

**Women in Prison: Seeking Justice Behind Bars
U.S. Commission on Civil Rights**

**Recommendations of
The Arthur Liman Center for Public Interest Law, Yale Law School**

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We thank the Commission for convening the hearing on women in prison and hope that it marks the beginning of sustained efforts addressing the problems faced by incarcerated women. The Commission asked us to address issues of discipline and of the treatment of women, to which we responded in the testimony submitted on January 25, 2019, available at https://law.yale.edu/system/files/area/center/liman/document/liman_statement_us_commission_on_civil_rights_revised_title_march_11_2019.pdf. Based on that statement, we provide below recommendations, as well as an overview of recent state statutes enacted to address women's needs in prison.

Recommendations

Promote legislation in state and federal systems to curb and to end the use of solitary confinement. As we detailed, the Liman Center has joined with the Association of State Correctional Administrators (ASCA) to document the policies governing and the use of solitary confinement, defined as holding individuals for 22 or more hours in cells for fifteen days or more. These surveys have produced the only nation-wide data on use of solitary confinement. As of the fall of 2017, ASCA-Liman estimated that more than 60,000 people were held in prison in such conditions. Women are approximately seven percent of the prison population, and in the 32 jurisdictions reporting, we identified almost 800 women held in solitary confinement. Black women were 40 percent of that group. In contrast, black women were 23 percent of the total custodial population. We also detailed some of the studies documenting how disabling solitary confinement is.

One state, Colorado, has ended holding individuals in cells for fifteen days or more, 22 hours or more. In 2016, in new accreditation standards for "restrictive housing" (an umbrella term for solitary confinement), the American Correctional Association (ACA) called for the end of such confinement on the basis of gender identity and for pregnant women or juveniles. Further, the ACA called for limits on the use of restrictive housing for "seriously mentally ill" individuals. The 2015 Nelson Mandela Rules, promulgated by the United Nations as international standards on the treatment of prisoners, describe prolonged isolation (more than 15 days) to be "cruel, inhuman or degrading treatment or punishment." These Rules prohibit the use of isolation except in exceptional circumstances and ban placement for longer than 15 consecutive days. Several states have pending or enacted legislation regulating and, in some instances, banning solitary confinement.

In short, models abound for restricting solitary confinement, whether by executive regulations, legislation, litigation, or model rules. Given the disparate impact of solitary confinement on women of color and its harms to all persons, the Commission should call for its abolition. Further, for individuals held in cell confinement, the Commission should call for regulation of the conditions of confinement to ensure access to out-of-cell time of at least four hours a day, to fresh air, to daily showers, and to reading and writing materials.

Call on Congress to ensure implementation of the 2018 First Step Act. We testified that, while the First Step Act calls for women to receive necessary hygiene products and prohibits restraints on pregnant women, its text does not build in a mechanism for oversight. Further, while also providing for more educational and vocational opportunities, resentencing, and potential release, the Act provides no means of ensuring that women and men of all colors receive equal treatment and obtain the benefits of the legislation. The Commission should ask for oversight hearings in 2018-2020 to gather data from the Federal Bureau of Prisons. Hearings will enable the Commission to assess the implementation of the First Step Act and to learn about whether women and men of all colors benefit from its mandates to reduce the use of mandatory minimum sentences, to release eligible prisoners, and to provide more and better services to people who are incarcerated. The required inquiries should include whether and how the Act's guarantee of free hygiene products and its ban on shackling of pregnant women have been put into practice in all of the 29 BOP facilities and in the many jails in which women are being held. Further, the Commission should call for parallel inquiries for women immigrants detained by the federal government in state, federal, or private facilities.

Revise commitments in the First Step Act through a new Family and Work Reentry Plan Act so that federal prisoners are within 75 miles of their homes. As the Liman Center testimony documents, the First Step Act's call for incarceration within 500 miles from home not only repeats what has been the policy of the Federal Bureau of Prisons, but is inadequate for people to maintain and to resume connections to their families and to have opportunities for successful reentry. The Commission should call for new legislation classifying women through gender-informed analyses, and limiting the placement of federal prisoners to 75 miles from home unless the Bureau can demonstrate extenuating circumstances why a specific individual cannot be located within that geographical limit. Further, that legislation—a Family and Work Reentry Plan Act—should require federal and state prison systems to publish annual data on the use of gender-informed classifications, the distance from home for prisoners, the rules for visiting prisoners, and the efforts made to revise rules to facilitate visits and low-cost phone calls. That act should also include subsidies to enable family members to visit incarcerated individuals and mandates for women in prison to obtain vocational and educational programs enabling them to join the wage workforce when leaving prison.

Create a National Institute on Women in Detention. The Civil Rights Commission should call on Congress to create and to fund an Institute on Women in Prison, to be comprised of individuals nominated by both Houses of Congress, the Executive, the National Center for State Courts, by ASCA, and by national and local groups devoted to the needs of current and formerly incarcerated women. That Institute should have staff sufficient to gather data and report to Congress yearly on the numbers of women and men of what ages, gender identities, races, and ethnicities in detention. To enable such data collection, Congress should mandate public reporting by state and federal systems and by the Bureau of Justice Statistics. The information gathered should include whether classification systems have been implemented that are gender-responsive and whether economic and educational opportunities include gender responsive programming. Congress should also require national data on health care provision, safety, discipline, and the use of solitary confinement, if such a practice continues. Further, the Institute should gather data on the treatment of subpopulations, including pregnant women, gay and transgender individuals, people with mental illness, and those with physical disabilities. By building on the work of many women who have left prison and shaped national and local efforts to help others who have been in their situation, the Institute should also formulate policies for helping formerly incarcerated women reenter their communities and propose legislation for states and the federal system to adopt to support such women. Further, given the many statutes focused on ensuring that women have necessary hygiene products, the Institute can draw on the expertise of the existing structures devoted to these issues.

Build on progress in the states. The U.S. Commission on Civil Rights is not alone in taking on the issue of women in prison. Many states have enacted legislation aimed at improving the treatment of incarcerated women. We have identified 13 states that, in 2018, enacted legislation to promote the dignity of women behind bars; similar legislation has been enacted previously in many other states and is pending in several more. These laws include bans on shackling pregnant women, provision of hygiene products at no cost, increased programming for parents, improvements in medical care, restrictions on staffing of women's facilities, dedicated supervisory staff for women's facilities, and implementation of gender-informed policies and programs. An overview of recent legislation follows. The Institute that we propose above should become a repository for such legislation and should analyze the impact and the needs for additional legislation and regulation.

Overview of State Statutes Enacted in 2018 Focused on Women in Detention*

California **AB 2550 An Act to Add Section 2644 to the Penal Code, Relating to Prisons**, 2017-18 Leg., Reg. Sess. (Cal. 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB2550

Adopted: August 20, 2018

Summary: Legislative Counsel’s Digest: “[P]rohibit[s] male correctional officers from conducting a pat down search of a female inmate unless the prisoner presents a risk of immediate harm to herself or others or risk of escape and there is not a female correctional officer available to conduct the search . . . prohibit[s] a male correctional officer from entering an area of the institution where female inmates may be in a state of undress, or from being in an area where they can view female inmates in a state of undress, unless an inmate in the area presents a risk of immediate harm to herself or others or if there is a medical emergency in the area and there is not a female correctional officer who can resolve the situation in a safe and timely manner without his assistance; requires staff of the opposite sex to announce their presence when entering a housing unit . . . [r]equires documentation of a male correctional officer conducting a pat down search or entering a prohibited area within 3 days of the incident and that the documentation to be reviewed by the warden and retained.”

Colorado **HB 1158 An Act Concerning a Supplemental Appropriation to the Department of Corrections**, 71st Gen. Assemb., 2d Reg. Sess. (Col. 2018), <https://legiscan.com/CO/text/HB1158/2018>

Adopted: March 29, 2018

Summary: Provides appropriations to the Department of Corrections for tampons.

Connecticut **SB 13 An Act Concerning the Fair Treatment of Incarcerated Persons**
2018 Leg., Reg. Sess. (Conn. 2018), <https://www.cga.ct.gov/2018/BA/2018SB-00013-R000603-BA.htm>

Adopted: May 8, 2018

Summary: OLR Bill Analysis: “(1) requires the Department of Correction (DOC) commissioner to ensure that at least one health care provider employed at York Correctional Institution (Connecticut’s female facility) has certain specialized training and knowledge related to pregnancy and childbirth; (2) requires a licensed health care provider to assess each inmate for pregnancy upon admission to the correctional institution; (3) gives pregnant inmates the right to receive specified counseling and written material, medical care at the

* See Appendix: Compendium of State Statutes Enacted in 2018 Focused on Women in Prison.

correctional institution, specialized diet, appropriate clothing and sanitary materials, opportunity for ambulatory movement, and access to treatment for postpartum depression; (4) requires the transfer of inmates with high risk pregnancies to the medical infirmary or a hospital; (5) generally limits the use of restraints on pregnant inmates, including during transportation, labor and delivery, and during the postpartum period, and requires written documentation when certain restraints are used; and (6) requires the correctional institution to provide pregnant inmates with counseling and discharge planning prior to their release.

Among the changes the bill makes regarding the general treatment of incarcerated women, it requires DOC to (1) establish support services for incarcerated women, such as a lactation policy and a neonatal intensive care unit and (2) provide inmates with feminine hygiene products free of cost, upon request.

. . . [Allows] DOC [to] reinstate its training program on mental health issues for custodial staff and requires it to: (1) establish visitation policies for all inmates with children under age 18; (2) permit specific privacy-related parameters for staff of the opposite gender regarding certain inmate activities; and (3) develop and implement, by October 1, 2018, a policy regarding the safety and protection of transgender inmates.

. . . [R]equires DOC, the Board or Pardons and Paroles, and the judicial branch's Court Support Services Division (CSSD) to use a gender-responsive approach in their risk assessment strategy.”

Delaware **SB 166 An Act to Amend Title 14 and Title 29 of the Delaware Code Relating to the Provision of Free Feminine Hygiene Products,**
149th Gen. Assemb., Reg. Sess. (Del. 2018), <https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocument?legislationId=26416&legislationTypeId=1&docTypeId=2&legislationName=SB166>

Adopted: September 13, 2018

Summary: “[R]equires that feminine hygiene products be provided free of charge to individuals in custody at facilities operated by the Department of Correction and facilities operated by the Department of Services for Children, Youth and Their Families.”

Illinois **HB 3904 An Act Concerning Criminal Law,** 100th Gen. Assemb., Spec. Sess. (Ill. 2018), <http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=91&GA=100&DocTypeId=HB&DocNum=3904&GAID=14&LegID=&SpecSess=&Session>

Adopted: September 22, 2017

Summary: Provides that the Department of Corrections shall establish a Women’s Division with a Chief Administrator “who has received nationally recognized specialized training in

gender-responsive and trauma-informed practices.” “The Chief Administrator shall be responsible for . . . development and implementation of evidence-based, gender-responsive, and trauma-informed practices” in the Women’s Division and shall develop training for all staff assigned to the Division “on gender-responsive and trauma-informed practices.” Also provides for “implementation of validated, gender-responsive classification and placement instruments” and risk assessment tools.

Kentucky **SB 133 An Act Relating to Crimes and Punishments**, 2018 Leg., Reg. Sess. (Ky. 2018), <https://apps.legislature.ky.gov/law/acts/18RS/documents/0115.pdf>

Adopted: April 10, 2018

Summary: LegiScan: Requires the Department of Corrections (DOC) “to promulgate administrative regulations for the jails that require adequate nutrition for pregnant inmates, adequate feminine hygiene products, and an appropriate number of undergarments for female inmates; . . . require[s] that pregnant inmates be restrained solely with handcuffs in front of the body unless further restraint is required to protect herself or others; ban[s] the shackling of female inmates; . . . require[s] the [DOC] to create a classification process for jails that may house female state inmates; . . . require[s] a jail be certified before housing any female state inmates . . . allow[s] orders of protection . . . [and] interpersonal protective orders to be filed at a domestic violence shelter or a rape crisis shelter; . . . require[s] the reporting of allegations of sexual assaults by a jailer or any employee, contractor, vendor, or volunteer of a supervising entity to the Attorney General's Office for investigation; . . . allow[s] an eligible pregnant woman to be released from custody”

Louisiana **SB 558 Dignity for Incarcerated Women Act**, 2018 Leg., Reg. Sess. (La. 2018), <https://legiscan.com/LA/drafts/SB558/2018>

Adopted: May 20, 2018

Summary: Requires provision of feminine hygiene products, moisturizing soap, toothbrushes, toothpaste, and any other healthcare produce the custodian deems appropriate at no cost and in a quantity that is appropriate to the needs of the woman without a medical permit.

Prohibits a male correctional employee from “conduct[ing] a pat-down or body cavity search on an incarcerated woman unless [she] presents an immediate risk of harm to herself and others and a female employee is not available”; requires male correctional employees to “announce [their] presence upon entering a housing unit for incarcerated women”; prohibits male correctional employees from entering an area “where incarcerated women [may be] in a state of undress”; requires documentation of any incident where a male correctional employee “conducts a pat-down or body cavity search or enters a prohibited area.”

Maryland **HB 797/SB 598 An Act Concerning Correctional Services – Inmates – Menstrual Hygiene Products**, 2018 Gen. Assemb., Reg. Sess (Md. 2018), <http://mgaleg.maryland.gov/2018RS/bills/hb/hb0797T.pdf>

Adopted: April 24, 2018

Summary: Requires each correctional facility to “have a written policy and procedure in place requiring menstrual hygiene products to be provided at no cost”; Requires that the female correctional facility “ha[ve] a sufficient supply of menstrual hygiene products to meet the needs of the inmate population at all times”; requires each correctional facility “maintain records on the provision and availability of menstrual hygiene products to inmates.”

HB 787/ SB 629 An Act Concerning Correctional Facilities – Pregnant Inmates – Medical Care, 2018 Gen. Assemb., Reg. Sess (Md. 2018), <http://mgaleg.maryland.gov/2018RS/bills/hb/hb0787T.pdf>

Adopted: May 26, 2018

Summary: Allows the managing correctional official to recommend that a pregnant prisoner be granted clemency; prohibits the use of physical restraints while a prisoner “is in labor or during delivery, except as determined by the medical professional” caring for the prisoner; prohibits the use of physical restraints on a prisoner known to be pregnant or postpartum unless there is an individualized determination restraint is necessary to ensure the safety of the prisoner, staff, medical providers, or others; if used the restraint must be “the least restrictive necessary and [must] not include waist or leg restraints”; provides that restraints will be immediately removed if the health professional requests it; requires each correctional facility to have a policy in place regarding the care of pregnant inmates.

Massachusetts **S 2371 An Act Relative to Criminal Justice Reform**, 190th Gen. Ct., Reg. Sess. (Mass. 2018), <https://malegislature.gov/Bills/190/S2371>

Adopted: April 13, 2018

Summary: Among other things, prohibits using gender identity or sexual orientation as grounds for placement in restrictive housing; prohibits placing a pregnant prisoner in restrictive housing.

New York **S 8821A An Act to Amend the Correction Law, in Relation to Providing Feminine Hygiene Products at No Cost to Individuals in Correctional Facilities**, 2018 Leg., Reg. Sess. (N.Y. 2018), <https://legislation.nysenate.gov/pdf/bills/2017/S8821A>

Adopted: December 7, 2018

Summary: Provides that “feminine hygiene products, including . . . sanitary napkins, tampons and panty liners . . . be provided at no cost” to female prisoners.

Oklahoma **HB 3393 An Act Relating to Prisons and Reformatories**, 56th Leg., 2d Sess. (Okla. 2018), <http://www.oklegislature.gov/BillInfo.aspx?Bill=hb3393&Session=1800>

Adopted: May 10, 2018

Summary: Requires all “penal institutions, detention centers, and county jails to use the least restrictive restraints on pregnant inmates” with a presumption that no restraints will be used in transport, during labor or delivery, or during recovery, unless directed by the physician in charge; requires consultation with medical staff and written approval from an administrator before restraints are applied unless there is reason to believe the prisoner presents an immediate risk; prohibits abdominal restraints, four-point restraints, leg and ankle restraints, restraints that link one prisoner to another; provides that frontal risk restraints shall generally be the least restrictive restraints.

Provides that correctional officers will be outside the room unless requested by the physician in charge.

Requires female prisoners be provided notice of the requirements of this law.

Requires pregnant prisoners be given access to one of the following during delivery: a pre-approved family or friend, a member of the clergy, or a doula.

Makes it a misdemeanor for a correctional officer or detention officer to use restraints on a pregnant prisoner as restricted by this law.

Rhode Island **H 7182A/S 2268A An Act Relating to State Affairs and Government – the Healthy Pregnancies for Incarcerated Women Act**, 2018 Leg., Jan. Sess. (R.I. 2018), <http://webserver.rilin.state.ri.us/BillText/BillText18/HouseText18/H7182A.pdf>

Adopted: February 7, 2018

Summary: Expands preexisting restrictions on shackling pregnant people to prohibit use of restraints during transport of a pregnant prisoner in her third trimester; requires restraints used to be the least restrictive means available; requires documentation and annual reporting on use of restraints.

Requires annual reporting on “the number of pregnant women incarcerated at the adult correctional institutions . . . and the number who were subject to the use of restraints . . .”

Virginia **HB 83 An Act to Require the Provision of Feminine Hygiene Products at No Cost to Female Prisoners or Inmates**, 2018 Leg., Reconvened Sess. (Va. 2018), <https://lis.virginia.gov/cgi-bin/legp604.exe?181+ful+CHAP0815>

Adopted: April 18, 2018

Summary: Requires the Board of Corrections and Director of Department of Corrections to implement a standard “to ensure the provision of feminine hygiene products to female prisoners without charge.”

Overview of Pending State Legislation Focused on Women in Detention

Florida **SB 332 Dignity for Incarcerated Women Act**, https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_s0332__.DOCX&DocumentType=Bill&BillNumber=0332&Session=2019

Status: In Senate Appropriations Committee, March 7, 2019

Summary: Provides for hygiene products at no cost; restricts searches of women by male staff to cases of immediate risk of harm; restricts presence in women’s units by male staff to medical emergencies or cases of immediate risk of harm; provides for documentation of searches by or presence of male staff.

Georgia **HB 857 Dignity for Incarcerated Women Act**, <http://www.legis.ga.gov/Legislation/en-US/display/20172018/HB/857>

Status: Before House Second Readers, February 12, 2018

Summary: Provides for access to hygiene products; restricts strip searches of pregnant women; prohibits pat-down searches of women by male staff; restricts presence of male staff in bathrooms and showers; requires gender sensitive and trauma training for staff; requires family connections be considered in placement decisions.

Missouri **HB 303 An Act to Enact Two New Sections Relating to Inmate Canteen Funds**, <https://house.mo.gov/billtracking/bills191/hlrbillspdf/1136H.03P.pdf>

Status: Reported to the Senate and First Read, February 25, 2019

Summary: Provides funding for free tampons and sanitary napkins in appropriate quantities to meet prisoners’ needs.

New Jersey **S2540/A3979 Dignity for Incarcerated Primary Caretakers Act**, https://www.njleg.state.nj.us/2018/Bills/S3000/2540_I1.HTM

Status: Referred to Assembly Appropriations Committee, June 11, 2018

Summary: Requires adoption of policies and programs regarding primary caretakers of children, including placement as close to home as possible, a pilot for overnight visitation and

expanded general visitation, parenting classes and trauma informed care, mentorship and reentry services, free phone calls and video conferencing, and residential drug abuse programs; prohibits solitary confinement and shackling for pregnant people; requires appointment of ombudsman for PREA monitoring; provides for hygiene and medical supplies; restricts officers from entering opposite sex restrooms.

New Mexico **SB 192 An Act Providing for Judicial Discretion to Release Inmates who are Pregnant or Lactating**, <https://www.nmlegis.gov/Sessions/19%20Regular/bills/senate/SB0192.html>

Status: Passed and Pending Governor's Signature, March 15, 2019

Summary: Instructs the court to consider pregnancy or lactation status in determining eligibility for release or bond; provides for release before birth and for up to eighteen months after birth.

Pennsylvania **SB 1252 Dignity for Incarcerated Women**, <https://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2017&sind=0&body=S&type=B&bn=1252>

Status: Referred to Senate Judiciary Committee, September 12, 2018

Summary: Restricts restraints and solitary confinement during and after pregnancy; restricts searches of pregnant women; provides for placement of women within 250 miles of home whenever possible and authorizes pilot program for overnight visits for children; limits searches by male officers; provides for hygiene products; provides for staff training regarding pregnancy and programming for pregnant women.

Tennessee **HB 129/SB 75 An Act to Amend Tennessee Code Annotated, Title 41, Relative to Prisoners**, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0075>

Status: Placed on Calendar for State House Committee, March 20, 2019

Summary: Provides for hygiene products at no charge and in an appropriate quantity.

Utah **HB 275 Contraception for Women Prisoners**, <https://le.utah.gov/~2019/bills/static/HB0275.html>

House Filed: March 14, 2019

Summary: Allows women in jail to remain on medically prescribed birth control as part of the jail intake process.