were deprived of their liberty in the last five years. Our analysis also added information about each detainment's procedural quality.⁷¹

The quantitative analysis was complemented with qualitative methodologies. The latter consisted of interviewing twelve women deprived of liberty in the Women's Penitentiary Center of Santiago, which is in the Metropolitan Region of Chile. In this sample, the aim was to include six women in the condition of pretrial detention and six convicted women.

69 See INTER-AM. COMM'N ON HUM. RTS., *Women Deprived of Liberty in the Americas*, H.R. Doc. 91/23, at 46–47 (2023).

70 This Article is part of a broader study being carried out by the Center for Studies on Justice and Society of the Pontifical Catholic University from Chile, "Motherhood in prison. Experiences of women living with their children in mother and child units in Chile (UMI) in a punitive social context." The study investigates how motherhood is experienced in the maternal and child units of prisons, analyzing the adversities and positive aspects of this experience, and unravelling the impact it has on both women and their infants. The aim is to generate knowledge, from the perspective of women, that contributes to improving public and prison policies. This study was approved by the Scientific Ethics Committee in Social Sciences, Arts, and Humanities of the Pontifical Catholic University under ID 241003001.

71 Although this information is not very detailed, we were unable to access more data due to the low levels of systematized information on the prison population. This is due to lack of registration, structural problems in existing recordkeeping, and difficulties in accessing data through restricted transparency laws.

Using the total number of women living with their children in March 31, 2024 (n=115),⁷² we estimated that by interviewing twelve women we were reaching approximately 10% of the population. Given the qualitative purpose of our study, the sample was not chosen with statistical methods to ensure representativeness. To select participants, we requested that the Chilean Penitentiary Services psychology services allow us to interview women in the following conditions: convicted women and women going through pretrial detention, who were living with their children or had lived with them at the unit in the last 2 months, and who had some variation in terms of age, type of charged crime, and time they had been inside.

In Table 1, we describe the sample of women that participated in the study.

Table 1: Sample description (N=12)

<i>Characteristic</i>	<i>Item</i>	<i>Descriptive</i>
Procedural condition	<i>Convicted (%)</i>	58%
	<i>Defendant (%)</i>	42%
Number of children	<i>Mean</i>	3.57
	<i>Range</i>	2–5
Age child inside (months)	<i>Mean</i>	14
	<i>Range</i>	3–24
Repeat offender	<i>%No</i>	42%
Type of crime	<i>Drug offender</i>	75%
	<i>Violent crime</i>	17%
	<i>Another</i>	8%
Time inside (months)	<i>Mean – total</i>	16
	<i>Mean – pretrial</i>	9
	<i>Range</i>	6–36
Pending time (for convicted women, months)	<i>Mean</i>	28
	<i>Range</i>	3–96
Reasons why they have their children inside	<i>Children’s health issues (%)</i>	8%

72 This number does not consider pregnant women living at the units.

	<i>Father in prison</i>	17%
	<i>They had no one outside for childcare</i>	75%

B. The Interviewing Process

The interviews⁷³ were conducted using a semi-structured pattern that guided the conversation through a series of topics relevant to the research, but these questions did not define the limits of this interaction. The analysis of the information recorded was deductive and inductive,⁷⁴ which allowed us to analyze previous categories of information that we had in mind from the bibliographic review and earlier work on the subject but also enabled new avenues of inquiry that were not contemplated at the outset of the project.

Before each interview, the Chilean Penitentiary Services allowed us to enter the respective maternal and child units (one for convicted women and the other for pretrial detainees) and contact the women. There, the interviewer made the invitation to participate in the study based on a pre-established script. All the interviewees participated in the reading and prior signing of an Informed Consent form, which explained the research details, the possible risks and benefits, and provided information on who to contact in case of concerns. In addition, this document emphasized the voluntary nature of the interviewees' participation and the absence of legal repercussions for the decision to do so or not. All the women invited to participate did so willingly.

The interviews were conducted during November and December 2024 during two daytime times. We tried to conduct interview sessions while the babies were in the nursery, but in some cases, it was impossible, and we had to perform them with the baby present (N=3). As a research team, we had an exhaustive protocol of action in contingencies. These contingency plans included the action plan for an emotional overflow with Psychological First Aid techniques for witnessing situations of serious violence against children.

Given the limitations on the authorization from the Chilean Penitentiary Services of Chile, we could not record the interviews. In lieu of recordings, what was discussed in each interview was recorded with paper and pencil. When the interviewers left the establishment,

73 The questionnaire that was used as a guide for the conversation is included in the Appendix.

74 See JAMES W. DRISKO & TINA MASCHI, CONTENT ANALYSIS (2015).

they recorded their notes immediately in an Excel spreadsheet containing all the findings that were relevant to record.

The results are described below. An analysis and discussion section are followed by our conclusions and policy recommendations. Finally, we note the limitations of the study and opportunities for future research in this area.

IV. Results

A. A National Perspective on the Subject

The number of women living in the maternal and child sections decreased between 2019 and 2020, mainly due to the pardons granted during the COVID-19 pandemic.⁷⁵ However, from 2020 to date, there have been upward trends in the rates of both conviction and charging.⁷⁶ In 2022, more women were living in these sections as accused detainees than as convicted prisoners (eighty-seven versus seventy-nine).⁷⁷

Figures from the Chilean Penitentiary Services for the year 2024 showed that although the national average of coverage was 61%—that is, there was occupancy of six for every ten places—this was not the case throughout the territory.⁷⁸ In the northern regions, where there is an overrepresentation of migrant women deprived of liberty, coverage was 120% and 140% in the CPF Arica and CCP Iquique, respectively.⁷⁹ This accounts for a finding also discussed with personnel of the Chilean Penitentiary Services and the Undersecretariat for Children about the territorial differences in the conditions in which women and their children live in these sections. Overcrowding is one of the additional inequalities they must face, but there are others, such as the lack of a nursery inside.

75 See INDH, *supra* note 9; see also Graphic 1.

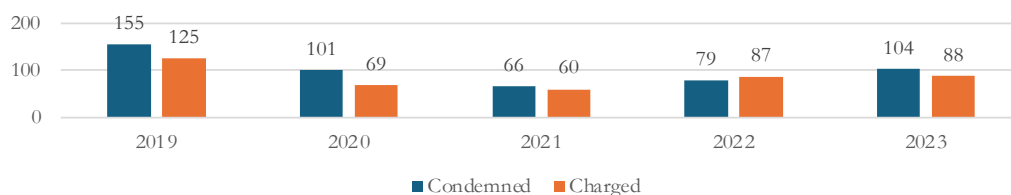
76 See INDH, *supra* note 9.

77 *Id.*

78 See *Comisión de Mujer y Equidad de Género [Women and Gender Equality Committee]* (TV Senado television broadcast May 3, 2024) (Chile), <https://tv.senado.cl/tvsenado/comisiones/permanentes/de-la-mujer-y-la-equidad-de-genero/comision-de-mujer-y-equidad-de-genero/2024-05-03/133839.html> [https://perma.cc/9SXA-3RTJ].

79 See INDH, *supra* note 9.

Graphic 1: Number of breastfeeding women in maternal and child sections according to year and procedural quality



Source: Authors' elaboration based on the 2024 Annual Report: Situation of Human Rights in Chile.

A study commissioned by the Undersecretary of Social Services in 2015 characterized this situation.⁸⁰ The study found that the average age at which children joined their mothers in prison was six months, and it was observed that, on average, they stayed inside for an average of 10.9 month.⁸¹ 68% of the children were born while the mother was in the CPF,⁸² and in 35% of cases, the father was also deprived of liberty.⁸³ Regarding who women perceive as caregivers of their child when they leave, only 9% indicate the father, evidencing a lack of active fatherhood.⁸⁴ This figure is consistent with a patriarchal context where care and domestic responsibilities fall mainly on women.

80 See ClioDinámica, *Estudio de Sistematización del Diseño e Implementación del Piloto Línea Materno Infantil – Programa Abriendo Caminos* [Study on the Systematization of the Design and Implementation of the Maternal-Infant Pilot Program – Abriendo Caminos Program] (2015) (Chile), https://www.desarrollosocialyfamilia.gob.cl/btca/txtcompleto/Final_Piloto_Materno_Infantil.pdf [https://perma.cc/XQ5R-6QVT].

81 *Id.* at 49.

82 *Id.* at 48.

83 *Id.* at 54.

84 *Id.* at 55.

B. Perspectives of Women Deprived of Liberty in CPF Santiago⁸⁵

1. Life Experience Before Admission to the UNIT

In line with extant literature, the reports of the women interviewed in the maternal and child sections show life experiences marked mainly by barriers associated with class and gender. Recurring themes that emerged across the interviews included social exclusion, material shortages, economic difficulties, and precarious access to jobs. Additionally, many interviewees reported that they had few support networks and little parental co-responsibility in raising children and in domestic chores, a close environment dedicated to criminal activities, and a history of substance use or domestic violence. This gives an account of trajectories of profound marginality and exclusion, which mark the lives of the women accused and detained pre-conviction, even though most of the women indicated that before their arrest, they had not been involved in criminal activities, and only some had been previously deprived of liberty.

In qualitative terms, no significant differences were detected in the trajectories of those who are accused and that of the women who were interviewed by the study who were serving sentences postconviction. Previous studies have shown that the most significant differences in the trajectories of women deprived of liberty are predicted by the type of crime for which they serve a sentence, not necessarily by procedural quality.⁸⁶ The most significant differences, we will show in this analysis, lie in the conditions in which women live while in prison.

A substantial portion of the women we interviewed mentioned that the situation that led to their arrest and subsequent imprisonment was a crime, usually drug-related, committed by another person close to them in their presence, at their home, or in some context that directly involved them. In this context, the first glimpses of an anticipated punishment framework in the face of ambiguous events take shape, revealing the criminal justice

85 The CPF Santiago is the mother-child section with the best conditions in the country, although there are still differences in the quality of care between the section of convicted women and those in pretrial detention. Therefore, the findings described here represent the conditions in the metropolitan region and are not necessarily representative of other regions that probably have more profound opportunities for improvement. In the future, it would be important to obtain funding to visit and replicate this study in the other maternal and child units in the country to contrast the experiences and delve into new aspects of analysis.

86 See RODRÍGUEZ ET AL., *supra* note 8, at 8.

system's lack of recognition of detainees' motivations and the questionable justification underlying the "well" applied measure of deprivation of liberty.

Most women interviewed were deprived of liberty for crimes committed concerning Law 20,000. As discussed in the literature review, given that the penalties imposed by this regulatory framework are high, it is more likely that preventive detention will be decreed for this type of crime. Most of the women charged do not describe deep, constant criminal trajectories or association with a high level of involvement in illicit activities. Several of them mentioned that the punishment they were receiving felt disproportionate, also alluding to the fact that several of them had left small children out of prison.

When women are asked why they decided to enter prison with their children under two years of age, dissimilar reasoning was offered for why it could improve the well-being of their children. While some pointed out that "no one is going to take care of a child better than his mother," others highlighted that the absence of support networks, and more specifically, the absence of other women in their environment who could take care of their children, were factors that led them to make their decision. One example of this was that even some women with adult children decided not to leave their baby in their other child's care because they were male, pointing out that "if they were female daughters," they would undoubtedly choose them to take care of their babies, and they would be free. A father figure was rarely present, and when he was, he is not identified as someone trustworthy who could take charge of the child's upbringing and care. In this sense, the gendered expectation of caregiving was present throughout the interviews. Those with support networks pointed out that they did not want to continue adding responsibility or "bothering"—as they put it—the families or friends who cared for their other children.

However, the most significant concerns described by the interviewees were attachment to the child, breastfeeding, and the fear of losing their bond with their child. As they shared more throughout the interviews, some interviewees pointed out that having their children there for them had been a salvation and a motivation to resist. However, they also mentioned that a detainment center was not a suitable place for any child.

2. Structural Differences of the Maternal and Child Unit: Differences Between Convicted Women and Pretrial Detainees

To fully understand the incarcerated experience of accused mothers and their children suffering anticipatory punishment, it is necessary to describe some elements that characterize the prison system, in contrast to the conditions in the maternal and child units

of accused women. It is pertinent to note that the characteristics of the maternal and child sections in Chilean prisons vary significantly between the different regions of the country, especially in terms of infrastructure, programmatic offer, and capacity. In this case study, as established in methodology, reference is made to the Women's Penitentiary Center of San Joaquín, located in the Metropolitan Region.

During the visits and the conduct of the interviews, structural and cultural elements that characterize the organization of the mother-child unit were identified. There are marked differences between the mother-child section for convicted women and that for sentenced women. Despite having a similar number of women and children in both sections, the spaces for children present discrepancies in infrastructure and the activities offered to them, in addition to lacking adequate areas for free play. Below, we highlight four key findings about the heightened stress women held in pretrial detention undergo due to these disparate conditions.

a. Infrastructure

The prison is a space that has historically been configured in terms of housing the male population—with little respect for human rights—making it even less well-adjusted to the habitability needs of the female population.⁸⁷ Similarly, the unit's infrastructure is not designed and organized for mothers to live with their children. Although the section for convicted women has better structure, women accused with their children were transferred in recent years from another detention center in the Metropolitan Region because of the increase of people deprived of liberty in the country and because their living space is not friendly to parenting. The kindergarten does not have direct access to the outdoors, and everything is organized around a long corridor of a dark building where it is difficult to meet. For example, in the convicts' section, the inmates can gather around a playground to talk and care for their children while they play—which simulates a square—but that does not happen in the defendants' section.

Thus, according to the accounts of the interviewees in pretrial detention, the building is characterized by its smallness, where the rooms concentrate the heat in summer and where the patio, remodeled with synthetic grass and awnings, is not used due to the high temperatures that have already caused several accidents and burns. In the winter, the rooms'

87 See, e.g., Subin Abraham et al., *Gender Specific Needs and Human Rights in Prisons*, 44 LIBR. PROGRESS INT'L 8986 (2024).

high ceilings generate extreme cold that cannot be compensated for by the few blankets delivered.

b. Access to Vital Resources

The interviewees also reported a scarcity of resources to meet basic needs, an essential problem of the Chilean prison system. This resource shortage manifests in limited food, diapers, and other supplies necessary to ensure the well-being of children. Although women can receive parcels from specific people who are duly authorized to do so, the internal regulations of the Chilean Penitentiary Services and the discretionary use of authority mean that these resources often do not reach the women for whom they are intended. Children who require special food or care must try to bring the products in through visits, and obtaining them is particularly difficult due to the bureaucracy of the Penitentiary Services.

These accounts reveal institutional barriers to ensuring the well-being of these women's children. Detained women face impediments to bringing in bottles, diapers, fruits, vegetables, or other foods, and even face a lack of response to their children's health emergencies because their reports are often dismissed or doubted. These barriers are more evident in women who have been charged compared to those who have been convicted. For example, in the unit for sentenced women, the preschool operates from Monday to Friday from 9 a.m. to 4 p.m. In contrast, the unit for defendants operates in a shift system where children attend for approximately one hour a day.

c. Bureaucratization of Care, Processes, and Access to Activities

Another problem associated with structural factors in the prison system is insufficient staffing, which is an obstacle to the proper functioning of the unit and, therefore, to the well-being of mothers and children. This problem means that at night, the courtyard of the accused—which logistically is far from the technical spaces and meeting spaces—is left without custody. When emergencies occur, the women have no one to whom they can turn, and so they are not given an immediate response. Another direct consequence of the lack of equipment is the difficulty in managing outings, such as appointments at health facilities when children are sick. In many cases, women comment that their children have not received timely medical attention because there are no officials to guard their transfer to the corresponding care facility. This is one of the significant stressors they suffer while there.

A characteristic commonly identified by the women interviewed was the bureaucratization of the prison's processes, which generates various difficulties and stressors for both women and their children. No matter how urgent, any request must be expressed in writing, received by the unit's officials, and forwarded to the prison authority. Women point out that their requests are often poorly answered or are rejected without any justification, which occurs even more often for accused women because they are in an intermediate space. In this way, according to the interviewees, there is a lot of discretion in the treatment and decisions made by the staff which makes it difficult to guarantee decent living conditions for their children. Several interviewees mentioned that the conditions of incarceration depend largely on the person in charge of managing the units. When a specific professional with the capacity and willingness to promote improvements in the spaces and who even specialized medical care within the unit left her post, many women noted that their quality of life was diminished.

The procedural quality also limits the possibilities of access to various benefits during the deprivation of liberty. Although access to educational, work, or other activities is not widely available in the prison system, convicted women have the possibility of accessing them to the extent that they meet the entry requirements according to each program's quotas. On the other hand, pretrial detention restricts access to any of these benefits, and there are no specialized programmatic offerings for these women, who must spend their time in prison practically without access to any of these activities, which deepens their mental discomfort. The few interventions or workshops in which they have participated come from the management of programs outside the Penitentiary Services.

d. Prison Staff's Treatment

Another differentiating factor of the experience of incarceration identified through the study was the difference in treatment from prison staff according to the procedural quality of the woman's case. The women accused, compared to those who have already received their sentences, more frequently described situations in which they received undignified treatment by Chilean Penitentiary Services personnel, arbitrariness in the decisions made regarding the unit, and lack of concern regarding the problems they raise about the low quality of life in the maternal unit. An example of this is the language used by prison staff, who describe the women accused as "more complicated," "screaming," "complainer-alegonas," and "rumormonger or troublemaker-cahuineras," reflecting greater institutional violence compared to that faced by the convicted. Likewise, the interviewees commented that because convicted women are "of the house"—in contrast to the accused who can leave at any time by order of the competent court—they maintain a closer link to the

institution and enjoy greater access to facilities and resources that, although tremendously insufficient, are notably better than those offered to women in pretrial detention.

Although the interviewed women greatly valued the ability to stay with their children in their first years of life to strengthen their maternal bond, this gratitude was in tension with guilt they reported feeling for having to enter prison with their children. They made it very clear that they were aware that this was not a space conducive to the proper development of their children. This argument, in many cases, is used by the Chilean Penitentiary Services to blame the women themselves for being “bad mothers” or suggesting that their children are there for what they did, which causes a lot of emotional exhaustion.

Additionally, in the case of both convicted and accused women, interviewees described the use of children as a control mechanism and manipulation tactic by the Chilean Penitentiary. On several occasions, Penitentiary Services threatened to take their children away; these stories appeared throughout the interviews as a recurring fear. One woman described that “you could be hitting your head against the wall at night, but during the day you have to show yourself well” so that you are not disqualified from care and your child is taken outside. If women present mental health problems, fight with another inmate or express a combative attitude, the Penitentiary Services can inform the authorities and take the child out of the compound. These children may be removed to relatives, or if relatives are unavailable, to state protection homes. This would partly explain why this type of module remains calmer. In one remarkable story, according to two interviewees, one woman was punished and taken to solitary confinement with her son for two weeks. She asked to be taken out of there because of the humidity that her son was exposed to, and then she began to hit the walls harder and scream out of desperation. At that time, the institution decided that the woman was “disabled” to take care of her son, and he was removed from the unit and her care.

Although this form of control is evident in the testimonies of convicted men and women, the additional uncertainty felt by the accused can aggravate the emotional repercussions of this immense anxiety and stress.

3. Conditions of Imprisonment of Mothers and Their Children

The living conditions of mothers and children in pretrial detention are marked by vulnerability, uncertainty, and unmet basic needs. An extremely common sentiment in the interviewees’ accounts is that “I am the one who is imprisoned here, not my son,”

alluding to the fact that they can deal with the precariousness of incarceration, but that it is unjustified for their children.

The de facto imprisonment of children, according to the accounts of the women interviewed, reveals a deficient quality of life that violates the rights of their children. Basic subsistence conditions are well below a standard that guarantees well-being in the areas of food, health, education, and recreation. The food provided by the Chilean Penitentiary Services is perceived as insufficient, with little variety, and often of low quality. Health is the area that generates the greatest concern for these mothers, considering the consistent barriers to timely access to healthcare that place the lives of their children at risk. In this sense, the conditions of incarceration mean that outbreaks of viruses and other diseases are concentrated in the child population and generate contagion for all those who live in the unit. As with other challenging conditions, this situation is exacerbated in the case of the women held in pretrial detention, as they are in a space that receives less attention and care from the institution.

Children also have few spaces that allow them developmental opportunities. They have limited access to toys or other objects that encourage their stimulation during growth. The kindergarten, according to the women interviewed, is far from being an interactive learning space and instead operates as a nursery that reduces the cognitive development of their children. There are great differences between the space available in the kindergarten of convicted women in contrast to that of accused women, the former being comparable those offered outside and the latter simply being an indoor holding room. Several of the accused women expressed their concern about their children difficulty developing skills appropriate to their life cycle.

Regarding the children's connection with the outside world, the interviewees state that there are barriers to their children interacting with their grandparents, siblings, or other relatives, due to the habits developed while being in the restricted, monotonous environment of the unit. Similarly, when addressing issues related to children's outings or "bonds," it is observed that the interviewees, due to the young age of their children, prefer to limit the frequency of these outings. In some cases, this is because the children are breastfed; in others, because the children do not know any of their relatives outside. When asked about visits in prison, the interviewees pointed out that the spaces intended for these interactions are not suitable for children, since they present extreme conditions, such as excessive cold in winter and intense heat in summer.

When the interviewees were asked how they perceived the well-being of their children in the unit, the immediate answer was typically that it was the worst possible environment for a child's growth because their rights are constantly violated. However, as the interviews progressed, some positive aspects emerged, such as the possibility of exercising motherhood even when they are deprived of liberty, or the care and affection of some officials towards their children. However, the exercise of motherhood in the context of confinement is marked by concern, especially considering that the uncertainty of their future—the outcome of the investigation and the possibility of being convicted after a trial at any time is always present—and the long duration of preventive detention ranging from six to eighteen months for the women interviewed.

The sense of motherhood of the accused in the unit generates deep pains of imprisonment, as they do not have any clarity about how much longer they will have to spend deprived of liberty, and do not know if after two years their children will have to leave without them. When asked about what would happen if they had to remain incarcerated after their children were released, none of the women consulted could imagine a scenario in which they would have to be separated from their children, which shows a deep emotional and mental discomfort that is left unaddressed. In the same way, women still expressed deep concern for the well-being of their older children who remained in a free environment under the care of other people, but who they found it difficult to maintain a bond with.

Support networks in this regard are key, but many of the women reported feeling discomfort receiving visits from their children in this environment because they did not want their children to see them in prison. Visitors also must face long waits or go through arduous review procedures to enter the penitentiary, trials that the interviewees did not want to impose on their children. In this way, the exercise of motherhood of accused women deprived of liberty is marked by stress and constant concern for the well-being of their children both inside and outside prison, constituting a profoundly lonely and painful experience.

However, when the women detained in the accused units assess their living conditions, they focus on the conditions of their children. In other words, they do not problematize the precarious conditions of incarceration on themselves but rather shift their attention to the well-being of their children. Scarcely do the women refer to institutional neglect of their own physical and mental health care, or the lack of supplies and coverage of their basic needs. This is underscored by an idea repeated in the interviews: "I can adapt to anything. Here the mistake was made by me, not my son." In sum, there is an established discourse on the rights that must be guaranteed to children, but not to mothers.

V. Analysis and Discussion

These results clearly illustrate how women in pretrial detention with their children suffer at the intersection of the “maternal” pains of incarceration⁸⁸ and those pains that seem to be exacerbated in pretrial detention contexts.⁸⁹ We conclude that the anticipatory punishment that women held in pretrial detention suffer is in fact more acute than the pains suffered by women imprisoned postconviction.

One of the major differences of discomfort felt by the accused women in contrast to the convicted women is how their period of detainment is marked by uncertainty in different aspects of their lives.⁹⁰ The accused women experience this time as a double punishment: in addition to being deprived of liberty during the investigation of the crimes with which they are charged, their inability to know the duration of this procedural situation generates additional psychological stress. Uncertainty about their future prevents them from planning their lives, and they suffer by not knowing what will happen to their children who are imprisoned with them. Added to this uncertainty is the pain of being unable to ensure the well-being of those children who have been left out of prison, which is a common experience.⁹¹

This punishment also has more concrete repercussions. In general, the conditions of the sections for pretrial detainees are more precarious, with worse infrastructure and a scarce programmatic offerings, since, due to their procedural condition, they do not have to comply with an intervention plan, which is replicated in other contexts around the world.⁹² This deepens the discomfort derived from the pains of incarceration associated with living with their children inside because it is not a suitable place for their development, which affects the children’s well-being and causes the mothers to feel guilt, shame, and frustration.⁹³ This discomfort would deepen given the already-discussed material conditions in the units.

Motherhood and the first two years of life are critical developmental periods in the life of a woman and a child. This period is taking place in a small space that is very unfriendly

88 See Nuytiens & Jhaes, *supra* note 32, at 145–46.

89 See Rabinowitz, *supra* note 56, at 2–8.

90 See Oleski, *supra* note 53, at 1007–08.

91 Nuytiens & Jhaes, *supra* note 32, at 134.

92 Toman et al., *supra* note 49.

93 See Nuytiens & Jhaes, *supra* note 32, at 134; Boza et al., *supra* note 32, at 53.

and uncondusive to women and their children's needs, in which they are practically without activities, with few social ties or support networks, and suffering in uncertainty for periods as extended as two years. For children, this means living their first years of life in the context of confinement, in cramped spaces, with no or little stimulation and high levels of stress and conflict.

The first years of life are essential for the proper development of children because of the importance of forming attachment and secure bonds and developing neural plasticity.⁹⁴ It is precisely this significance that generates conflicting priorities for mothers, since they value strengthening that bond and attachment so necessary in the first years of life, but it is at odds with the guilt they feel knowing that their children are not growing up in dignified and conducive spaces for their development. All of these stressors cause significant deterioration in the mental and physical health of these women.

While these inadequate conditions have been recognized before, our study also reveals the pain associated with the bureaucratization of these children's care. In order to take care of their children, incarcerated mothers must go through a system that limits, restricts, reviews, controls and even prohibits the elements that they consider necessary to that care. Given the structural differences between the conditions in which the accused and convicted women are held, the discomfort associated with this bureaucratization of care is greater for the former, as they face additional barriers in the process and less institutional disposition to help.

It is an international agreement that, although children live in prisons, they are not deprived of liberty and can go to the outside environment if this can be coordinated.⁹⁵ In practice, due to lack of personnel, lack of networks, or the well-founded apprehensions of incarcerated women, this does not happen so expeditiously or recurrently, and children are de facto prisoners of the system. This has a direct impact on the fact that when we talk about the pains of incarceration, we are not only referring to those that women experience there, but also that the pains suffered by children are deepened in pretrial detention.

In this way, the accumulated pains suffered by women who enter the mother-child units as defendants constitute an anticipated punishment, with clear class and gender inequalities. Women held in pretrial detention suffer similar harms, or are even more harshly punished,

94 See generally BOWLBY, *supra* note 22.

95 SEE MANFRED NOWAK, UNITED NATIONS GLOBAL STUDY ON CHILDREN DEPRIVED OF LIBERTY (2019); G.A. 44/25, art. 37(b), Convention on the Rights of the Child (Nov. 20, 1989).

than those serving time post-conviction,⁹⁶ a situation with severe consequences for these mothers, their children, and the social order.

VI. Recommendations

Reports by international bodies like CEDAW⁹⁷ point to the need for robust reform of the prison system. The findings of our study and others focusing on a female prison population⁹⁸ provide clarity regarding the measures that should be taken to develop gender-sensitive prison policies that consider the welfare and rights of children incarcerated with their mothers. Our study also allows for a more in-depth analysis of pretrial detention and reinsertion program recommendations.

In light of our findings, we argue that the following measures must be considered when setting public policy to strengthen protections for this population. Only by implementing these reforms can the Chilean justice system reduce the societal toll of the anticipatory punishment of women accused of crimes.

A. Legal and Justice System Reforms

Given the high rates of pretrial detention in the female population, the first and perhaps central reform should be the rational use of pretrial detention as an exceptional measure, not a default punishment. Pretrial detention should be even more limited in the case of women who are the primary caretakers of children. To this end, the prosecutor's office should develop clear guidelines that explicitly consider gender and that authorize pretrial detention only for truly qualified and serious cases.

In addition, alternatives to prison must be strengthened, including promotion of parole processes and community reintegration programs that offer comprehensive support to women. Such programs should offer with resources like housing, employment, medical and psychological care, and childcare assistance. These programs can be based on the restorative justice paradigm, focusing on rehabilitation, trauma repair, and social

96 See Anderson et al., *supra* note 48, at 806.

97 See, e.g., U.N. Doc. CEDAW/C/CHL/CO/7, *supra* note 29.

98 See, e.g., Abraham et al., *supra* note 87; COMITÉ PARA LA PREVENCIÓN DE LA TORTURA [COMM. FOR THE PREVENTION OF TORTURE], INFORME DE VISITA A LA SECCIÓN MATERNO INFANTIL DEL CENTRO PENITENCIARIO FEMENINO SAN JOAQUÍN [REPORT ON THE VISIT TO THE MOTHER AND CHILD SECTION OF THE JOAQUÍN WOMEN'S PENITENTIARY CENTER] (2022), [<https://perma.cc/CE4Z-JYRB>].

reintegration, rather than solely punishment. Rather than carrying out a punitive mission, the state can safeguard the community while treating the root causes of criminal conduct by offering intensive supervision, participation in addiction treatment programs, community work, and vocational training. The literature shows that these programs are most effective when they are tailored to the specific needs of each woman and her family.⁹⁹ To achieve this, it is necessary to seek collaboration with community organizations, faith-based groups, and volunteers who can provide support to women and their families. Community participation also helps reduce the stigma associated with incarceration and facilitates social reintegration.

A comprehensive response to prison reform is necessary in light of this study's findings: the commission of crimes occurs in the context of trajectories of profound material and social adversity, which in the case of women is accentuated by the single-parent responsibility of raising and supporting their children in a gender inequitable structure. Any reintegration program must consider the comprehensiveness of these women's needs in both material terms and trauma reparation.

Finally, Law 20,000, which regulates punishable conduct in relation to drug trafficking and production, should be reviewed to reduce excessive penalties, especially for women who commit crimes related to drug consumption or trafficking in situations of economic or social vulnerability (which is the reality of the women that participated in this study and others we have done with incarcerated women).¹⁰⁰ Considering that drug consumption is a common issue among this population, instead of custodial measures and sentences, addiction treatment should be prioritized in the revised law, authorizing detoxification, therapy and social support programs as an alternative to incarceration. Other alternatives such as community service or fines should also be considered, reserving prison for cases addressing serious crimes or recidivism. There are successful international models of statutes regulating drug crimes focus on public health, such as Portugal's, where possession of drugs for personal use is considered a public health concern, not a criminal offense.

99 See generally INT'L CORR. & PRISONS ASS'N, ALTERNATIVES TO INCARCERATION AND COMMUNITY-BASED PROGRAMS FOR JUSTICE-INVOLVED WOMEN: KEY PROGRAM INDICATORS AND COST-BENEFIT ANALYSIS CONSIDERATIONS FOR DECISION MAKERS (2020); Renée Gobeil, Kelley Blanchette & Lynn Stewart, *A Meta-Analytic Review of Correctional Interventions for Women Offenders: Gender-Neutral Versus Gender-Informed Approaches*, 43 CRIM. JUST. & BEHAV. 301 (2016); Richard Summers, Simon Pemberton & Joanna Long, *Examining the Effectiveness of Interventions for Criminal Justice-Involved Women: A Meta-Analytic Review*, 52 CRIM. JUST. & BEHAV. 690 (2025) (summarizing seventy-one interventions and finding gender-responsive programs up to 42% more effective).

100 See RODRÍGUEZ ET AL., *supra* note 8, at 26.

B. Social Support and Gender-Responsive Programs

While high level legal reform of the prison system takes place, it is essential to develop programs to support mothers who are currently incarcerated. These programs must be designed with a multidisciplinary approach. Psychological support should include individual and group therapy, aimed at addressing trauma, anxiety, and depression. Social support should involve the provision of resources for women such as financial aid, housing opportunities, legal assistance, and guidance in accessing social services. For mothers with infants in prison, breastfeeding support is necessary, as well as access to childcare or childcare programs within the prison or in the community.

Access to education should include literacy, vocational training, and job training programs. Courses tailored to women's needs and interests should be offered, with flexible timetables and childcare support. In relation to the right to healthcare, medical care must be comprehensive, including reproductive health (prenatal control, family planning, postpartum care) and mental health. Child health services must be comprehensive, including regular checkups, immunizations, and treatment of illnesses. Early stimulation for children should be provided by trained professionals, using educational methods appropriate to their age.

C. Prison Staff

The training and sensitization of prison staff must go beyond theoretical courses. Training should include simulations, role-playing, and hands-on workshops that help new staff understand the experiences of incarcerated women, the consequences of incarceration on families, and the importance of humane and respectful treatment. The importance of non-discrimination and the need to create a safe and supportive environment for mothers and their children should be emphasized.

Prison staff's treatment of detainees in the mother-child unit should be aimed at maintaining the family bond. In this context, visitation policies must be flexible and accessible, respectful of the children's rights, and cognizant of the needs of mothers and their families. This includes allowing regular visits, with longer durations and fewer restrictions. Visits from children, including newborns, should be allowed with the possibility of breastfeeding during visits. Phone calls and videoconferences should be facilitated so that the mothers can maintain regular contact with their children who remain outside of prison.

In terms of the necessary infrastructure, facilities should be designed with the specific needs of women and their children in mind, creating a safe, natural, clean, and stimulating environment. Visiting areas should be private and comfortable spaces, with games and toys for children. Adequate childcare spaces should be provided, including nurseries and playrooms. Sanitary facilities should be clean and accessible, considering the needs of breastfeeding women and young children. Efforts should be made to create an environment that facilitates the mother-child bond, promoting interaction and the early development of children.

D. Monitoring, Evaluation, and Interinstitutional Coordination

Lastly, it is important to further assess the long-term impacts of the deprivation of liberty on mothers and their children. Future studies should employ qualitative and quantitative methodologies, including surveys, interviews, and statistical analysis. The well-being of women and their children should be monitored before, during, and after incarceration. The results should be used to inform policies, improve programs, and evaluate their effectiveness.

Human rights organizations—in particular, the Human Rights Institute and the Office of the Ombudsman for Children—should play a primary role in monitoring compliance with the human rights of incarcerated women and their children. This involves investigating allegations of rights violations, making recommendations to improve prison conditions, and representing women before the authorities. These institutions can also educate the public about the rights of incarcerated women and promote legislative changes.

Finally, for all of these reforms to be possible, it is essential to strengthen inter-institutional and inter-agency collaboration. This collaboration requires coordinated work between the justice system, social services, the education system, healthcare providers, and other relevant agencies. An effective referral system, with clear and fluid communication between institutions, could ensure that women and their families receive the help they need. It will be necessary to create stable and mandatory inter-institutional working groups to plan and coordinate these efforts.

VII. Limitations and Projections of Our Study

One of the main limitations of this Article is the fact that voice recorders were not allowed in the mother-child units, even though we repeatedly requested authorization at different institution levels. Therefore, our interviews were not recorded, and so it was not

possible to report verbatim excerpts from the women's accounts. In spite of this limitation, we decided to continue with the study because of the importance of making visible these women's conditions in order to make informed public policies recommendations and contribute to the academic debate on the use of deprivation of liberty and, specifically, pretrial detention.

We are aware that this limitation reduces compliance with the Article's ethical principles of reproducibility and transparency. However, having decided that the benefit of going ahead without recordings was greater than the costs of foregoing the opportunity to shed any light on this issue, we took the following precautions. First, we handwrote notes of the main points of the interview, as long as this did not interfere with the flow of conversation, after receiving consent from the women to leave a written record of their speech. In addition, immediately upon leaving the interview room, we recorded a personal audio note with everything we remembered from the conversation. Finally, we filled out a form with information about the interview's content and the characteristics of the women who participated to keep the results registered.

We were also limited by the conditions of the environment where the interviews were held: the spaces we were provided did not always ensure the privacy of the women, and sometimes the interviews took place in the presence of a prison officer. This limitation could not be solved during the interviews due to the institutional dynamics of the maternal and child units and their infrastructure. To reduce its possible impact, we prioritized being in spaces where the women felt comfortable (they could choose where to take the interviews, with some of them done in the yard, others in the bedrooms, and others further down the hall). Also, we spoke very close to the women and in a low tone of voice to reduce the likelihood that third parties could overhear their speech.

Another limitation of the study, given its qualitative nature and small sample, is that the interviewers' biases may have affected the guidance of the conversation and the interpretation of the women's narratives. In order to reduce these biases, we made the following decisions: (1) We diversified the interviewers' backgrounds by employing researchers who had entered and done studies in prison before and others who had not, as well as researchers who were mothers and others who were not. (2) After the first entry, we met to discuss and calibrate our assessments. We also discussed them with other team members with experience in the subject, which allowed us to adjust specific interpretations, questions, and protocols for future interviews. (3) We tried to focus the interviews on the issues the interviewees believed to be relevant, not on what the interviewers were looking for (beyond using the questions as a thematic guide). (4) We jointly decided on the thread

of the study's findings and the argument, trying to make them more descriptive of what we found rather than interpretative from our position.

The study lacks detailed statistical information that would have allowed for a larger sample size. With access only to the number of people living in the units and their procedural quality due to low levels of registration, systematization, and transparency in the administrative records and national data in this regard, it was not possible to elaborate further analysis that would account for the bigger picture of incarcerated mothers in Chile.

Finally, our findings are based on visits and interviews carried out in a penitentiary facility that has been evaluated as having the best conditions in the country, according to prison staff and government officials. This means we still have little to no knowledge of what happens in other maternal and child units, especially in those in northern Chile, which are known to have worse living conditions. In addition to gathering data on these other regions, it is hoped that future studies will discover more about the unique experience of migrant women deprived of liberty with their children. In this study, only one foreign woman was interviewed, from whose singular account it is still possible to observe that she experienced acute problems and unique challenges. These limitations suggest the need to strengthen registration systems to enable future studies to utilize more robust and representative information on the Chilean prison population.

Despite these restrictions, the main contribution of this article is of a qualitative and exploratory nature, shedding light on a topic that is scarcely visible in the extant literature or public policies. We see this study as a beginning that illustrates the need to explore these issues with greater precision and robustness in the future.

APPENDIX

Interview Guideline (translated from Spanish to English)

INTRODUCTION

Thank you for your time. Let me tell you about the study.

My name is XXX, thank you very much for being here. I work as a researcher at the Catholic University, where we are doing a study on motherhood in prison to learn about the experience of women who are living or have lived in the mother and child units. Our goal is to get to know you, to know about your life, and to understand how motherhood is lived in this space, to know the negative and positive aspects of the experience and the impact it has had on your life. We are going to interview several women here, and then we are going to tell those who make decisions about the prison about the study, and with that we hope that they can take measures so that in the future other women and children will have a better quality of life.

Your participation would be with an interview that would take between one hour and one hour and a half, and there are no good or bad answers. I just want to know your life story and your vision about living here with your child. Also, at the end of the interview, I will ask you some quick questions with a questionnaire in order to record the characteristics of those who participated. Participating in the study is completely voluntary, and if you decide to leave, we can end the interview at any time you want to stop. Also, everything you tell me here is confidential, and nothing will ever be published where your name or your child's name is identified, nor will any information be exposed that would put you at risk. Only I will know that you participated, and then the results of all the women who participated without names will be analyzed. There are no benefits to participating, but I would like to give you this snack as a thank you for your time. To confirm that you want to participate, I need you to sign this informed consent form detailing everything I have told you in more detail. Look, let's read it together.

[Informed consent form is read together, explained, and signed.]

INTERVIEW

The goal is to make interviews as conversational as possible.

1. Before the Conviction

To begin with, I would like you to tell me a little bit about yourself and your story, thinking about your life just before you entered the CPF:

- What was your life like? What did you do? Who did you live with and where did you live? (Did you always live in that place? What was the neighborhood you lived in?)

- How many children do you have? How would you describe your relationship with your children? What was your children's relationship with their father? Who were your main support networks in motherhood before you came here? (What was your relationship with the father of your children? Did you have other important relationships? What was your relationship with your family before you came here? What was it like in your childhood and youth?)

- [Only if the interviewee is a foreigner with a migration project] How did you arrive in Chile? How was the process of migrating here? With whom did you come? Who stayed in your country of origin? How was the treatment you received when you arrived here? What was it like for you and your children (if applicable) to adapt to this new life?

- [Only if the interviewee is a foreigner detained at the border] What was it like to enter Chile? How were you treated? What information did you have about what was going to happen after your detention?

2. Entry to CPF and IMU

Now I would like to talk to you about your admission to the CPF and to the IMU in particular.

- Could you tell me how long ago you entered the prison and why? What module did you enter? (Had you been deprived of liberty before? When and for how long? For what crime?)

- [if convicted] For how long were you sentenced? How long have you been in prison?

- [if charged] How long have you been in pretrial detention?

- [only if the interviewee has more children] What happened to your children when you came here? Who was left in charge of their care?

- How was the process to enter the Mother and Child Unit? What information did you have about your rights and those of your child? Who made the decision? Did someone or some institution support you in the process? Why did you decide to enter with your child? How long were you in another module until you were transferred to the IMU?

- [only if the interviewee had their child while incarcerated] How was your pregnancy in the unit? How was the delivery process? Who helped you? What was the best and worst thing about the process?

3. Experience in the IMU

Now I would like to talk about your life and your child's life in the Mother and Child Unit:

Routine and Bonding with Child

- How old was your child when he/she was admitted? How did he/she adapt to this place? What was the best and the most complex part of this process?

- What is your daily routine like, and that of your child?

- How has life been here? What is it like to live here compared to a regular population module? What differences and similarities do you have with the women who live outside the IMU? For example, I imagine that in the modules you see more drug use than here in the IMU. What is drug use like here in the IMU? Have you ever used drugs in your childhood or youth? Have you received treatment?

- What do you think is the best thing about living here with your child? What has been the worst thing? What impact do you think it has for your child to go through the IMU?

- What benefits do you think it has for you and your child to be in the IMU compared to him/her being outside? How much care is taken at the IMU to guarantee the rights of the children?

- How do you think your child is doing here in terms of the care he/she receives? How do you feel he/she is doing here? How have you felt living with him/her here? How would you describe the relationship you have been able to form with your child?

- How do you evaluate the conditions of the place? What could be changed to improve his/her daily life here?

Link to the Outside World

- [if applicable] How many children were left outside and in whose care? How is your relationship with them?

- How is your relationship with the father of your children? Does your child have contact with him/her? And with other people in the family?

- What are your main support networks? How is your contact with people outside the country? Do you receive visits or parcels?

- Are there other people or organizations - other than your family or the Gendarmerie - who support you or your child in the IMU? What kind of support do they receive? How does this support differ from the support you receive from the staff working in the IMU?

Access to Benefits and Link with Gendarmerie

- How does access to resources for your and your child's physical health and mental health work? How is your access to recreational activities?

- How is your access to education or work in the unit? (Tell me a little about your education, up to what grade did you attend? If you left, for what reason? Which grades did you complete here? Have you ever worked in your life? What were those jobs like? Have you worked during your detainment?)

- How is your access to workshops or other activities?

- How is your relationship with the Gendarmerie in the UMI? How is your relationship with your fellow inmates?

- How is your child's relationship with the prison staff? And with the other women and their children?

- How is your child's relationship with the people from the institution and how do you evaluate the quality of the place and the treatment of you and your child?

4. Transition to the Outdoors

And about your child's transition to the outdoors.

- When should your child leave the prison? If you don't leave with your child, how much longer should you stay? Until what age do you think the children should be here?
- Who will your child go to live with once he/she leaves? What do you think his/her life will be like when he/she leaves? What are the positives and negatives of your child leaving, for you and for him/her?
- What do you think the discharge process is like for you and for him/her? What would you change in that process to make the transition out of the CPF better for you and for him/her?

5. Areas for Improvement

- What is needed to improve the quality of life of the children in the IMU? And to improve the quality of life of the women?
- What could be improved in terms of the activities and services the children access?
- How could the place/space be improved? What other things would make the passage through the IMU better?
- Can you imagine a better alternative for women who have young children to serve their sentence, without the children having to be in a unit like this?

6. Future Projections

- What would you like to do when you get out of here? Where would you like to live? What would you like to do when you get out? What do you think you need to do to get out?
- What do you imagine your relationship with your children will be like once you leave?
- What challenges do you think you will face when you leave the prison? What goals do you want to accomplish?
- Is there anything about your history, your life here, your hopes for the future, or any opinions that you think you haven't told me, but you think are important to you?

- What are the three things you value most in your life, and the three things you like most about yourself?

ACCIDENTAL CARCERAL SUBJECTS: REASSESSING THE PRISON NURSERY MODEL IN INDIA

STUTI SHAH*

Abstract

This Article critically examines the Indian prison nursery model from a sociolegal perspective. Although framed as a reform to uphold child rights, the policy of allowing children to live with their incarcerated mothers until the age of six obscures the inherently punitive and harmful nature of carceral institutions to these children.

The Article argues that the purported “choice” mothers have to keep their children with them in prison is profoundly shaped by structural inequality—while women with access to resources may arrange external care, those without are left with no meaningful alternative. This coerced caregiving compromises children’s constitutional rights and situates maternal labor within carceral control. The Article also critiques the state’s heavy reliance on nonprofit organizations to operate prison nurseries, exposing the uneven, unsustainable, and often ad hoc nature of these arrangements. Rather than mitigating harm, such reforms often entrench carceral logics under the guise of care.

Ultimately, the Article calls for a shift away from reformatory models toward abolitionist frameworks that center the dignity, rights, and autonomy of both mothers and children. It urges a radical reimagining of the state’s response to maternal incarceration, one that dismantles carceral systems and enables mothers and children to live together and thrive beyond prison walls.

© 2025 Shah. This is an open access article distributed under the terms of the Creative Commons Attribution License, which permits the user to copy, distribute, and transmit the work provided that the original author(s) and source are credited.

* Doctoral Candidate, Columbia Law School. Fulbright-Nehru Research Fellow. I am deeply grateful to Smita Dharmamer, Vijay Raghavan, Kurpa Shah, Surekha Sale, Monica Dhawan, and Renu Nag for sharing their time and insights with me. I would also like to thank Julie Matonich, Olivia Hudson, Barbara Frey, and the Children of Incarcerated Caregivers team for their support throughout this project. My sincere thanks to the organizers of this symposium (particularly, Sarah Hubner and Aysha Tabassum), and to the editorial staff of the *Columbia Journal of Gender and the Law* for their thoughtful feedback and careful edits. I am equally indebted to my fellow symposium participants, whose work and reflections have enriched my thinking in meaningful ways.

INTRODUCTION

Across the world, rates of female prisoners are on the rise.¹ India ranks fourth globally in terms of its absolute prison population,² with women constituting 4.15% of the prison population in India.³ Reports from various governmental agencies, jail⁴ reform committees, and non-governmental organizations (NGOs) have consistently highlighted the deplorable conditions within women's prisons in India, which are marked by overcrowded cells, inadequate sanitary facilities, and a general lack of access to essential healthcare and recreational facilities.⁵ Many women also continue to be incarcerated in cells within larger male prisons, which exacerbates their vulnerability.⁶

What is conspicuously absent from socio-legal discourse on carcerality, which legal researcher Dr. Shona Minson calls an “institutional blindspot,”⁷ is an adequate examination of an invisible cohort—the children of incarcerated women, who are often confined along with their mothers up to the age of six in India.⁸ Equally overlooked is the painful separation children face upon turning six, when they are either placed with a suitable surrogate

1 PENAL REFORM INT'L & THAI. INST. OF JUST., GLOBAL PRISON TRENDS 2023 (2023), <https://cdn.penalreform.org/wp-content/uploads/2023/06/GPT-2023.pdf> [<https://perma.cc/JDD8-HTY4>].

2 *Incarceration Rates by Country 2024*, WORLD POPULATION REV., (2024), <https://worldpopulationreview.com/country-rankings/incarceration-rates-by-country> [<https://perma.cc/2N2M-GEHV>].

3 NAT'L CRIME RECORDS BUREAU, PRISON STATISTICS INDIA 45 (2022) (India), <https://www.ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/psiyearwise2022/1701613297PSI2022ason01122023.pdf> [<https://perma.cc/62ZS-38XL>].

4 In India, the term “jails” is used interchangeably with the term “prisons.” Pre-trial detainees are often incarcerated within the same carceral complexes as convicted individuals.

5 See, e.g., *Plight of Women in Indian Prisons: A Compilation of Facts and Figures by CJP*, CITIZENS FOR JUST. & PEACE (2019), <https://cjp.org.in/plight-of-women-in-indian-prisons/> [<https://perma.cc/67JZ-SB47>]; NAT'L COMM'N FOR WOMEN, A REPORT ON IMPROVING THE CONDITION OF WOMEN INMATES IN PRISONS (2018) (India), [<https://perma.cc/46X8-RBQV>]; MINISTRY OF WOMEN & CHILD DEV., WOMEN IN PRISONS (2018) (India) [<https://perma.cc/B7VR-3ZWG>]; CTR. FOR RSCH. & PLAN., REPORT ON PRISONS IN INDIA: MAPPING PRISON MANUALS AND MEASURES FOR REFORMATION AND DECONGESTION (2024) (India), [<https://perma.cc/7TU6-HPWH>].

6 See NAT'L CRIME RECS. BUREAU, *supra* note 3, at 13–14. In India, only sixteen out of thirty-six states and union territories have women's jails. *Id.* at 8.

7 See generally SHONA MINSON, MATERNAL SENTENCING AND THE RIGHTS OF THE CHILD (2020) [hereinafter MINSON, MATERNAL SENTENCING].

8 See Rachel Condry & Peter Scharff Smith, *The Sociology of Punishment and the Effects of Imprisonment on Families*, in PRISONS, PUNISHMENT, AND THE FAMILY: TOWARDS A NEW SOCIOLOGY OF PUNISHMENT? 2 (Rachel

caregiver or sent to an institution run by the Social Welfare Department. As of December 2022, 1,764 children accompanied their mothers (1,537) to India's prisons.⁹ Notably, 85.3% (1,312) of these incarcerated women were pre-trial detainees, with 1,479 children in tow, while 12.9% (198) were convicted individuals, accompanied by 230 children.¹⁰ These children are not collateral consequences¹¹ but are integrated into a carceral system that remains woefully ill-equipped to meet their specific needs, either in terms of safety, health, or development. This lack of recognition has created significant barriers to understanding who these children are and what their specific needs entail. The aim of this Article is to disrupt this invisibility and provide a critical examination of the lived experiences of children in prisons.

Furthermore, terms used to describe children of incarcerated caregivers, such as the "orphans of justice," the "Cinderella of penology," or the "forgotten victims of crime,"¹² are based on limited, often sentimentalized or overly simplistic narratives that obscure the broader implications of their circumstances. They do not adequately reflect the nuances of the children's experiences or their unique socio-legal status within the prison system. This Article therefore introduces the term "accidental carceral subjects" to describe these children, who are punished despite having committed no crime. The term acknowledges the lack of agency that these children have in their circumstances and the unintended nature of state harm. It highlights the legal and social gray area these children reside in, where they are ostensibly the beneficiaries of the state's policy that allows them to stay with their mothers yet are simultaneously treated as prisoners.¹³ This Article seeks to critically

Condry & Peter Scharff Smith eds., 2018). The question of prisoners' relatives and children did not surface properly until the latter part of the twentieth century.

9 NAT'L CRIME RECS. BUREAU, *supra* note 3, at 41.

10 *Id.*

11 See MINSON, MATERNAL SENTENCING, *supra* note 7. Minson has critiqued the use of the term "collateral consequences" to describe the impact of parental incarceration on children. *Id.* She argues that this terminology minimizes the harm these children experience, framing their suffering as a passive, indirect effect rather than as an intentional and direct consequence of their mothers' imprisonment by the state. *Id.* Minson highlights that the problematic origin of the phrase was in military discourse, where it was used to categorize certain people as unwanted, surplus, or expendable. *Id.*

12 See Asha Bhandari, *Women Prisoners and their Dependent Children: A Study of Jaipur and Jodhpur Central Jails in Rajasthan*, 65 SOCIO. BULL. 357 (2016).

13 See *infra*, Parts II, III.

explore this tension, highlighting the ways in which the state's actions both safeguard and undermine the welfare of children caught in the carceral web.¹⁴

The Article also critiques the illusion of choice that the state offers mothers—to either raise their children within the confines of a prison or face the heartbreaking decision of separation, condemning their child to grow up without them. This Hobson's choice reflects broader systemic failures in both the prison system and social welfare structures, which fail to provide adequate alternatives for mothers and children caught in the web of the criminal justice system.¹⁵

In this Article, I employ theoretical and critical methodologies to analyze this issue, supplementing these approaches with interviews with three NGOs—India Vision Foundation, Prayas, and Aangan Trust—that are involved in running prison nurseries in India. These interviews provide valuable insights into the practical realities of implementing policies designed to support mothers and children in prison while also illuminating the gaps between policy and practice.¹⁶ The Article highlights how India's prison system fails to meet its national and international obligations related to the rights of children and the treatment of incarcerated mothers. This leads to significant harm that disproportionately affects women and children from marginalized Dalit¹⁷ and Adivasi¹⁸ communities by failing to recognize their status as active victims of the punitive system, reinforcing their marginalization.¹⁹ According to the latest official prison statistics, 66% of undertrials belong to Scheduled Castes, Scheduled Tribes, and Other Backward Classes across religions.²⁰

14 See *infra*, Parts II, III.

15 See JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861). The idiom “Hobson's choice” refers to an illusion of choice between two inequivalent options.

16 See *infra* Part II.

17 The term “Dalit” refers to individuals of heterogenous communities that occupy the lowest rung of India's caste-based hierarchy and are placed outside the caste system altogether. Dalit Panthers adopted the term “Dalit” to refer to themselves, rejecting both M.K. Gandhi's label “Harijan” (which translates to “people of God”) and the British government's label of “Depressed Classes.” The term “Dalit” means “broken to pieces” in Marathi.

18 The term “Adivasis” is a Sanskrit term used to refer to India's indigenous populations.

19 See NAT'L DALIT MOVEMENT FOR JUST., CRIMINAL JUSTICE IN THE SHADOW OF CASTE: STUDY ON DISCRIMINATION AGAINST DALIT AND ADIVASI PRISONERS & VICTIMS OF POLICE EXCESSES 13–20 (2018) (India), https://www.annihilatecaste.in/uploads/downloads/data_190118030229_21000.pdf [https://perma.cc/UTE9-GJDQ].

20 Shibra Siddiqui, *Majority of Prison Undertrials Youth, From Oppressed Communities*, NEWSCLICK (Jan. 9, 2024), <https://www.newsclick.in/majority-prison-undertrials-youth-oppressed-communities> [https://

This Article proceeds in three sections. Part I introduces the broader context of the issue, tracing the socio-legal emergence of the neglect of children who accompany their mothers to colonial times. Part II assesses the gap between policy and practice regarding children in prison and further explores the inadequacy of a reform that the Indian carceral system has adopted to address the issues experienced by these accidental carceral subjects: prison nurseries. Part III offers a way forward and proposes what can be done differently. I argue that even if these policies were implemented effectively, prisons remain fundamentally unsuitable environments for children. This Part supports the recommendation of the Council of Europe that children living in prison with a primary caregiver experience substantial trauma, vulnerability, and stigmatization and that although prisons are not appropriate environments for children, forced separation of mothers and infants is highly undesirable. It therefore advocates for the adoption of the United Nations (U.N.) Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the “Bangkok Rules”),²¹ which urge nations to employ non-custodial sentences for mothers with caregiving responsibilities.²²

Most studies on the consequences of parental incarceration suggest that the impact on children is largely consistent, regardless of the nature of the parent’s crime—whether violent or non-violent, as long as it does not involve a crime against children.²³ Accordingly, this Article adopts a non-discriminatory stance, viewing all incarcerated mothers, irrespective of the crime of which they have been charged, as deserving of support, care, and the opportunity to parent their children in a non-carceral environment.²⁴

perma.cc/JT2P-B2LY]. “Scheduled Castes” and “Scheduled Tribes” refers to a prescribed schedule of castes and tribes, including Dalits and Adivasis, in the Indian Constitution who are eligible for special provisions, including affirmative action policies under Part XVI of the Indian Constitution. India Const. art. 16(4).

21 See G.A. Res. 65/229, United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the “Bangkok Rules”) (Dec. 21, 2010).

22 *Id.* at r. 60.

23 See, e.g., SARA WAKEFIELD & CHRISTOPHER WILDEMAN, NAT’L COUNCIL ON FAM. RELS. HOW PARENTAL INCARCERATION HARMS CHILDREN AND WHAT TO DO ABOUT IT (2018) [<https://perma.cc/8G9B-8HT5>] (“One thing that is clear from the research we review here is that there is little evidence that the consequences of parental incarceration for children differ for parents convicted of violent crimes, drug crimes, or other nonviolent crimes.”).

24 The Article critiques the application of colonial legal frameworks to assess the actions of indigenous women, arguing against the characterization of certain behaviors as “crimes” under such laws. It also challenges the use of these frameworks to determine the suitability of mothers to care for their children.

While the primary focus of this Article is on children who are incarcerated with their mothers, its findings may have broader implications for children separated from their mothers and who exist on the “outside.”²⁵ The extension of punitive measures to the children of incarcerated women raises a critical ethical and legal question: How can the imposition of punishment on a primary caregiver be justified when it extends to the child, who is often an innocent party?

I. Setting the Context: Invisibility of The Accidental Carceral Subjects

A. Continuation of a Colonial Project

Colonial governance in India was consolidated through the establishment of the modern penal infrastructure.²⁶ The architecture, regulations, and conditions of colonial prisons were designed primarily with male prisoners in mind.²⁷ Women prisoners, who were a minority and therefore overlooked, were often placed in sections of prisons designed for men, with little to no regard for their gender-specific requirements, such as privacy, safety, or appropriate health care.²⁸

Furthermore, when women were incarcerated, they were often left with no choice but to bring their children along with them, particularly if there was no one to care for their children on the outside.²⁹ From the very inception of the modern prison in India, children of incarcerated mothers were subjected to the same brutal conditions as their mothers,

25 See Neelam Sukhrmani & Shivangi Gupta, *Children of Incarcerated Parents*, 57 INDIAN PEDIATRICS 199, 199–203 (2020). While there is no official data on the number of children on the outside who are affected by maternal incarceration, based on the fertility rate and the prison population within the reproductive age group, some estimates suggest that eight lakh children in India do not follow their mothers into the prison. *Id.* Therefore, the Indian carceral system impacts more children of women prisoners than women prisoners themselves.

26 See Mira Rai Waits, *Imperial Vision, Colonial Prisons: British Jails in Bengal, 1823–73*, 77 J. SOC’Y ARCHITECTURAL HISTORIANS 146, 147 (2018).

27 See Mahuya Bandopadhyay & Rimple Mehta, *Introduction: Carceral Logics, Gender Justice, and Resistance*, in WOMEN, INCARCERATED: NARRATIVES FROM INDIA 9 (Mahuya Bandopadhyay & Rimple Mehta eds., 2022) (“The prison is organized with the male prisoner as the archetype.”).

28 See Satadru Sen, *The Female Jails of Colonial India*, 39 INDIAN ECON. & SOC. HIST. REV. 417 (2002).

29 See, e.g., as recorded in Section 1(2) of the Andaman and Nicobar Manual, which detailed, amongst other things, the transportation of convicts to the islands where the British had set up a penal settlement:

including surveillance,³⁰ overcrowding,³¹ and poor hygiene.³² They were highly vulnerable to a range of health risks, exacerbated by inadequate medical care, poor sanitation, and the lack of protective measures against contagious diseases.³³ The absence of quarantine protocols for incarcerated individuals suffering from infectious illnesses led to alarmingly high mortality rates among children. For instance, in 1870, twenty-five out of thirty-seven children residing in the Female Penitentiary died within the year, a testament to the harsh and neglectful conditions in which they were confined.³⁴

There were also no specialized facilities designed to meet the needs of children, nor any efforts to create a nurturing environment conducive to their development.³⁵ Prison authorities therefore encouraged incarcerated mothers to send their children outside prison once they turned two years old.³⁶ However, many mothers resisted this mandate, fearing that such separation may negatively impact their relationships with their children.³⁷

The colonial shaping of India's carceral system did not end with the departure of the British. Instead, coloniality entrenched itself within ostensibly benign carceral reforms, such as the establishment of prison nurseries, allowing the colonial project to survive in neo-colonial forms. Implicit in these reforms is the assumption that mothers will continue to be incarcerated alongside their children—a notion embedded in the colonial logic of control and containment. In this sense, prison nurseries are not just remnants of the past but

Convict mothers are permitted to take with them to Port Blair, their children in arms who are under two years of age, in cases in which the father of the children will not keep them and no other satisfactory arrangement can be made for their being kept back in India.

ANDAMAN & NICOBAR POLICE MANUAL (1908) (India). This was possibly the first time a legal document in India had explicitly mentioned what was to be done with children who are taken to prisons by their incarcerated mothers.

30 See Waits, *supra* note 26, at 153.

31 See, e.g., Sen, *supra* note 28, at 435 (noting that eleven women were incarcerated in a space meant for four in Karnal jail).

32 See *id.* at 434.

33 See *id.*

34 *Id.* at 435.

35 See *id.*

36 See *id.*

37 See *id.*

contemporary structures that obscure broader, indigenous visions of justice and care. As Ugandan academic Mahmood Mamdani has argued, the dual and oppositional structures of colonial governance and colonial legal systems laid the groundwork for postcolonial failure even in India.³⁸ The persistence of colonial legacies in the prison system illustrates how colonial frameworks continue to shape not only the nature of punishment but also the way society imagines care, motherhood, and justice.

This Article contends that true decolonization cannot be achieved by merely reforming colonial structures. Decolonizing institutions would require us to move beyond the confines of the carceral system and rethink how we approach care and justice for incarcerated mothers and their children.³⁹ This shift is essential not only for dismantling the colonial legacies embedded in India's prison system but also for building a justice system that is truly transformative, restorative, and human centered.

B. Legal Framework Addressing Accidental Carceral Subjects

After India gained independence from the British in 1947, most Indian states allowed children to live with their incarcerated mothers. Age limits for this arrangement varied across regions—sometimes they were stated explicitly in policy, while in other cases they were left vague.⁴⁰ During this period, the union government issued a series of directives and commissioned committee reports that acknowledged the adverse conditions faced by children living in prisons.⁴¹ However, these efforts fell short of producing comprehensive policies or meaningful reforms to address the needs and welfare of these children effectively.⁴²

38 See Mahmood MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* 285 (1996).

39 See Aya Gruber, *Colonial Carceral Feminism*, in *THE ROUTLEDGE INTERNATIONAL HANDBOOK ON DECOLONIZING JUSTICE* 235 (Chris Cunneen et al. eds., 2023).

40 Some of the state-specific policies that had been explicitly codified pre-2006 have been mentioned in the *R.D. Upadhyay* judgment. See *infra* note 54.

41 See, e.g., 1 MINISTRY OF HOME AFFS., *ALL-INDIA COMMITTEE ON JAIL REFORMS (MULLA COMMITTEE)* ch. XIII (1983) (India) [<https://perma.cc/2TZ4-77TS>].

42 For instance, the 1986–87 National Expert Committee on Women Prisoners was the first exclusive official inquiry into the experiences of women and their children in correctional systems. The Committee ascertained that none of the facilities were useful for the balanced growth of children. Prior to that, in 1974, a National Policy for Children adopted by the government emphasized the importance of providing adequate services to children, especially children belonging to weaker sections of society, to ensure they reach their

A significant step forward came in 1991, when Prayas, a field-action project of the Mumbai-based Tata Institute of Social Science, launched India's first "*Balwadi*"⁴³ program in the women's section of the Arthur Road Prison in Mumbai.⁴⁴ This pioneering initiative aimed to provide a structured, pre-nursery education and developmental support to children up to the age of five years who resided with their mothers in prison.⁴⁵ Prayas appointed a teacher to oversee the *Balwadi* and to engage children in activities such as storytelling through puppets and songs, painting, and dance.⁴⁶ Additionally, volunteers visited once a week to facilitate group discussions with the children on topics including parent-child relationships, sibling rivalries, friendship, sexuality, and even crime.⁴⁷

The success of this initiative led to its incorporation in the Maharashtra state government's Integrated Child Development Scheme ("ICDS"), and the establishment of *Balwadis* in seven state prisons.⁴⁸ However, such facilities remained limited to a few locations within and outside the state of Maharashtra.⁴⁹ The availability and continuity of these daycare centers were largely contingent on the discretion of state authorities, strong-willed individuals, and collaborating NGOs.⁵⁰

potential and to protect them from neglect. Despite these publications, children continued to stay in prisons in unaltered conditions. See Tabish Ahsan, CHILDREN OF WOMEN PRISONERS: THE INVISIBLE TRIAL (Vijay Raghavan ed., 2018), [<https://perma.cc/GA3A-UHBR>].

43 *Balwadi* is a Marathi term for preschools. A Prayas report defines it as "a rural pre-primary school run economically but scientifically and using as many educational aids as possible, prepared from locally available material." AHSAN, *supra* note 44, at 11.

44 See TATA INST. OF SOC. SCIS., PRAYAS ANNUAL REPORT FEBRUARY 1991–FEBRUARY 1992 13 (1992), [<https://perma.cc/KF9M-A7V3>].

45 See MINISTRY OF HOME AFFS. & MINISTRY OF HUM. RES. COMM. ON EMPOWERMENT OF WOMEN, WOMEN IN DETENTION (2001) (India), [<https://perma.cc/CY4J-K9ZA>].

46 See TATA INST. OF SOC. SCIS., *supra* note 44, at 11.

47 See *id.*

48 See Interview with Dr. Vijay Raghavan, Professor, School of Social Work, Tata Institute of Social Science, Krupa Shah, Senior Social Worker, Prayas, & Surekha Sale, Senior Social Worker, Prayas (Oct. 5, 2023).

49 See Interview with Dr. Vijay Raghavan, Krupa Shah, & Surekha Sale, *supra* note 48.

50 See Interview with Dr. Vijay Raghavan, Krupa Shah, & Surekha Sale, *supra* note 48.

A notable example is the setting up of the first crèche⁵¹ at the Tihar Jail Complex, the largest prison in India, located in the national capital, Delhi. Between 1993 and 1995, around forty-six children were living with their mothers in the women's ward of Tihar, but there was no child specialist, no established immunization program for these children, nor any crèche facilities.⁵² Dr. Kiran Bedi, the first woman to serve in the Indian Police Service, took it upon herself to address this gap by establishing standards for the well-being of children and a crèche at Tihar, marking a pivotal moment in the lives of those children and the ones that came after.⁵³

It was only in 2006 that the Indian Supreme Court addressed the legal ambiguities surrounding children of incarcerated mothers in its ruling in *R.D. Upadhyay v. State of A.P.*⁵⁴ The court held that “female prisoners shall be allowed to keep their children with them in jail till they attain the age of six years.”⁵⁵ At the outset of the judgment, the court acknowledged the unfortunate reality faced by these children, stating:

Children, for none of their fault, but per force, have to stay in jail with their mothers. In some cases, it may be because of the tender age of the child, while in other cases, it may be because there is no one at home to look after them or to take care of them in the absence of the mother.⁵⁶

Therefore, while the judgment proceeds to frame the allowance of children below the age of six years in prisons as a choice available to mothers, for many women from marginalized communities, bringing their children to prison is often not a matter of choice but a necessity resulting from the lack of an alternative support system.

51 “A Crèche is a care centre that provides a safe and nurturing environment for children while their parents or guardians are at work.” MINISTRY OF WOMEN & CHILD DEV., NATIONAL MINIMUM STANDARDS AND PROTOCOLS FOR CRÈCHES 7 (2024) (India), [<https://perma.cc/42RQ-BBKN>]. “These facilities prioritise the children’s health, provide supplementary nutritious meals, and maintain a secure and safe environment. It provides age-appropriate educational activities to boost holistic development of the child.” *Id.*

52 See KIRAN BEDI, IT’S ALWAYS POSSIBLE: TRANSFORMING ONE OF THE LARGEST PRISONS IN THE WORLD 39 (1998).

53 Dr. Bedi won a Ramon Magsaysay Award for her work in reforming Tihar Jail. See *About Us*, INDIA VISION FOUND., <https://indiavisionfoundation.org/about-us/> [<https://perma.cc/M57G-ZKQ3>]. Bedi used the money she received from the award to set up the India Vision Foundation in 1994. See *id.*

54 *R.D. Upadhyay v. State of A.P. & Ors*, (2006) 3 SCR 1132 (India).

55 *Id.* at 1133.

56 *Id.* at 1137.

Furthermore, the court specified that, for “education and recreation” purposes, “[c]hildren below three years shall be allowed [in a] crèche and those between three and six years shall be looked after in the nursery.”⁵⁷ In its ruling, the court recommended: “The prison authorities shall preferably run the said crèche and nursery outside the prison premises.”⁵⁸ However, the judgment did not elaborate on the standards or conditions necessary for the operation of these facilities,⁵⁹ leaving many practical and logistical questions unanswered.

Importantly, the ruling emphasized that children residing with their incarcerated mothers should not be regarded as “undertrials”⁶⁰ or “convicts,”⁶¹ and that each child is entitled to basic rights, including access to adequate food, shelter, medical care, clothing, education, and recreational facilities.⁶² In furtherance of these rights, the Court issued a set of guidelines aimed at safeguarding the well-being and development of children living in prisons.⁶³ Among these guidelines was the mandate that upon reaching the age of six, a child should be placed with a suitable surrogate caregiver chosen by the mother, or, if no alternative caregiver is available, be sent to an appropriate institution operated by the Social Welfare Department.⁶⁴ The judgment, however, fell short in outlining measures to ensure that this transition is handled in a smooth or humane manner.

The *R.D. Upadhyay* judgment represents an important step in aligning Indian policy with international standards regarding children accompanying incarcerated mothers. These include the Bangkok Rules, the U.N. Minimum Standards for the Treatment of Prisoners (the Nelson Mandela Rules),⁶⁵ and the U.N. Convention on the Rights of

57 *Id.* at 1135.

58 *Id.* at 1135.

59 *See id.*

60 Pre-trial detainees are known as “undertrials” in India.

61 This holding aligns with Rule 49 of the Bangkok Rules, which states that “children in prison with their mothers shall never be treated as prisoners.” G.A. Res. 65/229, *supra* note 21, at r. 49.

62 *R.D. Upadhyay*, at 1132.

63 *Id.* at 1154–59.

64 *Id.* at 1134.

65 G.A. Res. 70/175, annex, ¶ 29, U.N. Standard Minimum Rules for the Treatment of Prisoners. (the Nelson Mandela Rules) (Dec. 17, 2015).

the Child (“U.N. CRC”),⁶⁶ all of which emphasize the protection of children’s rights in prison settings. However, the judgment falls short of providing a practical roadmap for the effective implementation of these standards, and therefore the realization of the judgment’s guidelines remains inadequate. To this day, no comprehensive legislation has been enacted to fully enforce the Court’s directives.⁶⁷ In an order issued on August 2, 2018, in the case of *In Re-Inhuman Conditions in 1382 Prisons*, the Supreme Court recognized that, despite the *R.D. Upadhyay* judgment, the prison environment is hardly conducive to the well-being and health of the children.⁶⁸ It also noted the inadequate conditions of children on the outside who are impacted by maternal incarceration and whose plight remains under-discussed.⁶⁹

The *Model Prison Manual*, last revised in 2016, provides a framework for the welfare of incarcerated individuals, including the education, diet, healthcare, and recreational opportunities of children living in prisons.⁷⁰ However, under the Indian Constitution, the administration of prisons is a state responsibility, meaning state governments have the authority to adopt and adapt the *Model Prison Manual* to meet regional needs and circumstances.⁷¹ As a result, there is no uniformity in the implementation of these welfare measures across the country. As of 2022, only eighteen out of thirty-six states and union

66 G.A. Res. 44/25, at 9, U.N. Convention on the Rights of the Child (Nov. 20, 1989).

67 The Juvenile Justice (Care and Protection of Children) Act of 2015 (JJ Act) has broadened its scope to address the care and protection of children. The Juvenile Justice (Care and Protection of Children) Act, 2015 (No. 2 of 2016). Although children whose parents are incarcerated are not specifically included, the Supreme Court has given a broad reading to the scope of protection of the JJ Act. *Re: Exploitation of Children in Orphanages in the State of Tamil Nadu v. Union of India & Ors.* (2017) 7 SCC 578. This legislation, alongside other constitutional provisions, reinforces the state’s role as a backup caregiver for children, ensuring that their welfare is a priority. Despite these legal frameworks, there has been a notable lack of accountability, which has hindered the effective assessment of existing policies and measures designed to protect children in prison.

68 See SUP. CT. OF INDIA, COMPILATION OF DIRECTIVES IN RE - INHUMAN CONDITIONS IN 1382 PRISONS, W.P. (CIVIL) No. 406/2013, [<https://perma.cc/9T2Z-B45V>].

69 See *id.*

70 See MINISTRY OF HOME AFFS., MODEL PRISON MANUAL 2016, §§ 24.26–24.36 (2016) (India). The Ministry of Home Affairs had in fact prepared the *Model Prison Manual* with the objective of “ensuring uniformity in the basic principles governing prisons.” *Prison Reforms*, MINISTRY OF HOME AFFS. (India), https://www.mha.gov.in/en/divisionofmha/Women_Safety_Division/prison-reforms [<https://perma.cc/8NHW-SRWA>].

71 See India Const. sched. VII, list II, cl. 4.

territories have fully or partially implemented the *Model Prison Manual*.⁷² This uneven implementation has led to significant disparities in prison conditions, with the welfare of incarcerated individuals (particularly mothers and children) varying widely depending on the priorities, resources, and political will of their state government. Despite partial or full implementation of the *Model Prison Manual* and compliance with the *R.D. Upadhyay* judgment in some states, the conditions for children in prisons remain far from ideal, as detailed in the next section.⁷³ Part III delves into the urgent need to abolish prisons for incarcerated mothers to truly address the welfare and rights of both mothers and children.

II. Assessing the Gaps in Implementation

As noted in the previous section, the *R.D. Upadhyay* judgment and corresponding provisions of international covenants assert that the children of incarcerated mothers should not be treated as undertrials or convicts while in jail.⁷⁴ The Bangkok Rules further stipulate that the environment for these children should resemble that of a child outside prison, ensuring their rights to a nurturing, non-punitive environment.⁷⁵ They specifically prohibit the punishment of women with infants or breastfeeding mothers through close confinement or disciplinary segregation.⁷⁶ Despite these legal frameworks protecting children's rights and providing guidelines for their care, systemic apathy, lack of accountability, and limited resources continue to impede their realization.⁷⁷ The poor implementation of the Bangkok Rules also stems from a broader disregard for Dalits and Adivasis most affected by incarceration.⁷⁸

India's prison system is beset by numerous and deep-rooted challenges, including severe overcrowding, deplorable living conditions, and insufficient infrastructure.⁷⁹ These challenges are particularly acute for incarcerated mothers, who face unique obstacles in

72 See Press Release, Ministry of Home Affs., Implementation of *Model Prison Manual* (Mar. 15, 2023) (India), <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1907161> [<https://perma.cc/R5BJ-RBTU>].

73 See *infra* Part II.

74 See *supra* Part I.

75 See G.A. Res. 65/229, *supra* note 21, at r. 51(2).

76 See *id.* r. 22.

77 See Sukhramani & Gupta, *supra* note 25, at 202.

78 See NAT'L DALIT MOVEMENT FOR JUST., *supra* note 19, at 76.

79 See generally CTR. FOR RSCH. & PLAN., *supra* note 5.

maintaining familial relationships and accessing essential resources for their own well-being and that of their children.⁸⁰ Children continue to stay in prisons with their mothers and experience incarceration in ways that closely mirror the conditions faced by adult prisoners.⁸¹

A considerable body of literature already addresses the ways in which incarcerated children are deprived of the opportunity to lead lives of dignity and receive conditions conducive to their development.⁸² This section, therefore, focuses on the failure to adequately implement a key proposal from the *R.D. Upadhyay* judgment, which advocates for the creation of specialized facilities—such as nurseries and crèches—designed to meet the needs of children born to incarcerated individuals.⁸³ Drawing on interviews I conducted with representatives from three NGOs in India—Aangan Trust, Prayas, and India Vision Foundation, that have established and operated prison nurseries, this Part examines the shortcomings in the execution of this proposal.

A. Examples of the Prison Nursery Model in India

As set out below, NGOs are making considerable efforts to ensure the effective functioning of the Prison Nursery Model and to mitigate any immediate negative impacts on children. Although the state is responsible for managing prisons, limited resources often hinder adequate investment.⁸⁴ To bridge this gap, NGOs are stepping in to complement and support the state's efforts. They are striving to provide the best possible care within the constraints of the circumstances in which they operate.

80 See NAT'L COMM'N FOR WOMEN, *supra* note 5, at 18–19.

81 See Shreehari Paliath & Preety Acharya, *Children of Women Prisoners in India Struggle to Get Proper Food and Education Despite Guidelines*, SCROLL (Oct. 9, 2020), <https://scroll.in/article/975186/in-india-children-of-women-prisoners-struggle-to-get-proper-food-and-education-despite-guidelines> [https://perma.cc/9SNB-AP3E].

82 See, e.g., TATA INST. OF SOC. SCIS., *supra* note 44; NAT'L COMM'N FOR WOMEN, *A STUDY OF CONDITION OF WOMEN PRISONERS & THEIR CHILDREN IN EASTERN U.P. JAILS* 46 (2011) (India), [https://perma.cc/FFL6-Y5K4]; STUTI SHAH, *CHILDREN OF INCARCERATED CAREGIVERS*, 2024 INDIA PRISON NURSERY REPORT (2024), [https://perma.cc/F92W-YSE8] [hereinafter SHAH, *INCARCERATED CAREGIVERS*]; MINISTRY OF HOME AFFS., *supra* note 41 at 193–205; *R.D. Upadhyay v. State of A.P. & Ors.*, (2006) 3 SCR 1132, at 1139–54 (India) (citing reports of deficient conditions for children).

83 See Stuti Shah, *Incarcerated Women and Their Children in Indian Prisons*, 59 ECON. & POL. WKLY. 1, 1 (2024) [hereinafter Shah, *Incarcerated Women*].

84 See DEP'T-RELATED PARLIAMENTARY STANDING COMM. ON HOME AFFS., *TWO-HUNDRED FORTY-FIFTH REPORT ON PRISON-CONDITIONS, INFRASTRUCTURE AND REFORMS* (2023), [https://perma.cc/RAL9-JA3X].

1. Byculla Women's Jail, Mumbai

At Byculla Women's Jail ("Byculla") in Mumbai, Aangan Trust has been providing prison nursery services to children since 2023 in a program termed "Nanhe Kadam."⁸⁵ Dr. Smita Dharmamer, Aangan's Associate Director,⁸⁶ highlighted that in accordance with the *R.D. Upadhyay* judgment, they established the prison nursery outside Byculla. This decision was made to ensure that children could experience life outside the traumatic conditions of the prison, even if for a short time. Aangan employed two caretakers and teachers to care for the children and enlisted mothers from the community to volunteer on a daily basis.⁸⁷ These volunteers offered specialized activities, such as dance, art therapy, and yoga, to enrich the children's development.⁸⁸

When I spoke to her in January 2024, Dr. Dharmamer noted that Anganwadi workers had been on strike since December 2023, demanding better wages and improved working conditions.⁸⁹ While their demands were both significant and justified, the strike inadvertently left children without access to the prison nursery and crèche facilities.⁹⁰ In this challenging context, the presence of additional caretakers and teachers provided by Aangan proved critical in maintaining stability and continuity for children.

Aangan's Nanhe Kadam is implemented through an innovative model that brings together the children of prison officials and the children of incarcerated individuals in the same nursery.⁹¹ This inclusive approach helps mitigate stigma associated with children of incarcerated parents while fostering support for the nursery and crèche programs among

85 "Nanhe Kadam" is a Hindi term for "small steps."

86 Virtual interview with Dr. Smita Dharmamer, Associate Director, Aangan Trust (May 25, 2023); Interview with Dr. Smita Dharmamer, Associate Director, Aangan Trust (Jan. 4, 2024) (at Byculla prison nursery).

87 The caretakers would also go into prison to pick the children up from the mother's barrack in the morning, then drop them back at lunchtime. They would then again pick them up after lunch and drop them back at around 4:30 p.m.

88 Interview with Dr. Smita Dharmamer, Associate Director, Aangan Trust (Jan. 4, 2024).

89 *See id.* Anganwadi workers, established under the ICDS, serve as frontline providers of essential services for childcare and development. Following significant advocacy efforts, NGO Prayas successfully facilitated the inclusion of Anganwadi workers in some Maharashtra prisons through the ICDS scheme. *See TATA INST. OF SOC. SCI.*, *supra* note 44, at 13.

90 *See* Interview with Dr. Smita Dharmamer, *supra* note 88.

91 *See id.*

prison officials.⁹² It has been particularly beneficial in states where women guards who are frequently transferred from other regions and residing in employee quarters near the prisons, lack access to childcare facilities and often bring their children to work.⁹³ Aangan has pioneered the implementation of prison nurseries with this model across five women's prisons in Maharashtra and is soon looking to expand to other states.⁹⁴

2. Tihar Jail No. 6, Delhi

India Vision Foundation runs two programs for children of incarcerated caregivers. One of them focuses on early childhood care and the development of children below the age of six who are in prison with their mothers.⁹⁵ The program has adopted commendable practices, such as organizing excursions for children to zoos and museums, which allow the children to experience life outside the confines of the prison and foster a sense of normalcy.⁹⁶ The Foundation's other program supports children on the outside, including those who have been compelled to leave prison after they turn six years of age.⁹⁷ Additionally, India Vision Foundation continues to operate the Tihar Jail crèche and nursery and has introduced the "Nanhi Kiran" program, which aims to provide a standardized early childhood care and development curriculum for children residing in prisons.⁹⁸

B. Failure of the Prison Nursery Model in India

Under the *R.D. Upadhyay* judgement as well as other legal documents, a prison nursery or crèche is categorized under the broader category of "recreational" needs for

92 *See id.*

93 *See id.*

94 *See id.*

95 *See* Virtual Interview with Monica Dhawan, Director of the India Vision Foundation & Renu Nag, Head of Learning and Development of India Vision Foundation (Nov. 13, 2023); Interview with Monica Dhawan, Director of the India Vision Foundation in New Delhi, India (Dec. 7, 2023).

96 *See* Interview with Monica Dhawan (Dec. 7, 2023), *supra* note 95.

97 *See id.*

98 They have also entered into collaborations with NGOs running prison nurseries and crèches in other states in India to share the curriculum with them.

children,⁹⁹ failing to recognize the significant developmental and emotional needs that a nursery should address. Notwithstanding the guidelines provided by the Supreme Court for prison nurseries and crèches in the *R.D. Upadhyay* judgment, these establishments have been found to be available only in a few jails.¹⁰⁰ Furthermore, even where available, their quality has been dismal in terms of the availability of teachers' play material, the presence of child-centered libraries, and the teacher-student ratio.¹⁰¹ This Section provides some insight into the issues that have contributed to the failure of the prison nursery model as a successful carceral reform in India.

1. Unsustainability of the NGO Model:

In Indian prisons, the success of the prison nursery model is highly dependent on the involvement of the NGO.¹⁰² Dr. Vijay Raghavan, who co-leads Prayas, has maintained that state governments should be responsible for setting up and conducting the prison nursery since India is a welfare state.¹⁰³ Even the *R.D. Upadhyay* judgment clearly places the responsibility of ensuring the prison nursery runs efficiently on the state.¹⁰⁴ Dr. Raghavan argues that the role of NGOs should be to support governments in identifying the best prison nursery model based on their studies and expertise, as Prayas had established through the Child Guidance Clinic.¹⁰⁵ Raghavan argues that NGOs running prison nurseries will prove unsustainable in the long run, and therefore either state governments should take over, or they should provide NGOs with the resources to run them.¹⁰⁶

Contrary to the directives laid out in the *R.D. Upadhyay* judgment, these nurseries have not been consistently established across the country, and where they do exist, the establishment of such facilities is largely contingent upon the willingness of prison authorities and the availability of NGO support, leading to significant inconsistencies in

99 See NAT'L LEGAL SERVS. AUTH., A CAMPAIGN FOR ENHANCING LEGAL SERVICES TO WOMEN INMATES AND THEIR ACCOMPANYING CHILDREN IN PRISONS (India) [<https://perma.cc/97WH-C42A>].

100 See SUKHRAMANI & GUPTA, *supra* note 25, at 200.

101 See *id.*

102 See Interview with Dr. Vijay Raghavan, *supra* note 48.

103 See *id.*

104 See *R.D. Upadhyay v. State of AP & Ors*, (2006) 3 SCR 1132, at 1135 (India).

105 See Interview with Dr. Vijay Raghavan, *supra* note 48.

106 See *id.*

their availability.¹⁰⁷ These organizations are often responsible for setting up and running prison nurseries, filling critical gaps in care, and offering support that the state has failed to provide.¹⁰⁸

Furthermore, the nurseries run by the state government, most often located within the prison itself, often lack proper infrastructure and fail to provide the necessary separation from crèches.¹⁰⁹ In cities where NGOs and prison authorities do not collaborate, the conditions of prison nurseries remain dire.¹¹⁰ Most prisons lack the resources necessary to comply with the guidelines established by the *R.D. Upadhyay* judgment.¹¹¹

In addition, organizations like the India Vision Foundation, Aangan, and Prayas predominantly operate in major urban centers, where access to NGO support is relatively easier. However, challenges in supporting the children of incarcerated women extend beyond urban areas. Due to the limited number of women's prisons in India, incarcerated women, along with their children, are often placed in facilities located far from their home regions.¹¹² As a result, children are taught in the vernacular of the new area, rather than in their mother tongue, which, according to many mothers, hinders their learning and development.¹¹³ This geographical and linguistic disconnect further complicates the efforts to provide effective support for these children.¹¹⁴

107 See Sukanya Shantha, *When 'Bandi' Is Both a Game and Life: The Children of India's Women Prisoners*, WIRE (Aug. 1, 2022), <https://pulitzercenter.org/stories/when-bandi-both-game-and-life-children-indias-women-prisoners> [<https://perma.cc/HYM3-MTGN>].

108 See *infra* Part III.

109 The space allocated to each incarcerated woman is the same, regardless of whether she has one child or multiple children. See BHANDARI, *supra* note 12, at 367.

110 See Shah, *Incarcerated Women*, *supra* note 83.

111 See SUKHRAMANI & GUPTA, *supra* note 25, at 201.

112 See Kiran R. Naik, *Women in Prisons India*, 6 INT'L J. RSCH. & ANALYTICAL REVS. 178, 199 (2019).

113 See NAT'L COMM'N FOR PROT. OF CHILD RTS., EDUC. STATUS OF CHILD. OF WOMEN PRISONERS IN INDIA 18 (2021) (India).

114 See *id.*

2. India's Limited Resources for Prison Nurseries

India lacks both the financial capacity and infrastructure to establish and sustain effective prison nurseries on a scale comparable to the models implemented in resource-intensive countries.¹¹⁵ The concept of prison nurseries, particularly as seen in countries like Norway, the United Kingdom, and Finland, envisions separate mother-baby units operated by prisons, where mothers and children can remain together in an environment that provides support around the clock and does not resemble the prison.¹¹⁶ However, in India, the resources and infrastructure devoted to prisons do not support such a model.¹¹⁷ Prison nurseries in India are structured as day care centers where children visit for a few hours each day.¹¹⁸

There is a general absence of comprehensive and specialized services that are required to run such daycare programs effectively. Empirical studies across states in India have reported that prison libraries did not have any children's books and that student-teacher ratios are shockingly poor.¹¹⁹ Even if the intention exists to create such facilities, the scale and complexity of implementation across India would require significant investment in prison infrastructure, staff training, and ongoing support systems—resources that are already stretched thin in India's overcrowded and underfunded correctional facilities.¹²⁰

Furthermore, though international covenants and the *R.D. Upadhyay* judgment have prescribed that children be separated from the general incarcerated population, often this cannot be implemented due to a resource or space crunch.¹²¹ While some larger facilities may have designated areas for incarcerated mothers and children, severe overcrowding in

115 See 1 SAHANA MANJESH & SUGANDHA SHANKAR, KARNATAKA STATE LEGAL SERVS. AUTH. & COMMONWEALTH HUM. RTS. INITIATIVE, *INSIDE KARNATAKA PRISONS* (Deepan K. Sarkar & Madhurima Dhanuka eds., 2022) (India), [<https://perma.cc/ADW6-F6W2>].

116 See Marie Claire Van Hout et al., *Children Living in Prison with a Primary Caregiver: A Global Mapping of Age Restrictions and Duration of Stay*, 7 LANCET 809, 809–14 (2023).

117 See MANJESH & SHANKAR, *supra* note 115, at 27–38.

118 SHAH, INCARCERATED CAREGIVERS, *supra* note 82, at 9.

119 For instance, Bhandari's study in Rajasthan Central jails notes that there was only one person that taught primary-level education to children of all age groups. See BHANDARI, *supra* note 12, 368–69.

120 See Md. Imran Wahab, *Challenges Afflicting Prisons: A First-Hand Observation*, 5 INT'L J. FOR MULTIDISCIPLINARY RSCH. 1, 3 (2024).

121 See SUKHRAMANI & GUPTA, *supra* note 25, at 200.

these designated spaces continues to harm children in manifold ways, rendering the benefit of a separate space unimpactful.¹²²

3. Ignorance

A particularly troubling aspect is that many incarcerated mothers are unaware of their legal right to have their children attend prison nurseries or crèches during the day.¹²³ This lack of awareness exacerbates the barriers to accessing these services and leaves mothers without the support and children without the benefit they are entitled to under the law.¹²⁴

In Byculla, Dharmamer often assumes the responsibility of informing incarcerated mothers about these legal mandates and encourages them to send their children to prison crèches and nurseries during the day.¹²⁵ The women are skeptical about trusting someone from the state with their children, so knowing that an NGO is running the prison nursery and hearing Dharmamer's assurances makes them feel more comfortable about sending their children to the prison nursery.¹²⁶ Dharmamer in many cases also informs prison guards and officers about these specific legal mandates outlined in the *R.D. Upadhyay* judgment, particularly the requirement that children under three years of age be provided with a crèche.¹²⁷ As a result, the role of the NGO in this context extends beyond the provision of services, encompassing the critical task of implementing and educating government officials about legal obligations.

Owing to the high illiteracy in prisons,¹²⁸ women are also unable to supplement their children's learning in the prison nursery once the children come back to the barracks. On

122 *See id.*

123 *See* Interview with Dr. Smita Dharmamer, *supra* note 88.

124 *See id.*

125 *See id.*

126 *See id.*

127 *See id.*

128 *See* NAT'L CRIME RECS. BUREAU, *supra* note 3, at xiii. According to statistics from the National Crime Records Bureau, 25.6% of incarcerated individuals in India are illiterate. *Id.* While data on literacy rates is not disaggregated by gender, it is likely that illiteracy rates are higher among women in prison. This is consistent with broader societal trends. *See* Rishabh Chauhan, *Understanding the Gender Disparities in Indian Education*, INDIA TODAY (Aug. 14, 2024), <https://www.indiatoday.in/education-today/featurephilias/story/understanding-the-gender-disparities-in-indian-education-2579174-2024-08-14> [<https://perma.cc/6V6N-GH8A>].

being asked, around 43% of the women in central jails in Rajasthan reported that they were unaware of the study material provided to their children and therefore could not contribute to supporting their children's studies.¹²⁹

This Part has demonstrated how carceral reforms in India, such as prison nurseries and crèches, fall short in their implementation. The next Part argues that even if these reforms were executed flawlessly, they would still be insufficient; true justice for both children inside and outside prisons requires the abolition of incarceration for mothers.

III. The Case for Moving Away from Prisons

While it is essential to acknowledge that separating mothers from their children has devastating consequences,¹³⁰ this Part will highlight how it is equally important to recognize that raising children in a carceral environment is both morally indefensible and legally untenable. A more humane and just alternative would involve enabling mothers of minor children¹³¹ and their minor children to remain together outside of carceral spaces, facilitated through community service or other non-carceral solutions.

Children, as independent citizens of the state, irrespective of their background, are entitled to the protection and care guaranteed to them under the Indian Constitution,¹³² the *R.D. Upadhyay* judgment, and national and international legal frameworks, including the JJ Act and the U.N. CRC, respectively. The state has a clear duty of care towards them, and any departure from this responsibility must have a clear, legitimate basis rooted in law.

This section calls for the abolition of prisons,¹³³ particularly for mothers and their children, highlighting the failures of reform efforts, including the inadequacies of the

129 NAT'L COMM'N FOR PROT. OF CHILD RTS., *supra* note 113, at 20.

130 Article 9 of the U.N. CRC also obligates states to ensure that a child is not separated from their parents, unless such separation is in the best interest of the child.

131 Minor children are defined as individuals below the age of eighteen, as specified by the JJ Act.

132 For instance, the Rights Against Discrimination (Article 15) and Right to Education (Article 21A) are fundamental rights under the Indian Constitution that explicitly recognize children as recipients of rights as equal citizens of India.

133 While this Article focuses on advocating for the abolition of prisons for women and children, this does not imply that other individuals are any less deserving of prison abolition. Rather, I argue that the issue of children of incarcerated caregivers provides a particularly compelling entry point for broader discussions on prison abolition, given the urgency and moral weight of their circumstances.

current prison nursery model. It calls for interventions that center the rights, dignity, and well-being of both mothers and their children so that we can take a significant step toward reimagining justice systems more broadly that move beyond punishment and towards care and restoration.

A. Inadequacy of Reformist Efforts

Reforms seek to improve an institution by modifying it. This Section critiques reformist efforts, which attempt to change the carceral system by investing in it. I instead advocate for abolitionist reforms, which are explored in the following Section.¹³⁴

Even if the gaps in implementation of the *R.D. Upadhyay* judgment highlighted in Part II above were addressed,¹³⁵ such as through increased funding for prison infrastructure, improved conditions, and the establishment of successful prison nurseries, this section supports the stance articulated by the Council of Europe: prisons, by their very nature, are fundamentally inappropriate environments for children.¹³⁶ No amount of investment in beautifying or improving prison facilities can change the fact that prisons are unconstitutional for children, are designed primarily for punishment, and are inherently isolating, overcrowded, and restrictive.

1. Prisons as Inherently Unsuitable for Children

Studies from across the world have shown that children of incarcerated mothers often experience disrupted education¹³⁷ and difficulty in following a pro-social trajectory, resulting in increased criminality.¹³⁸ These children often encounter a higher aggregate

134 See CRITICAL RESISTANCE, REFORMIST REFORMS VS. ABOLITIONIST STEPS TO END IMPRISONMENT (2021), [<https://perma.cc/BC3Z-BVWJ>].

135 See *supra* Part II.

136 See COUNCIL OF EUR., RECOMMENDATION CM/REC (2018) 5 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES CONCERNING CHILDREN WITH IMPRISONED PARENTS 22 (2018), [<https://perma.cc/Z3WT-X7DT>] (“[M]any prisons do not provide suitable facilities for children to experience meaningful contact with their imprisoned parent, and children’s best interests and needs are frequently seen as incompatible with security concerns.”).

137 See Danielle H. Dallaire & Laura C. Wilson, *The Relation of Exposure to Parental Criminal Activity, Arrest, and Sentencing to Children’s Maladjustment*, 19 J. CHILD & FAM. STUD. 404, 412 (2010).

138 See GREER LITTON FOX & MICHAEL L. BENSON, FAMILIES, CRIME AND CRIMINAL JUSTICE (2000), [<https://perma.cc/PUS7-HU2K>].

of adversities and risk factors, which can exacerbate their vulnerability.¹³⁹ A recent study from the Netherlands underscores the severity of these effects, revealing that children who experience maternal imprisonment are more likely than their peers, and even more so than children of incarcerated fathers, to die before the age of sixty-five.¹⁴⁰ Prisons are inherently unsuitable environments for children, as has been documented by several reports,¹⁴¹ regardless of how well these reforms are implemented.

a. Foundational Disregard for Children

Sociologist Megan Comfort highlights the distinct impact of the carceral system on children, arguing that unlike other institutions designed to provide a “social good,” the prison system has a corrosive impact on children.¹⁴² Minson argues that a “corrosive” form of harm inflicts a long-lasting and peculiar kind of damage that shapes a child’s identity, socialization, and sense of security.¹⁴³ This harm is distinct because it is not an isolated traumatic event but rather a pervasive, ongoing experience that fundamentally alters a child’s relationship with their primary caregiver and the world around them.¹⁴⁴

The carceral system remains predominantly adult-centered, with little attention given to how children may be affected by maternal incarceration, and fails to cater to their specific needs.¹⁴⁵ Legal scholar Julia Fionda’s theory of “conceptual malleability” provides further insight into how the law tends to conflate the interests of children with those of adults, leading to a distortion of children’s identities, legal standing, and social needs.¹⁴⁶ This perspective, Fionda argues, prevents the development of appropriate care structures

139 ALISON CUNNINGHAM & LINDA L. BAKER, *WAITING FOR MOMMY: GIVING A VOICE TO THE HIDDEN VICTIMS OF IMPRISONMENT* (2003).

140 Steve G.A. van de Weijer et al., *Parental Imprisonment and Premature Mortality in Adulthood*, 4 J. DEVELOPMENTAL & LIFE-COURSE CRIMINOLOGY 148, 148 (2018).

141 See TATA INST. OF SOC. SCIS., *supra* note 44; NAT’L COMM’N FOR WOMEN, *supra* note 5; SHAH, *INCARCERATED CAREGIVERS*, *supra* note 82; MINISTRY OF HOME AFFS., *supra* note 41 at 193–205.

142 See Megan Comfort, *Punishment Beyond the Legal Offender*, 3 ANN. REV. L. & SOC. SCI. 271, 273 (2007).

143 See Shona Minson, *Briefing Paper: The Impact of Maternal Imprisonment upon a Child’s Wellbeing and Their Relationship with Their Mother* (Nov. 8, 2017), <https://ssrn.com/abstract=3067653> [<https://perma.cc/L8AW-3JA7>] [hereinafter Minson, Briefing Paper].

144 See *id.*

145 See Julia Fionda, *Introduction to LEGAL CONCEPTS OF CHILDHOOD* 3–18 (Julia Fionda ed., 2001).

146 See *id.*

for children in the context of incarceration.¹⁴⁷ Furthermore, the legal and institutional treatment of children as a homogenous group, without consideration for their individual needs, backgrounds, or experiences, further exacerbates the challenges they face.

The U.N. CRC recognized in its 2005 General Comment on Implementing Rights in Early Childhood that children of incarcerated parents are particularly vulnerable.¹⁴⁸ Despite this recognition, the state has consistently failed to adequately address the unique rights and needs of these children within legal frameworks.¹⁴⁹ This systemic neglect results in a form of discrimination.

To better articulate the distinctive harm suffered by children of incarcerated parents, many scholars, including Minson, emphasize the concept of “secondary prisonization.”¹⁵⁰ This term, developed by Megan Comfort, describes how the wives and partners of incarcerated men experience the pervasive effects of the carceral system without being incarcerated themselves.¹⁵¹ I argue that secondary prisonization is especially potent for children on the inside, who experience firsthand the carceral system’s efforts to regulate and control their bodies, disciplining and shaping their responses to their mothers’ imprisonment. These children are often forced into a liminal existence, separated not only from their mothers but also from siblings, friends, and extended family. In this way, their experience extends far beyond the immediate loss of parental care: it reshapes their entire world.

b. Impact on Early Socialization

Incarcerated mothers face significant challenges in shielding their children from the negative influences and behaviors prevalent within the prison environment.¹⁵² These

147 See *id.*

148 Children’s rights to development are at serious risk where they are orphaned, abandoned, or deprived of family care, or where they suffer long-term disruptions to relationships or separations (e.g., due to parental imprisonment); U.N. CRC, GENERAL COMMENT NO. 7: IMPLEMENTING CHILD RIGHTS IN EARLY CHILDHOOD 9 (2005).

149 As highlighted in Parts II and III of this Article.

150 See Shona Minson, *Direct Harms and Social Consequences: An Analysis of the Impact of Maternal Imprisonment on Dependent Children in England and Wales*, 19 CRIMINOLOGY & CRIM. JUST. 519 (2019) [hereinafter Minson, *Direct Harms*].

151 See COMFORT, *supra* note 142.

152 See SUKHRAMANI & GUPTA, *supra* note 25.

influences include the widespread use of profanity, exposure to various vices, and the normalization of aggressive or coercive behaviors.¹⁵³ Children, being highly impressionable, are likely to internalize and emulate the behaviors they observe in their surroundings.¹⁵⁴ Dhawan shared an account of a child in Tihar Jail who repeatedly exhibited violent behavior by hitting other children in the prison nursery—a pattern of conduct the child appeared to have adopted from her mother.¹⁵⁵

Dharmamer mentioned that their primary aim with setting up prison nurseries in Maharashtra was to shield children from, and help them unlearn, the detrimental aspects of prison culture to which they are exposed.¹⁵⁶ To achieve this, they have instituted a mandatory afternoon nap time for children in the nursery, providing them with a brief respite from the constant noise, altercations, and the pervasive sound of television in the barracks, allowing them a period of calm and the opportunity to rest deeply.¹⁵⁷ However, given that the children spend limited time in the prison nursery and are ultimately returned to the hostile environment of the prison, the positive effects of the nursery are often undermined by their ongoing exposure to the broader prison culture.¹⁵⁸ As such, so long as the fundamental nature of the prison environment remains unaddressed, the prison nurseries are unlikely to yield substantial long-term benefits for the children.

Children living in prison experience significant social isolation and limited opportunities for healthy socialization, resulting in their worldview being shaped by the prison subculture.¹⁵⁹ In the case of *R.D. Upadhyay* (which was also noted in the interview with Raghavan),¹⁶⁰ the court highlighted how children born in prison grow up in an artificial environment, with restricted exposure to the outside world.¹⁶¹ As a result, commonplace experiences, such as encounters with non-human animals, vehicles, or even natural

153 *See id.*

154 *See id.*

155 *See* Virtual Interview with Monica Dhawan & Renu Nag (Nov. 13, 2023), *supra* note 95.

156 *See* Interview with Dr. Smita Dharmamer, *supra* note 88.

157 *See id.*

158 *See* Interview with Monica Dhawan, *supra* note 95.

159 *See* SUKHRAMANI & GUPTA, *supra* note 25.

160 *See* Interview with Dr. Vijay Raghavan, *supra* note 48.

161 *See* *R.D. Upadhyay v. State of AP & Ors*, (2006) 3 SCR 1132, at 1135–36 (India).

elements like the stars and the moon, become unfamiliar and frightening.¹⁶² Additionally, their interactions with male figures are typically limited to those in positions of authority, leading them to associate such figures with violence.¹⁶³ Consequently, these children lack the concept of a “home” as a safe, violence-free sanctuary.¹⁶⁴

This “prisonization”¹⁶⁵ of children is pronounced, especially since it impacts them during their formative years and therefore has a lasting impact on their foundational development.¹⁶⁶ The harm these children experience continues to affect them at every stage of their lives, shaping their development and future interactions with society.¹⁶⁷

c. Impact on Children’s Mental Health

Children experience significant secondhand trauma on account of their mothers, who are themselves deeply traumatized, in addition to experiencing significant trauma firsthand.¹⁶⁸ A study has reported that thirteen out of sixteen children living with their mothers in prison when surveyed were found to have moderate to severe aggression, and three had mild aggression or no aggression.¹⁶⁹ Furthermore, mothers cannot be nurturing because the carceral environment deprives them of the opportunity to develop a bond with their children, especially when they are burdened with being sole caregivers around the clock.¹⁷⁰

162 See Interview with Dr. Vijay Raghavan, *supra* note 48; see also TATA INST. OF SOC. SCIS., *supra* note 44 at 3.

163 See TATA INST. OF SOC. SCIS., *supra* note 44, at 3.

164 See *id.*

165 See Liam Martin, “Free but Still Walking the Yard”: Prisonization and the Problems of Reentry, 47 J. CONTEMP. ETHNOGRAPHY 671, 673 (2018).

166 See Minson, *Direct Harms*, *supra* note 150, at 532.

167 See *id.*

168 See SHAH, INCARCERATED CAREGIVERS, *supra* note 82.

169 Shilpi Sarkar & Sandhya Gupta, *Prevalence of Aggressive Behaviour Among Children Co-Detained with Imprisoned Mothers in a Selected Prison of North India*, 2 INT’L J. PAEDIATRICS & CHILD CARE 1, 1 (2017).

170 There is more to be written about the experiences of mothers in prisons, but since this Article focuses on the child, rather than the mother, I have not gone into the mother’s experiences with motherhood in more detail.

Children in prison are frequently exposed to forms of structural violence, whether from prison officers, other prisoners, or the routine struggle for basic necessities like food, water, and space.¹⁷¹ They are often silent witnesses to the dehumanizing treatment their mothers endure, which can include verbal abuse, physical mistreatment, neglect, and the daily stress of survival in an overcrowded and under-resourced institution.¹⁷² Prisons also amplify conditions of economic distress where the opportunity cost of an adequate meal is hygiene, and mothers are constantly put in the unfair position of making this choice.¹⁷³ Mothers have reportedly sold their child's share of legally obligated milk to other women prisoners to get money to buy toiletries.¹⁷⁴ This systemic depravity and violence creates a toxic environment that negatively impacts the psychological and emotional development of children.¹⁷⁵ Children internalize these experiences to such an extent that it informs the games they play, their thoughts, and the violence they in turn exhibit.¹⁷⁶

Children are also subjected to the same restrictive conditions as their mothers, even though they are not convicts themselves, and even if their mothers are pre-trial detainees.¹⁷⁷ For instance, the rigid “*bandi*” timings, which dictate the hours of confinement for incarcerated people in their barracks and span a majority of the day, are imposed on children as well.¹⁷⁸ Journalist Sukanya Shantha highlights the almost immediate impact of confinement during *bandi* through the instance of a boy who would start screaming

171 See SUKHRAMANI & GUPTA, *supra* note 25.

172 Shah, *Incarcerated Women*, *supra* note 83.

173 See Kiran Bedi, *Foreword* to RUZBEH NARI BHARUCHA, SHADOWS IN CAGES: MOTHER & CHILD IN INDIAN PRISONS 7, 9 (2004) (describing how mothers in a certain Indian prison sold—to other prisoners—the extra milk that their child was statutorily entitled in exchange for toiletries, highlighting the harsh survival strategies in a system of deprivation).

174 See *id.*

175 See Patricia Allard, *When the Cost Is Too Great: The Emotional and Psychological Impact on Children of Incarcerating Their Parents for Drug Offences*, 50 FAM. CT. REV. 48, 48–52 (2012).

176 See Shantha, *supra* note 107.

177 In fact, even pre-trial detainees are treated as convicts, but this would be the focus of another paper.

178 *Bandi* timings vary across prisons but are generally imposed for the majority of the day. For instance, in Byculla Women's Prison in Mumbai, women are allowed outside their barracks for only nine hours every day—from six a.m. to twelve p.m. and then again from three p.m. to six p.m. They are otherwise locked in their cells throughout the day. On Sundays and holidays, they are allowed outside their barracks only for seven hours—from six a.m. to one p.m. See Interview with Dr. Smita Dharmamer, *supra* note 88.

hysterically and was visibly traumatized every time the barracks were locked.¹⁷⁹ He even tried to squeeze his little body out of the iron bars every single day.¹⁸⁰ The overcrowded nature of these barracks further exacerbates the problem, as children during *bandi* often lack adequate space to play, explore, or interact with others in ways that would promote healthy development. The impact of this restrictive environment on children's behavior and development is profound.

Children are generally prohibited from leaving the prison premises, except under specific circumstances, further isolating them from the outside world.¹⁸¹ Typically, even family members distance themselves from justice-impacted women.¹⁸² This kind of isolation experienced by women and their children further impacts their mental health. Confinement is often accompanied by humiliating and invasive experiences, such as strip searches, which are routinely imposed on both incarcerated mothers and their children upon re-entry into prison.¹⁸³

Over time, as these children grow accustomed to the prison routine, they develop a heightened reliance on the highly controlled and rigid structures of prison life.¹⁸⁴ Once released from prison, these children often struggle with reintegration into society, as they have difficulty adapting to self-directed routines, making independent decisions, and establishing healthy relationships, much like their mothers.¹⁸⁵

Finally, the stigma attached to incarcerated mothers extends to their children, a phenomenon that sociologist Erving Goffman conceptualizes as "courtesy stigma."¹⁸⁶ Criminology professor Rachel Condry adds nuance to this transmutation of stigma by

179 See Shantha, *supra* note 107.

180 See *id.*

181 See NAT'L COMM'N FOR PROT. OF CHILD RTS., *supra* note 113, at 12.

182 See Nanumma Subba, *The 'Double Jeopardy' of Criminal Women in India: Revisiting the Literature and Jurisprudence*, 2021 I.L.I. L. REV. 26 (2021).

183 See Shantha, *supra* note 107.

184 See Martin, *supra* note 165. Though Martin discusses such challenges amongst adult prisoners, the same would be true for children staying with their incarcerated mothers, who experience life in prison as carceral subjects.

185 See *id.*

186 See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 43 (1963).

framing the term “secondary stigma,” explaining that it “does not simply ‘rub off’” on the child due to close proximity but also due to “causal implication.”¹⁸⁷ This stigma burdens children of incarcerated mothers with the perceived responsibility for their mother’s actions.

Condry identifies several key manifestations of such stigma, social isolation, constant anxiety about whom to trust with their past, and an inability to share their struggles.¹⁸⁸ Their difference becomes central to their identity, leading to discrimination and self-consciousness both personally and publicly.¹⁸⁹ Such discrimination not only harms them emotionally but also perpetuates disparities in social, economic, and political power, with long-lasting cultural and political consequences.¹⁹⁰

Many children, once released, report that they have no one to talk to about their mother’s imprisonment, and lacking this outlet further impacts their mental health.¹⁹¹ The grief they experience is ambiguous, uncertain, and unvalidated. What they experience cannot be “openly acknowledged, socially sanctioned, or publicly mourned.”¹⁹² This can also generate feelings of shame and embarrassment, which Minson terms as “confounding grief.”¹⁹³ This may be expressed in anger, aggression, and other forms of behavior that may result in criminalization.¹⁹⁴

Therapy and external support can equip children with tools to articulate their emotions and better understand their experiences. However, mental health counseling remains largely absent from most schools, particularly government schools, due to limited funding, lack

187 RACHEL CONDRI, *FAMILIES SHAMED: THE CONSEQUENCES OF CRIME FOR RELATIVES OF SERIOUS OFFENDERS* 62 (2007) (“I will use the term secondary stigma because it is both a stigma by contagion—an extension of the offender’s stigma travelling through kinship ties—and a stigma attached to the new identity the relative holds as a ‘mother of a murderer’ or ‘wife of a sex offender’ and the blame this new status attracts.”).

188 *See id.* at 82–88.

189 Rachel Condry & Shona Minson, *Conceptualising the Effects of Imprisonment on Families: Collateral Consequences*, *THEORETICAL CRIMINOLOGY* 540, 542–43 (2020).

190 *See id.*

191 *See* Minson, *Direct Harms*, *supra* note 150.

192 *See id.*

193 *See id.*

194 *See id.* at 524.

of trained professionals, and the persistent stigma surrounding mental health care.¹⁹⁵ As a result, many children of incarcerated parents are left without the necessary resources to process their grief and trauma even once they return to school, exacerbating their emotional distress and increasing their vulnerability to systemic neglect.

The adversities children of incarcerated mothers face affect them differently depending on factors such as their personal resilience, age, and specific circumstances, as well as the availability of external support and alternative care options.¹⁹⁶ However, the systemic and structural issues outlined above have manifestations on all children of incarcerated mothers to a certain degree.

2. Constitutionality of Children in Prisons and the Best Interest Principle

The Bangkok Rules state that the decision to allow children to stay with their mothers in prison should be based on the child's best interests.¹⁹⁷ However, the Bangkok Rules do not provide any clear criteria for determining what constitutes the "best interests" of the child. The U.N. CRC emphasizes that children's perspectives in the determination of their best interests need to be taken into consideration in accordance with their age and maturity.¹⁹⁸

While the *R.D. Upadhyay* judgment subscribes to the best interests of the child principle,¹⁹⁹ it lacks nuance by granting mothers the complete autonomy to decide whether to bring their children with them to prison without any expert evaluation of the child's best interests and without taking into consideration the child's voice. Unlike resource-intensive countries, the Indian legal system does not have the resources or bandwidth to devote to such an independent determination of the "best interest of the child." While many mothers may genuinely consider their child's best interests, some may lack the foresight to make that decision, and others may be incapable of fulfilling their role as a nurturing, protective parent given their circumstances. Some mothers are also unaware of their rights to keep their children outside the prison, and in some cases, they are deeply distrustful of state

195 See Baiarbha Massar, *School Based Mental Health Programme in India: A Review*, 11 INT'L J. INDIAN PSYCH. 3002, 3008–10 (2023).

196 See NEELAM SUKHRAMANI ET AL., CHILDREN OF INCARCERATED PARENTS: EXPERIENCES AND IMPACTS (2019).

197 See G.A. Res. 65/229, *supra* note 21, at r. 69.

198 See G.A. Res. 44/25, *supra* note 66, at art. 12.

199 See *R.D. Upadhyay v. State of AP & Ors.*, (2006) 3 SCR 1132, at 1138 (India).

authorities,²⁰⁰ fearing that their children would be institutionalized if left in the outside world. The lack of oversight raises serious concerns about the adequacy of the decision-making process in protecting vulnerable children. The *R.D. Upadhyay* judgment fails to acknowledge that the mother may not always be able to make decisions in the child's best interest or that the best interests of the child may conflict with the mother's own needs and circumstances.

Furthermore, the judgment grants mothers the choice to bring their children to prison without recognizing that this choice is largely illusory.²⁰¹ Existing policies have legitimized the assumption that prison is the default placement for children who lack alternative support systems. For instance, the *Model Prison Manual* of 2016 states, "A child up to six years of age shall be admitted to prison with his mother if no other arrangements, for keeping him with relatives or otherwise, can be made."²⁰² This provision creates an inherent inequality within the law, disproportionately affecting children from marginalized communities who lack access to alternative caregivers. Such children are effectively compelled to live in prison until the age of six, without a critical assessment of whether this arrangement truly serves their best interests. As a result, children from these communities are unduly subjected to the hostile and harmful environment of prison—a reality not faced by children of mothers with greater resources or options.

The situation of children with incarcerated parents raises significant concerns regarding discrimination, as it contravenes the protections afforded under Articles 14 and 15 of the Indian Constitution, as well as Article 2 of the U.N. CRC.²⁰³ The Indian Constitution guarantees fundamental rights and directive principles of state policy that

200 See Shantha, *supra* note 107.

201 See *id.*

202 MINISTRY OF HOME AFFS., MODEL PRISON MANUAL 2016, 244 (2016) (India).

203 Article 14 of the Indian Constitution guarantees that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." India Const. art. 14. Article 15, clause 1 of the Indian Constitution states, "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them." India Const. art. 15 cl. 1. Article 15, clause 3 of the Indian Constitution clearly demarcates women and children as special categories of citizens who owing to the historic negligence they have suffered, would be subject to special provisions for their welfare. India Const. art. 15 cl. 3. It states, "Nothing in this article shall prevent the State from making any special provision for women and children." *Id.* Article 2 of the U.N. CRC aims to protect children from discrimination which they may suffer as a consequence of the "status" or "activities" of their parents. G.A. Res. 44/25, *supra* note 66, at art. 2.

are meant to safeguard children's interests.²⁰⁴ These include the right to live in freedom and dignity,²⁰⁵ the right to health,²⁰⁶ opportunities for healthy development,²⁰⁷ and access to early childhood care and education, particularly for those under six years of age.²⁰⁸ Thus, the Constitution recognizes children as independent rights-holders. However, the treatment of children of incarcerated mothers flagrantly violates these constitutional protections and their rights under the U.N. CRC. This situation results in what Kolber terms the "unintentional burden of punishment," whereby children, through no fault of their own, bear the negative consequences of their parents' incarceration.²⁰⁹ Incarcerating children alongside their mothers is therefore fundamentally unconstitutional.

American legal academic James Dwyer is a vocal critic of prison nurseries, arguing that they are unconstitutional and that states are placing children in these environments without due process, thereby violating the children's constitutional rights at taxpayer expense.²¹⁰ His argument is based on the premise that women in prison are ill-suited to be long-term parents, and therefore their children may be better off being placed for adoption, or if the mother's sentence is under seven months, placed with a temporary caregiver until her release.²¹¹ This Article does not support Dwyer's view of imprisoned mothers as inherently unfit parents. Instead, it argues that neither mothers of minor children nor their minor children should be in prison in the first place and that placing children in prisons is an incursion on their constitutional rights.

204 Parts 3 and 4 of the Indian Constitution contain the Fundamental Rights guaranteed to the citizens of India and the Directive Principles of State Policy, respectively. *See* India Const. arts. 12–51.

205 Article 19(1)(d) states that all citizens shall have the right to "move freely throughout the territory of India." India Const. art. 19, cl. 1(d). Article 21 states, "No person shall be deprived of his life or personal liberty except according to procedure established by law." India Const. art. 21.

206 *See* Mridula Sarmah, *A Study of Right to Health Under the Constitution of India*, 5 INT'L J. HUMANS. & SOC. SCI. STUD. 85, 85–90 (2019).

207 Article 39(f) of the Indian Constitution requires "that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment." India Const. art. 39(f).

208 Article 45 of the Indian Constitution states, "The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years." India Const. art. 45.

209 Adam J. Kolber, *Unintentional Punishment*, 18 LEGAL THEORY 1, 13 (2012).

210 *See* James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. REV. 755, 835 (2009).

211 *See id.* at 770.

It is deeply contradictory that colonial-era legislation, such as the Prisons Act of 1894,²¹² continues to govern the experiences of women and children in Indian prisons—legislation that was enacted long before the Indian Constitution came into effect in 1950. These laws make no provision for the children of incarcerated mothers, reflecting a failure to incorporate constitutional principles into the correctional system. This Article argues that, if subjected to contemporary constitutional scrutiny, legislation allowing children to stay with incarcerated parents could be deemed unconstitutional, as they are discriminatory, arbitrary, and in violation of their fundamental rights. It is crucial to address these systemic flaws and the enduring legacies of colonial policies in order to create a decolonial, compassionate, and just correctional framework.

B. Need for Prison Abolitionist Interventions

As discussed in Part I, the correctional facilities established during British colonial rule in India were not designed with children in mind.²¹³ Given this, it is both impractical and unjust to try to integrate children into a system that was not designed to meet their needs. Incarcerated mothers of minor children should not be compelled to make the impossible choice between leaving their children behind or subjecting them to the harmful and dehumanizing conditions of prison. Continuing to fund prisons (including reforms such as prison nurseries) ultimately contradicts the broader vision of prison abolition, which seeks both to dismantle the system of imprisonment and to create sustainable, community-centered alternatives.²¹⁴ Since abolition is a long-term, radically transformative process, immediate interventions are also necessary, ones that do not further entrench or expand the carceral system. Non-reformist or abolitionist reforms serve as intermediate measures, introducing changes within the carceral system that align with abolitionist principles of making sustainable and material differences in people's lives without requiring additional investment in it.²¹⁵ I have set out below some non-reformist reforms and abolitionist ideas that can help us inch towards this objective.

212 Prisons Act, 1894 (India).

213 See *supra* Part I.A.

214 See *What Is the PIC?, What is Abolition?*, CRITICAL RESISTANCE, <https://criticalresistance.org/mission-vision/not-so-common-language/> [<https://perma.cc/SU4U-2ZQC>].

215 See CRITICAL RESISTANCE, *supra* note 134; ANGELA DAVIS ET AL., *ABOLITION. FEMINISM. NOW.* (2022).

1. Liberalizing Bail Provisions

As discussed in the Introduction, more than 85% of women who are in prison with their children are pre-trial detainees.²¹⁶ A majority of these mothers belong to marginalized communities and are detained for a prolonged period of time before their trial due to reasons associated with their lack of social capital and resources.²¹⁷ Legally, they are innocent, as the accusations against them have not been proven.

For the children of pre-trial detainees, life inside is characterized by instability and upheaval. They may form attachments to certain peers or caregivers within the institution, only to face the uncertainty of being transferred to other facilities or external placements, often only to be returned later. This constant disruption harms their emotional and psychological well-being.

While the law does not currently recognize the unique vulnerabilities of pre-trial mothers and their children, a few judicial decisions have granted temporary bail to mothers on postpartum and caregiving grounds. Notably, the Punjab and Haryana High Court in *Naina v. State of Punjab*,²¹⁸ and the Additional Sessions Judge in Delhi in *State v. Suman Kumari*,²¹⁹ granted bail to new mothers for limited durations, acknowledging the adverse effects of incarceration on the mental and physical health of their children, the stigma they face, and the long-term implications for their cognitive and emotional well-being. However, such outcomes depend heavily on the individual discretion of judges and are far from being institutionalized practice.

To address this, bail provisions for pre-trial detainees who are mothers of minor children must be made more flexible and accessible through policy change. A comparative example can be drawn from Italy, where the law categorically excludes pre-trial detention for parents of children under six years of age, eliminating judicial discretion in such cases.²²⁰

216 NAT'L CRIME RECS. BUREAU, *supra* note 3, at xiii.

217 See Vrinda Bhandari, *Pretrial Detention in India: An Examination of the Causes and Possible Solutions*, 11 ASIAN J. CRIMINOLOGY 83, 98–99 (2016).

218 See *Naina v. State of Punjab*, Crm-M-16103/2024, Punjab & Haryana High Court (May 13, 2024).

219 See *State v. Suman Kumari*, Bail Matter No. 1132/21, Additional Sessions Judge, Delhi (March 31, 2021).

220 See AGNIESZKA MARTYNOWICZ, DANISH INST. FOR HUM. RTS., CHILDREN OF IMPRISONED PARENTS 14 (2019), [<https://perma.cc/Q8NG-HWXQ>].

Adopting similar legislative safeguards in India would represent an important step toward truly centering the best interests of the child in pre-trial detention decisions.

2. Amendment of Sentencing Guidelines

The criminal legal system, from the stage of defining what a crime is to sentencing an individual for the crime, operates within a patriarchal lens.²²¹ There is a growing need to advocate for sentencing guidelines that consider the presence of children and prioritize alternatives to incarceration for mothers to avoid the harm inherent in incarceration. Rules 57 and 61 of the Bangkok Rules encourage states to adopt such gender-mainstreamed sentencing guidelines.²²² However, domestic law has yet to build these recognitions in.

Most notably, South Africa altered its sentencing practices to give regard to the children of defendants.²²³ The case of *M v. the State* before the Constitutional Court of South Africa held that criminal courts must not relinquish the welfare interests of the state and ordered them to develop sentencing guidelines that consider the unique experiences of mothers and the children who accompany them to prison.²²⁴ It further stated that “statutes must be interpreted, and the common law developed in a manner which favors protecting and advancing the interests of children.”²²⁵ It also referred to the state’s duty to minimize harms suffered by children when their parents are unable to care for them properly.²²⁶ The judgment provides a helpful blueprint for other countries to recognize their duty of care towards all citizens and that children, too, constitute citizenry of the State.²²⁷

221 See DIKSHA PANDEY, SOC. & POL. RSCH. FOUND., FEMALE PRISONERS IN INDIA: THE CONSEQUENCES OF TRIPLE MARGINALISATION (2021), [<https://perma.cc/3JQX-S7DX>].

222 See G.A. Res. 65/229, *supra* note 21, at Part III.

223 See *M v. the State*, 2007 (3) SA 232 (CC) (S. Afr.).

224 *Id.* Having said this, I acknowledge that Professor Mrinal Satish is skeptical of the impact of sentencing guidelines, especially in cases of rape. See MRINAL SATISH, DISCRETION, DISCRIMINATION AND THE RULE OF LAW: REFORMING RAPE SENTENCING IN INDIA (2016).

225 *M v. the State*, 2007 (3) SA 232 (CC) at ¶ 15 (S. Afr.).

226 See *M v. the State*, 2007 (3) SA 232 (CC) at ¶¶ 20, 35 (S. Afr.).

227 “If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents.” *M v. the State*, 2007 (3) SA 232 (CC) at ¶ 18 (S. Afr.).

While sentencing mothers of minor children, Indian courts have typically not considered the rights of a dependent child.²²⁸ Judges interviewed by Prayas for a study indicated that they did not feel that the law had assigned the adult courts a definite role and responsibility for the children of prisoners.²²⁹ However, even an amendment to the sentencing guidelines may have limited application when judges exhibit severe bias about prisoners and their backgrounds. Prayas' report recorded a judge commenting that children were suffering the consequences of their mothers' actions.²³⁰

3. Decarcerating Children and Their Mothers

From the moment of arrest through to imprisonment, the criminal justice system is deeply traumatic for both the mother and child.²³¹ Although Rule 29(2) of the Nelson Mandela Rules states that "Children in prison with a parent shall never be treated as prisoners,"²³² this principle remains aspirational in the Indian context, where children are treated as carceral subjects. The emotional and psychological toll of separation, the uncertainty surrounding their future, and the abrupt disruption to their lives are rarely discussed in policy circles or legal discourse.²³³

The court in *R.D. Upadhyay* noted that a child living in jail along with their incarcerated mother is not desirable at all and must be considered as a last resort when all alternative care options are exhausted.²³⁴ Similarly, the JJ Act prescribes institutionalization of children only when family or community-based alternatives are unavailable.²³⁵

No matter how much we improve the architecture or the physical conditions of prison nurseries, the inherent structural violence of incarceration cannot be eliminated. Prisons

228 See Himanshu Dixit, *Child of Incarcerated Parents: A Deemed Criminal*, 2023 I.L.I. L. REV. 245, 262 (2023).

229 See TATA INST. OF SOC. SCIS., FORCED SEPARATION: CHILDREN OF IMPRISONED MOTHERS (AN EXPLORATION IN TWO INDIAN CITIES) 159 (2002) [<https://perma.cc/HE4V-D8YY>].

230 See *id.* at 161.

231 See Bhandari, *supra* note 12, at 366.

232 G.A. Res. 70/175, *supra* note 65, at r. 29(2).

233 See SUKHRAMANI ET AL., *supra* note 196.

234 See *R.D. Upadhyay v. State of AP & Ors.*, (2006) 3 SCR 1132, at 1142 (India).

235 See Juvenile Justice Act, 2016, § 3(xii) (India).

are institutions designed to punish, surveil, discipline, and confine²³⁶—not places of care, safety, or development.²³⁷ As such, even the most well-intentioned carceral reforms cannot mitigate the profound and lasting harms experienced by children who grow up behind bars. At the same time, separating a child from their mother, who is often their primary caregiving, during their formative years can be equally damaging. The long-term goal must therefore be to decarcerate both mothers and children, while simultaneously investing in non-custodial, community-based models of care that center both maternal and child dignity and rights.

4. Popularizing Non-Custodial Sentences

Non-custodial sentences, community-based programs, and robust support services offer a more effective solution for both mothers and their minor children. I argue that this approach should be extended to mothers of minor children who are their primary caregivers. Such an approach would not only address the needs of children forced to accompany their mothers to prison but also safeguard the well-being of children left on the outside and be in line with Rule 64 of the Bangkok Rules which prescribes non-custodial sentences for mothers with dependent children, where possible and appropriate.²³⁸

Many countries have increasingly started taking into consideration this unique relationship of the mother and child by passing legislation that provides for the option of community-based sentencing for mothers. If such policies can be effectively implemented alongside bail provisions, then it would address the requirements of all mothers: those who are pre-trial detainees and those who are convicted.

In Italy, mothers with children up to the age of ten are permitted in some circumstances to serve their sentences outside until their children reach age ten.²³⁹ Colombia recently passed the Public Utility Act, which states that women who are the primary house runners would be subject to community service and would not be passed through the criminal legal system.²⁴⁰ Argentina has a law that puts mothers of children who are the primary caretaker

236 See generally MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 2d ed. 1979).

237 See generally ANGELA DAVIS, ARE PRISONS OBSOLETE? (2003).

238 See G.A. Res. 65/229, *supra* note 21, at r. 64.

239 See Legge 8 marzo 2001, n.40, G.U. Aug. 3, 2001, n.56 (It.).

240 See L. 2292, marzo 8, 2023, DIARIO OFICIAL [D.O.] (Colom.).

on house arrest if their child is under five years of age.²⁴¹ Though these laws are also flawed in the manner in which they underscore women's place as a default caregiver,²⁴² they offer a better alternative than prison. By reallocating resources from incarceration to social welfare programs, we can begin to break the cycle of intergenerational incarceration and create healthier, more supportive environments for families.

The newly enacted Bharatiya Nyaya Sanhita prescribes community service for certain offences.²⁴³ This alternative can be offered to mothers who have caregiving responsibilities, with the simultaneous provision of state-run childcare centers that support women and promote their rehabilitation.²⁴⁴

While the proposed prison abolitionist framework may appear to confer differential benefits to women, it is important to note that such provisions would be constitutionally valid under Article 15(3) of the Indian Constitution.²⁴⁵ This provision explicitly empowers the state to create special laws for women and children, acknowledging their unique socio-economic vulnerabilities. Consequently, a law or policy permitting decarceration, sentencing, or bail reforms exclusively for women would not constitute sex discrimination.

Nevertheless, to mitigate concerns about reinforcing gender stereotypes, particularly the perception of women as default caregivers for children, a more inclusive policy could be envisaged. A gender-neutral approach would grant non-carceral sentences to incarcerated individuals who fulfill the role of primary caregivers, irrespective of gender. Such an approach would center caregiving responsibilities as the pivotal criterion rather than the

241 Article 32 of Law 24.660 on sentence execution was amended in 2008, expanding the grounds for granting home detention as a substitute for prison confinement. *See* Law No. 26.472, Jan. 12, 2009 (Arg.). The amendment, originally in Spanish, states, “El Juez de ejecución, o juez competente, podrá disponer el cumplimiento de la pena impuesta en detención domiciliaria: (f) A la madre de un niño menor de cinco (5) años o de una persona con discapacidad, a su cargo,” which translates to “The executing judge, or competent judge, may order the fulfillment of the sentence imposed under house arrest: (f) To the mother of a child under five (5) years of age or of a disabled person under her care.” *Id.*

242 *See, e.g.,* Claudia Alejandra Cardona, *Public Service: An Alternative to Women's Incarceration in Colombia*, INT'L DRUG POL'Y CONSORTIUM BLOG (Aug. 3, 2022), <https://idpc.net/blog/2022/08/public-service-an-alternative-to-women-s-incarceration-in-colombia> [<https://perma.cc/6A4J-V98V>].

243 *See, e.g.,* Bharatiya Nyaya Sanhita, 2024, § 226 (India) (attempt to suicide); Bharatiya Nyaya Sanhita, 2024, § 202 (India) (public servant unlawfully engaging in trade).

244 *See* Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77 (2011).

245 *See* India Const. art. 15(3); *see also supra* note 203.

individual's gender. In the short term, given entrenched societal norms that predominantly position women as caregivers, women would likely derive the most immediate benefit from this framework. However, the policy's long-term trajectory could encourage broader societal and cultural shifts, enabling more equitable distribution of caregiving responsibilities across genders. By fostering an environment where men are increasingly involved in caregiving roles, this approach would advance substantive equality while ensuring that caregiving itself remains at the heart of prison abolitionist efforts.

CONCLUSION

Addressing the complexities of mother-child separation within the criminal justice system requires a nuanced approach, one that considers the immediate needs of children, the impact on their mothers, and the long-term consequences of imprisonment on children, families, and communities.

A key issue with this project is the absence of comprehensive data on children impacted by parental incarceration, both in prisons and on the outside, and the establishment and efficient running of prison nurseries in states across India. This lack of information exacerbates the challenges these children face, including limited access to resources and a lack of institutional support. Such reporting should be made a part of the annual prison statistics that are published by the National Crime Records Bureau, a central government agency under the Ministry of Home Affairs.

Much of the existing literature on this topic relies on self-reported data from parents that is methodologically limited.²⁴⁶ Notably, there is a lack of longitudinal studies tracking the experiences of children from parental arrest to release, both in the short and long term. Additionally, comparative studies between children incarcerated with a parent and those living outside of prison, particularly in the Indian context and from an interdisciplinary perspective, remain scarce. Furthermore, research is necessary to identify the developmental stages during which children most critically require their mothers' presence. There is no justification for the state imposing six as the age limit for children to stay with their mothers in prisons.

246 See SUKHRAMANI ET AL., *supra* note 196.

As the number of children experiencing parental incarceration continues to rise in India,²⁴⁷ it is essential to fill the gap in research and consider both the psychological insights and the lessons learned from other countries. The societal impacts of mass incarceration are well-documented,²⁴⁸ and it is crucial to question the true value of imprisoning mothers. What are we sacrificing in the name of justice, both for the incarcerated individuals and for the children left behind?

Ultimately, the conversation must go beyond policy reform; it must center on justice, abolition, and a radical reimagining of caregiving and community care. The harm inflicted by the current system is evident.²⁴⁹ It is crucial to recognize that punishment, in contrast to liberal conceptions of justice, does not affect the individual alone; its consequences ripple out to the larger society, including the families and communities of the incarcerated. As British criminologist Shadd Maruna observes, “It is impossible to isolate punishment as practiced in most societies to a single individual, when we are all connected in families, communities, and societies.”²⁵⁰ In this sense, the justice system’s failure to consider the broader social ramifications of punishment constitutes a breach of its duty of care towards the most vulnerable members of society.

India’s justice system is rooted in liberal values, as it tends to focus on the individual defendant and often ignores the collective impact of punishment on families and communities. A shift toward a communitarian approach to justice would recognize the inevitable suffering of those materially and emotionally tied to prisoners—individuals whose experiences are often overlooked in both theoretical debates and policy decisions.²⁵¹ Abandoning a strictly individualistic perspective forces us to confront the reality that punishment, particularly imprisonment, often extends far beyond the person incarcerated and harms innocent parties, most notably their children. The issue of children living in prison provides a compelling entry point for initiating broader abolitionist conversations, as it starkly reveals the systemic flaws of a carceral approach that subjects children to such environments.

247 See NAT’L CRIME RECS. BUREAU, *supra* note 3, at xiii. There were 1,628 children in women’s prisons as of December 31, 2020. This number has increased over time to 1,764 as of December 31, 2022. *Id.* at 41.

248 See, e.g., Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 2010 DÆDALUS 8 (2010).

249 See generally DAVIS, *supra* note 237.

250 Shadd Maruna, *Time to Get Rid of the Skid Bid? What Good Are Short Stays of Incarceration?*, 665 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 100 (2016).

251 See generally SUKHRAMANI ET AL., *supra* note 196.

Many studies draw on John Bowlby's "attachment theory," which suggests that separation from parents is generally harmful to children.²⁵² However, and as established in this Article, it is simultaneously important to recognize that prison nursery policies, while well-intentioned, cannot effectively work in carceral spaces. They also inadvertently reinforce patriarchal norms by positioning mothers as the default caregivers. In advocating for the release of mothers from prisons and for community-based alternatives, this Article recognizes the exceptional status of mothers. However, it is also cautious not to reinforce harmful gender stereotypes about caregiving.²⁵³ The call for abolition is not merely about freeing mothers from prison; it is about transforming the underlying structures that perpetuate inequality—both within and outside prison. Our immediate goal should be the decarceration of mothers and their children, but our long-term vision must aim at creating a society where caregiving is shared equitably and not solely the burden of women.

The current carceral ecosystem has long been taken for granted, with outdated policies and practices rarely questioned or revised. Ultimately, a more humane approach to justice requires a focus on the well-being of both mothers and children. While implementing standardized policies for such a small and specific group of beneficiaries may seem challenging, it is essential to recognize that even small numbers of affected individuals deserve comprehensive and compassionate consideration.

252 See John Bowlby, *Attachment Theory and Its Therapeutic Implications*, 6 *ADOLESCENT PSYCHIATRY* 5 (1978).

253 As stated in Part III above, a possible way to address the issue of policy interventions further reinforcing harmful stereotypes is by introducing a policy that grants incarcerated individuals who are primary caregivers of minor children a non-carceral sentence under similar circumstances. This approach would shift the focus from gender to the caregiving role itself, ensuring that caregiving, rather than gender, becomes the central criterion for such considerations. Naturally, given societal norms and expectations, women—who comprise the majority of caregivers—would disproportionately benefit from these non-carceral sentences in the short term. Simultaneously, efforts must be made to implement policies and cultural initiatives that encourage men to take on more active caregiving roles. This would also create a possibility that in the long term, the policy would benefit fathers as well. This would help distribute the caregiving burden more equitably over time, preventing it from remaining disproportionately placed on mothers.