

Prisons, Patriarchy, and Parenthood: Reproductive Injustice as Double Punishment

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ABSTRACT

This Article critically examines the doctrinal, cultural, and institutional barriers that systematically constrain the reproductive autonomy of women directly impacted by incarceration in India. These constraints, manifesting through custodial childbirth, performance of “hypercare,” enforced separation from children, and the denial of self-determination over parenting, constitute forms of inhuman and degrading treatment that extend punishment beyond formal legal sanction, and are disproportionately borne by women from socio-economically marginalized communities.

Drawing on doctrinal law and socio-legal theory and critique, the Article argues that current carceral practices violate women’s fundamental rights to procreate and parent, rights firmly rooted in domestic constitutional jurisprudence and international human rights frameworks. In response, the Article advances a normative claim—that prisons are structurally incapable of guaranteeing women these rights. Although grounded in the Indian landscape, the Article places its analysis in critical conversation with the United States, where incarceration also functions as a mechanism of racialized reproductive control, identifying both convergences and divergences in legal and policy approaches. The Article ultimately calls for a prison abolitionist praxis in India that centers decarceration of women, while simultaneously challenging dominant assumptions about gendered caregiving within carceral institutions and beyond them.

INTRODUCTION

“To solve a problem relating to a minor member of a convicted family . . . : not being an accompanying child, not a convicted adult, she had to be slotted somewhere to avoid the complications of leaving her uncared for,” writes Rani Dhavan Shankardass, former President of Penal Reform International.¹ The

1. RANI DHAVAN SHANKARDASS, OF WOMEN ‘INSIDE’: PRISON VOICES FROM INDIA 74 (2012).

minor in question was a twelve-year-old visually impaired girl whose mother and other family members were being imprisoned. Indian law prohibits children above the age of six from residing in prison with their mothers, and she had no extended family to take care of her on the outside. Faced with this logistical impasse, authorities proposed what they considered an ingenious solution: “why not convict her as well (by passing her off as an adult)² and have her stay with the rest of her family in prison. . . She would not be with unknown persons,” officials reasoned, “and her family. . . would be relieved.”³ In manufacturing both her legal majority and her conviction, the state revealed its acute awareness of the absence of supportive institutions that would adequately care for the child outside prison walls once her mother was incarcerated.

The Indian carceral system has been organized with the male prisoner as the archetype since its inception.⁴ What therefore remains absent from the socio-legal discourse on carcerality in India is a sustained and holistic engagement with the reproductive choices and default caregiving responsibilities of women in prison.

As of December 2023, 1,318 women in India’s prisons were accompanied by their 1,492 children, all under the age of six.⁵ Though legally innocent, their children are effectively absorbed into a carceral environment that is ill-equipped to meet their developmental, emotional, or physical needs.⁶ Children born or raised in such conditions are not merely “collateral consequences” of their mothers’ incarceration,⁷ but active victims of a broken system that harms them and punishes caregiving.⁸ Yet, for many children, including the twelve-year-old girl discussed above, remaining with their primary caregiver (even within the confines of prison) may paradoxically offer greater continuity of care than the abandonment and instability that awaits outside.

The carceral structure, therefore, and as further discussed in this Article, compels female caregivers to make these impossible choices in conditions of deprivation and control, revealing the limitations of conventional legal frameworks in addressing the full extent of harm. To grapple with these layered and disproportionate gendered impacts that extend far beyond the deprivation

2. Which for the purpose of the Indian criminal legal system is someone who is at least eighteen years of age.

3. SHANKARDASS, *supra* note 1.

4. Mahuya Bandyopadhyay & Rimple Mehta, *Introduction*, in *WOMEN, INCARCERATED: NARRATIVE FROM INDIA 9* (Mahuya Bandyopadhyay & Rimple Mehta eds., 2022).

5. NATIONAL CRIME RECORDS BUREAU (NCRB), *PRISON STATISTICS INDIA* xiii (2023).

6. See generally PRAYAS: TATA INSTITUTE OF SOCIAL SCIENCE, *CHILDREN OF WOMEN PRISONERS: THE INVISIBLE TRIAL* (Vijay Raghavan ed., 2018).

7. See generally Rachel Condry & Shona Minson, *Conceptualizing the Effects of Imprisonment on Families: Collateral Consequences, Secondary Punishment, or Symbiotic Harms?*, 25 *THEORETICAL CRIMINOLOGY* 540 (2020). Minson & Condry have critiqued the use of the term “collateral consequences” to describe the impact of parental incarceration on children. They argue that this terminology minimizes the harm these children experience, framing their suffering as an indirect effect, rather than as an intentional and direct consequence of their mothers’ imprisonment by the state. *Id.*

8. This Article does not delve deeply into the specific challenges faced by the children of incarcerated mothers. For a focused analysis, see generally Stuti Shah, *Accidental Carceral Subjects: Reassessing the Prison Nursery Model in India*, 46 *COLUM. J. GENDER & L.* 103 (2025).

of liberty or the act of “doing time,” this Article introduces the concept of “double punishment.” It situates this analysis within two critical frameworks: reproductive justice and brahmanical patriarchy.

Reproductive justice, as articulated by American legal professor Dorothy Roberts and rooted in the work of Black feminists and activists in the United States (“U.S.”),⁹ goes beyond the narrow pro-choice paradigm. It encompasses not only the right to avoid unwanted pregnancies, but also the right to parent children autonomously in safe and supportive environments.¹⁰ This Article examines how incarceration undermines women’s reproductive self-determination, which in this context is the freedom to pursue motherhood on their own terms. Furthermore, it relies on the reproductive justice framework to argue that the focus must not be limited to guaranteeing individual reproductive rights but must extend to reimagining a polity where socio-economic infrastructures are transformed to meaningfully enable women to access and exercise these entitlements. This framing is useful in understanding the experiences of incarcerated women in India, whose lives exist at the intersection of multiple forms of marginalization.

This Article situates reproductive injustice of incarcerated women within the broader matrix of brahmanical patriarchy, a term coined by Indian feminist historian Uma Chakravarti. Brahmanical patriarchy describes how caste and gender oppression operate jointly to sustain the dominance of upper-caste men, most visibly by regulating women’s sexuality and reproductive roles to preserve caste boundaries through procreation.¹¹ The term includes U.S. critical race theorist Kimberlé Crenshaw’s conceptualization of intersectionality.¹² Women’s experience of marginality in prison cannot be understood in isolation from the broader socio-political structures that shape their lives beyond the prison,¹³ such as gender, kinship, and caste.¹⁴ A 2025 World Economic Forum Report ranked India 131st out of 148 countries in terms of gender inequality,¹⁵ underscoring the deep entrenchment of patriarchy within India’s legal, cultural,

9. Coined by a group of Black women in the U.S. in 1994, “reproductive justice” offers a more inclusive framework that captures the lived realities of women of color, marginalized women, and trans people. See *About Us*, SISTERSONG, (last accessed Feb. 10, 2026) <https://www.sistersong.net/about-x2> [<https://perma.cc/5PCE-T6T2>].

10. See generally DOROTHY E. ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997); see *supra* note 9 (“SisterSong defines Reproductive Justice as the human right to maintain personal bodily autonomy, have children, not have children, and parent the children we have in safe and sustainable communities.”).

11. See generally Uma Chakravarti, *Conceptualising Brahmanical Patriarchy in Early India: Gender, Caste, Class and State*, 28 *ECON. AND POL. WKLY.* 579 (Apr. 3, 1993). Chakravarti drew inspiration from DR. B.R. AMBEDKAR, *CASTES IN INDIA: THEIR MECHANISM, GENESIS & DEVELOPMENT* (1916).

12. The term “intersectional” was first coined by American civil rights advocate Kimberlé Crenshaw as a lens to articulate the experiences of African-American women. See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 *U. CHI. LEGAL F.* 139 (1989).

13. In India, the terms “jails” and “prisons” are used interchangeably to mean judicial custody.

14. Bandyopadhyay & Mehta, *supra* note 4, at 5.

15. *WORLD ECONOMIC FORUM, GLOBAL GENDER GAP REPORT*, 33 (2025) https://reports.weforum.org/docs/WEF_GGGR_2025.pdf [<https://perma.cc/H37T-QN7D>].

and systemic frameworks.¹⁶ When layered with caste, these gendered inequities become more acute.

The prevailing narrative, that incarcerated women deserve the burdens of fractured families and performing unsupported round-the-clock caregiving (which this Article refers to as “hypercare”) in hostile, resource-deprived environments because of their crimes, is not only morally repugnant,¹⁷ but constitutionally unsound.¹⁸ This Article challenges this narrative on three grounds. First, about eighty percent of incarcerated mothers (1,049 women) in India, accompanied by their 1,191 children, are undertrial prisoners who are legally innocent,¹⁹ and incarcerated primarily because of structural marginalization.²⁰ Second, this double punishment imposed on women violates their constitutional rights to equality, non-discrimination, and life, dignity, and liberty, rights that persist even during incarceration and are guaranteed under Articles 14, 15, and 21 of the Indian Constitution.²¹ Third, it constitutes a form of gender-based discrimination that is unconstitutional under Article 14 of the Indian Constitution, as incarcerated men are not subjected to comparable burdens and denials related to parenthood.

The central argument advanced in this Article is that it is unconstitutional for the state to infringe upon the reproductive autonomy of women, even those accused or convicted of crimes. This obligation is not grounded in radical or aspirational ideals but in existing legal guarantees, particularly international human rights instruments recognized and adopted by India, and Articles 14, 15, and 21 of the Indian Constitution which guarantee dignity, reproductive justice, and substantive equality to all people, including incarcerated individuals. However, these constitutional values remain meaningfully unrealized, particularly for incarcerated women, due to their systemic de-prioritization

16. See generally Bhabhani Shankar Nayak & Geeta Sinha, *Patriarchal Family, Gendered Society and Capitalist State in India, in IMPACT OF PATRIARCHY AND GENDER STEREOTYPES ON WORKING WOMEN* (Bhabhani Shankar Nayak & Naznin Tabassum eds., 2025).

17. See generally Julia Morgan & Caroline Leeson, *Stigma, Outsider Status and Mothers in Prison*, 45 J. FAM. ISSUES 852 (2023).

18. As further argued in this Article.

19. NCRB, *supra* note 5. The terms “undertrials” and “pre-trial detainees” are often used interchangeably, yet they possess nuanced distinctions. “Pre-trial detainees” specifically refer to individuals who are incarcerated during the period before the commencement of their trial. In contrast, the term “undertrial prisoners,” commonly used in India’s official documents and common parlance, is broader in scope, encompassing the entire duration during which an accused individual awaits the conclusion of their trial, including the pre-trial detention phase. For the purposes of this Article, I employ the term “undertrial” to denote all individuals who remain incarcerated without having been convicted, thereby highlighting their protracted subsistence within the penal system.

20. See generally Murali Karnam & Trijeeb Nanda, *Conditions of Undertrials in India: Problems and Solutions*, 51 ECON. & POL. WKLY. 14 (2016).

21. Constitution of India (1949). Article 14. Equality before law.—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.—(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them... (3) Nothing in this article shall prevent the State from making any special provision for women and children.

Article 21. Protection of life and personal liberty.—No person shall be deprived of his life or personal liberty except according to procedure established by law.

within India's socio-political landscape, and more specifically, within a carceral regime structured by brahmanical patriarchy. Realizing these rights demands a transformative, decarceral shift that is supported by de-gendering caregiving for children, for all of which the Indian constitutional law framework already contains the normative infrastructure necessary. The abolitionist potential of Indian constitutionalism lies in its capacity to imagine and pursue reproductive justice of incarcerated women beyond incarceration.

This Article proceeds in four Parts. Part I situates the central argument of this Article within India's colonial and postcolonial penal history, emphasizing how contemporary carceral practices are shaped by and underpin colonial legacies, which in turn reify brahmanical patriarchy. Drawing from a historical perspective, it critiques the post-colonial state's continued "reproduction with a range of variation"²² of "biopower,"²³ in exerting control over the bodies and choices of incarcerated women, particularly those from marginalized communities. For the purposes of this Article, "marginalized" communities refer to the systematically oppressed Dalits²⁴, Adivasis²⁵, and individuals from Other Backward Classes ("OBCs"),²⁶ who collectively comprise about two-thirds of India's incarcerated population.²⁷ As highlighted in this part, their criminalization is not incidental but embedded within the historical logic of caste hierarchy and exclusion.

Part II examines how, in continuity with colonial legacies, incarceration deprives women of the ability to pursue motherhood on their own terms. Although the jurisprudence on custodial pregnancy is extensive, this section focuses on the period of childbirth and after, which is largely neglected in both literature and judicial discourse. It focuses on the legal and institutional frameworks governing the caregiving responsibilities of incarcerated mothers, moving beyond romanticized ideals of motherhood to highlight the violence, trauma, and structural neglect these women face. The section argues that the "ideal mother" trope is not only unattainable for incarcerated women, but also weaponized against them. Through case law analysis, it demonstrates that although Indian constitutional law holds normative potential to support the

22. Upendra Baxi, *Postcolonial Legality: A Postscript from India*, in *A COMPANION TO POST COLONIAL STUDIES*, 544 (Henry Schwarz & Sangeeta Ray eds., 2000).

23. This is a term conceptualized by French historian Michel Foucault, further discussed in Section I, below.

24. Ramanthan S., *Stop calling Dalits 'Harijan': SC Calls the Term Abusive, as we Remain Ignorant and Insensitive*, THE NEWS MINUTE, (Mar. 27, 2017), <https://www.thenewsminute.com/voices/stop-calling-dalits-harijan-sc-calls-term-abusive-we-remain-ignorant-and-insensitive-59315> [https://perma.cc/6PPX-T8VQ]. Dr. B.R. Ambedkar argued for the redefinition of individuals historically labeled as "harijans," "untouchables," "Depressed Classes," or "outcastes"—those relegated to the lowest rung of India's caste hierarchy and placed outside the caste system altogether, as "Dalit." *Id.*

25. The term "Adivasis" is a Sanskrit word that refers to India's indigenous peoples.

26. The term "Other Backward Classes (OBCs)" is an official term used by the Indian Government to classify communities that are educationally or socially disadvantaged. The OBCs are not part of either end of the caste spectrum, but a more heterogeneous group of people.

27. Praveen Kumar, *How Marginalised People are Left Behind in India's Criminal Justice System*, IDR (July 31, 2025), <https://idronline.org/article/social-justice/how-marginalised-people-are-left-behind-in-indias-criminal-justice-system/> [https://perma.cc/ZD56-VDLU].

caregiving roles of incarcerated people beyond prison walls, such support is rarely exercised by the judiciary.

Part III examines the denial of motherhood to women as a consequence of incarceration, arguing that this reflects a continuity with colonial-era eugenic and brahmanical patriarchal policies. Although India's state courts have affirmed the procreative rights of incarcerated men through conjugal visits and artificial insemination, no comparable recognition has been extended to women. Part III also highlights the structural, social, and legal barriers faced by incarcerated women when seeking access to motherhood through alternative means, including assisted reproductive technologies, even post-release. The resulting disparity raises concerns under Articles 14 and 21 of the Indian Constitution.

Finally, Part IV advances prison abolitionist pathways to address the state's systematic denial of reproductive justice to women in prisons. Although reform efforts exist, they are unable to be effectively implemented, revealing deeper structural failures. This section contends that meaningful change requires both decolonial legal reform and a broader social transformation, rooted in constitutional guarantees, that not only advance decarceration but also confront entrenched gender norms that burden women with disparate caregiving responsibilities. Central to this vision is the inclusion of formerly and currently incarcerated women in shaping the laws and policies that affect their rights, dignity, and autonomy.

This Article does not endorse the coercive valorization of motherhood. Rather, it contends that women who wish to become mothers must not be denied that reproductive right by a state that paradoxically glorifies motherhood and yet structurally prevents incarcerated women from accessing it. In denying these women the possibility of mothering on their own terms, the carceral system not only infringes upon their fundamental rights but also entrenches their marginalization within both legal and social orders.

Notably, this Article calls for dismantling punitive systems that harm all women, regardless of the offenses for which they are imprisoned.²⁸ Although acknowledging that most incarcerated women, particularly mothers, are undertrial prisoners, the demands articulated in Part IV are not limited to this group. Feminist legal scholar Pratiksha Baxi and human rights activist Navsharan Singh have aptly identified “[a]ll women in prisons without distinction of charge, crime or sentence, whether pregnant, lactating, menstruating or menopausal, differently abled or ailing” as “custodial minorities,” emphasizing that their incarceration often results from systemic failures rather than individual culpability.²⁹ Their imprisonment, or engagement in activities deemed illegal, must therefore not serve as justification to portray them as inherently “bad mothers.”

28. With the exception of women who have been accused of offenses involving direct harm to children.

29. Pratiksha Baxi & Navsharan Singh, *A Case for the Release of all Women Undertrial Prisoners*, INDIAN CULTURAL FORUM (Apr. 5, 2021), <https://indianculturalforum.in/2021/04/05/a-case-for-the-release-of-all-women-undertrial-prisoners/> [<https://perma.cc/PRR9-4ZY4>].

Furthermore, whereas this Article is committed to advancing reproductive justice for women, the claims it articulates extend to other “custodial minorities,” including trans, queer, and non-binary people resisting the carceral state,³⁰ reinforcing the need for a transformative and inclusive vision of justice. As scholars have highlighted, the prison is one among many institutions of concentrated disadvantage that replicate entrenched gendered hierarchies and magnify the structural inequities women face outside its walls.³¹

Finally, although grounded in the Indian context, this Article draws critical parallels with the United States, where incarceration similarly operates as a tool of racialized and reproductive control.³² As aforementioned, India possesses a robust constitutional framework with the potential to transform carceral practices, yet has not meaningfully engaged with abolitionist approaches. Unlike India, the United States lacks comparable constitutional guarantees of reproductive autonomy, especially for incarcerated mothers. However, despite and because of its constitutional limitations, the United States has produced powerful abolitionist responses through activism, litigation, and scholarship. By situating these two jurisdictions in dialogue, this Article contributes to a growing body of transnational feminist and abolitionist legal scholarship. It underscores how prisons globally weaponize gender and motherhood, and why reproductive justice of incarcerated women must be central to any movement for gender justice.

I. THE ARCHITECTURE OF CONTROL: COLONIAL LEGACIES, CASTE HIERARCHIES, AND GENDERED CARCERALITY

India’s “modern” prison system, underpinned by colonial-era statutes such as the Prisons Act of 1894 and the Prisoners Act of 1900,³³ was designed by

30. Although this Article uses the terms “women” and “mothers,” I acknowledge that transgender men, non-binary and other gender-diverse people may also experience pregnancy and require reproductive health services. See generally David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM. L. REV. 309 (2019). Inclusive language is essential to affirming the full spectrum of gender identities, particularly as trans and non-binary individuals face compounding barriers to reproductive care and heightened psychological distress when misgendered. See generally Kinnon R. MacKinnon et al., *Recognizing and Renaming in Obstetrics: How Do We Take Better Care with Language?*, 14 OBSTETRIC MED. 201 (2021). Restrictions on transgender rights and reproductive rights “come from the same [legislative] playbook,” creating compounding barriers to reproductive health care access. AC Facci, *Why We Use Inclusive Language to Talk About Abortion*, ACLU (June 29, 2022), <https://www.aclu.org/news/reproductive-freedom/why-we-use-inclusive-language-to-talk-about-abortion> [https://perma.cc/UPK2-KBCV]. However, because legal frameworks, policy language, and data in this area are overwhelmingly organized around ‘women’ and ‘mothers,’ this Article retains those terms when engaging with such sources. This choice is not intended to erase gender-diverse experiences but reflects the language embedded in legal structures. The critique of carceral reproductive injustice advanced in this Article seeks to benefit all birthing-people.

31. SADAF MODAK, *Gender and Prison Structures*, in WOMEN, INCARCERATED, *supra* note 4, at 174.

32. See generally Akshara Iyer & Matthew W. Hughey, *Reproductive Care Options in the US Criminal Justice System*, 19 SOCIO. COMPASS 1 (June 5, 2025).

33. The Prisons Act, 1894 (Act IX of 1894) (India) governs prisons, including admission, maintenance, and officer duties; The Prisoners Act, 1900 (Act III of 1900) (India) consolidates the law relating to prisoners confined by order of the court, dealing with aspects such as their delivery, discharge, and removal. Both are colonial legislations that continue to govern most states in post-colonial India as well.

male British authorities primarily for male subjects and rooted in rigid constructions of masculinity.³⁴ Although colonial prison reformers in India eventually adopted architectural models that echoed Euro-American precedents, the design, spatial organization, and everyday functions of these prisons diverged significantly from their Global North counterparts, reflecting distinct logics of control, racial hierarchy, and empire.³⁵ As a result, its infrastructure, governance, and operational logic remain structurally unresponsive to the distinct needs of native women and gender minorities. Children born to or accompanying incarcerated women were allowed to stay in these institutions from the conception of the modern prison, revealing a normative assumption that caregiving of children, even in carceral spaces, was an inherently feminine responsibility. Such gendered presumptions, which remain today, have denied incarcerated women the agency to define motherhood on their own terms, while simultaneously reinforcing heteronormative ideals within prison governance.

The modern Indian prison system was additionally set up as an ecosystem of social control and eugenicist governance. Colonial carcerality in India has operated in more diffused and socially embedded ways than in its Eurocentric institutional formulations.³⁶ Certain communities have long been discursively produced as inherently criminal, a process that predates their formal criminalization and operates to restrict their mobility, regulate their reproduction, and position them as disposable within a regime of state-sanctioned discipline and surveillance.³⁷ Such colonial logic of control and exclusion endures in contemporary penal policies, albeit in reconfigured and ostensibly neutral forms.

This Part draws on French historian Michel Foucault's concept of biopower to trace how both colonial governance and the post-colonial Indian state have deployed criminalizing strategies to regulate not only individual bodies, but also their reproductive capacities.³⁸ Biopower, as theorized by Foucault, refers to the techniques and mechanisms through which modern states manage, discipline,

34. See generally Brenda J van den Bergh et al., *Imprisonment and Women's Health: Concerns about Gender Sensitivity, Human Rights and Public Health*, 89 BULL. OF THE WORLD HEALTH ORGANIZATION 689 (2011); Pratiksha Baxi & Navsharan Singh, *Gendering the Pandemic in the Prison*, THE INDIA FORUM (July 9, 2020), <https://www.theindiaforum.in/article/gendering-pandemic-prison> [https://perma.cc/UPK2-KBCV]. "For women, prisons are built with stones of 'patriarchal' law." *Id.*

35. See generally Mira Rai Waits, *Imperial Vision, Colonial Prisons: British Jails in Bengal, 1823-73*, 77 J. SOC'Y ARCHITECTURAL HISTORIANS 146 (June 2018). Unlike European prisons where moral reform was positioned as the central aim of incarceration, with "penitence" promoted by Evangelicals, the primary objective of colonial prisons in India was to segregate and contain those classified as threats to the colonial order and Victorian morality. *Id.* at 155.

36. See generally Mark Brown et al., *Imperial legacies and southern penal spaces: A study of hunting nomads in postcolonial India*, 23 PUNISHMENT & SOC'Y 675 (2021).

37. *Id.* at 683.

38. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY*, VOL. 1: THE WILL TO KNOWLEDGE 142-44 (Robert Hurley trans., 1978). On biopower, Foucault states: "the set of mechanisms through which the basic biological features of the human species became the object of a political strategy. . . ." Michel Foucault, *Security, Territory, Population*, Lectures at the Collège de France, 1977-78, 16 (Graham Burchell trans., Michel Senellart ed., 2004).

and order populations.³⁹ In the Indian context, biopower has been operated through a historically entrenched nexus of colonialism, heteronormativity,⁴⁰ and brahmanical patriarchy. This intersection has enabled the state to target and subjugate non-normative populations through the criminal legal apparatus, reinforcing hierarchies of caste, gender, sexual orientation, and class that remain embedded in India's contemporary criminal justice system. Within this biopolitical regime, Dalit women have disproportionately borne the brunt of its coercive and regulatory force.⁴¹

A. *From Empire. . . : Consolidating Carcerality as a
Tool of Brahmanical Patriarchy*

This section traces the historical and legal foundations of contemporary penal power in India by examining the continuity of colonial and caste-based legacies that shape the socio-legal environment in which incarcerated women, particularly those from marginalized communities, navigate questions of reproductive autonomy and motherhood.

1. *Colonial Carcerality and the Biopolitics of Native Motherhood*

The establishment of the modern prison system in India was a central component of the colonial contraption, instrumental in consolidating British control over the subcontinent. It functioned not only as a tool for punishment but also as a mechanism for disciplining and institutionalizing colonial "subjects"⁴² through biopower.⁴³

Native women⁴⁴ were primarily incarcerated under colonial rule for thievery, vagrancy, and being "prone to prostitution."⁴⁵ Regardless of the specific

39. FOUCAULT, *THE HISTORY OF SEXUALITY*, at 140.

40. Heteronormative ideology refers to the belief that there are two separate and opposing genders with associated natural roles that match their assigned sex, and that heterosexuality is a given. See generally Jojanneke van der Toorn et al., *Not quite over the rainbow: the unrelenting and insidious nature of heteronormative ideology*, 34 *CURRENT OP. BEHAV. SCI.* 160 (2020).

41. This is discussed further in this Article.

42. Native Indians were often denied recognition as citizens and, in many cases, even as human beings. The assertion of sovereignty through the re-territorialization of indigenous spaces extended beyond the physical occupation of land; it perpetuated systemic violence while confining the colonized to an ambiguous position, existing in a liminal space between being subjecthood and objecthood. See generally Achille Mbembe, *Necropolitics*, 15 *PUB.CULTURE* 11 (Libby Meintjes trans., 2003).

43. British colonizers initially termed Indians as representative of "misguided children" who needed guidance. However, post-the 1857 revolt, Indian citizens were seen as "treacherous and unchangeable," and governance therefore "required a strong hand capable of smashing any 'sedition' or disloyalty, combined with an acceptance of Indians." Bernard S. Cohn, *COLONIALISM AND ITS FORMS OF KNOWLEDGE: THE BRITISH IN INDIA* 124-25 (1996).

44. The British colonial administration failed to recognize identities beyond the male-female binary, making no specific provisions for or acknowledgment of trans or homosexual individuals. Instead, they often pathologized and criminalized these identities. Notably, "eunuchs" or trans people were categorized under the list of criminalized tribes, a designation reflecting the British effort to stigmatize and control marginalized communities. See generally Jessica Hinchy, *The eunuch archive: colonial records of non-normative gender and sexuality in India*, 58 *CULTURE THEORY AND CRITIQUE* 127 (2017).

45. Satadru Sen, *The Female Jails of Colonial India*, 39 *INDIAN ECON. AND SOC. HIST. REV.* 417, 421 (2002).

charges, British colonial authorities constructed these women as aberrant, immoral, oversexed, and impulsive.⁴⁶ As South Asian historian Satadru Sen observes, “the punishment of women was ‘useful’ because it validated and extended colonial rule.”⁴⁷

For native women, the prison system represented an additional layer of brahmanical patriarchal subjugation. Imprisonment not only deprived them of liberty but also subjected their reproductive and familial lives to the disciplinary force of the colonial state’s biopower, resulting in a form of double punishment.⁴⁸ The harms experienced by these women and by their children, who were permitted to stay with them in prison until the age of two,⁴⁹ were pervasive across institutions, whether located on the mainland or in remote penal colonies.

(i) On the Mainland

The majority of married women who committed crimes were confined in the female wards of predominantly male prisons on the mainland.⁵⁰ Most of these prisons were under-resourced, with both male and female populations residing in a segregated manner within the same larger prison as a matter of economic convenience.⁵¹ Exclusive penitentiaries for women were rare, with the notable exception of one such facility in Lahore (in present-day Pakistan) in the 1860s.⁵² As a result, in most non-segregated prisons, spaces originally intended for the rehabilitation of incarcerated women were frequently reallocated to accommodate the expanding male prison population.⁵³

In many instances, the shared spaces of these mixed-sex prisons resulted in a troubling lack of privacy for incarcerated women.⁵⁴ Incarcerated men and male guards often had unrestricted access to observe women in moments of vulnerability, such as during bathing or defecation.⁵⁵ English social reformer Mary Carpenter, during her visits to prisons across the Indian subcontinent, documented her horror at the lack of privacy and the absence of meaningful gender-based segregation, worried that it disregarded women’s distinct needs.⁵⁶

46. *See id.* at 419.

47. *Id.*

48. *See id.* at 435.

49. *Id.*

50. *Id.* at 423.

51. *Id.* at 426–27.

52. *Id.* at 423. The Indian Jail Committee’s 1919 report marked the first official recognition of the need for gender-specific reforms, recommending the segregation of female prisoners and their children from male inmates and their supervision exclusively by female warders, to prevent any “seeing, or conversing, or holding any intercourse with, any male prisoner.” *See* SUPERINTENDENT, GOVERNMENT CENTRAL PRESS, SIMLA, REPORT OF THE INDIAN JAILS COMMITTEE, 1919-1920 252 (1920). Despite such recommendations, the majority of female wards remained embedded within male prisons and administered by male staff, conditions that persisted well into postcolonial India. *See* NCRB, *supra* note 5, at ix–x.

53. Sen, *supra* note 45, at 427.

54. Sen discusses how this was recorded in places such as Hissar, Rohtak, Sirsa, and Ludhiana. *Id.* at 429.

55. *Id.*

56. MARY CARPENTER, SIX MONTHS IN INDIA VOL.1 202-03 (1868). Carpenter’s views were echoed by D. Brown, the Chief Commissioner of Tenasserim: “women were kept in a ‘cage-like apartment’ in

Within these penal spaces – characterized by overcrowding,⁵⁷ lack of segregation among women prisoners, and pervasive male surveillance – children resided with their mothers. Neither the architectural design of colonial prisons, their daily administration, nor the governing legal frameworks accounted for the care or well-being of mothers and their children.⁵⁸ The consequences of this were devastating; for instance, of the thirty-seven children in the Lahore Female Penitentiary in 1870, twenty-five died before year end.⁵⁹

Although some reforms were thereafter introduced to mitigate these issues, such as increased food rations and reduced workloads for breastfeeding mothers,⁶⁰ they failed to address the deeper issue surrounding the lack of maternal agency. Prison authorities exerted control over even the most intimate aspects of care, including the withholding of expressed breast milk, thereby undermining women's sense of maternal self-determination.⁶¹

(ii) In the Penal Colonies

Women involved in heinous crimes, many of whom had already served substantial sentences on the mainland, were frequently transferred to penal colonies such as the Andaman Islands.⁶² Their transfer served multiple colonial objectives, including supplying wives and sexual partners for male convicts, even for those already married and with wives on the mainland.⁶³ These arrangements were aimed at suppressing homosexual relationships, thereby advancing Victorian heteronormative ideals of sexual regulation and control over male convicts' bodies, desires, and intimate lives.⁶⁴

For these women, the conditions of incarceration were especially harsh, as they were not only separated from their families but also frequently tasked with upholding a colonial ideal of womanhood centered around sexual, reproductive, and domestic labor. The women were seen as both a disciplinary tool and a sexual resource.

Some incarcerated women taken to the penal colonies were also mothers. Section 1(2) of the Andaman and Nicobar Manual explicitly accounts for them:

the same courtyard with the male prisoners, men and women could see each other and freely converse, and, echoing Carpenter's horror in Awadh, 'the men and women have even now for the purpose of nature to visit the same latrine.'" Sen, *supra* note 45, at 430.

57. For instance, in Karnal Jail, eleven women were incarcerated in a space meant for four. Sen, *supra* note 45, at 435.

58. See generally Waits, *supra* note 35.

59. Sen, *supra* note 45, at 435.

60. *Id.*

61. *Id.*

62. *Id.* at 422.

63. *Id.* at 418.

64. "In 1860, F.J. Mouat, the Inspector General of Prisons in Lower Bengal, wrote about women selected for transportation to the Andamans: "It is true that they have all been convicted of the atrocious crime of murder, with such extenuating circumstances as caused them to escape the highest penalty of the law. Many of them committed the crime at so tender an age as to render it difficult to suppose that they could have been fully aware of the moral turpitude of their acts. It is painful to contemplate the prolonged misery, without hope or mitigation of any kind, to which they are of necessity at present subjected; and it is reasonable to presume that in the less unhappy circumstances of a Penal Colony they will not again relapse into crime." *Id.* at 422.

“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 (mainland).” This was among the first formal legal provisions in colonial India to recognize children accompanying mothers to prison, marking a pivotal moment in institutionalizing maternal roles within the penal system.

Prison regulations for incarcerated women were codified by and under the supervision of British prison administrators,⁶⁵ whose social positions were disconnected from the lived realities of the women they governed, across lines of class, sex, and nationality. Consequently, these women and their children were deprioritized within the colonial penal system, receiving minimal attention and resources. These gaps were often rationalized by casting women as short-term, low-risk offenders.⁶⁶ However, such justifications obscured a deeper indifference to the privacy, autonomy, and dignity of marginalized women. It also facilitated the exercise of biopower in differentiated ways across mainland prisons and penal colonies, both by enforcing caregiving by mothers as the norm and by restricting women’s ability to mother on their own terms.

Colonial prison policy required incarcerated mothers to “send home” their children once they reached the age of two, but many women resisted, seeking to retain custody even at the risk of clashing with prison authorities.⁶⁷ Sen argues that these tensions were not driven by the colonizers’ concerns for the children’s welfare but were part of a broader colonial strategy to “colonize” the maternal body.⁶⁸ This effort constituted an extension of biopower, through which the colonial state sought to determine which women were deemed fit to parent, and under what conditions. In this context, incarcerated women’s attempts to assert custodial rights over their children became broader acts of defiance against the carceral logic of empire.

2. *Caste Criminalization as a Basis for Dispossessing Mothers of their Children*

Although the Indian criminal legal system is often critiqued as a colonial relic, it is one that rests on and reinforces an even older indigenous structure of socio-political control—the caste system.⁶⁹ The caste system provided the British with a ready-made fertile framework of social hierarchy and exclusion, for the consolidation of colonial policing and penal governance.

The Criminal Tribes Act, 1871, (“CTA”) epitomized this convergence, criminalizing entire communities of Dalits, Adivasis, and gender-nonconforming

65. *Id.* at 436.

66. *Id.* at 438.

67. *Id.* at 435.

68. *Id.*

69. See generally Srujana Bej, Nikita Sonavane & Ameya Bokil, *Construction(s) of Female Criminality: Gender, Caste and State Violence*, 56 *ECON. & POL. WKLY.* 36 (2021), <https://www.epw.in/engage/article/constructions-female-criminality-gender-caste-and> [<https://perma.cc/EGL2-8HDM>].

groups including *bijras*, on the basis of caste, ethnicity, and gender.⁷⁰ Introduced by British legal official J.F. Stephen, the CTA was an exercise of biopower, justified by the colonial state's claim that ordinary criminal law was insufficient to control communities deemed inherently deviant.⁷¹ Drawing on Italian criminologist Cesare Lombroso's pseudoscientific theories of hereditary criminality, the law branded these groups as "addicted to the systematic commission of bailable offences."⁷²

The impact on women in these communities was particularly devastating. They endured intersecting forms of oppression—criminalization by the colonial state, caste-based stigmatization from dominant society, and patriarchal control both within and outside their communities.⁷³ The CTA's regulatory regime intruded on their family life: entire families were placed under surveillance, required to register with the police, report their movements, and notify authorities of temporary absences from their residences.⁷⁴ The law also dictated marital arrangements, prohibiting intra-community unions and enabling colonial-aligned zamindars to arrange marriages for women, often incentivized by state-sponsored dowries.⁷⁵ In 1897, the CTA was amended to permit the forcible removal of children from their homes between the ages of four and eighteen to resettlement camps.⁷⁶ These interventions were rationalized as preventive measures against the transmission of criminal genes, as if criminality were a genetic contagion.⁷⁷ This pathologization of criminality as hereditary reflected and reified caste-based eugenics by encoding it into the architecture of colonial law.⁷⁸

B. *To Republic: Enduring Penal Logics of Caste, Patriarchy, and Control*

In post-colonial India, the state's exercise of biopower endures through the carceral system and the continued criminalization of marginalized communities via colonial-casteist logic of brahmanical patriarchy and inherited criminality. The targeting of these communities is evident not only in their disproportionate representation within prisons, but also in the systemic neglect of their specific needs. Colonial legal frameworks institutionalized these modes of control, many of which persist to this day with minimal reform. The

70. DILIP D'SOUZA, *BRANDED BY LAW: LOOKING AT INDIA'S DENOTIFIED TRIBES*, Chapt. 5 (2001).

71. See generally Mark Brown, *Postcolonial Penalty: Liberty and Repression in the Shadow of Independence*, *INDIA* c. 1947, 21 *THEORETICAL CRIMINOLOGY* 186 (2017).

72. CESARE LOMBROSO, *THE CRIMINAL MAN* (Mary Gibson & Nicole Hahn Rafter trans., 2006).

73. Bej et al., *supra* note 69.

74. D'SOUZA, *supra* note 70.

75. *Id.*

76. *Id.*

77. Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 *U. MIAMI L. REV.* 1219, 1236 (1999); see also Subir Rana, *Nomadism, Ambulation and the 'Empire': Contextualising the Criminal Tribes Act XXVII of 1871*, 2 *TRANSCIENCE* 17 (2011), https://www2.hu-berlin.de/transcience/Vol2_Issue2_2011_1_22.pdf [<https://perma.cc/5VDS-QRAT>]. § 17A, CTA states that, "The Local Government may establish and maintain reformatory settlements for children and may separate and remove them from their parents and place in such a reformatory settlement."

78. See Bej et al., *supra* note 68; see generally T.N. Roy, *Hindu Eugenics*, 18 *J. OF HEREDITY* 67 (1927).

Prisons Act of 1894 remains in force, whereas other colonial-era laws have been cosmetically updated—for instance, the CTA was replaced by the Habitual Offenders Act (“HOA”), and the Indian Penal Code of 1860 was rebranded as the Bharatiya Nyaya Sanhita in 2023.⁷⁹

It was not until the 1980s, following the recommendations of the All-India Committee on Jail Reforms and the National Expert Committee on Women Prisoners, that carceral policies began to formally acknowledge the gendered inequities of incarceration, marking a long-overdue recognition of women’s distinct needs.⁸⁰ Despite these recommendations, the structural neglect of incarcerated women and their children persists in law, institutional culture, and the allocation of resources, underscoring their continuing marginalization in India’s penal system.

1. *Current Legal Framework Governing Carceral Maternalism*

Although India’s criminal legal system is a colonial inheritance, the Indian Constitution has served as a progressive blueprint for transforming the post-colonial state, particularly through the protection of its citizens’ fundamental rights. This transformation, however, has unfolded more through judicial interpretation than legislative reform.

In two landmark rulings in 1979 and 1980, in cases filed by incarcerated petitioners Sunil Batra and Charles Sobhraj, the Supreme Court of India firmly established that incarceration does not divest individuals of their fundamental rights.⁸¹ The Court affirmed that “Part III of the Constitution [which lists the fundamental rights] does not part company with the prisoner at the gates, and judicial oversight protects the prisoner’s shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authority.”⁸² It further emphasized that certain rights, particularly those guaranteed under Article 21 of the Constitution,⁸³ the right to life and personal liberty, remain applicable to prisoners, though with necessary limitations imposed by the

79. Stuti Shah, *New Criminal Law Bills: There Is Nothing Anti-colonial About Them*, THE INDIAN EXPRESS, Aug. 24, 2023, <https://indianexpress.com/article/opinion/new-criminal-law-bills-nothing-anti-colonial-opinion-8907127/> [https://perma.cc/96TC-UCVD].

80. See generally Ministry of Home Affairs, All-India Committee Report on Jail Reforms, 1980-83; Ministry of Home Affairs, Human Resource Development, National Expert Committee on Women Prisoners, 1986-87.

81. See *Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494 (India); *Sunil Batra v. Delhi Administration*, (1980) 3 SCC 448. These cases reaffirmed the position held by the Supreme Court in *D. Bhuvan Mohan Patnaik v. State of A.P.*, (1975) 3 SCC 185 (“[E]ven a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to procedure established by law.”). Although these cases did not directly extend Article 21 to reproductive rights, they were foundational in cementing the broader jurisprudence of prisoners’ rights in India. Subsequent decisions have expanded this framework to encompass reproductive autonomy, as discussed below.

82. *Batra* (1978), *supra* note 81, at para. 52.

83. Article 21 of the Indian Constitution states: “Protection of Life and Personal Liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.”

conditions of imprisonment.⁸⁴ In stating so, the Court rejected the “hands-off attitude” relied on by federal courts in the United States with respect to prison administration.⁸⁵

The Indian Supreme Court has progressively interpreted Article 21 to include a broad spectrum of rights, including reproductive rights.⁸⁶ Integral to these rights is the right of women to become mothers, and the right of women to exercise motherhood autonomously, dimensions of reproductive rights that must continue to be recognized even within carceral settings.⁸⁷

Despite this expansive constitutional interpretation of Article 21, incarcerated women in India continue to be denied their reproductive rights. Nearly eighty percent of incarcerated women fall within the reproductive age group of eighteen to fifty, yet imprisonment deprives them of the opportunity to experience motherhood on their own terms, including the autonomy to determine whether, when, and how to become mothers.⁸⁸ Furthermore, about eighty percent of incarcerated women incarcerated with their children are undertrials.⁸⁹ A far greater number of women who are most likely primary caregivers are separated from their children upon arrest.⁹⁰ However, India lacks comprehensive data on the total number of children who experience separation because of the imprisonment of their mothers.⁹¹

Post-colonial India did not establish a uniform legal or policy framework addressing the plight of mothers in prison or the specific needs of children who accompany their incarcerated mothers to prisons. It was only in 2006, in the case of *R.D. Upadhyay v. State of A.P.*,⁹² that the Indian Supreme Court issued a set of guidelines to ensure the well-being and development of children living in carceral spaces.⁹³ The Court sought to align Indian jurisprudence with evolving international norms, including the United Nations (“UN”) Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules),⁹⁴ the UN Minimum Standards for the

84. Batra (1978), *supra* note 81, at para 88.

85. *Id.* at para. 213-A.

86. In the case of *Suchita Srivastava & Anr. v. Chandigarh Administration*, 2009 (9) SCC 1 para. 22, the Supreme Court of India held, “a woman’s right to make reproductive choices is a dimension of personal liberty...under Article 21 of the Constitution of India...reproductive choices can be exercised to procreate as well as to abstain from procreating.”

87. *See generally* ROBERTS, *supra* note 10.

88. NCRB, *supra* note 5, at 77.

89. *Id.* at xiii.

90. *See generally* Neelam Sukhramani & Shivangi Gupta, *Children of Incarcerated Parents*, 57 INDIAN PEDIATRICS 199 (2020), <https://indianpediatrics.net/mar2020/mar-199-203.htm> [<https://perma.cc/X9RV-3P44>].

91. Children separated from incarcerated mothers may reside with the remaining parent, extended kin, in state-run child-care institutions, or, in some cases, alone. However, reliable national data on these children is unavailable, except for those who reside in prison with their mothers. Based on India’s fertility rate and the proportion of incarcerated women within the reproductive age group, a conservative estimate suggests that the number of children with incarcerated parents could exceed 800,000. *Id.* at 199.

92. *R.D. Upadhyay vs State of A.P.*, (2006) 3 SCC 422, 436 (India).

93. *Id.*

94. G.A. Res. 65/229, United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (“the Bangkok Rules”), U.N. Doc. A/RES/65/229 (Dec. 21,

Treatment of Prisoners (the Mandela Rules),⁹⁵ and the UN Convention on the Rights of the Child,⁹⁶ all of which emphasize the protection of children's rights in prison settings.

R.D. Upadhyay held that “female prisoners shall be allowed to keep their children with them in jail till they attain the age of six years,”⁹⁷ and directed states to set-up crèches and nurseries for children under the age of three, and between the ages of three and six, respectively.⁹⁸ Unlike the prison nurseries established in resource-intensive countries such as the United States, these crèches and nurseries serve as day care centers.⁹⁹ The Judgment stipulated that upon reaching the age of six, a child should be placed with a suitable surrogate caregiver chosen by the mother, and if no alternative caregiver is available, be sent to an appropriate institution operated by the state-run Social Welfare Department.¹⁰⁰ The Judgment however falls short of providing a practical roadmap for the effective implementation of these standards,¹⁰¹ and therefore their realization remains inadequate.¹⁰² To this day, no comprehensive legislation has been enacted to codify the Judgment's guidelines.¹⁰³

Although the *R.D. Upadhyay* Judgment centered the rights of children, it failed to meaningfully address the complex experience of motherhood in carceral contexts.¹⁰⁴ Contemporary prison policies continue to reinforce gendered caregiving roles, with rehabilitation programs often conditioning women to

2010).

95. G.A. Res. 70/175, United Nations Standard Minimum Rules for the Treatment of Prisoners (“the Nelson Mandela Rules”), U.N. Doc. A/RES/70/175 (Dec. 17, 2015). Furthermore, the Indian Ministry of Home Affairs circulated these guidelines to all States and Union Territories, and advised that they be translated into local languages and disseminated among prison officials to ensure their effective implementation. GOVERNMENT OF INDIA MINISTRY OF HOME AFFAIRS RAJYA SABHA, RESPONSE TO UNSTARRED QUESTION NO. 3257, <https://sansad.in/getFile/annex/253/AU3257.pdf?source=pqars#:~:text=The%20Ministry%20of%20Home%20Affairs%20had%20circulated%20the%20Nelson%20Mandela,officials%20concerned%20in%20dealing%20with> [https://perma.cc/BKF6-B7V5].

96. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

97. Upadhyay, *supra* note 92, at 435.

98. *Id.* at 15.

99. Stuti Shah, INDIA PRISON NURSERY REPORT, CHILDREN OF INCARCERATED CAREGIVERS WEBSITE (2024), <https://cicmn.org/wp-content/uploads/2024/05/India-Report-Finalized-Version.docx.pdf> [https://perma.cc/R7DP-3KQA].

100. Upadhyay, *supra* note 92, at 436.

101. *Id.*

102. See generally Pritish Desai, Right to procreate behind bars: balancing state interests, constitutional rights and the reality of female prisoners, LAW SCHOOL POLICY REVIEW (Nov. 25, 2024), <https://lawschoolpolicyreview.com/2024/11/25/right-to-procreate-behind-bars-balancing-state-interests-constitutional-rights-and-the-reality-of-female-prisoners/> [https://perma.cc/A3VG-BD4N].

103. 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. Though children whose parents are incarcerated are not specifically included in the Act, the Supreme Court in *Re: Exploitation of Children in Orphanages in the State of Tamil Nadu v. Union of India* (W.P. (Criminal) No. 102/2007 (2017)), has given a broad reading to the scope of protection of the Act. 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.

104. As noted earlier, because this Article does not focus on the experiences of children of incarcerated caregivers, I will not delve further into the shortcomings of this Judgment.

conform to societal ideals of the dutiful wife, nurturing mother, and obedient citizen.¹⁰⁵ At the same time, these policies often deny incarcerated women the option to be mothers,¹⁰⁶ echoing the colonial legacy of controlling reproductive and familial roles through penal governance.

Therefore, despite the formal recognition of reproductive rights under the Constitution and through periodic judicial intervention, the Indian carceral state continues to deny women substantive maternal autonomy, replicating colonial-era modes of brahmanical patriarchal governance under the guise of rehabilitation.¹⁰⁷

2. *Evolution of the Biopolitic through Law*

Soon after India's independence from Britain, the Criminal Tribes Act Enquiry Committee, which was tasked with evaluating the dismantling of the CTA, instead reinforced its core framework.¹⁰⁸ The newly formed government adopted the Committee's recommendation to expand and repackage the CTA as the HOA, with a few modifications.¹⁰⁹ In doing so, the postcolonial state embedded colonial biopolitical strategies within its legal framework, thereby continuing to exert disciplinary control over marginalized populations.¹¹⁰

The HOA, adopted by several Indian states, preserves the discretionary powers of the police to surveil, stigmatize, and disproportionately target Dalit, Adivasi, and transgender communities historically branded as "criminal." Individuals from these communities continue to be routinely arrested based on mere suspicion or past association.¹¹¹ Although the HOA does not explicitly mandate the removal of children from their mothers (in departure from the CTA), the carceral system operationalizes similar outcomes. Many mothers, disproportionately belonging to marginalized communities, are compelled to relinquish their maternal roles to the state. They are either denied the opportunity to be mothers, or must choose between bringing their children into prison or enduring separation from them, as further discussed in Parts III and II of the Article, respectively. This denial of maternal autonomy and coercive

105. For instance, Maharashtra's Prison Manual, like that of many other Indian states, outlines vocational training programs for incarcerated women that are overtly gendered and extensions of women's traditional domestic roles: home sciences, tailoring, gardening, and fruit and vegetable preservation. The Manual also includes training in "mother craft" and "dai (birth attendant) work," further entrenching the belief that women's primary social function lies in nurturing and caregiving. Maharashtra, Prison Manual Rules, , Ch. XLI § II (13), 1970, https://upload.indiacode.nic.in/showfile?actid=AC_MH_166_857_000_01_00001_1611919011180&type=rule&filename=maharashtra_prison_manual_1979_rules.pdf. [<https://perma.cc/6WA6-MBJW>].

106. Further discussed in Section III of the Article.

107. SEN, *supra* note 45, at 427.

108. *See generally* BROWN, *supra* note 71.

109. Jawaharlal Nehru's (independent India's first Prime Minister) government repealed the CTA and instituted the HOA. Nehru himself described the Act in a 1936 speech as "a negation of civil liberty [...] out of consonance with all civilized principles." D'SOUZA, *supra* note 69, at 57.

110. *See generally* BROWN, *supra* note 71.

111. Bharat Dogra, *Has Independence changed the lot of Denotified Tribes?*, PRESS INSTITUTE OF INDIA, (Aug. 4, 2023), <https://pressinstitute.in/vidura/has-independence-changed-the-lot-of-denotified-tribes/> [<https://perma.cc/G9MK-G67B>].

“choice” reflects the structural violence inherent in the criminal legal system which renders reform inadequate and underscores the urgent need for prison abolitionist approaches, discussed further in Part IV.

Therefore, brahmanical patriarchy, inherited from colonial governance and reinscribed in post-independence legal regimes, continues to criminalize and regulate the reproductive and maternal lives of marginalized women, both within and beyond the prison walls.¹¹²

3. *Proposed Law: The Model Prison Manual of 2016*

Under the Indian Constitution, the subject of “prisons” falls under the legislative competence of individual states, resulting in variations in prison manuals and administrative practices across jurisdictions.¹¹³ In *Ramamurthy v. State of Karnataka*, the Supreme Court of India emphasized the need for nationwide uniformity in prison laws and regulations, and doing away with the colonial Prisons Act.¹¹⁴ In response, the central government introduced the Model Prison Manual in 2016,¹¹⁵ representing it as a progressive legal framework intended to standardize prison administration across states. However, as a non-binding instrument, adoption of the Manual remains discretionary, resulting in uneven implementation and continued fragmentation of prison governance. As of 2022, only eighteen out of thirty-six states and union territories have fully or partially implemented the Manual.¹¹⁶ Consequently, the lived experiences of incarcerated mothers and their children remain highly disparate across jurisdictions, shaped by differential access to resources, and varying degrees of priorities of state administrations and political will.¹¹⁷

Nevertheless, although the Manual introduces incremental reforms such as welfare measures for children living in prisons, including those related to education, health care, diet, and recreation, these remain superficial interventions.¹¹⁸ Much like the revised criminal laws touted as anti-colonial reforms, the Manual retains the essence of colonial-era provisions by continuing to

112. See Bej et al., *supra* note 69.

113. Schedule VII of the Constitution of India specifies the allocation of powers and functions between the Union and State legislatures; PTI, *Centre to bring Model Prisons Act: Amit Shah, asks States to Adopt Model Jail Manual*, THE ECONOMIC TIMES, (Sept. 4, 2022), <https://economictimes.indiatimes.com/news/india/centre-to-bring-model-prisons-act-amit-shah-asks-states-to-adopt-model-jail-manual/article-show/93986295.cms?from=mdr> [<https://perma.cc/B4YY-GRQ8>]. The Ministry of Home Affairs video advisory dated 4th May 2017 advised the State Governments and Union Territories to adopt the Model Prisons Manual of 2016. Bhavika Vajawat & Prabha S Chandra, *Becoming a Mother Behind Bars*, THE CITIZEN, (Dec. 24, 2021), <https://www.thecitizen.in/index.php/en/NewsDetail/index/15/21252/Becoming-a-Mother-Behind-Bars> [<https://perma.cc/38RT-E2C5>].

114. *Ramamurthy v. State of Karnataka*, AIR 1997 SC 1739 (India), at para 49.

115. Model Prison Manual of 2016 (India).

116. Ministry of Home Affairs, *Implementation of Model Prison Manual*, PIB DELHI, (Mar. 15, 2023), <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1907161> [<https://perma.cc/VW4Z-S69K>].

117. See *infra*, Section II.

118. Bill Keller, *Reimagining Prison with Frank Gehry*, THE NEW YORKER (Dec. 21, 2017), <https://www.newyorker.com/news/news-desk/reimagining-prison-with-frank-gehry> [<https://perma.cc/QSD3-LY4C>].

operate within the structural logic of colonial criminal law and carcerality.¹¹⁹ The Manual's foundation remains entrenched in brahmanical-patriarchal and colonial ideologies designed to control and punish marginalized populations.

For instance, although the Manual asserts that “[p]risons are not the places for confinement of children,” and that “[c]hildren (under eighteen years of age) shall in no case be sent to prisons,”¹²⁰ it paradoxically permits the admission of a child up to six years of age into the prison with their mother (even if she is undertrial) “if no other arrangements. . . can be made.”¹²¹ This contradiction effectively condemns children, overwhelmingly from marginalized communities, into enduring carceral conditions as the only alternative to abandonment.

Furthermore, by positioning incarcerated women primarily in caregiving roles, the Manual reproduces paternalistic and gender-normative frameworks. It also fails to acknowledge or support the complex socio-legal dimensions of reproductive autonomy and maternal self-determination in prison contexts. These tensions are further explored in Parts II and III of this Article.

II. DOUBLE PUNISHMENT FOR MOTHERS BEHIND BARS

Women in India are culturally and often legally (as in the case of the R.D. Upadhyay Judgment) assigned the responsibility of addressing the material and emotional needs of their children, whether within or outside prison.¹²² A 2018 survey in India found that mothers account for ninety-one percent of primary caregivers, whereas fathers represent only two percent.¹²³ Mothers disproportionately experience the physical and emotional toll of parenting, often

119. SHAH, *supra* note 79.

120. Modalities (xvi), Model Prison Manual of 2016.

121. § 26.34, Model Prison Manual of 2016. A Parliamentary Standing Committee on Home Affairs has recommended that the Union Government extend the age limit for children born in prisons to remain with their incarcerated mothers from the current six years to twelve years. This proposal aims to ensure a more sustained “nurturing environment” for these children during their formative years: STANDING COMMITTEE ON HOME AFFAIRS, STANDING COMMITTEE REPORT SUMMARY: PRISON- CONDITIONS, INFRASTRUCTURE AND REFORMS, PRS LEGISLATIVE RESEARCH (Sept. 21, 2023), https://prsindia.org/files/policy/policy_committee_reports/Standing_Committee_Report_Summary_prison_conditions.pdf [<https://perma.cc/BM2C-E7S2>].

122. The full scope of the issue remains elusive because of the lack of data collected by law enforcement authorities. The NCRB, which provides the most comprehensive official statistics on prisons, only reports the number of mothers who are accompanied by their children in prison. However, it fails to account for the numerous children who are outside of prison yet affected by parental incarceration. Scholars have approximated that number to exceed 800,000 (Sukhramani & Gupta, *supra* note 90). In the absence of an investigative body focusing on this data, it is impossible to grasp the full magnitude of the issue or to mobilize efforts for addressing it through effective policymaking.

123. Madhusudhan Rao, *Shaping tomorrow: Important for Corporate Responsibility Programmes to Re-define Childcare*, BUSINESS TODAY (Oct. 9, 2023), <https://www.businesstoday.in/opinion/columns/story/shaping-tomorrow-important-for-corporate-responsibility-programmes-to-redefine-indian-parenting-duties-401299-2023-10-09> [<https://perma.cc/F6VU-ERFC>]; Nikki van der Gaag et al., STATE OF THE WORLD'S FATHERS 2023: CENTERING CARE IN A WORLD IN CRISIS, 28 (EQUIMUNDO 2023): “Some 70 to 90 percent of men across 15 countries agreed that they “feel as responsible for care work” as their partner/ the other parent. . . The only exception is India, where only 25 percent of men feel as responsible as their partner when it comes to unpaid care work.”

reporting feelings of stress, exhaustion, and judgment from societal groups regarding their parenting choices.¹²⁴

Incarcerated women additionally face unique and heightened challenges throughout their maternal journey, encompassing pregnancy, childbirth, postpartum care, child-rearing, and ultimately, separation from their child.¹²⁵ These challenges are enhanced by pervasive societal stigma that labels them as both unfeminine and incapable of fulfilling maternal roles in a traditional manner, often branding them as “bad mothers.”¹²⁶ Many incarcerated women also experience estrangement from their families due to the societal shame associated with their imprisonment,¹²⁷ resulting in a lack of familial support to alleviate the anticipated hardships of motherhood behind bars.¹²⁸

This disparity underscores the “double punishment” that incarcerated mothers endure in prison—a term this Article introduces to capture the legal sanction imposed by the justice system, enhanced by the emotional, financial, and physical challenges inherent to motherhood. Together, these hardships create a unique matrix of adversity for incarcerated mothers.

This Part underscores the socio-legal positioning of incarcerated mothers and the gap between the reproductive autonomy formally guaranteed under doctrinal law and the lived realities of women who are structurally prevented from exercising such rights. This disjuncture is deeply rooted in prisons being a distinct form of caste- and gender-based punishment.¹²⁹ The analysis in this Part leads into Part IV of the Article, which argues that judicial and policy-based reform interventions, although important, remain inadequate for incarcerated women in the absence of transformative change in the material and institutional practices that constitute everyday carceral life.

124. See Anushree Modak et al., *A Comprehensive Review of Motherhood and Mental Health: Postpartum Mood Disorders in Focus*, 15 CUREUS, no. 9. (Sep. 29, 2023).

125. As noted in the Introduction, the specific issues surrounding pregnancy involve distinct concerns and are already the subject of extensive scholarship; they therefore fall outside the scope of this Article.

126. See Julia Morgan & Caroline Leeson, *Stigma, Outsider Status and Mothers in Prison*, 45 J. FAM. ISSUES 852 (2019).

127. SHANKARDASS, *supra* note 1, at 174-175.

128. Sukanya Shantha, *When ‘Bandi’ Is Both a Game and Life: The Children of India’s Women Prisoners*, THE WIRE, Aug. 1, 2022, <https://pulitzercenter.org/stories/when-bandi-both-game-and-life-children-indias-women-prisoners> [<https://perma.cc/3RJZ-FBHZ>].

The legal framework for abortion in India, particularly under the Medical Termination of Pregnancy Act of 1971, grants women the right to terminate unwanted pregnancies, offering broader autonomy to women than in the U.S. However, societal stigma surrounding abortion remains pervasive, leading many women to seek the procedure discreetly. For incarcerated women, this process is far more restrictive, occurring in a highly surveilled and judgmental environment. The lack of privacy, bureaucratic obstacles, and institutional control over their reproductive choices not only magnify the stigma but also strip them of the autonomy to exercise a right legally granted to them. As journalist This oppressive environment leads many incarcerated women to attempt self-managed abortions in secrecy, choosing physical suffering over societal judgment.

129. BAXI & SINGH, *supra* note 29.

A. *Relevant Case Law*

As discussed in Part I, women in Indian prisons are constitutionally entitled to reproductive rights under Article 21 of the Indian Constitution. Despite this, the Model Prison Manual of 2016 offers limited guidance for addressing incarcerated women's specific needs during pregnancy,¹³⁰ childbirth, and caregiving responsibilities.¹³¹ These remain reformist interventions situated within a fundamentally carceral framework. In two notable cases discussed below, the judiciary affirmed the reproductive autonomy of incarcerated women by granting non-custodial sentences in the interest of both mother and child, thereby offering rare but important jurisprudential departures from the punitive normativity that often governs pre-trial detention decisions in India.

1. *State v. Suman Kumari*

In a departure from conventional, male-centric bail jurisprudence, Additional Sessions Judge Vishal Gogne in New Delhi foregrounded the rights of children of incarcerated parents in a case involving allegations of dowry death.¹³² Recognizing that one of the accused was the mother of a twenty-one-month-old infant and that trial proceedings had yet to begin, the court emphasized the need to balance the imperatives of criminal justice with the constitutional rights of the child.¹³³

Although the prosecution argued that the child remained safely with his mother in prison, the court rejected this framing, observing that carceral settings inherently undermine a child's healthy development.¹³⁴ Calling such children the "forgotten victims of incarceration," the judge acknowledged that denying bail to mothers often results in the de facto imprisonment of their children.¹³⁵ Emphasizing the child's right to freedom and development, the court therefore granted bail to the mother, noting: "a system which is predicated on the presumption of innocence of the accused should not subject the child of such an accused to detention without cause."¹³⁶

Notwithstanding its progressive reasoning, the order positioned only the child and not the mother as innocent, despite the mother being an under-trial whose guilt had not yet been established. This framing reduced bail

130. VAJAWAT & CHANDRA, *supra* note 113. In India, there is a striking data gap on the prevalence of pregnant women in prisons, as most correctional facilities are neither required to track nor report pregnancy-related information. Routine screening for pregnancy is rarely conducted, even if required. Structural and administrative barriers increase the challenges faced by pregnant women in prison. These include overcrowding, restrictive environments, inadequate nutrition, the absence of standardized medical protocols, delays in transporting women to health care facilities, and insufficient support from prison staff.

131. § 2.05, Model Prison Manual of 2016.

132. *State v. Suman Kumari*, Bail Matter No. 1132/21 (Addl. Sessions Judge, Dwarka Cts., Delhi Mar. 31, 2021) (India).

133. *Id.* at para 9.

134. *Id.* at para 19.

135. *Id.* at paras 14 and 15.

136. *Id.* at para 20.

for the mother to merely a means of securing the “release of her little child to freedom,”¹³⁷ with no affirmation about her entitlement to reproductive autonomy.

2. *Naina v. State of Punjab*

In a landmark decision, the Punjab and Haryana High Court granted bail to a five-month pregnant woman, despite her criminal record and pending charges under the Narcotic Drugs and Psychotropic Substances Act of 1985, for the duration of her pregnancy and up to one year postpartum.¹³⁸ The court emphasized that “pregnant women and lactating mothers need bail, not jail,” asserting that even those convicted or accused of serious offenses deserve temporary reprieve in recognition of the “sacrosanct freedom in motherhood.”¹³⁹ Stressing that “in the absence of a convincingly adequate system in place [in prison], the judicial compassionate approach would be to safeguard the fundamental human rights of a pregnant person and a lactating mother *as well as* the child.”¹⁴⁰

The order called for holistic, community-based alternatives that address the unique needs of pregnant and postpartum women, even for those who are convicted. It evocatively stated, “Cradles of motherhood and nurseries of civilization are in meadows and not in cages,” and cautioned that “heavens will not fall” if incarceration is deferred during this sensitive period.¹⁴¹ As elaborated in Part IV, the Bangkok Rules similarly calls for prioritizing non-custodial measures for undertrial and convicted women with dependent children, recognizing the profound harm incarceration inflicts on the mother-child dyad.¹⁴²

In *Suman Kumari*, the focus was solely on the child’s rights, rendering the mother visible only as a caregiver.¹⁴³ *Naina* marked a jurisprudential shift, recognizing the dual harms of incarceration on both mother and child. The *Naina* judgment centered the mother’s reproductive dignity and highlighted the structural failures of carceral institutions in accommodating maternal needs. However, such compassionate jurisprudence remains exceptional. It is also noteworthy that in both cases, bail was contingent on furnishing financial sureties, requirements that may be prohibitive for marginalized women.¹⁴⁴ These cases thus illustrate recurring contradictions—although courts have the

137. *Id.*

138. *Naina v. State of Punjab*, CRM-M-16103/2024 (P&H May 13, 2024) (India).

139. *Id.* at 17.

140. *Id.*

141. *Id.*

142. Rule 64, Bangkok Rules, *supra* note 94.

143. *State v. Suman Kumari*, *supra* note 132.

144. *Id.*; *Naina v. State of Punjab*, *supra* note 138; UPNEET LALLI, *Redesigning Women’s Prisons for Correction*, in *WOMEN, INCARCERATED*, at 244: “When bail is a right, pretrial detention is sometimes not a function of the risk of absconding or obstruction of justice but rather a result of the economic condition, which prevents suspects from paying even small amounts of bail. Many a times, women undertrials report that their lawyers do not follow up with their cases. To add to their woes they may not have someone to give a surety or money to deposit the bail amount as fixed by the court.”

constitutional mandate to recognize non-custodial alternatives for mothers of infants, such relief remains largely un-institutionalized and materially inaccessible for many women.

B. Custodial Childbirth

R.D. Upadhyay provides guidelines for the childbirth of incarcerated women, emphasizing that: “As far as possible and provided she has a suitable option, arrangements for temporary release/parole should be made to enable an expectant prisoner to have her delivery outside the prison.”¹⁴⁵ Only exceptional cases constituting high security risk or cases of equivalent grave descriptions can be denied this facility. In 2018, the Ministry of Women and Child Development reaffirmed this stance, asserting that pregnant women¹⁴⁶ should be granted bail to facilitate childbirth outside prison.¹⁴⁷

Despite these recommendations, implementation remains inconsistent and inadequate.¹⁴⁸ Many state jail manuals place decisions regarding the parole or temporary release of pregnant women at the discretion of jail authorities.¹⁴⁹ Consequently, numerous women are compelled to give birth in overcrowded and unsanitary prison conditions, endangering both maternal and neonatal health.¹⁵⁰

In some states, prison manuals require pregnant women to continue to stay incarcerated and then be transported to an affiliated hospital at the time of childbirth, where security protocols take precedence over the privacy and comfort typically afforded during labor.¹⁵¹ As one woman recounted the consequences of not being taken to the hospital from her barrack on time, “I had blood everywhere. . . it took them hours before they called an ambulance. . . then they found out I had miscarried.”¹⁵²

145. Upadhyay, *supra* note 92. However, measures including temporary release or parole to allow childbirth outside prison remain judiciary-specific rather than systemic. For instance, in *Surbhi v. State of Maharashtra* [Criminal Application (BA) No. 940 of 2024], the Bombay High Court held that, “Delivering child during pregnancy in jail atmosphere would certainly impact not only on the applicant but also on child, which cannot be lost sight of. . .therefore, humane considerations are required.”

146. It is essential to recognize that pregnancy-related conditions extend beyond childbirth. Incarcerated women may also experience spontaneous abortions, miscarriages, or premature deliveries with complications, further exacerbating the challenges of maternal care in prisons.

147. Ministry of Women and Child Development, *Women in Prisons Report* (June 25, 2018).

148. See generally Baxi & Singh, *supra* note 29.

149. See, e.g., § 10A, Rajasthan Prisoners Release on Parole Rules, 1958; Rule 275(2), Rajasthan Prison Rules, 2022; Rule 1466, Goa Prisons Rules, 2021.

150. SHANTHA, *supra* note 128. In one instance, a woman was pregnant and delivered her baby in prison without the notice of prison authorities, who were too busy managing overcrowded cell spaces. She later drowned the baby, possibly worried about the life and future of the baby.

151. Delhi Prison Rules, 2018, Rule 1459. However, even this is subject to security concerns, in which case the mother would be required to deliver her baby within the prison premises. Karnataka Prisons and Correction Services Manual, 2021, Rule 446.

152. Ritika Yadav, *Menstrual Health in Women's Prisons in India*, FEMINISM IN INDIA (July 22, 2024), <https://feminisminindia.com/2024/07/22/menstrual-health-in-womens-prisons-in-india/#:~:text=I%20was%20bleeding%20so%20badly,%2C'%20said%20a%20pregnant%20prisoner> [https://perma.cc/XP6E-TXGG].

Several U.S. states have adopted reformist measures of integrating doulas and birthing companions into the prison system to support incarcerated pregnant women through pregnancy and childbirth.¹⁵³ These individuals not only bring essential expertise in prenatal and birthing care but also provide critical emotional support, helping mothers navigate the physical and psychological demands of childbirth in an otherwise controlled, isolating, and anxiety-inducing setting.¹⁵⁴ Although India's Ministry of Health permits birthing companions in public hospitals to reduce maternal and infant mortality,¹⁵⁵ this support has not yet been extended to incarcerated women before or after delivery, revealing a double standard when it comes to carceral maternal care.

After childbirth, mothers in India are typically allowed two to three days in the hospital after childbirth,¹⁵⁶ offering minimal opportunity for recovery to those who have to go back to prison. Furthermore, if a mother chooses not to bring her newborn back to prison, she is afforded a narrow timeframe to establish a bond with her child before separation. Conversely, if she opts to keep the child with her in custody, the newborn is immediately severed from other familial bonds.

Only eight state prisons in the U.S., located in Illinois, Indiana, Ohio, Nebraska, New York, South Dakota, West Virginia, and Washington, permit children to remain with their mothers for up to one year, or at most eighteen months, and even this is contingent on strict eligibility criteria.¹⁵⁷ At the federal level, two programs exist: the Mothers and Infants Nurturing Together and the Residential Parenting Program.¹⁵⁸ Eligibility for both state and federal prison nursery programs requires that mothers be pregnant at the time of incarceration, have no history of violent offenses, and participate in parenting programs, significantly narrowing access.¹⁵⁹ In the remaining forty-two states, incarcerated mothers are separated from their infants immediately after childbirth. Their children are more likely to enter foster care, with one study reporting that in one out of every eight such cases, incarcerated parents permanently lose their parental rights.¹⁶⁰

The abrupt and often traumatic separation of mothers and newborns contributes to maternal mental health struggles, including postpartum depression,

153. Rebecca J Shlafer et al., *Doulas' Perspectives about Providing Support to Incarcerated Women: A Feasibility Study*, 32 PUBLIC HEALTH NURS. 316, 316 (2015).

154. *Id.* at 317.

155. Sushmi Dey, 'Birth Companions' to Help Mothers-to-Be, THE TIMES OF INDIA (Feb. 26, 2016), <https://timesofindia.indiatimes.com/india/birth-companions-to-help-mothers-to-be/article-show/51147091.cms> [<https://perma.cc/DA6V-ACUZ>].

156. Pradeep Kumar & Preeti Dhillon, *Length of Stay After Childbirth in India: A Comparative Study of Public and Private Health Institutions*, 20 BMC PREGNANCY CHILDBIRTH 181, 181 (2020).

157. OLIVIA HUDSON, 2025 UNITED STATES PRISON NURSERY REPORT, CHILDREN OF INCARCERATED CAREGIVERS 2 (2025).

158. *Id.* at 3.

159. *Id.* at Appendix 1.

160. Eli Hager & Anna Flagg, *Parenthood Lost: How Incarcerated Parents Are Losing Their Children Forever*, WASH. POST (Dec. 3, 2018), <https://www.washingtonpost.com/national/parenthood-lost-how-incarcerated-parents-are-losing-their-children-forever/2018> [<https://perma.cc/29R9-JGH6>]; S. Lisa Washington, *Time and Punishment*, 134 YALE L. J. 536 (2024).

and disrupts early bonding,¹⁶¹ which research shows is vital for infant attachment.¹⁶² Moreover, such separation can heighten the risk of recidivism and compound intergenerational trauma.¹⁶³

Courts in both India and the United States must unequivocally recognize that all custodial pregnancies and childbirths constitute inherently cruel, inhuman, and degrading treatment. Such practices stand in direct violation of Article 21 of the Indian Constitution, which guarantees the right to life with dignity, and the Eighth Amendment to the U.S. Constitution, which prohibits cruel and unusual punishment.¹⁶⁴ The judiciary's continued failure in both countries to make this declaration reveals critical gaps in their respective legal frameworks and reflects a deeper, systemic disregard for the reproductive justice of all women.

C. *Post-Natal Care & Post-Partum Depression*

In the immediate postpartum period, mothers undergo a complex physiological and emotional transition, as they adapt from the embodied continuity of pregnancy to the early stages of separation and adjustment. The R.D. Upadhyay Judgment obligates concerned authorities to ensure basic postnatal care facilities in prisons before admitting pregnant women.¹⁶⁵ However, Indian prisons not only lack adequate postnatal care,¹⁶⁶ but also intensify the psychological distress of incarcerated mothers.¹⁶⁷

A study conducted in Mandoli Women's Jail in New Delhi reveals the profound mental health toll on incarcerated women: 87.8 percent reported distress, 73.3 percent experienced depression, 77.8 percent suffered from anxiety, and 82.2 percent showed signs of somatization.¹⁶⁸ These conditions are further compounded for women suffering from postpartum depression and trauma related to carceral childbirth.¹⁶⁹

161. In custody, the mother-child relationship is profoundly shaped and constrained by the criminal justice system. See generally PRAYAS, FORCED SEPARATION: CHILDREN OF IMPRISONED MOTHERS (AN EXPLORATION IN TWO CITIES) 138 (2002).

162. Ria Wolleswinkel, *Children of Imprisoned Parents*, in *Developmental and Autonomy Rights of Children: Empowering Children, Caregivers and Communities* 194 (Jan C.M. Willems ed., 2002).

163. *Id.*

164. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

165. Upadhyay, *supra* note 92.

166. Stuti Shah, *Incarcerated Women and Their Children in Indian Prisons*, 59 *ECON. & POL. WKLY.* 9 (Mar. 2, 2024).

167. I use the term "carceral childbirth" to refer not only to childbirth within the prison itself, but also to childbirth in a hospital, where the accused is transported from prison for delivery; Aikansha Chawla et al., *Postpartum Depression in Correctional Populations*, 30(2) *J. CORRECT. HEALTH CARE* 65, 67 (2024).

168. Navdeep Kaur and Sanjay Roy, *Mental Health Status of Incarcerated Women in India: A Perspective from a Social Worker*, 29 *INDIAN JOURNAL OF GENDER STUDIES* 113, 119 (2021).

169. Mariann A. Howland et al., *Depressive Symptoms among Pregnant and Postpartum Women in Prison*, 66 *J. MIDWIFERY WOMEN'S HEALTH* 494, 494 (2021).

Their emotional strain is also exacerbated in the event of separation from their infants and the absence of supportive environments.¹⁷⁰ Prisons, lacking in both sensitivity and resources, offer little support to mothers processing these complex emotions. Moreover, the absence of familial and communal networks, especially the support of female relatives, deprives new mothers of informal care systems that are vital for their emotional reassurance and confidence in navigating early motherhood.¹⁷¹

1. Best Interest Test & the Illusion of Choice

The Bangkok Rules,¹⁷² the Nelson Mandela Rules,¹⁷³ the UN Convention on the Rights of the Child,¹⁷⁴ and the R.D. Upadhyay Judgment¹⁷⁵ mandate that any state action affecting a child must prioritize the child's "best interests." However, the "best interests" standard is vaguely defined and lacks clear procedural guidelines for its determination across diverse contexts.

Scholars have questioned whether women who are accused of crimes can adequately safeguard their child's best interests.¹⁷⁶ Such discussions are reductive and often overlook how prisons are not only unsuitable environments for raising children, but also inappropriate, inequitable, and burdensome spaces for women to fulfill their roles as mothers. A striking example of this oversight lies in the legal framework¹⁷⁷ which permits incarcerated mothers to determine whether it is in the best interest of their child (under the age of six) to accompany them to prison, without providing them with the resources and tools to make this decision, or to cope with its consequences.¹⁷⁸

Notably, although these national and international policies emphasize the "best interests" of the child, they fail to account for the "best interests" of the mother, particularly when the two may conflict. For example, should a mother

170. Laura Abbott et al., *Compulsory Separation of Women Prisoners from their Babies Following Child-birth: Uncertainty, Loss and Disenfranchised Grief*, 45 SOCIOLOGICAL HEALTH & ILL. 1, 1 (2021).

171. Rachel Y. Moon et al., *A Qualitative Analysis of How Mothers' Social Networks are Established and Used to Make Infant Care Decisions*, 58 CLINICAL PEDIATRICS (PHILADELPHIA) 985, 985 (2019).

172. "Decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children." United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) Rule 49, Dec. 21, 2010, G. A. Res. 65/229.

173. G. A. Res. 70/175, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* (Dec. 17, 2015). "A decision to allow a child to stay with his or her parent in prison shall be based on the best interests of the child concerned."

174. G.A. Res. 65/229, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ("the Bangkok Rules")*, Rule 4, U.N. Doc. A/RES/65/229 (Mar. 16, 2011). "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child." Convention on the Rights of the Child art. 9(1), Nov. 20, 1989, G. A. Res. 44/25.

175. Upadhyay, *supra* note 92.

176. See, e.g., James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. REV. 755 (2009).

177. Upadhyay, *supra* note 92.

178. Minson terms the plight of children impacted by maternal imprisonment as "both an institutional and institutionalised blindspot." See generally SHONA MINSON, *MATERNAL SENTENCING AND THE RIGHTS OF THE CHILD* (2019).

assume the role of a full-time caregiver in prison for her child's best interests, even at the expense of her mental health, opportunity to work and earn, and personal identity? This tension underscores a critical gap in the R.D. Upadhyay Judgment's framework that assumes that a mother's well-being is inextricably linked to her ability to care for her child effectively. A more nuanced inquiry is required into whether the interests of both mother and child can be meaningfully balanced, or even realized, within carceral settings.

Furthermore, the "choice" presented to incarcerated mothers by the R.D. Upadhyay Judgment, whether to bring their children with them to prison or leave them with a loved one, is a Hobson's choice.¹⁷⁹ For women without external support from family or community, particularly Dalit women, there are often no viable alternatives to bringing their children into prison, effectively stripping them of the ability to make a genuine, informed assessment of what is in the child's best interests. Even where alternatives exist, the stigma attached to voluntarily relinquishing custody is profound. Feminist scholars Joyce A. Arditi and Debra A. Madden argue that negative stereotypes about non-custodial mothers emerge from the dominant cultural ideal of the "good mother," a figure expected to engage in intensive mothering and make continuous personal sacrifices for her children.¹⁸⁰ Gazal Raina, founder of Milaap in India, a support group for non-custodial parents notes, "It is very difficult for a woman to explain why she does not have her children living with her," when it is a voluntary decision.¹⁸¹ This reflects a broader societal bias that views non-custodial mothers as "unfit" or "defective," whereas fathers in comparable situations are far more socially accepted.¹⁸²

By compelling new mothers to choose between separating their child from themselves or the child's broader family outside, the prison system imposes an additional burden on women at a time of immense vulnerability, under duress and with minimal resources. A study conducted by NGO Prayas in Maharashtra revealed that when a child was present at the time of arrest, the sudden and forcible actions of the state left mothers to make decisions without clarity.¹⁸³ Similar predicaments arise post-birth, where unpredictable circumstances and structural inadequacies, such as an social abandonment, an absent or incarcerated partner, or families unable to retrieve the child, force mothers to navigate critical decisions under uncertainty and lack of support.

Absent from prevailing legal discourse on the child's best interests is a meaningful engagement with the mother's best interests, the structural absence of real choice, and the gendered expectation that she will bear the burden

179. JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 145 (1861). The idiom "Hobson's choice" refers to the lack of a genuine choice between two alternatives.

180. Joyce A. Arditti & Debra A. Madden-Derdich, *Noncustodial Mothers: Developing Strategies of Support*, 42 FAM. REL. 305, 305 (1993).

181. Pritha Bhattacharya, *Breaking the Stigma, Non-Custodial Mothers in India Are on the Road to Redefining Parenting*, THE WIRE, June 27, 2021, <https://cms.thewire.in/culture/motherhood-non-custodial-mothers-india-parenting> [<https://perma.cc/5ES2-Z7FT>].

182. *Id.*

183. PRAYAS, *supra* note 147, at 20.

of childcare by default. Incarcerated mothers face societal scrutiny and moral condemnation regardless of the decision they make—whether to retain custody of their children in prison or leave them in the care of others, which is ultimately shaped by a range of constraints, some of which have been mentioned above. Therefore, although the R.D. Upadhyay Judgment and the Indian Constitution recognize a mother's reproductive autonomy, this right rarely translates into meaningful practice within the prison system.

D. *Child-Rearing in Prisons*

Although *R.D. Upadhyay* formally grants mothers (and not fathers) the choice to retain custody of their children in prison, it assumes that all mothers operate on a level playing field, overlooking the deep structural inequalities that shape women's ability to make and exercise such a choice. As underscored by the court in *Naina*: "It is tough to fill all necessary and unavoidable, essential needs of the child on jail premises, which include the appropriate temperature of the room, a hygienic and peaceful environment, adequately nutritious food for the child, skilled assistance for the child's health care, adequate clothing, non-threatening, safe and comfortable environment for the child and the mother, etc."¹⁸⁴ These material deprivations and aggravating conditions jeopardize the health of both mother and child, while compounding the psychological strain of navigating motherhood in confinement.¹⁸⁵ Doctrinal law fails to grapple with the coercive, restrictive, and often violent nature of carceral institutions that systematically erode maternal autonomy.

1. *Child-care is Expensive*

Arranging basic care items for children in prison, such as clothing, infant formula, and diapers, remains a persistent challenge for mothers, particularly those from marginalized communities who often lack the social and economic capital to secure these essentials. Although prison manuals may instruct authorities to provide such resources, implementation is frequently inconsistent and inadequate. For instance, although some states supply disposable diapers for infants in prison, the quantities are often insufficient to meet daily needs.¹⁸⁶ Cloth diapers, although a potential alternative, present their own set of challenges; the limited ventilation and cramped conditions in prison cells make it difficult for these diapers to dry quickly.¹⁸⁷

Incarcerated mothers with family support are often able to secure essentials for their children through couriers, whereas those with financial means can purchase necessities from the prison canteen. For mothers without either external support or economic resources, prison labor becomes essential, not only for

184. *Naina v. State of Punjab*, *supra* note 138, at 15.

185. VAJAWAT & CHANDRA, *supra* note 105.

186. Interviews with Dr. Smita Dharmamer, Associate Director of NGO Aangan Trust, (May 25, 2023) (virtual) & (Jan. 4, 2024) (at the prison nursery of Byculla Women's Prison, Mumbai, Maharashtra).

187. *Id.*

their own well-being but also for ensuring a basic level of material security for their children. However, undertrial prisoners, who constitute the majority of India's prison population and largely belong to marginalized communities, are often not formally employed for the work they perform,¹⁸⁸ compelling them to rely on non-governmental organizations (NGOs) for basic supplies.¹⁸⁹ Even when mothers are permitted to work in prison, their performance of hypercare leaves little to no opportunity for participation in prison labor programs.

In such conditions of deprivation and neglect, incarcerated mothers are often forced to make difficult choices, sacrificing one necessity for another, and adopting harsh survival strategies, while striving to remain emotionally present for themselves and their children. Journalist Ruzbeh Nari Bharucha recounts how mothers in an Indian prison were compelled to sell the statutorily allocated milk meant for their children to other incarcerated individuals to purchase basic toiletries for their children and themselves.¹⁹⁰

2. *The Experience of Carceral Maternalism*

Motherhood in Indian prisons often becomes a stifling and isolating experience. Incarcerated mothers are expected to provide their children with hypercare, every day of the week, without respite. This unrelenting hypercare responsibility severely limits their ability to engage in activities that foster personal development, such as pursuing education, learning new skills, or participating in vocational programs that could strengthen their claims for parole and support post-release reintegration. The constant presence of their children also restricts opportunities for socialization, communal participation, and access to recreational outlets that are vital for mental health and provide temporary relief from the monotony and emotional strain of prison life. In many prisons, and especially in overcrowded facilities, mothers are also compelled to share their already scarce resources, sleeping space, food, and basic amenities with their children.¹⁹¹ As a result, motherhood within the carceral system becomes a form of double punishment.

Although mothers cannot neglect their daily chores, they must identify others to care for their children in the meantime.¹⁹² Although mothers do receive support from fellow incarcerated women, this solidarity is also shaped by deep-seated prejudices. As Bharadwaj notes: "Caste, class and community hierarchies are at work here too, as elsewhere in the jail, though subtly. That talkative little one. . .has a sour-faced mother who yanks her along as she cries.

188. Though page 17 of the Model Prison Manual, 2016 states that undertrials can volunteer to work and they would have to be paid fair and equitable remuneration for their work, the reality is that undertrials are typically not paid for the work they do: SUDHA BHARADWAJ, FROM PHANSI YARD: MY YEAR WITH THE WOMEN OF YERAWADA (2023).

189. Interviews with Dr. Smita Dharmamer, *supra* note 188.

190. Ruzbeh Nari Bharucha, *Shadows in Cages: Mother & Child in Indian Prisons* 9 (2004).

191. SHANTHA, *supra* note 119.

192. When children grow older, they often accompany their mothers on their daily chores. BHARADWAJ, *supra* note 172, at 107.

She gets little sympathy and not so many gifts (as other children), probably because she is the child of a Dalit mother.”¹⁹³ As mentioned above, motherhood not only deepens the burdens of incarceration for Dalit women, but becomes a site of compounding inequality that further restricts their access to care and support.

The establishment of prison nurseries and crèches in India, as envisaged by the R.D. Upadhyay Judgment, was intended to provide recreation for children in prisons.¹⁹⁴ However, the functioning of these facilities is highly inconsistent across states and often contingent on the involvement of NGOs.¹⁹⁵ Even where operational, they serve as daytime childcare centers, offering only temporary relief to mothers. After spending a few hours in these child-friendly spaces, children must return to the prison barracks, where they live alongside their mothers and other incarcerated individuals in spaces ill-suited for their development. In contrast, the eight states and two federal programs that operate prison nurseries in the United States have established child-friendly mother-baby units, often located outside the main prison compound.¹⁹⁶ In these arrangements in the United States, NGOs or designated prison personnel provide supervised care for children, while the mothers engage in work, education, or go about their routine. Most prison nursery models in the United States therefore offer the dual benefit of giving mothers a brief respite from their hypercare duties while also creating pathways for their skill-building and economic self-sufficiency.

R.D. Upadhyay remains silent on the caregiving burden borne by women in Indian prisons. It fails to advocate for support structures that would allow them a chance to recuperate, engage in self-care, work, learn, and participate in rehabilitative activities. This limited focus on the child’s environment, without attending to the mother’s needs and autonomy, as seen also in the *Suman Kumari* case, reinforces a reductive view of incarcerated women merely as custodians of infants, rather than as individuals with rights, aspirations, and identities beyond motherhood.

Furthermore, only sixteen out of thirty-six states and union territories have dedicated women’s prisons, in non-conformance with the Bangkok Rules.¹⁹⁷ Consequently, many women are detained far from their home states, making visits from partners, children, or extended family logistically and financially

193. BHARADWAJ, *supra* note 172, at 50. That said, there exists an unspoken camaraderie in women’s prisons, where women often care for each other’s children. For instance, in BHARADWAJ, *supra* note 172, at 63, 50, and 120.

194. Upadhyay, *supra* note 92.

195. Shah, *supra* note 8.

196. See generally 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*, CHILD ABUSE & NEGL. (2022).

197. The Bangkok Rules, *supra* note 94 (“Women prisoners shall be allocated, to the extent possible, to prisons close to their home or place of social rehabilitation, taking account of their caretaking responsibilities, as well as the individual woman’s preference and the availability of appropriate programmes and services.”).

unfeasible.¹⁹⁸ This geographic isolation further deepens their alienation and diminishes the already scarce support that is available to them.¹⁹⁹

Even if these logistical, economic, and infrastructural challenges experienced by mothers in prison were addressed through increased funding or institutional reform, such measures would not resolve the deeper issue that prisons are inherently gendered institutions of control, and not spaces of care or nurture.²⁰⁰ This incompatibility has long been noted by advocates such as Gail Smith, former advisor to Illinois' prison nursery program, who recounted,²⁰¹ "Staff members were discussing...when mothers would and would not be allowed to feed their babies...I was appalled that these administrators could think...that it was appropriate to deny a hungry infant sustenance until the scheduled time convenient for corrections officers."²⁰² Smith's account illustrates how even carceral logic subordinates maternal agency to institutional convenience and control.

This disregard is mirrored in the Indian context. As Bharadwaj recalls from her time in prison, "She (the child) has a cute lisp, but is a bit of a crybaby, constantly running to her mother with loud complaints, often exaggerated, that other children are bullying her. Her mother has little energy and patience for her, but straddles her on her hip and continues doing whatever she was doing before. The Constables accuse her of 'not looking after her daughter,' but I think, looking at her taut, bitter face – how does one give love when one has never received it oneself?"²⁰³ This powerful observation reveals the impossible standards of caregiving that incarcerated mothers are held to. They are expected to perform idealized motherhood while navigating conditions of scarcity, fatigue, distress, and constant surveillance. These examples highlighted by Smith and Bharadwaj underscore the fundamental incompatibility between carceral institutions and reproductive justice—prisons can never meaningfully accommodate motherhood, they can only punish it.

E. Separation from Children

Although existing research has documented the harm children experience when separated from their mothers, including emotional distress, anxiety about future placement, and disrupted attachment,²⁰⁴ there is an urgent need to foreground the consequences of separation on mothers themselves.

R.D. Upadhyay stipulates that "upon reaching the age of six years, a child (staying with their incarcerated mother) shall be either handed over to a suitable surrogate as per the wishes of the female prisoner or shall be sent to

198. See NCRB, *supra* note 5, at 8.

199. Ministry of Women and Child Development, *supra* note 147.

200. See generally FOUCAULT, *supra* note 38.

201. Sarah Yager, *Prison Born*, THE ATLANTIC (2015) at 69.

202. *Id.* at 69-70.

203. BHARADWAJ, *supra* note 190, at 107.

204. See generally E. N. Hines et al., *Parent-Child Separation Due to Incarceration: Assessment, Diagnosis, and Treatment Considerations*, 40 ZERO TO THREE 22 (2020).

a suitable institution run by the Social Welfare Department.”²⁰⁵ Regardless of the arrangement, the enforced separation of children from their incarcerated mothers has far-reaching implications on maternal mental health.²⁰⁶ The trauma of separation, whether it occurs at the time of arrest or when the child turns six in prison, is acute and enduring for mothers, deepening feelings of grief, loneliness, and helplessness.²⁰⁷ A study conducted by NGO Prayas in Maharashtra highlighted that separation from children, particularly for first-time offenders, is one of the most agonizing aspects of imprisonment.²⁰⁸

This pain is further magnified by a widespread lack of awareness among incarcerated women about the legal provisions governing the custody and care of their children.²⁰⁹ Many mothers report persistent worry over their children’s health, safety, and well-being, as a long-term consequence of absence.²¹⁰ Some are unaware that they have the right to have their children with them in prison till the age of six or to receive regular visits from them.²¹¹ For Dalit women, this distress is intensified by a mistrust of the state, rooted in historical and systemic inequities. In cases where girls are transferred to state-run departments because of their mother’s incarceration, maternal anxiety is heightened.²¹² As Shankardass has noted, “shelter homes are not always beyond suspicion and having encountered ugly malpractices in several homes for hapless children, we have had reservations about recommending them too readily as suitable alternatives, especially for girls.”²¹³

Mothers also experience deep concern about the future of their bond with separated children, particularly when these relationships are mediated or even erased by others, especially in contexts of familial hostility. As one incarcerated mother recounted, “I wanted to meet my son, but could not even say goodbye to him (before being arrested). I miss him a lot. I fear he will forget me or people (especially her in-laws, who had custody of her child) will make him see me as the one who killed his father.”²¹⁴ The fear that their children might no longer recognize, accept, or love them upon release haunts many mothers, compounding their psychological toll of incarceration with an overwhelming sense of grief and loss.²¹⁵

205. Upadhyay, *supra* note 92 at 437.

206. Barbara Koons-Witt et al., *Coping with Incarceration: How Women Adjust to Being Separated from Their Children*. 51 CRIM. JUST. & BEHAV. 353, 354 (2024).

207. Shlafer et al., *supra* note 153, at 324.

208. See generally PRAYAS, *supra* note 163.

209. SHAH, Interview with Dr. Smita Dharmameter, *supra* note 188.

210. PRAYAS, *supra* note 163.

211. Shereen Sadiq, *Women, Crime, and Punishment, in WOMEN, INCARCERATED: NARRATIVES FROM INDIA* (Mahuya Bandyopadhyay & Rimple Mehta eds., 2022).

212. Shankardass, *supra* note 1, at 72.

213. *Id.*, at 74.

214. *Id.*

215. *Id.*

1. *Mulaqat or Visits to Mom in Prison*

Frequent *mulaqat* (an Urdu term translating to “visitation”) between incarcerated mothers and their children is essential for maintaining their bond and helping both cope with the strain of separation. The Bangkok Rules reinforces this: “After children are separated from their mothers and placed with family or relatives or in other alternative care, women prisoners shall be given the maximum possible opportunity and facilities to meet with their children, when it is in the best interests of the children and when public safety is not compromised.”²¹⁶ However, multiple structural and logistical barriers in India affect the quantity and quality of these visits, impacting the effective implementation of this rule.

As noted above, the absence of dedicated women’s prisons in every state poses a significant barrier to maintaining family connections, rendering visits logistically difficult and financially burdensome.²¹⁷ One study recorded a guardian’s remark: “When money is there we go for mulaqats. Many times, when there isn’t, we do not go,”²¹⁸ and a child’s lament, “I want to meet my mother in jail, but no one takes me.”²¹⁹ Geographical challenges limit the frequency of visits, thereby increasing the emotional distance between mother and child.²²⁰ Furthermore, the stigma surrounding incarcerated women contributes to reduced visitation from family members, including husbands with their children,²²¹ leaving mothers increasingly isolated.²²²

Additionally, the *mulaqat* system, as it currently stands, is ill-suited for children. Even when visits are possible, their emotionally distressing nature leads caregivers to reduce their frequency to safeguard the child’s “best interest.” Legal academic Shona Minson has emphasized the traumatizing nature of these encounters which are regulated by carceral logics in terms of duration, timing, and conditions.²²³ In many Indian states, children are prohibited from physically touching or embracing their mothers during these brief meetings, often separated by mesh screens or glass partitions that deprive both mother and child of the comfort and reassurance of physical connection.²²⁴ In one documented instance, when a child was separated from her mother by prison bars during *mulaqat*, both wept on either side. Even the jail staff, visibly moved by the scene, admitted, “We can’t bear it,” but nonetheless felt compelled to

216. Rule 51, Bangkok Rules, *supra* note 174.

217. As stated above, only sixteen out of thirty-six states and union territories have women’s prisons, NCRB, *supra* note 5.

218. PRAYAS, *supra* note 163, at 131, 132.

219. *Id.*

220. *Id.*

221. SHANKARDASS, *supra* note 1, at 120.

222. NATIONAL COMMISSION FOR WOMEN, A STUDY OF CONDITION OF WOMEN PRISONERS & THEIR CHILDREN IN EASTERN U.P. JAILS 41 (2011), https://ncwapps.nic.in/pdfReports/A_Study_of_condition_of_Women_Prisoners_and_Their_Children_in_Eastern_UP_Jails.pdf.

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

224. TATA TRUSTS & PRAYAS, GALABHET PROGRAM IMPACTS ASSESSMENT (2018) (India) at 2.

enforce the rules.²²⁵ In an effort to address these limitations, the state of Maharashtra has introduced the *Galabbet* (a Marathi term translating to “hug”) program, which allows children to meet their incarcerated parents face-to-face, in an unrestricted environment.²²⁶

NGOs such as Aangan Trust, known for establishing prison nurseries across Maharashtra’s women’s prisons, have noted that many mothers, overwhelmed by the trauma of incarceration, struggle to mask their distress during mulaqat, inadvertently transferring their trauma to their children.²²⁷ To address this issue, NGOs encouraged the Byculla Women’s Prison in Mumbai to introduce family rooms and a pre-visit counseling program for incarcerated mothers.²²⁸ The counseling sessions aim to equip mothers with tools to engage with their children in ways that reduce the risk of transmitting trauma.²²⁹ The family rooms, in turn, provide a more nurturing environment for parent-child interactions, allowing children to meet their mothers in a space designed to support emotional well-being and simulate a setting that feels un-prison-like.²³⁰

Although these initiatives are commendable, they remain situated within a broader colonial-casteist carceral framework that continues to inflict harm. Invasive practices like strip searches of even child visitors, still common in many prisons, are deeply traumatic and serve as powerful deterrents to mulaqat.²³¹ Even when visits occur, the transient joy of reunion is often eclipsed by the pain of re-separation. As documented by NGO Prayas, one child poignantly remarked, “After mulaqat, (I) come home and cry.”²³²

Ultimately, although policies surrounding mulaqat aim to sustain the mother-child bond, the structural and emotional challenges of incarceration often reinforce the failure of reformist interventions aimed at supporting carceral maternalism. As discussed in Part IV, there is a pressing need for a fundamental shift toward non-punitive alternatives to incarceration, particularly for mothers of infants, alongside a broader dismantling of the gendered assumptions surrounding caregiving.

III. DENYING MOTHERHOOD: INCARCERATION AS GENDERED PUNISHMENT

Drawing on Foucault’s conception of biopower, this section situates the carceral system’s denial of motherhood within the broader logic of state control

225. Shankardass, *supra* note 1.

226. Raina Assainar, *A Meeting Without Barriers for Prison Inmates*, THE HINDU (Dec. 8, 2017), <https://www.thehindu.com/news/cities/mumbai/a-meeting-without-barriers-for-prison-inmates/article21292681.ece> [<https://perma.cc/U4KZ-APK3>].

227. SHAH, Interview with Dr. Smita Dharmameter, *supra* note 188.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. PRAYAS, *supra* note 163, at 134.

over the bodies and lives of marginalized populations.²³³ Women incarcerated in India during their fertile years are deprived of the opportunity to conceive. Even post-release, the stigma of imprisonment, combined with structural and legal barriers, often prevents them from forming families. These denials are not gender neutral. Despite formal legal advancements, the occasional judicial recognition of prisoners' reproductive rights has largely centered cisgender men. Male prisoners, whose fertility remains biologically intact over a longer span,²³⁴ and whose social reintegration is easier,²³⁵ also retain far greater opportunities to exercise reproductive agency post-release. This asymmetry illustrates the gendered nature of reproductive punishment: the carceral state disproportionately impedes women's ability to become mothers.

The carceral regulation of reproduction bears disturbing parallels to colonial-era laws such as the CTA, which subjected marginalized women, particularly Dalit and Adivasi women, to surveilled motherhood and coercive regulation. Then, as now, reproductive control functioned as a tool for upholding caste-based hegemonies. Where the colonial state sought to restrict the reproductive capacities of women it criminalized, the contemporary carceral state continues this legacy by denying incarcerated women, many from similarly oppressed communities, the right to bear children.

This section discusses how denying incarcerated women the opportunity to pursue motherhood constitutes a direct affront to Articles 14 and 21 of the Indian Constitution, reinforcing historical patterns of state violence against caste- and class-oppressed communities. Article 14 prohibits discrimination on the basis of sex and guarantees equality before the law,²³⁶ whereas Article 21 guarantees the right to life and personal liberty, including the right to reproductive autonomy, as discussed in Part I.²³⁷

This denial by the prison system is further compounded by India's sociocultural expectations surrounding motherhood.²³⁸ Motherhood is central to the construction of womanhood in Indian society,²³⁹ and women who are childless—whether by force or by choice—are often marked as socially irrelevant, and rejected by their families, communities, and potential romantic prospects.²⁴⁰

233. FOUCAULT, *supra* note 39 at 139-140.

234. W.B. Schill, *Fertility and Sexual Life of Men after their Forties and in Older Age*, 3 *ASIAN J. AN-DROL.* 1 (2001).

235. PENAL REFORM INTERNATIONAL, KEY FACTS, <https://www.penalreform.org/issues/women/key-facts/> [https://perma.cc/U48J-53KZ]; MINISTRY OF WOMEN AND CHILD DEVELOPMENT, *supra* note 147.

236. Article 14 of the Indian Constitution states: "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. whereas Article 15(1) 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(1)

237. See generally Suchita Srivastava & *Anr. v. Chandigarh Administration*, 2009 (9) SCC 1.

238. SADIQ, *supra* note 213.

239. *Id.* at 122.

240. *Id.*

A. Carceral Regulation of Women's Fertility While Incarcerated

Historically, the carceral system in India has used targeted reproductive violence against incarcerated women, particularly those from marginalized caste backgrounds, to impair their “natural fertility,” the biological capacity to conceive without medical intervention. One of the most egregious examples of this is the non-consensual hysterectomy performed on Phoolan Devi.²⁴¹ A revolutionary figure who resisted brahmanical patriarchy and caste oppression, Devi was from the Mallah community, a historically criminalized sub-caste in the state of Uttar Pradesh.²⁴² Growing up in poverty, she endured child marriage, gang rape, and eventually lost faith in the legal system, resorting to banditry against higher caste people.²⁴³ While imprisoned, Devi was forcibly sterilized by prison officials, with one jail doctor reportedly stating, “we don’t want Phoolan Devi breeding more Phoolan Devis or sons for that matter.”²⁴⁴ This brutal act of custodial violence criminalized not just her body but her potential to reproduce, effectively weaponizing her caste and gender identities to strip her of her reproductive autonomy.

Such acts of custodial violence have historically disproportionately targeted women of lower castes, inflicting irreparable inter-generational harm.²⁴⁵ This sub-section does not focus on these exceptional cases of reproductive violence, but rather examines the carceral system’s more systematic and routine denial of natural fertility. As stated in Part I, the majority (about eighty percent) of incarcerated women in India are within their reproductive years, granting the state wide latitude to police their reproductive lives through ostensibly gender-neutral policies.²⁴⁶

1. Conjugal Visits in Prisons

International instruments such as the Nelson Mandela Rules,²⁴⁷ the Bangkok Rules,²⁴⁸ the UN Declaration of Human Rights,²⁴⁹ and the International

241. See generally, MALA SEN, *INDIA’S BANDIT QUEEN: THE TRUE STORY OF PHOOLAN DEVI* (1994).

242. Abhigyan Prakash, *How Phoolan Devi’s Fortune Changed During the Prime of Mandal-Kamandal Politics in UP*, THE PRINT (March 21, 2022), <https://theprint.in/pageturner/excerpt/how-phoolan-devis-fortune-changed-during-the-prime-of-mandal-kamandal-politics-in-up/881665/> [https://perma.cc/8RNG-NCLY].

243. *Id.*

244. SEN, *supra* note 241, at 244.

245. Baxi & Singh, *supra* note 29.

246. CENTRE FOR RESEARCH AND PLANNING, SUPREME COURT OF INDIA, REPORT ON PRISONS IN INDIA 54 (2024), <https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/11/2024110677.pdf> [https://perma.cc/PHQ7-QF45].

247. Specific provisions are further discussed below, in this section.

248. Specific provisions are further discussed below, in this section.

249. Article 16(1) of the *Universal Declaration of Human Rights* states that: “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution;” Article 25(2) states that: “Motherhood and childhood are entitled to special care and assistance.” *Universal Declaration of Human Rights*, arts. 16(1), 25(2), G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948)

Covenant on Civil and Political Rights,²⁵⁰ recognize the right of prisoners to maintain family relations and access conjugal visits. They also explicitly mandate that conjugal visits' policies, where permitted, must be implemented without discrimination. Rule 58(2) of the Nelson Mandela Rules states, "Where conjugal visits are allowed, this right shall be applied without discrimination, and women prisoners shall be able to exercise this right on an equal basis with men. Procedures shall be in place and premises shall be made available to ensure fair and equal access with due regard to safety and dignity." Similarly, Rule 27 of the Bangkok Rules affirms that, "Where conjugal visits are allowed, women prisoners shall be able to exercise this right on an equal basis with men." The discriminatory denial of conjugal rights to incarcerated women in India is therefore in direct violation of these established international standards.

The Madras High Court has defined conjugal visits as a privilege granted to a married couple, encompassing mutual rights of "companionship."²⁵¹ Such visits may either involve a non-incarcerated spouse visiting their incarcerated partner in prison for intimate time, or an incarcerated person receiving parole²⁵² to visit their non-incarcerated spouse outside prison. Indian courts, as elaborated below, have selectively recognized the right to conjugal visits, for purposes ranging from procreation to satisfying biological "needs."

In 2014, the Punjab and Haryana High Court, in the case of *Jasvir Singh and Anr. v. State of Punjab and Ors.*, affirmed that the right to procreation survives incarceration.²⁵³ The court held that the right to life and personal liberty under Article 21 encompass prisoners' rights to conjugal visits, and alternatively, to artificial insemination, subject to reasonable restrictions.²⁵⁴ The court directed state authorities to formulate policies governing conjugal visits, while also acknowledging that overcrowding and inadequate infrastructure in prisons remain critical barriers to their effective implementation.²⁵⁵

In 2018, the Madras High Court, in the case of *Mebaraj v. State of Tamil Nadu*, allowed a man serving a life term to visit home for two weeks to undergo infertility treatment.²⁵⁶ Similarly, in *Kundan Singh v. NCT of Delhi*,²⁵⁷ the wife of a life-terminer petitioned the Delhi High Court, seeking to protect her and her husband's lineage through procreation. She argued that medical

250. Article 23(2) of the *International Covenant on Civil and Political Rights* states that: "The right of men and women of marriageable age to marry and to found a family shall be recognized." *International Covenant on Civil and Political Rights*, art. 23(2), Dec. 16, 1966, 999 U.N.T.S. 171. India ratified the Covenant on March 27, 1979.

251. *Meharaj v. State of Tamil Nadu*, H.C.P. (MD) No. 365 of 2018, ¶ 14 (Madras High Ct. Jan. 20, 2022).

252. Parole refers to a prisoner's temporary or permanent release before the end of a sentence on the promise of good behavior. *Black's Law Dictionary* 983 (9th ed. 2009).

253. *Jasvir Singh v. State of Punjab*, CWP No. 5429 of 2010 (P&H May 29, 2014) (India).

254. *Id.* ¶¶ 81–82.

255. *Id.* ¶¶ 91, 96.

256. *Meharaj*, H.C.P. (MD) No. 365 of 2018, .

257. *Kundan Singh v. The State Govt. of NCT Delhi*, W.P. (CRL) 2700/2023 (Delhi High Ct. Dec. 22, 2023).

examinations and potential In Vitro Fertilization (IVF) treatment necessitated her husband's temporary release. The Court granted him parole of four weeks to facilitate medically assisted procreation, recognizing that: "the right to procreate is inherently linked to the notion that every individual has the right to extend their lineage. However, this right is not without its nuances, and its exercise is subject to various considerations. . . . If the inmate already has children, this dynamic aspect of the right may be considered fulfilled."²⁵⁸ In doing so, the Court granted the state implicit authority to regulate how many children an incarcerated individual may be permitted to have, making it the ultimate arbiter of reproductive sufficiency. The ruling in *Jasvir* has been upheld in the 2020 case of *Rajeeta Patel v. State of Bihar*, where the Patna High Court directed the state authorities to consider the male petitioner's request for parole to enable a conjugal visit.²⁵⁹

Similarly, the Rajasthan High Court in 2022, in the case of *Nand Lal v. State*, relied on *Jasvir's* ruling to grant a convicted person fifteen days of parole after his wife requested his temporary release to enable the couple to conceive a child.²⁶⁰ The Court emphasized that, "denial to the convict-prisoner to perform conjugal relationship with his wife more particularly for the purpose of progeny would adversely affect the rights of his wife,"²⁶¹ including those protected under Article 21 of the Constitution.²⁶²

Despite some legal victories recognizing the right to conjugal visits as an extension of prisoners' right (or their wives' right) to parenthood under Article 21 of the Constitution, petitioners in India have faced discrimination based on sex. In 2023, a sessions court in Mumbai denied an undertrial woman permission to undergo IVF treatment for procreation, holding that permitting the treatment would impose an unreasonable logistical burden during her trial.²⁶³ This ruling is particularly troubling because it involved an undertrial prisoner, whose guilt had not been established. The mere existence of administrative or security burdens cannot justify the curtailment of constitutional rights; rather,

258. *Id.* ¶ 36.

259. *Rajeeta Patel @ Rajita Patel v. State of Bihar*, AIR ONLINE 2020 PAT 978 (Patna Oct. 12, 2020) (India).

260. *Nand Lal v. State*, 2022 SCC OnLine Raj 678 (Rajasthan High Ct.).

261. *Id.*

262. When the state prison authorities challenged this order before the Supreme Court, the Court upheld the relief granted but disagreed with certain observations made by the Rajasthan High Court. It reaffirmed that parole is a privilege, not a right, and emphasized that in most state prison manuals across the country, conjugal visits are not explicitly recognized as a ground for granting parole. Utkarsh Anand, *Rajasthan HC's judgment on parole for having baby cannot be a precedent: SC*, HINDUSTAN TIMES (Aug. 2, 2022), <https://www.hindustantimes.com/india-news/rajasthan-high-court-s-judgment-on-parole-for-having-baby-cannot-be-a-precedent-says-supreme-court-101659379081690.html> [https://perma.cc/49PR-8QJR].

263. Sadaf Modak, *Woman Undertrial Seeks Nod for IVF Treatment, Fails to Convince Court*, Indian Express (July 4, 2023), <https://indianexpress.com/article/cities/mumbai/woman-undertrial-seeks-nod-for-ivf-treatment-fails-to-convince-court-8685971/#:~:text=She%20cited%20family%20pressure%20to,treatment%20and%20visit%20the%20doctor> [https://perma.cc/QMK5-LZ75].

the state bears a positive obligation to ensure and facilitate the meaningful exercise of these rights.²⁶⁴

Similar institutional anxieties around gender equity have surfaced in the United States, albeit with courts adopting a distinct approach. Federal courts in the United States have considered the question of incarcerated men's right to procreate in two prominent cases, *Goodwin v. Turner*²⁶⁵ and *Gerber v. Hickman*.²⁶⁶ Both cases were brought under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution,²⁶⁷ which *inter alia* prohibits states from depriving individuals of liberty without due process of law. Prison officials in each case, opposed recognizing a procreative right for incarcerated men, arguing that doing so would necessitate extending similar reproductive accommodations to incarcerated women under the Fourteenth Amendment's Equal Protection Clause. They feared that granting incarcerated women the right to procreate would be expensive and create a logistical nightmare.²⁶⁸ Ultimately, the federal courts ruled in favor of the prison authorities in both cases, reinforcing the institutional resistance to recognizing reproductive rights in carceral settings, particularly when gender equity was at stake.

Following the court's decision in *Jasvir Singh*, Punjab became the first state in India in 2022 to explicitly allow conjugal visits for prisoners (with certain exclusions) from their spouses for two hours every two months.²⁶⁹ The initiative was first set up in three prisons in Punjab, including a women's facility.²⁷⁰ Participating prisons must have a designated room equipped with a bed and an attached bathroom to provide privacy for the couple, and in some facilities, condoms are provided.²⁷¹ However, the arrangements are far from ideal, as the rooms are locked from the outside by prison officials, with all exit points secured.²⁷² Visitors seeking conjugal visits are required to provide documentary

264. DESAI, *supra* note 102.

265. *Goodwin v. Turner*, 908 F.2d 1395, 1400 (8th Cir. 1990).

266. *Gerber v. Hickman*, 291 F.3d 617, 623 (9th Cir. 2002). The majority bench in this case went further to hold that procreation does not survive incarceration, stating that, "[a] holding that the State of California must accommodate Gerber's request to artificially inseminate his wife as a matter of constitutional right would be a radical and unprecedented interpretation of the Constitution." *Id.* ¶ 623.

267. U.S. Const. amend. XIV, § 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

268. Jaime Escuder, *Prisoner Parents: An Argument for Extending the Right to Procreate to Incarcerated Men and Women*, 2002 U. CHI. LEGAL F. 269, 281, 284-285.

269. The Policy excludes certain categories of people from availing its benefits: (1) High-risk prisoners, gangsters and terrorists. Those jailed for child abuse, sexual crimes or domestic violence; (2) Prisoners suffering from infectious disease unless cleared by the prison doctor; (3) Those who haven't been carrying out their duties properly for the past three months; and (4) Those who haven't shown good conduct and discipline, as determined by the superintendent. Geeta Pandey & Arvind Chhabra, *Punjab: Hundreds enjoy new conjugal visit rooms in India jails*, BBC (Oct. 21, 2022), <https://www.bbc.com/news/world-asia-india-63327632> [<https://perma.cc/Y3W6-XH96>].

270. Sanjeev Verma, *Punjab to Allow Conjugal Visits from Today*, Times of India (Sept 20, 2022), <https://timesofindia.indiatimes.com/city/chandigarh/punjab-to-allow-prison-conjugal-visits-from-today/articleshow/94315629.cms> [<https://perma.cc/U83W-SJC7>].

271. PANDEY & CHHABRA, *supra* note 271.

272. *Id.*

proof of their marital relationship, valid identity proof, and a medical certificate from a government hospital confirming that they are negative for HIV/AIDS, COVID-19, or any other infectious diseases.²⁷³ Special staff are deputed to monitor the implementation of this scheme, further emphasizing the restrictive nature of such visits.²⁷⁴ This policy is inherently carceral, as it allows the state to regulate and control private acts of intimacy.²⁷⁵

That said, no other Indian state has achieved what Punjab has, by explicitly facilitating conjugal visits for heteronormative married couples, and for recognizing the conjugal rights of cisgender women. In the absence of comparable policy frameworks in other states, incarcerated individuals and their spouses have resorted to seeking judicial interventions, with several successful petitions shaping the policy on a case-by-case basis. Although the principle that the right to procreate survives incarceration is now judicially settled, the specific modalities of its implementation remain at the discretion of courts, resulting in a fragmented and inconsistent approach.²⁷⁶

Furthermore, although the state of Punjab has extended its conjugal rights policy to women, the policy was not designed to uphold their reproductive rights but rather to regulate sexual activity within men's prisons. It was framed as a measure to "keep the stress levels of inmates in control," ensure "re-entry into society," fulfill a "basic biological need," curb homosexuality (mirroring colonial objectives of shipping women prisoners to penal colonies, as noted in Part I), and prevent the spread of HIV/AIDS,²⁷⁷ concerns that appear to be focused on male prisoners, given reports of homosexuality and HIV transmission prevalent in men's prisons in India.²⁷⁸ The state's extension of conjugal rights exclusively to heterosexual married couples reflects its broader carceral logic, which instrumentalizes reproductive autonomy as a tool of control rather than a right.

This arbitrary denial of reproductive justice to women highlights their unequal treatment in the prison system, undermining their rights under international human rights frameworks and constitutional guarantees of equality and procreation under Articles 14 and 21 of the Indian Constitution respectively. More fundamentally, it reinforces the structural limitations of the carceral system, which remains rooted in patriarchal and colonial frameworks.

273. Press Trust of India, *Punjab Prisons Begin Conjugal Visits for Inmates with Good Conduct*, NDTV (Sept. 20, 2022), <https://www.ndtv.com/india-news/punjab-prisons-begin-conjugal-visits-for-inmates-with-good-conduct-3360512> [<https://perma.cc/2RNT-DPCC>].

274. *Id.*

275. Although homosexuality was decriminalized in India following the landmark Supreme Court judgment of *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321, marriage equality continues to be denied. Making marriage an eligibility criterion for conjugal visits perpetuates systemic discrimination against homosexual and queer couples in the carceral context, denying them the same rights and opportunities for intimacy as their heterosexual counterparts.

276. DESAI, *supra* note 102.

277. PANDEY & CHHABRA, *supra* note 270.

278. Kate Dolan & Sarah Larney, *HIV in Indian Prisons: Risk Behaviour, Prevalence, Prevention & Treatment*, 132 INDIAN J. MED. RES. 696 (2010).

2. *Inequitable Access to Alternative forms of Incarceration*

After gaining independence from British rule, India introduced an alternative to traditional incarceration, the open prison model, to prioritize rehabilitation of incarcerated people and reduce recidivism.²⁷⁹ The origins of this model in India can be traced back to the eighteenth century when prisoners were transferred to open prisons and employed for intensive public works projects.²⁸⁰

Currently, there are one-hundred and one of these institutions across India,²⁸¹ categorized into three tiers, each offering varying degrees of autonomy and reintegration.²⁸² Of the one-hundred and one open prisons, only three states and one union territory (Delhi, Kerala, Maharashtra, and Rajasthan) admit women.²⁸³ The remaining thirty-one states and union territories offer no open prison alternatives for women, reflecting a profound gender disparity in access to alternative sentencing and family-integrative reforms. This disparity is formalized through prison manuals in some states. For instance, Assam's prison manual explicitly bars women from eligibility for transfer to open prisons.²⁸⁴ In 2017, the Delhi High Court quashed similar gender-discriminatory guidelines in its prison manual that excluded women from open and semi-open prisons.²⁸⁵ Such paternalistic policies are often justified on grounds of "protecting" women or are the result of institutional apathy.²⁸⁶ They reinforce systemic gender discrimination within the carceral system, and contravene Article 14 of the Indian Constitution, which guarantees equality before law.

Though eligibility criteria vary by state, these facilities generally admit convicted individuals who have spent a considerable time in the traditional prison, and who have demonstrated compliance with prison regulations whilst there.

Semi-Open Training Institutions resemble conventional prisons and keep incarcerated people under close surveillance.²⁸⁷ They focus on providing vocational training and skill development to prepare incarcerated individuals for life outside prison.

Open Training Institutions or Work Camps operate in comparatively less restrictive environments and assign incarcerated individuals to public infrastructure projects. The less restrictive of the three types of institutions, Open

279. India's first open prison was established in Sanganer, in Rajasthan in 1963. It was set up by Shri Sampurnanand, the Governor of Rajasthan in the 1960s. See generally Parikshit Goyal & Kamesh Vedula, *Understanding Open Prisons in India*, 56(4) EPW ENGAGE (Jan. 23, 2021), <https://www.epw.in/engage/article/understanding-open-prisons-india> [https://perma.cc/S84Q-H35U].

280. See generally Khushal I. Vibhute, *Open Peno-Correctional Institutions in India*, 6 Max Planck Inst. for Foreign & Int'l Crim. L. (2005). The author also mentions how difficult it was to find data on the subject of open prisons, echoing legal scholar Upendra Baxi. See generally Upendra Baxi, *Open Prisons, Closed Minds*, in THE CRISIS OF THE INDIAN LEGAL SYSTEM (1982).

281. NCRB, *supra* note 5, at 7.

282. GOYAL & VEDULA, *supra* note 281.

283. NCRB, *supra* note 5; *Sunil Kumar Gupta v. Government of NCT of Delhi*, *infra* note 289.

284. Rule 5, The Assam Superintendence and Management of Jails (Supplementary Provisions) Rules (1968) (India).

285. *Sunil Kumar Gupta v. Government of NCT of Delhi*, W.P.(C) 7787/2017 (2018) (India).

286. LALLI, *supra* note 144, at 242.

287. *Id.*

Colonies, allows residents to live with partners and children, earn wages, and support their families, closely approximating life outside prison and facilitating smoother societal reintegration. Despite evidence supporting their rehabilitative potential,²⁸⁸ only two open prisons in Rajasthan operate as open colonies for women—the *Shri Sampurnanand Khula Bandi Shivir* in Sanganer, and the Prisoners' Open Air Camp at the Agriculture Research Farm in Durgapur.²⁸⁹ In contrast, the open prisons for women at Pune in Maharashtra, and at Tihar in Delhi function more like semi-open training institutions, where women remain confined within the traditional prison complex, separated from their families.²⁹⁰ The open colonies in Rajasthan remain the only facilities in India where incarcerated women are permitted to cohabit with their partners, and have children, in an environment that approximates normalcy.²⁹¹ These facilities provide a rare opportunity for women to maintain their roles as mothers with caregiving support, while also engaging in education, employment, or personal development during their sentences. However, their exceptional nature underscores the stark inequities in access to family-friendly alternatives available for women within India's carceral system. Moreover, eligibility for open prisons is restricted to convicted women, who constitute less than twenty-six percent of the incarcerated population,²⁹² underscoring the inability of open prisons to meaningfully address the structural concerns examined in this Article.

Denying incarcerated women access to open prisons not only eliminates their opportunity to experience motherhood if they are not already mothers, but also deprives them of the chance to nurture their children with support and without the fear of separation in a less harmful, less traumatizing, and more supportive environment.

B. Post-Release Reproductive Costs for Women

Men, even when incarcerated, retain the ability to maintain existing relationships, or form new ones upon release, with relative ease.²⁹³ In contrast,

288. See generally Smita Chakraborty, *The Open Prisons of Rajasthan: A Detailed Study* (Rajasthan State Legal Services Authority, 2017).

289. GOYAL & VEDULA, *supra* note 281; Mohammed Iqbal, *For prisoners in Rajasthan, Open Jails provide Liberation*, THE HINDU (March 5, 2017), <https://www.thehindu.com/news/national/for-prisoners-in-rajasthan-open-jails-provide-liberation/article17409679.ece> [<https://perma.cc/ZE56-ECRZ>].

290. BHARADWAJ, *supra* note 189; PTI, *LG Approves Semi-open, Open Prisons for Women: HC told*, MID-DAY (May 15, 2018), <https://www.mid-day.com/news/india-news/article/ig-approves-semi-open-open-prisons-for-women-hc-told-19422198> [<https://perma.cc/8YYPY-RTQ8>].

291. *Id.*

292. NCRB, *supra* note 5, at xi.

293. MINISTRY OF WOMEN AND CHILD DEVELOPMENT, *supra* note 146, at v. In fact, the stigma faced by female victim-survivors of sexual offenses in India often exceeds that endured by convicted male perpetrators, even if the latter are incarcerated. It is not uncommon for rape survivors to be pressured into marrying their rapists, with the judicial system at times endorsing such arrangements. Poorvi Gupta, *How India's Rape-Survivors End Up Marrying Their Rapists*, ARTICLE 14 (Aug. 24, 2020), <https://www.article-14.com/post/how-india-s-rape-survivors-end-up-marrying-their-rapists> [<https://perma.cc/H3MA-FFVW>].

women face a markedly different reality. The long-term, gender-specific consequences of incarceration, particularly its impact on women's ability to form intimate relationships and exercise reproductive autonomy, remain largely invisible within dominant criminal justice discourse. This blind spot reflects a broader failure to account for how incarceration reinforces and exacerbates preexisting gendered and social inequalities.

1. *Partner Prospects*

Despite formal legal commitments to equality, societal attitudes toward incarcerated women remain deeply patriarchal and punitive, in comparison to men.²⁹⁴ As social science scholars Rimple Mehta and Mahuya Bandyopadhyay observe, "She [the female prisoner] is presented as extraordinary, grotesque, and demonic, one who has not only broken the legal frame but has also transgressed several normative and moral boundaries of social life. The figure of the female deviant is seen to bring dishonor to the family and the wider community. Honour, then, is the crucial context within which female deviance is perceived, not just by the institutions of the family and community but by the criminal justice system as well."²⁹⁵ In the Indian context, this narrative is intensified by the workings of brahmanical patriarchy, which locates familial and community honor within the bodies and behaviors of women.²⁹⁶ Incarcerated women therefore face profound societal stigma, which hinders their ability to form and sustain relationships both during and after imprisonment.²⁹⁷

This stigma manifests in two significant ways. First, women who enter prison with partners on the outside frequently experience abandonment.²⁹⁸ Partners sever ties, leaving them without critical emotional and social support at a crucial phase in their lives, when they must cope with the everyday "pains of imprisonment."²⁹⁹ As sociologist Shereen Sadiq aptly notes, "If a man is in prison, women pool in money to bail them out, but if a woman is behind bars, she is effortlessly replaced as a wife or mother."³⁰⁰

Second, following their release from prison, women face considerable challenges in forging new relationships. Marked by stigma and exclusion, they are often deemed "deviant" or "undesirable" for marriage or motherhood.³⁰¹ This social rejection significantly curtails their ability to form stable partnerships,

294. See generally SHANKARDASS, *supra* note 1; LALLI, *supra* note 144, at 237, 244-252.

295. BANDYOPADHYAY & MEHTA, *supra* note 4.

296. Chakravarti, *supra* note 11.

297. NATIONAL COMMISSION FOR WOMEN, A Report on Improving the Condition of Women Inmates in Prisons 2, 44 (2018) (India); RUSSELL DOBASH, SUE BARNE-GUTTERIDGE & R. EMERSON DOBASH, *THE IMPRISONMENT OF WOMEN* (1986).

298. MINISTRY OF WOMEN AND CHILD DEVELOPMENT, *supra* note 146, at v.

299. Kanupriya Sharma, *The Many Tales of 'Love,' in WOMEN, INCARCERATED*, *supra* note 4, at 141.

300. *Tales from Former Inmates: What Life is like in a Women's Jail in India*, HINDUSTAN TIMES (July 26, 2017), <https://www.hindustantimes.com/india-news/tales-from-former-inmates-what-life-is-like-in-a-women-s-jail-in-india/story-UBBSj0N5yz2VskZpqgGiLK.html> [<https://perma.cc/UXM7-LPWY>].

301. Lauren Snider, *Making a Change in Neo-liberal Times*, in *CRIMINALIZING WOMEN: GENDER AND (IN)JUSTICE IN NEO-LIBERAL TIMES* 268 (Gillian Balfour & Elizabeth Comack eds., 2d ed. 2014).

thereby eliminating or delaying the possibility of childbearing, even during their reproductive years. Therefore, incarceration not only disrupts women's reproductive lives while they are in prison but also casts a long shadow well into their post-carceral existence.

2. *Having Children through Alternative Means*

Upon release from prison, women often face challenges in pursuing parenthood, particularly if incarceration has caused them to miss the already narrow biological window for natural fertility. Access to alternative pathways to parenthood becomes even more constrained for those who wish to be single mothers, have infertile partners, or experience fertility issues, further limiting their ability to build families.

In India, the Child Adoption Resource and Guidance System disqualifies individuals with criminal convictions, or even pending accusations of child rights violations, from adopting children.³⁰² Although facially gender-neutral, this restriction disproportionately affects women, who are more likely to seek alternative paths to parenthood due to the limited span of their reproductive years.

Furthermore, the Surrogacy (Regulation) Act of 2021 forecloses yet another pathway to parenthood by prohibiting commercial surrogacy in India.³⁰³ The Act permits only altruistic gestational surrogacy,³⁰⁴ and restricts eligibility to married heterosexual couples, or in limited circumstances, widowed or divorced women. These narrow eligibility criteria exclude single women, LG-BTQ+ individuals, and, by implication, a significant proportion of formerly incarcerated women who may not have the idealized family structure envisioned by the law.³⁰⁵ While one potential avenue is to seek surrogacy abroad, the prohibitive financial costs make this path inaccessible for most, particularly for women emerging from incarceration, who already contend with economic precarity and systemic marginalization.

Additionally, the spontaneous and often abrupt nature of arrests makes it nearly impossible for women to consider fertility preservation, such as through egg freezing, before incarceration. The procedure demands foresight, substantial financial resources, and access to advanced medical care, all of which are out of reach for most women in conflict with the law, who belong to criminalized

302. MINISTRY OF WOMEN AND CHILD DEVELOPMENT, Child Adoption Resource and Guidance System, Regulation 5 (2022) (India). Typically, this has to be proven through the submission of a police verification report or clearance certificate confirming that the adoptive parents have no criminal record or pending legal issues.

303. Surrogacy (Regulation) Act, No. 47 of 2021, § 2, 38 (India).

304. Altruistic surrogacy is surrogacy in which no monetary compensation is provided to the surrogate, with the exception of medical expenses and insurance costs.

305. Surrogacy (Regulation) Act, No. 47 of 2021, § 4 (India). ("The female partner must fall between the age range of 23 to 50 years, whereas the male partner must be in the age bracket of 26 to 55 years.")

communities and socio-economically marginalized groups.³⁰⁶ Once incarcerated, women are entirely excluded from accessing reproductive technologies that could preserve their ability to have biological children in the future.

Collectively, these structural barriers curtail the reproductive choices of incarcerated and formerly incarcerated women, compounding the long-term collateral consequences of imprisonment and reinforcing reproductive injustice. Such unequal reproductive burdens placed on women stand in clear violation of Articles 14 and 21 of the Indian Constitution, underscoring the gendered structure of the criminal legal system, which imposes a pernicious and enduring double punishment on women, beyond the legal sentence already served. Moving beyond this entrenched inequity requires envisioning transformative justice frameworks that challenge the brahmanical patriarchal foundations of carcerality, and advancing abolitionist pathways that center dignity, care, and reproductive justice for all.

Having outlined how carceral regimes systematically deny women the autonomy to be a mother in Part III, and to mother in Part I, the following section examines emergent openings that gesture toward decolonial alternative imaginaries of care, responsibility, and justice beyond the dominant carceral frame.

IV. EMERGENT OPENINGS: CENTERING REPRODUCTIVE JUSTICE AND ABOLITIONIST FUTURES

The Supreme Court of India, in the case of *R.D. Upadhyay* held that a child may reside in prison with their mother only when no safer alternative exists.³⁰⁷ This principle finds resonance in Section 3 of the *Juvenile Justice (Care and Protection of Children)* Act of 2015 and Article 37 of the UN Convention on the Rights of the Child of 1989, both of which mandate institutionalization of children as a last resort.³⁰⁸ Rule 29(2) of the Nelson Mandela Rules states that “children in prison with a parent shall never be treated as prisoners.” These provisions collectively affirm what extensive scholarship and lived experience have long established: that prisons are unfit environments for children.³⁰⁹

This Article extends this critique further to argue that prisons are equally unfit and constitutionally indefensible spaces for mothers and women who want to be mothers. Incarcerated women in India are often denied the support required to parent their children, or are altogether stripped of the opportunity to become mothers. This burden falls most heavily on Dalit women, whose marginalization is compounded by the state’s control over their reproductive lives. Despite legal protections under Articles 14 and 21 of the Indian Constitution, which guarantee equality, the right to procreation, and reproductive

306. Pujil Gulati, *How Much Does Egg Freezing Cost in India? Latest 2025 Prices*, BABYBLOOM IVF (Jan. 27, 2025), <https://babybloomivf.com/egg-freezing-cost-in-india/> [https://perma.cc/N78W-2U95].

307. Upadhyay, *supra* note 92 at 427.

308. *Juvenile Justice (Care and Protection of Children) Act*, 2015, No. 2 of 2016, § 3(xii) (India).

309. *See generally* Shah, *supra* note 8.

autonomy to incarcerated women, the daily realities of incarceration, marked by surveillance, coercion, deprivation, and violence, render those rights meaningless in practice. As demonstrated throughout this Article, no degree of carceral reform can reconcile this contradiction. Even reforms that come closest, such as Open Colonies, are limited to convicted individuals, who constitute a minority of India's incarcerated population, and remain largely unavailable to women in most states.

Closing this gap requires more than policy tinkering—it demands a transformative vision of justice rooted in reproductive justice and abolition feminism. As noted in the Introduction, reproductive justice recognizes that a rights-based framework is insufficient unless it is accompanied by robust social and economic investments that enable all women to meaningfully exercise their reproductive rights. Furthermore, abolition feminism is an intersectional and relational approach that understands prison abolition and feminism as mutually reinforcing frameworks and praxes.³¹⁰ As U.S. based scholars and activists have noted, “abolitionist theories and practices are most compelling when they are also feminist, and conversely, a feminism that is also abolitionist is the most inclusive and persuasive version of feminism for these times.”³¹¹

This Article advances a two-pronged approach rooted in abolition feminism and reproductive justice. First, an immediate investment in non-custodial, community-based alternatives to incarceration for women, particularly those who are pregnant, caregivers of children, or of reproductive age. International human rights frameworks, such as the Bangkok Rules, explicitly advocate for non-custodial measures for women in these categories, recognizing the disproportionate harms incarceration imposes on them and their children and fetuses.³¹² Second, a long-term commitment to dismantling the colonial, brahmanical patriarchal, carceral complex and replacing it with systems grounded in care, accountability, and equity. This means not only decarcerating women (and, by extension, their children), but also the proactive construction of infrastructure and systems that would eventually render prisons obsolete—universal access to health care and social support, equitable distribution of caregiving labor, and the eradication of caste- and gender-based violence.³¹³

Such a project must reject technocratic solutions that center professionalized expertise over the wisdom of lived experience. In keeping with abolitionist praxis, alternatives to the carceral system must be developed by centering the voices of formerly incarcerated women, especially those from historically oppressed communities. Their experiences offer crucial insight into what systems

310. See generally ANGELA DAVIS ET AL., *ABOLITION.FEMINISM.NOW.* (2022).

311. *Id.* at 1.

312. The Bangkok Rules, *supra* note 94 (“Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.”)

313. See generally MARIAME KABA, *WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE* (2021).

of care and justice should look like. Only by shifting our orientation from punishment to care and liberation, can we imagine a legal and political order that honors the full humanity of mothers, and all those whose lives are most devalued by the carceral state.

The following strategies develop the two-prong approach, and aim to close the gap between the normative commitments of the Indian Constitution and the realities of carceral institutions and praxis.

A. *Dismantling Carceral Structures*

Building on Baxi and Singh's framing of women as "custodial minorities," this section argues that women require distinct legal and policy approaches that address the gendered harms and vulnerabilities they face within the carceral system. Article 15(3) of the Indian Constitution anticipates this imperative by empowering the state to enact special provisions for the benefit of women and children.³¹⁴ This constitutional guarantee provides a critical framework for addressing the structural inequities specifically faced by incarcerated women.

Rules 57 and 58 of the Bangkok Rules urge member states to adopt alternatives to detention that take into account women's caretaking responsibilities and histories of victimization. These rules call for sentencing and pretrial mechanisms that avoid the separation of women from their families and communities, recognizing the compounded harms that incarceration inflicts on mothers and their children. In line with these principles, this section advances a framework for dismantling carceral structures by centering reproductive justice. The immediate goal must be to end the incarceration of additional women and systematically reduce the existing population of incarcerated women, with particular attention to those imprisoned for non-violent offenses or detained while their trials are still ongoing. Over time, this effort must expand to challenge the incarceration of people of all marginalized groups subjected to structural violence under the carceral state.

However, decarceration alone is insufficient, and must be accompanied by the creation of robust support systems and safe housing options. Without these systems in place, release risks becoming merely a transfer of vulnerability from the prison to the street.³¹⁵

1. *De-carcerating Women Undertrial Prisoners*

As noted in the Introduction, seventy-four percent of India's incarcerated population comprises undertrial prisoners, individuals who are still awaiting

314. Article 15(3) of the Indian Constitution states, "Nothing in this article shall prevent the State from making any special provision for women and children." The Indian Supreme Court has observed that Article 15(3) allows the State to positively discriminate in favor of women and children, thereby freeing the State from the "bondages of Article 14." *Madhu Kishwar v. State of Bihar & Ors* (1996) 5 SCC 125, 9 (India).

315. BANDYOPADHYAY & MEHTA, *supra* note 4, at 5.

trial. Among mothers living with their children in prison, about eighty percent are undertrials, underscoring the large-scale punitive impact of pre-trial detention on women and their families.³¹⁶

Pre-trial detention is challenging for all individuals, but particularly so for women.³¹⁷ Though Indian bail law appears gender-neutral on its face, as Baxi has argued, bail jurisprudence is “foundationally adult, able-bodied, and male. It does not empathize with women and children, or the elderly and the afflicted.”³¹⁸ Marginalized women, in particular, are detained during the pre-trial stage because of limited access to bail, legal representation, and support, and the economic, social, and psychological consequences that they face of being undertrial are often more severe than those experienced by men.³¹⁹ Incarceration immediately strips women of their liberty and places them at heightened risk of losing their families, homes, jobs, and community ties.³²⁰ Despite repeated observations from the Supreme Court noting that bail conditions disadvantage marginalized individuals, judicial practice continues to produce outcomes that penalize women not for the gravity of their alleged offense, but for their poverty, social location, and gender.³²¹

Courts must begin acknowledging that prolonging women’s incarceration during the trial period not only violates their fundamental constitutional rights under Articles 14 and 21, but also inflicts lasting harm on their well-being, their opportunity to procreate, and permanently impacts their bond with their children.³²² As a necessary corrective, courts should be required to grant bail to women, unless there is compelling evidence that release would pose a serious and imminent risk.

In cases such as *Suman Kumari* and *Naina*, courts have adopted a more child-centric approach, acknowledging the futility of incarcerating mothers of infants when trials have not even begun. However, in both cases, the imposition of prohibitively high bail bonds undermined the accessibility of relief, effectively reinforcing the same structural barriers the decisions purported to dismantle. Meaningful efforts to address the plight of incarcerated women must therefore include the development of a liberal bail policy in which bail amounts are proportionate to a woman’s economic condition.³²³

Having said the above, the problem is not merely discretionary, but structural. Pre-trial detention for women who pose no threat to public safety serves

316. NCRB, *supra* note 5.

317. MADHURIMA DHANUKA, *Impact of Pre-Trial Detention on Women*, in WOMEN, INCARCERATED, *supra* note 4, at 269.

318. Pratiksha Baxi, *Delhi Court Granting Bail to Infant’s Mother is A Welcome Change During the Pandemic*, THE INDIAN EXPRESS, April 21, 2021, <https://indianexpress.com/article/opinion/columns/bail-jurisprudence-womens-prisons-judiciary-7282034/> [<https://perma.cc/BA8R-2QNS>]; KARNAM & NANDA, *supra* note 18.

319. DHANUKA, *supra* note 320, at 269-284.

320. *Id.*

321. *Hussainara Khatoon (I) v. Home Secretary, State of Bihar*, 1 SCC 81 (1980) (India).

322. Sukhramani & Gupta, *supra* note 89.

323. DHANUKA, *supra* note 320, at 282.

no legitimate penal purpose and should be strictly limited.³²⁴ As envisioned in Rules 57 and 58 of the Bangkok Rules, states must adopt gender-sensitive alternatives to pretrial detention that account for women's caregiving responsibilities. Given that the trial phase often lasts years, this intervention is urgent.³²⁵ Jurisdictions like Italy offer a compelling model; under Italian law, pretrial detention is strictly prohibited for parents of children under six, eliminating judicial discretion entirely in such cases.³²⁶

The excessive use of pretrial detention must be understood within a broader matrix of patriarchal control. As feminist scholars have noted, the prison and the family operate as dual sites of patriarchal governance,³²⁷ disciplining women who transgress social norms while denying them meaningful support. Ending the pretrial incarceration of women is a vital first step in dismantling this custodial nexus. That said, as the following subsection elaborates, decarceration efforts must also encompass convicted women, and ultimately challenge the very logics that underpin carceral punishment.

2. *Alternate Sentencing: Moving Beyond Prisons*

The criminal legal system, from the definition of crime to the imposition of punishment, functions within a deeply patriarchal framework in India.³²⁸ Sentencing decisions in particular must account for the structural differences between men and women's lives, especially in patriarchal societies where mothers disproportionately bear caregiving responsibilities. The absence of comprehensive sentencing guidelines in India leaves judicial discretion largely unconstrained,³²⁹ resulting in inconsistent and often gender-insensitive outcomes. Courts seldom consider the caregiving roles of women, whether they are pregnant, mothers, or primary caretakers of dependent children, when determining sentences.³³⁰

Research by the NGO Prayas underscores this systemic gap. Their findings reveal that many judges did not perceive sentencing in adult criminal courts as involving any legal obligation to consider the interests of prisoners' children.³³¹ One judge even remarked, "women's children were suffering because of what they had done,"³³² reflecting punitive attitudes that ignore both

324. *Id.* An exception must be carved out for women who are accused of offences involving direct harm to children. See *supra* note 29.

325. *Id.*

326. See generally Danish Inst. For Hum. Rts. (DIHR), *Children of Imprisoned Parents* 14 (2019), <https://childrenofprisoners.eu/wp-content/uploads/2019/02/DIHR.pdf> [<https://perma.cc/55M2-MFNZ>].

327. BANDYOPADHYAY & MEHTA, *supra* note 4, at 23.

328. See generally Disha Pandey, *Female Prisoners in India: The Consequences of Triple Marginalisation*, Soc. & Pol. Rsch. Found. (2021), <https://sprf.in/wp-content/uploads/2021/02/Female-Prisoners.pdf> [<https://perma.cc/S4WY-7HZB>].

329. See generally MRINAL SATISH, *Discretion, Discrimination and The Rule Of Law: Reforming Rape Sentencing In India* (2016).

330. See generally Himanshu Dixit, *Child of Incarcerated Parents: A Deemed Criminal*, 2 *ILI L. REV.* 45 (2023).

331. PRAYAS, *supra* note 6.

332. *Id.*, at 171.

the intergenerational harms of incarceration and the constitutional rights of children as citizens of India. There is therefore a clear need for strengthened sentencing guidelines that require courts to investigate and consider defendants' caregiving responsibilities during sentencing.

Expert committees constituted by the Indian government to propose criminal law reforms have consistently underscored the need for structured and gender-mainstreamed sentencing guidelines. In 1987, the National Expert Committee on Women Prisoners recommended the development of policy guidelines on sentencing for convicted women, the inclusion of pre-sentence investigations, and the "diversion of women offenders to separate and specialized trial processes and to non-institutional correctional options."³³³ The Committee on Reforms of Criminal Justice System, in 2003, strongly criticized the incarceration of pregnant women and mothers with young children, stating that it "is cruel and most unreasonable to virtually put the innocent child in prison for no fault of the child which will also affect his future life. Therefore, pregnant women or women with child (below seven years) should, instead of being sent to prison, be ordered to be under house arrest. This, the Committee feels is not a charity but the legitimate right of the unborn and young children."³³⁴ More recently, the 2018 report on Women in Prisons in India, reiterated the need to prioritize non-custodial measures for women offenders, stating that imprisonment must be used as a last resort, especially in cases of non-heinous and non-violent crimes committed by women.³³⁵ The report proposed a range of alternatives to custodial measures, including community service and placement in open jail facilities, and emphasized their effectiveness to support the reform of women offenders at a fraction of the human and financial costs associated with incarceration.³³⁶

The recommendation to prioritize non-custodial accountability mechanisms for pregnant women and mothers of young children who are convicted requires immediate implementation.³³⁷ The UN Standard Minimum Rules for Non-Custodial Measures, 1990 (Tokyo Rules) could guide the development of appropriate alternative accountability measures, including community service, probation, suspended sentences, and weekend furloughs. Reimagining accountability beyond imprisonment requires a decisive shift toward feminist frameworks of transformative justice,³³⁸ which emphasize accountability without reliance on punitive measures, and contribute to building more resilient and equitable communities.³³⁹

333. DHANUKA, *supra* note 319, at 276.

334. MINISTRY OF LAW, Committee on Reforms of the Criminal Justice System, 288 (2003) (India).

335. MINISTRY OF WOMEN AND CHILD DEVELOPMENT, *supra* note 146 at 41.

336. *Id.*

337. LALLI, *supra* note 144.

338. Hannah Barrie, *No One is Disposable: Towards Feminist Models of Transformative Justice*, 33 J.L. & SOC. POL'Y 65 (2020).

339. DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR (2019).

Recognizing the critical relationship between mothers and their children, several countries have adopted legislative frameworks that prioritize non-custodial alternatives such as community-based sentencing for convicted mothers. In some jurisdictions, such as the United Kingdom, caregiving responsibilities are considered as mitigating factors during sentencing,³⁴⁰ and in South Africa, the Constitutional Court in *M v. The State* emphasized that the welfare of children should be considered in sentencing decisions.³⁴¹ An increasing number of U.S. states have enacted laws allowing courts to consider a woman's pregnancy and caregiving responsibilities for a minor child during sentencing, enabling the use of community-based alternatives in place of incarceration.³⁴² Meanwhile, Colombia's Public Utility Act explicitly permits women who are the primary heads of households and are primary caregivers to their children to be eligible to perform community service instead of serving custodial sentences.³⁴³

The recently enacted Bharatiya Nyaya Sanhita in India, which has replaced the colonial-era Indian Penal Code of 1860, introduces community service as an alternative punishment for certain offenses.³⁴⁴ This shift toward non-custodial sentences presents an opportunity to address the specific needs of convicted women through sentencing.³⁴⁵

However, care must be taken to ensure that these alternatives do not simply mirror carceral structures. For instance, the All-India Committee on Jail Reforms proposed the establishment of protective homes, whereas the Women in Prisons Report supported admission to rehabilitation centers, and housing shelters managed by independent agencies—all recommended as alternatives to women's prisons.³⁴⁶ These alternatives, however, may reproduce carceral logics by isolating women under restrictive and surveilled conditions. Similarly, Argentina and Brazil enacted legislation allowing mothers caring for children under five years of age to serve house arrest instead of prison sentences.³⁴⁷

340. Shona Minson, *New Sentencing Guideline in Force from 1st October 2019*, THE RIGHTS OF CHILDREN WHOSE PARENTS ARE IN CONFLICT WITH THE LAW (Oct. 1, 2019), <https://shonaminson.com/2019/10/01/new-sentencing-guideline-in-force-from-1st-october-2019/> [<https://perma.cc/7SLU-Q4ZW>]. Within the list of 'Factors reducing seriousness or reflecting personal mitigation', 'sole or primary carer for dependent relatives' is listed.

341. See generally *M v. the State*, 2008 (3) SA 232 (CC 26 September 2007) (South Africa).

342. See generally Nat'l Univ.-Based Collaborative on Justice-Involved Women & Children, *Alternatives to Incarceration for Pregnant & Postpartum People in the U.S.*, Ctr. for Leadership Educ. in Maternal & Child Pub. Health, Univ. of Minn. (2023).

343. Bill No. 093 of 2019 (Senate), No. 498 of 2020 (Chamber) (Colom.); See generally Claudia Alejandra Cardona, *Public service: An alternative to women's incarceration in Colombia*, IDPC (Aug. 3, 2022), <https://idpc.net/blog/2022/08/public-service-an-alternative-to-women-s-incarceration-in-colombia> [<https://perma.cc/W95P-F7BK>].

344. For instance, § 226 (attempt to commit suicide) and § 202 (public servant unlawfully engaging in trade) of the Bharatiya Nyaya Sanhita, 2023 (India).

345. However, exceptions may be warranted for women convicted of offenses involving direct harm to children. See *supra* note 29; *supra* note 328.

346. See generally MINISTRY OF HOME AFFAIRS, Report of the All-India Committee on Jail Reforms (1983) (India); Ministry of Women and Child Development, *supra* note 146.

347. See generally Leyla Savloff, *Deviant Motherhood: House Arrest and Social Belonging in Argentina*, 38 Soc. TEXT 67 (2020); Law No. 13.769 (Braz.) (Dec. 19, 2018).

However, many on the ground have reported that these arrangements often replicate the same carceral dynamics, albeit in a different setting.³⁴⁸

In the following sub-section, I argue that recognizing women as primary caregivers of infants must be accompanied by broader efforts to challenge and dismantle the systemic inequalities that disproportionately place the burden of childcare on them.

B. *Re-defining Caregiving and Building Structures of Support*

Feminist political activist and academic Angela Davis has extensively written about the harmful functions of prisons, advocating for us to incorporate prison abolitionist principles in our daily lives.³⁴⁹ She notes that the prison “functions as an abstract site into which undesirables are deposited, relieving us of the responsibility of thinking about the real issues afflicting those communities from which prisoners are drawn in such disproportionate numbers.”³⁵⁰ As noted in the previous sections, this is particularly true in India where marginalized women are disproportionately incarcerated, as part of the colonial legacy of the state.

A meaningful shift away from carceral responses to harm requires an equally robust investment in systems of care that support families rather than fracture them. Reallocating public resources from punitive institutions to social systems and infrastructure, such as affordable childcare, stable housing, quality education, and accessible health care, can address the root causes of women’s criminalization, which are often tied to poverty, lack of support, and gender-based violence.³⁵¹ Community-based investments, particularly those that ensure access to reproductive health services and family planning, including contraception, abortion, and fertility preservation, empower women to make autonomous decisions about their bodies and futures. Housing programs that provide secure and stable shelter not only prevent homelessness but also offer critical lifelines for women seeking to exit abusive relationships or stabilize their lives post-release.³⁵² Similarly, education and job training initiatives can facilitate long-term economic security, reducing the structural precarity that so often underlies women’s criminalization.³⁵³

By centering care rather than punishment, such strategies offer concrete ways to interrupt intergenerational cycles of trauma and incarceration.³⁵⁴ In doing so, they reaffirm the constitutional and human rights of women to parent

348. *Id.*

349. See generally ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 16 (2003).

350. *Id.*

351. See generally Laura Hawks et al., *Community Investment Interventions as a Means for Decarceration: A Scoping Review*, 8 LANCET REGIONAL HEALTH - AMERICAS (2021).

352. *Id.*

353. *Id.*

354. See generally Lorie S Goshin, *Ethnographic Assessment of an Alternative to Incarceration for Women with Minor Children*, 85 AM. J. ORTHOPSYCHIATRY 469 (2015).

with dignity and autonomy, and to pursue reproductive justice free from the carceral gaze.

Among the efforts to build enabling structures for women's well-being is the urgent need to redefine motherhood and equitably distribute caregiving responsibilities. In India and elsewhere, the social construction of motherhood continues to frame women as self-sacrificing nurturers, while relegating men to the periphery of caregiving. As sociologist Jackie Krasas has observed, society's moral panic over mothers without custody of their children stems in part from a deep-seated skepticism about fathers' caregiving capacities.³⁵⁵ These assumptions reinforce patriarchal norms that obstruct equitable parenting and uphold the gendered division of care. This dynamic is further intensified in the prison context, where caregiving is structurally, legally, and symbolically tethered to the incarcerated mother, yet rarely transferred to fathers, even in cases where the mother is absent altogether.³⁵⁶

Redefining motherhood in heteronormative relationships through an abolitionist feminist lens requires dismantling the assumptions that idealize women as caregivers. Instead, caregiving must be reimagined as a collective, gender-neutral responsibility, supported by legal and institutional resources.³⁵⁷ This shift would allow women, particularly those from marginalized communities to exercise care without coercion or self-erasure. It would also create space for forms of love, care, and familial belonging that are not rooted in punishment, surveillance, or state control. Ultimately, expanding our understanding of caregiving is essential to any project aimed at reproductive justice, gender equity, and the dismantling of the prison system.

CONCLUSION

In *Naina*, the Punjab and Haryana High Court observed, “[a]s a progressive society with a liberal and dynamic Constitution, automatically imprisoning a newborn [and the mother] will eventually reflect grave injustice. We recognise the criticality and gravity of such an issue...and to endeavour for our civilization to be on the right side of the history.”³⁵⁸

To be on the right side of history, India, much like jurisdictions across the world, including the U.S., must confront the reality that its prisons are not merely colonial sites of confinement, as discussed in Part I, but instruments of

355. Jackie Krasas, *Mothers Without Custody: Some 2 Million Women Feel the Stigma*, MOMSRISING TOGETHER (Mar. 29, 2012), <https://www.momsrising.org/blog/mothers-without-custody-some-2-million-women-feel-the-stigma> [https://perma.cc/EKA2-Y72E].

356. PRAYAS, *supra* note 166, at 3: In a rare instance, a widowed father was permitted to have his young son reside with him in prison.

357. See generally Nicola Carone & Vittorio Lingiardi, *Untangling Caregiving Role from Parent Gender in Coparenting Research: Insights from Gay Two-Father Families*, 13 FRONT. PSYCHOL. (2022); GARY BARKER, *Capacity-Building For Mainstreaming a Gender Perspective Into National Policies and Programmes to Support The Equal Sharing of Responsibilities Between Women and Men, Including Care-Giving in the Context of HIV/AIDS*, U.N. Doc. E/CN.6/2009/CRP.6 (2009).

358. *Naina*, Crm-M-16103/2024, at para 54.

gendered, racialized, and caste-based, reproductive control. For women, incarceration entails a double punishment—not only the deprivation of liberty, but also the erosion of bodily autonomy and the disruption of reproductive choices.

Reproductive injustice within Indian prisons operates across a wide spectrum: from inadequate maternal health care and forced separation from children, to the policing of menstruating, lactating, or aging bodies, to the imposition of invasive security measures such as strip searches, cavity probes, and persistent violations of privacy.³⁵⁹ This Article focuses on two enduring manifestations of this injustice rooted in colonial legacies—first, in Part II, the state’s regulation and disruption of women’s autonomy to raise their children with dignity and without surveillance, and in a supportive environment; and second, in Part III, the state’s denial of women’s right to procreate or pursue parenthood through self-determined routes and timelines.

Despite a robust constitutional framework that guarantees substantive equality and personal liberty under Articles 14, 15(3), and 21, India’s courts have largely failed to safeguard the reproductive rights of incarcerated women. Although decisions in *Naina*, *Suman Kumari*, *Kundan Singh*, and *Jasvir Singh* express moments of judicial empathy, they remain exceptions and seldom engage with the structural colonial violence and brahmanical patriarchy inherent in incarceration itself. In line with Baxi and Singh’s observation that “prisons are foundationally male spaces, designed to reduce all women to biological degradation,”³⁶⁰ this Article argues that incarceration, as currently constituted, is fundamentally incompatible with reproductive justice.

The reproductive injustices outlined in Parts II and III do not begin or end at the prison gates. These harms are embedded within a broader socio-political order that replicates societal ideologies of control over women.³⁶¹ They are symptoms of deeper structural failures, including the state’s refusal to invest in systems of care, the judiciary’s inability to center women’s lived realities, and the continuing perception of women, particularly marginalized women, as expendable. This Article in Part IV draws on U.S. reproductive justice and abolitionist feminist frameworks to argue for decarceration and non-custodial alternatives for undertrial and convicted women in India, alongside robust investments in systems of care, dignity, and justice. Alongside decarceration and sentencing reform, the pursuit of reproductive justice must be rooted in structural transformations that include access to affordable housing, universal childcare, and the dismantling of gendered norms of caregiving.

The prison abolitionist claims advanced in this Article are not legally untethered; rather, I argue that they emerge from the Indian Constitution itself, with its Articles 14, 15(3), and 21 offering a normative foundation for reimagining justice. International frameworks, such as the Bangkok Rules, Tokyo Rules, and Mandela Rules, and abolitionist feminist theory and praxis, further

359. BAXI & SINGH, *supra* note 28.

360. *Id.*

361. See generally SUVARNA CHERUKI, *WOMEN IN PRISON: AN INSIGHT INTO CAPTIVITY AND CRIME* 90 (2008).

reinforce the need to dismantle the casteist and patriarchal underpinnings of India's colonial criminal legal system.

Given this reality, critical feminist and Dalit scholarship must extend their analyses beyond free society and actively incorporate the struggles of incarcerated women. These movements must converge to advance an intersectional "Dalit feminist" framework that recognizes the compounded oppression faced by incarcerated Dalit and other marginalized women, while working to dismantle the structures that criminalize and dehumanize them.

As mentioned in the Introduction, the analysis and contributions of this Article also extend to gender minorities, including those who are menstruating and have the capability of pregnancy. By using this institution of custody to articulate a broader discourse on gender justice, this Article contributes to the feminist tradition of locating the political within the personal.

Centering reproductive justice within carceral critique offers a transformative vision of justice: one in which the liberation of incarcerated women is not peripheral but central to broader struggles for gender justice, equality, and collective freedom.

