

DIGNITY BEHIND BARS: THE ONGOING LEGISLATIVE EFFORTS TO PROTECT INCARCERATED WOMEN

JESSICA MITTEN*

Women are currently the fastest-growing segment of America's prison population. The number of incarcerated women in the United States has increased by 750% since 1980,¹ and there are currently over 200,000 women in American prisons and jails.² While recent criminal justice reform efforts have reduced the overall prison population, the number of incarcerated women has remained steady as almost all of the affected prisoners have been men.³ The growing gender divide illustrates that more focus is needed to address the distinct ways that incarceration impacts women.

Incarcerated women face unique issues behind bars—almost two-thirds are mothers and the majority are survivors of trauma or abuse.⁴ Unfortunately, our current prison and jail systems inadequately provide for these unique circumstances. As Holly Harris, the director of the Justice Action Network, a bi-partisan criminal justice advocacy group, explains, “Women are entering prisons that are programmed for men even though their needs are entirely different.”⁵ In recent years, legislation attempting to address these concerns has achieved mixed success at the federal and state level.

I. Federal Reforms: An Overview of The Dignity Act

In 2017, Senator Cory Booker (D-NJ) attempted the most significant federal reform effort on this issue. Along with Senator Elizabeth Warren (D-MA), Senator Dick Durbin (D-IL), and now Vice President-elect Kamala Harris, he introduced The Dignity for Incarcerated Women Act (“the Dignity Act”).⁶ The legislation detailed a number of common-sense provisions designed to improve the treatment and protect the dignity of incarcerated women in federal prisons. The bill prioritizes addressing the needs of incarcerated primary caretaker parents, the unique medical needs of incarcerated women, and incarcerated women's unique vulnerability to violence.

A. Primary Caretaker Parents

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¹ This is twice the rate of growth of male prisoners in the same timeframe. The Sentencing Project, *Incarcerated Women and Girls* (June 6, 2019), <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/>.

² In 2019, there were 231,000 women incarcerated in state and federal prisons, local jails, youth facilities, and immigration detention centers. Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2019*, PRISON POLICY INITIATIVE (Oct. 29, 2019), <https://www.prisonpolicy.org/reports/pie2019women.html>.

³ Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POLICY INITIATIVE (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html.

⁴ Samantha Cooney, *Jails Weren't Built for Women. Inmate Advocates Say That's a Big Problem*, TIME (July 19, 2017), <https://time.com/4864958/incarcerated-women-prison-inmates/>.

⁵ *Id.* See also Just. Action Network, *Our Mission* (last accessed Nov. 16, 2020), <https://www.justiceactionnetwork.org/mission>.

⁶ Dignity for Incarcerated Women Act of 2017, S. 1524, 115th Cong. (2017). The bill failed. Senator Booker re-introduced the bill in 2019 and it is still pending. See *infra* Part II.

First, the Dignity Act aims to foster incarcerated primary caretaker parents' relationships with their children. Protections for parents in prison are especially important to incarcerated women, as over 80% of women jailed each year are mothers⁷ and more than 60% of incarcerated women are mothers of children under the age of 18.⁸ The bill expands visitation and substance abuse treatment for primary caretaker parents and requires an overnight visitation pilot program for primary caretaker parents and their children.⁹

The Dignity Act also requires that primary caretaker parents are placed as close to their children as possible.¹⁰ Placement is essential to the effective implementation of the above provisions as expanded visitation will be moot if children cannot travel to the facility. Unfortunately, the effect of the placement provision is limited by existing infrastructure, as there are few federal facilities that house women.¹¹ Only 29 federal correctional institutions house female prisoners, and 34 states do not have a single one.¹² The dearth of federal facilities for women creates a substantial risk that an incarcerated mother will be housed extremely far from her children despite the placement requirement.

B. Unique Medical Needs

Second, the Dignity Act addresses many of the unique medical needs facing incarcerated women, particularly pregnant women. Almost 150,000 pregnant women are jailed annually,¹³ nearly 4% of women recently admitted to state and federal prisons are pregnant, and hundreds of women give birth in prison each year.¹⁴ The bill prohibits practices such as placing pregnant and postpartum women in segregated housing units and shackling women while giving birth.¹⁵ Shackling women during labor is especially dangerous as it can cause severe pain and injury, and it obstructs emergency medical care.¹⁶ Moreover, restraint during labor is

⁷ Wendy Sawyer & Wanda Bertram, *Jail will separate 2.3 million mothers from their children this year*, PRISON POLICY INITIATIVE (May 13, 2018), <https://www.prisonpolicy.org/blog/2018/05/13/mothers-day-2018/>.

⁸ The Sentencing Project, *supra* note 1.

⁹ S. 1524 §§ 2-3.

¹⁰ S. 1524 § 2.

¹¹ Of 110 federal prisons, 6 exclusively house women, 23 house both men and women, and 81 exclusively house men. See Federal Bureau of Prisons, *Our Locations: List of our facilities*, <https://www.bop.gov/locations/list.jsp>.

¹² Those states are Arkansas, Colorado, Delaware, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Nevada, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Wisconsin, and Wyoming. See Federal Bureau of Prisons, *Female Offenders*, https://www.bop.gov/inmates/custody_and_care/female_offenders.jsp.

¹³ Sawyer & Bertram, *supra* note 7.

¹⁴ Carolyn Sufrin, et al., *Pregnancy Outcomes in US Prisons, 2016-2017*, 109 AM. J. OF PUB. HEALTH 799 (2019), <https://ajph.aphapublications.org/doi/pdfplus/10.2105/AJPH.2019.305006>.

¹⁵ S. 1524 § 2.

¹⁶ Equal Just. Initiative, *Shackling of Pregnant Women in Jails and Prisons Continues* (Jan. 29, 2020), <https://eji.org/news/shackling-of-pregnant-women-in-jails-and-prisons-continues/>.

generally unnecessary. It is common sense that laboring women are generally unable to flee or harm others.¹⁷

The bill also guarantees access to gynecological care and free menstrual products, including tampons and pads.¹⁸ Currently, many correctional facilities either do not provide women with menstrual products or provide insufficient products.¹⁹ This is an especially heavy burden on prisoners who have limited or no outside financial support. The average prison job only pays between \$0.14 and \$1.41 per hour,²⁰ and a single box of tampons can cost six to seven dollars.²¹ Women who are unable to pay the extra cost are forced to go without or create makeshift products,²² which can cause health problems.²³

C. *Unique Vulnerability to Violence*

Another goal of the Dignity Act is to reduce violence in prisons, especially against incarcerated women by prison staff. The Dignity Act broadly prohibits male correctional officers²⁴ from strip searching female prisoners and entering female restrooms.²⁵ Reducing the number of situations where male officers are alone with female prisoners is vital to reducing the occurrence of sexual abuse as American prisons have a history of staff-on-prisoner abuse. Although documenting the full extent of sexual abuse in prisons is essentially impossible, isolated investigations into individual facilities have repeatedly found widespread and pervasive sexual abuse in female prisons, sometimes to the point of violating the Eighth Amendment's prohibition on cruel and unusual punishment.²⁶

¹⁷ See also *id.*

¹⁸ S. 1524 § 2.

¹⁹ Kimberly Haven, *Why I'm Fighting for Menstrual Equity in Prison*, AM. CIVIL LIBERTIES UNION (Nov. 8, 2019), <https://www.aclu.org/news/prisoners-rights/why-im-fighting-for-menstrual-equity-in-prison/>.

²⁰ Wendy Sawyer, *How much do incarcerated people earn in each state?*, PRISON POLICY INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/>.

²¹ For example, San Mateo County Jail in California charges \$6.99 per box. Samantha Michaels, *Jail Is a Terrible Place to Have a Period. One Woman is on a Crusade to Make it Better.*, MOTHER JONES (Feb. 21, 2019), <https://www.motherjones.com/crime-justice/2019/02/jail-california-tampons-menstruation-paula-canny-sanitary-pads/>. The Colorado Department of Corrections charges \$5.99 per box. Colo. Dept. of Corrections, *Print Products* (last accessed Nov. 8, 2020), <http://www.doccanteen.com/index.html#printable>. The Michigan Department of Corrections charges \$6.99 per box. Bailey Laske, *Tampons, pads cost money in Michigan's women's prison*, SPARTAN NEWSROOM (June 12, 2018), <https://news.jrn.msu.edu/2018/06/tampons-pads-cost-money-in-michigans-womens-prison/>.

²² Haven, *supra* note 19.

²³ See Emma Goldberg, *Periods Don't Stop for Pandemics, So She Brings Pads to Women in Need*, N.Y. TIMES (Apr. 5, 2020), <https://www.nytimes.com/2020/04/05/us/02IHW-virus-tampons-pads-periods-product-shortages.html>.

²⁴ The language of the bill is gender-neutral but this article uses the terms male correctional officers and female prisoners for clarity.

²⁵ Both provisions include exceptions for emergencies. *Id.* at § 2.

²⁶ E.g., DEPT. OF JUST. CIVIL RIGHTS DIV., INVESTIGATION OF THE EDNA MAHAN CORRECTIONAL FACILITY FOR WOMEN (UNION TOWNSHIP, NEW JERSEY), 3-8 (2020), https://www.justice.gov/opa/press-release/file/1268391/download?utm_medium=email&utm_source=govdelivery (finding pervasive sexual abuse at a New Jersey correctional facility violated the Eighth Amendment); Acting Assistant Attorney General Jocelyn Samuels, letter to Governor Robert Bentley (Jan. 17, 2014),

Protecting incarcerated women from physical and sexual violence is especially important because most incarcerated women are already survivors of abuse. A staggering 86% of women in jail have experienced sexual violence,²⁷ and between 77% and 98% of incarcerated women have been exposed to interpersonal violence.²⁸ The importance of actively protecting incarcerated women from sexual violence is compounded by findings that nearly two-thirds of sexual assault survivors are revictimized in their lifetime.²⁹

II. The Current Status of The Dignity Act

In 2017, the Senate Judiciary Committee never held a vote on the bill. However, the next year, Congress passed the landmark bi-partisan criminal justice reform legislation the First Step Act, which absorbed three of the Dignity Act's provisions. Specifically, the First Step Act prohibited shackling pregnant, laboring, and postpartum women,³⁰ and mandated that female prisoners have access to free menstrual products.³¹ It also included a place of imprisonment provision similar to the Dignity Act, requiring placement of all federal prisoners within 500 miles of their primary residence to the extent practicable.³²

Unfortunately, the First Step Act's placement provision is weaker than the provision in the Dignity Act. First, the law prioritized prisoners' primary residence rather than the location of their children, which is likely to be different if their primary caretaker is now incarcerated. Second, the law placed less emphasis on minimizing distance, and instead, designated 500 miles as an acceptable distance. The First Step Act also included other factors that officials may consider in housing,³³ thereby creating a straightforward guide for prison officials to easily deny placement requests.

Senator Booker re-introduced the Dignity Act in 2019.³⁴ The language of the bill remained largely the same, although without the provisions included in the First

https://www.justice.gov/sites/default/files/crt/legacy/2014/01/23/tutwiler_findings_1-17-14.pdf (finding extensive staff-on-prisoner abuse over two decades at an Alabama prison).

²⁷ ELIZABETH SWAVOLA, ET AL., OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM, 11 (Vera Inst. Of Just., 2016), <https://www.vera.org/downloads/publications/overlooked-women-and-jails-report-updated.pdf>.

²⁸ Shannon Lynch, et al., *Looking Beneath the Surface: The Nature of Incarcerated Women's Experiences of Interpersonal Violence, Treatment Needs, and Mental Health*, 381 FEMINIST CRIMINOLOGY 382 (2012).

²⁹ Catherine C. Classen, *Sexual Revictimization: A Review of the Empirical Literature*, 6 TRAUMA, VIOLENCE, & ABUSE 103, 124 (2005).

³⁰ 18 U.S.C.A. § 4322(a). Notably, the First Step Act is silent on holding pregnant or postpartum women in solitary confinement.

³¹ 18 U.S.C.A. § 4042 Note.

³² 18 U.S.C.A. § 3621(b).

³³ For example, the Bureau of Prisons may specifically consider "bed availability, the prisoner's security designation, the prisoner's programmatic needs, the prisoner's mental and medical health needs, any request made by the prisoner related to faith-based needs, recommendations of the sentencing court, and other security concerns of the Bureau of Prisons" in making housing decisions. *Id.*

³⁴ Dignity for Incarcerated Women Act of 2019, S. 992, 116th Cong. (2019).

Step Act. Unfortunately, the bill has not progressed any further than the 2017 bill,³⁵ and is unlikely to fare better by the end of the year.

III. Next Steps: Federal & State Reform Efforts

A. *The Future of The Dignity Act in the Next Congress*

The future of the Dignity Act is likely dependent on which political party will lead the U.S. Senate in the 117th Congress.³⁶ While two Republican-controlled Senates have been unwilling to take up the bill, a Democrat-controlled Senate would certainly be more inclined to pass The Dignity Act. Moreover, the Act may become a priority for the Biden Administration as Vice President-elect Kamala Harris co-sponsored the bill in both 2017 and 2019.

This potentially shifting political landscape could finally bring much need relief for currently incarcerated women. The importance of passing The Dignity Act is two-fold. First, it would directly improve the lives of the over 16,000 women in the federal system by protecting them from a heightened-risk of violence, ensuring access to proper medical care, and fostering strong relationships with their minor children. Second, states and localities often look to federal policy in setting their own. As the President of the Vera for Justice Institute³⁷ explains, federal action can “further catalyze[] state action” and “send[] a signal that [women’s prison reform] is a national movement.”³⁸

However, if the Senate remains under Republican control, more progress may be found at the state level. Over the past two years, #cut50, a bipartisan campaign run by the nonprofit Dream Corps,³⁹ has successfully advocated for state-level legislation modeled after the Dignity Act all across the nation.⁴⁰ As of this writing, eleven states have passed a version of the Dignity Act,⁴¹ and four more have introduced legislation.⁴² This trend holds tremendous promise to help even more

³⁵ A companion bill was introduced in the House of Representatives in 2019 but did not progress beyond subcommittee. See Dignity for Incarcerated Women Act of 2019, H.R. 2034, 116th Cong. (2019).

³⁶ Which party has control of the Senate will depend on two runoff elections in Georgia set for January 2021. See Luke Broadwater, *What's a Runoff, and Why Are There Two? Here's Why Georgia Matters*, N.Y. TIMES (Nov. 7, 2020), <https://www.nytimes.com/2020/11/07/us/politics/georgia-senate-runoff-explainer.html>.

³⁷ The Vera Institute of Justice is dedicated to working with all levels of government toward criminal justice reform. Vera Inst. for Just., *About Us* (last accessed Nov. 11, 2020), <https://www.vera.org/about>.

³⁸ Leon Neyfakh, *Obama Wants to End Mass Incarceration*, SLATE (July 15, 2015), <https://slate.com/news-and-politics/2015/07/obama-and-mass-incarceration-how-much-power-does-the-federal-government-have-to-solve-this-problem.html>.

³⁹ #cut50, DREAM CORPS (last accessed Nov. 8, 2020), <https://www.thedreamcorps.org/our-programs/cut50/>.

⁴⁰ *Dignity for Incarcerated Women*, DREAM CORPS (last accessed Nov. 8, 2020), <https://www.thedreamcorps.org/our-programs/cut50/campaigns/dignity-for-incarcerated-women/>.

⁴¹ The eleven states are Arkansas, California, Connecticut, Florida, Georgia, Kentucky, Louisiana, Maryland, New Jersey, Oklahoma, and Tennessee. *Id.*

⁴² The four additional states are Arizona, Michigan, Pennsylvania, and Virginia. *Id.*

women, as the vast majority of incarcerated women are held in state prison and jails.⁴³

B. Advancing Reforms Beyond The Dignity Act

While the Dignity Act is a promising and significant first step, it will not solve all the challenges facing incarcerated women. In addition to the aforementioned criticisms of the bill's existing provisions, the Dignity Act is also silent on several key issues. For example, incarcerated women experience higher rates of serious mental illness than both the general population and incarcerated men,⁴⁴ yet the Dignity Act does not guarantee adequate mental health treatment. The Act also does not include provisions to reduce the number of women who are incarcerated in the first place. Diversion is less expensive and more effective than incarceration.⁴⁵ As most women who are arrested are arrested for low-level, non-violent offenses, many incarcerated women would be good candidates for diversion.⁴⁶ Finally, the bill does not include any provisions on reentry. Formerly incarcerated women have higher rates of unemployment and homelessness than formerly incarcerated men.⁴⁷ As poverty is the highest predictor of recidivism,⁴⁸ reentry programs are essential for keeping women out of prison. Advocates and policymakers should continue to advance bold ideas and pursue additional legislation to ensure the humane and just treatment of incarcerated women.

⁴³ Compared to the 16,000 women in federal prisons, there are 99,000 women in state prisons and 101,000 women in local jails. Kajstura, *supra* note 2.

⁴⁴ Lynch, *supra* note 28.

⁴⁵ Micah W. Kubic & Taylor Prendergrass, *Diversion Programs Are Cheaper and More Effective Than Incarceration. Prosecutors Should Embrace Them.*, Am. Civil Liberties Union (Dec. 6, 2017 12:45 a.m.), <https://www.aclu.org/blog/smart-justice/diversion-programs-are-cheaper-and-more-effective-incarceration-prosecutors>.

⁴⁶ SWAVOLA ET AL., *supra* note 27, at 26.

⁴⁷ Wendy Sawyer, *Who's Helping the 1.9 million women released from prisons and jails each year?*, PRISON POLICY INITIATIVE (July 19, 2019), <https://www.prisonpolicy.org/blog/2019/07/19/reentry/>.

⁴⁸ *Id.*