



*Hearing of the Committee on the Judiciary  
Subcommittee on Crime, Terrorism and Homeland Security*

*Women and Girls in the Criminal Justice System*

**Written Statement of the American Civil Liberties Union,  
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## **Introduction<sup>1</sup>**

The American Civil Liberties Union (ACLU) would like to thank Crime Subcommittee Chairwoman Karen Bass and Ranking Member John Ratcliffe for the opportunity to testify before the House Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security during this hearing on *Women and Girls in the Criminal Justice System*.

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures and communities to defend and preserve the individual rights and liberties that the Constitution and the law of the United States guarantee to everyone in the country. With more than four million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, DC, for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, or record of arrest or conviction. The ACLU advances equality through litigation and policy advocacy. The ACLU's priorities include defending the rights of immigrants, advocating for economic justice, and defending the housing rights of vulnerable populations.

### **I. Trends Among Women in Prison**

Prison is a women's issue.<sup>2</sup> Lost in the sobering statistics on the country's prison population and the narrative surrounding mass incarceration is the degree to which women are ensnared in the criminal justice system. Over the past thirty years, the number of incarcerated women has grown exponentially. Women are the fastest growing segment of the prison population, increasing by 700% from 1980 to 2017—a rate twice that of men.<sup>3</sup> Recent statistics from the Federal Bureau of Justice Statistics (BJS) indicate that, of the estimated 6.9 million persons under the supervision of adult correctional systems at year-end 2013, 18%, or 1.2 million, were women.<sup>4</sup> Today, more than 200,000 women are incarcerated in jails and prisons nationwide.<sup>5</sup> As of 2013, almost 60% of all women in correctional facilities were between the ages of 18 and 39.<sup>6</sup>

The majority of women are incarcerated for low-level offenses, most often property and drug-related crimes.<sup>7</sup> Even as the rate of imprisonment for women has risen dramatically in recent years, the percentage of women sentenced for crimes involving violence has fallen.<sup>8</sup> Much of the growth in the women's prison population over the past thirty years can be attributed to the "War on Drugs." From 1988 to 1999, the number of women in state facilities for drug offenses grew by 888%.<sup>9</sup> In New York for example, drug offenses accounted for 91% of the increase in the number of women sentenced to prison between 1986 and 1995.<sup>10</sup> This legacy has continued, and, at the end of 2012, a higher percentage of incarcerated women than men are serving time for drug offenses.<sup>11</sup> Drug and property offenses are often fueled by conditions of poverty, addiction, and untreated mental health issues, which is experienced by many of the women cycling through the criminal justice system.<sup>12</sup>

Women are more likely than men to commit crimes because of poverty. Women represent a disproportionate number of people arrested for and convicted of property crimes such as fraud, forgery, and embezzlement.<sup>13</sup> When they participate in more serious crimes, including serious drug crimes and robbery, women are generally not principals of the crime, but rather are minor accomplices.<sup>14</sup> When women commit homicide, they often do so in order to protect themselves from men who have abused them.<sup>15</sup> Thus, a man and a woman convicted of the same crime and given the same sentence may have been treated unequally by the system. Women's sentences are often disproportionate to their crimes and often do not take into consideration these mitigating factors.<sup>16</sup>

Women of color are disproportionately represented in the population of incarcerated women. In 2014, Black women were more than twice as likely as white women to be incarcerated and Latina women were 20% more likely to be incarcerated than white women.<sup>17</sup> Although the racial disparity among incarcerated women has narrowed in the past fifteen years—the rate of incarceration for Black women in prison declined by 30% between 2000 and 2009—the legacy of disparity remains.<sup>18</sup> Among women ages 18-19, the results were particularly pronounced—Black women were almost five times more likely than white women of the same age to be incarcerated.<sup>19</sup> Latina women were also incarcerated at a disproportionate rate.<sup>20</sup> Although Black children make up only 14% of all youth under age 18, 34% of girls incarcerated in youth facilities are Black; similarly, Native American youth make up only 1% of all youth but represent 3% of girls incarcerated in juvenile facilities.<sup>21</sup> Girls are more likely than boys to be in juvenile facilities due to low-level status offenses or technical violations and are far less likely to be detained for violent offenses.<sup>22</sup>

## **II. Women in the Federal Prison**

### **A. Mandatory Minimums and Federal Crimes**

The Sentencing Reform Act of 1984 (SRA) is the framework for the current federal sentencing system. In an effort to increase uniformity and reduce sentencing disparity, the SRA eliminated indeterminate sentencing (i.e. federal parole) and established the U.S. Sentencing Commission (Sentencing Commission) which led to the creation of the Federal Sentencing Guidelines (Guidelines).<sup>23</sup> In 1986, not long after the SRA was enacted, the Anti-Drug Abuse Act (ADAA) established mandatory minimum sentences for federal drug crimes.<sup>24</sup> The ADAA and other laws pass after 1986 included long sentences for many drug offenses based on the drug type and quantity, not the role the person played in a drug conspiracy.<sup>25</sup>

There are only two options judges have to reduce mandatory sentences for people convicted of drug crimes. These options occur when:

- An individual cooperates or provides substantial assistance to prosecutors investigating related offense; or
- A person qualifies for the “safety valve.” The five part “safety valve” criteria is when an individual has: (1) no more than one criminal history point; (2) not been involved in

violence or had a weapon; (3) not committed an offense involving serious bodily injury or death; (4) not played a leadership role; and (5) fully and truthfully disclosed information.<sup>26</sup>

Furthermore, federal drug conspiracy laws result in long, harsh sentences for people who are not involved in crimes beyond their associations with intimate partners and family members. According to Sec. 21 U.S.C. § 841 and 21 U.S.C. § 846, anyone who attempts or conspires to commit a drug offense will be subject to the same penalties as those for the actual offense.<sup>27</sup> Too often, federal drug conspiracy laws disproportionately punish those who unwittingly or unknowingly find themselves caught in the net of drug-related activity, even in a peripheral role. Women who are minimally involved in drug dealing, but who have partners or family members involved in the drug trade can be required to serve long sentences as a result of conspiracy laws. Some of these relationships are abusive or coercive and leave women vulnerable and with few options. Women of color often find themselves subject to prosecution based on their relationships and associations rather than their own personal conduct. Drug conspiracy laws have contributed to the recent explosion of drug convictions and incarceration rates for women in the federal system.

One such story is that of Danielle Metz, a mother of two who received a triple life plus 20 years sentence for her involvement in her husband's cocaine distribution enterprise which was her first offense.

“Danielle was the youngest of nine children raised in New Orleans and became involved with a drug dealer named Glenn when she was 18. She recalls that Glenn, then 30, promised to care for her and her baby. She says that she knew he was involved in drug distribution and that she was not initially involved in his activities. They married after they had a daughter together, Gleneisha.

Metz says her husband was very controlling and forbid her from getting a job or leaving their home for more than an hour at a time. According to Metz, he became physically and mentally abusive after they married and made her feel subservient because he paid the bills. She recalls that he later asked her to ride with her aunt Angela, a petty drug dealer who had become involved in Glenn's drug activities, to transport money to Houston. Metz says she accompanied her aunt twice and brought cocaine back to New Orleans on one of these occasions. According to Metz, she also collected money from Western Union, also at Glenn's request.

In 1990, they moved to Las Vegas, separating her from her family. According to Metz, Glenn struck her, causing her nose to gush with blood, while they were visiting her sister in Los Angeles. While returning to Las Vegas, Metz planned her escape. The next day, before boarding a flight to New Orleans, where her family still lived, Metz says she called Glenn to tell him where she had left the car and that she was leaving him. Two months later, she was arrested and indicted for participating in a drug conspiracy with her estranged husband.

Metz, then 26, was sentenced to three life without parole sentences plus 20 years in 1993. It was her first conviction. Metz was convicted largely on the basis of testimony from her aunt Angela, who had earlier been arrested for an unrelated drug charge and testified against Metz and her husband as part of a plea deal. Metz says that she had no useful information she could trade, the only way to win a sentence reduction under federal mandatory sentencing.”<sup>28</sup>

In 2016 after serving 23 years in federal prison, President Barack Obama granted Metz clemency. At the age of 50, Metz enrolled in school at Southern University of New Orleans and is studying to become a social worker. She recently made the dean’s list with a 3.75 grade point average.

Women, like Danielle, make up approximately 7% of the federal prison population.<sup>29</sup> More than 70% of the women in federal custody in 2017 were sentenced for drug trafficking (37.2%), fraud (20.4%), or immigration (15.3%) offenses.<sup>30</sup> Sixty-eight percent (68.0%) of females sentenced to federal prison had little or no prior criminal history and only 3% had serious or significant criminal histories. Latina women made up 44% of women convicted for drug trafficking while white women were 35% and Black women made up almost 15%.<sup>31</sup> Black and white women each made up 37% of those sentenced for fraud, with Latina women making up 20%. In 2017, almost 77% of females in the federal system were sentenced to prison, but 15% received a mandatory minimum sentence.<sup>32</sup> However, the difference in the length of sentence between those who received mandatory sentences and those who did not is drastic. Women who were sentenced to mandatory minimum sentences received an average of 75 months or over six years while those who did not were sentenced to an average of 19 months or a little over a year and a half.<sup>33</sup>

Today, there are almost 13,000 women<sup>34</sup> in Bureau of Prisons (BOP) facilities across the country compared to 1980, when there were 13,000 women in both state and federal prisons.<sup>35</sup> Since that time, women in prison have increased by twice the rate of men incarcerated.<sup>36</sup> Unfortunately, in addition to poverty, what often lands women in prison are their histories of physical and sexual abuse, high rates of HIV, and substance abuse problems.<sup>37</sup> When women are incarcerated, their children and families are also impacted. Mothers, in particular, are an integral part of the family structure. .

## **B. Conditions of Confinement for Women in Federal Prison.**

In September of 2018, the U.S. Department of Justice (DOJ) Office of Inspector General (OIG) released a report that evaluated the Federal Bureau of Prisons (BOP) management of women in the agency’s custody entitled *Review of the Federal Bureau of Prisons’ Management of Its Female Inmate Population*.<sup>38</sup> OIG examined BOP’s capacity and efforts to address the unique needs of women in federal prisons through the agency’s policies, programs, and decisions from FY 2012 through FY 2016. The OIG evaluated how BOP’s Women and Special Populations Branch and other relevant offices implemented pregnancy programs, gender-responsive trauma treatment and policies related to physical searches of female inmates as well as inmate access to feminine hygiene products. Finally, the OIG reviewed BOP’s decision to convert its Danbury,

Connecticut low security facility from a female to a male prison and how that affected women who had been housed at Danbury.<sup>39</sup>

The OIG concluded that BOP had not been strategic in its management of females in its custody. They recommended that BOP take supplemental steps to ensure that individual facilities are meeting the needs of females. The report found instances where BOP's programming and policies did not fully consider the needs of women inmates, thus making it hard for women to take advantage of important programs and supplies. The OIG concluded that BOP was following Prison Rape Elimination Act (PREA) standards and regulations, but the policies prohibiting cross gender searches were carried out inefficiently. Lastly, they determined the BOP's conversion of Danbury to a male prison had negatively affected some females who had been housed at the facility.

### **III. Burdens of Mothers in Behind Bars**

The majority of women in prison are mothers. Since 1991, the number of children with a mother in prison has grown 131%.<sup>40</sup> In 2004, approximately 62% of women had minor children.<sup>41</sup> The majority of these women were both custodial parents and primary financial providers. Mothers behind bars are likely to have lived in single-parent households and the overwhelming majority report that they were responsible for the daily care of their children. Unlike males, incarcerated women report that the other parent is not the caregiver for their children while they are incarcerated. Instead, a grandmother or other relative is the most likely caregiver for a woman's child or children. Further, 11% of mothers behind bars—five times more than men—report that their children are in foster care or otherwise cared for by the state.<sup>42</sup>

Since women are more likely than men to be the primary or sole caretaker of their children prior to incarceration,<sup>43</sup> children and families are profoundly affected by the rising numbers of women sent to prison.<sup>44</sup> Between 1991 and 2007, the number of children with a mother in prison more than doubled.<sup>45</sup> About 62% of women in state prisons, and 56% of women in federal prison, have minor children.<sup>46</sup> The very existence of the parental relationship can be endangered when a parent is incarcerated.<sup>47</sup> Incarcerated parents who have not been accused of neglect or abuse are far likelier to lose their parental rights permanently than are non-incarcerated parents who have assaulted their children. Thousands of parents in the last decade have had their rights terminated solely on the basis of their incarceration.<sup>48</sup> In addition to the devastating consequences of parental incarceration on families, children's future prospects also dim; children with mothers in custody are more likely to develop depression and anxiety, are at heightened risk of future substance abuse problems, and are more likely to become involved in the criminal justice system.<sup>49</sup>

## **IV. Needs of Women in Prison**

### **A. Differing Health Needs**

Women in prison have medical and mental health histories and needs that differ from the non-incarcerated population as well as their male counterparts. Women in jails and prisons have significantly higher rates of both chronic conditions (which include cancer, diabetes, asthma and other conditions) and infectious diseases (which include tuberculosis and sexually transmitted infections) than do their male counterparts.<sup>50</sup> Prison itself can contribute to health concerns; incarceration is directly linked to premature mortality for women, but not for men.<sup>51</sup> Additionally, substance abuse issues and mental illness are more prevalent among incarcerated women. A staggering proportion of incarcerated women suffer from mental health problems. In federal facilities, more than 40% more women than men have been diagnosed with mental health conditions.<sup>52</sup> And much higher numbers of women in state prisons and local jails are reported to suffer from mental health problems than similarly situated men.<sup>53</sup> Women also report past physical or sexual abuse, as well as other traumas, at a higher rate than their male counterparts.<sup>54</sup> In one BJS study, for example, 57% of women in state prison facilities, as compared with 16% of men, reported having been abused prior to admission.<sup>55</sup> These numbers might be significant underestimates; for example, the Federal Bureau of Prisons (BOP) relies on estimates that upwards of 90% of women entering prison have experienced trauma, most often sexual abuse.<sup>56</sup>

Because the great majority of people in prisons have always been men, corrections health care policies were created with the needs of men at the forefront, without regard for women's unique health needs. Despite the constitutional mandates of *Estelle v. Gamble*, which requires prisons to provide adequate medical care to the people in their custody,<sup>57</sup> widespread deficiencies in appropriate health care standards for females continue to exist. These deficiencies are cast in no sharper relief than in the context of reproductive health care policies and practices for women in prison. Particularly given the demographic composition of incarcerated women,<sup>58</sup> reproductive health care is one vital component in the provision of adequate access to health care for women in prison. In many core areas, the reproductive health services rendered to pregnant women are abysmally inadequate. Lawmakers and correctional facilities can ill-afford to continue to ignore the reproductive health care rights of incarcerated women. The public and our leaders must raise our voices to demand these critical rights for all.

### **B. Prenatal Care**

Approximately between four and five percent of women admitted into prisons and jails are pregnant at intake, though data on the actual number of pregnant women in prisons and jails remains elusive.<sup>59</sup> As the number of incarcerated women increases, correctional institutions must increasingly face the task of caring for pregnant women in jails and prisons. They are increasingly responsible for providing prenatal medical treatment, caring for women who give birth behind bars, serving the needs of mothers and their children, and providing access to abortions for those who wish to terminate their pregnancies. Corrections facilities have repeatedly shown that they are either unable or unwilling to provide the level of care necessary to ensure the health and safety of pregnant women who are incarcerated.

Little formal data exists about the quality of medical care provided to pregnant females.<sup>60</sup> However, what reports do exist tend to indicate that prenatal care is lacking or completely absent in many cases.<sup>61</sup> Lack of access to prenatal care is especially dangerous because most women have high-risk pregnancies and need special care to keep them and their children safe during and after pregnancy.<sup>62</sup>

One example is a former inmate at Wichita County Jail in Wichita Falls, Texas, who brought suit against jail officials and staff in May 2014 after she was forced to give birth in a prison cell, ultimately resulting in the loss of her baby.<sup>63</sup> Nicole Guerrero was eight-and-a-half months pregnant when she was admitted to the jail. According to her complaint, several days later, Ms. Guerrero began experiencing lower back pain, cramping, and vaginal discharge and bleeding. Over the course of several hours, Ms. Guerrero experienced excruciating pain while her repeated requests for help and medical attention were ignored. Ms. Guerrero went into labor while locked in a cell. She was aided by detention officers only in the final stages of her delivery, and even then, no medical personnel assisted her. The baby's umbilical cord was wrapped around her neck, and she was dark purple in appearance and unresponsive. The detention officer assisting Ms. Guerrero made no attempt to revive the baby while awaiting emergency services. Her baby was pronounced dead later that morning.<sup>64</sup> Ms. Guerrero's lawsuit has since been settled.<sup>65</sup>

### **C. Shackling Pregnant Women**

In addition to failing to provide necessary care, prisons may also actively harm pregnant people by shackling them. Shackling pregnant women is a dangerous and inhumane practice and widely regarded as an assault on human dignity, as well as an unsafe medical practice. Although significant progress has been made to prohibit this practice in federal prisons, women in prisons across the country are still routinely shackled during pregnancy and childbirth.

Shackling poses an unacceptable risk to the health of the pregnant woman. Freedom from physical restraints is especially critical during labor, delivery, and during postpartum recovery. Women often need to move around during labor, delivery and recovery, including moving their legs as part of the birthing process. Restraints on a pregnant woman can interfere with the medical staff's ability to appropriately assist in childbirth or to conduct sudden emergency procedures.<sup>66</sup> Because shackling limits the ability of a woman to move during labor, she is left unable to adequately shift positions in order to manage the extreme pains of labor and childbirth. This limitation of movement during pregnancy and labor can also increase the risk of blood clots.<sup>67</sup> Leg restraints may also cause severe cuts on women's ankles because of the strains associated with childbirth.<sup>68</sup> Using restraints after delivery may prevent mothers from effectively healing.<sup>69</sup>

Additionally, during all stages of pregnancy, shackling poses an unacceptable risk to the health and safety of the fetus and the life of a child. Pregnancy can create problems with balance that are exacerbated by shackling. Falls can injure not only the mother, but also the fetus.<sup>70</sup> When

restraints are used during labor, doctors are limited in how they can manipulate a mother for the safety of the unborn child. During the final stages of labor it is important for the physician to act quickly in order to avoid potentially life-threatening emergencies for both the mother and the unborn child. Shackles severely limit such actions and as such pose a threat to the survival of the fetus. Doctors may not be able to perform emergency caesarean sections in time due to shackles.<sup>71</sup>

Among the states that have restricted shackling of pregnant females, none have documented instances of women in labor escaping or causing harm to themselves, the public, security guards, or medical staff. In most instances, armed corrections officers accompany shackled women into or around the delivery room. These officers can ensure the safety of the physicians, mothers and the newborn without the use of shackling restraints.<sup>72</sup> Currently, twenty-two states—Arizona, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Mexico, New York, Pennsylvania, Rhode Island, Texas, Vermont, Washington and West Virginia and the District of Columbia, have laws prohibiting or restricting shackling pregnant women.<sup>73</sup> The federal government has also codified a long-standing ban on shackling pregnant females in federal custody with the just enacted First Step Act.<sup>74</sup>

#### **D. Solitary Confinement**

Women may also disproportionately be placed in solitary confinement, especially pregnant women,<sup>75</sup> individuals with mental illness,<sup>76</sup> transgender women and other sexual minorities,<sup>77</sup> and—in a particularly disturbing trend—victims of sexual assault by prison guards.<sup>78</sup> Women of color, especially Black women, are held in solitary confinement at rates far exceeding their white counterparts.<sup>79</sup> Women are also more likely than men to receive disciplinary actions for minor, nonviolent infractions like “disobedience” and also more likely to be placed into solitary confinement as punishment for such minor infractions.<sup>80</sup>

Solitary confinement can wreak extreme psychological harms on people generally, and pregnant women particularly. Even without the heightened risks created by solitary confinement, pregnancy often carries greater risks of stress and depression.<sup>81</sup> Placing pregnant women in solitary confinement only amplifies these risk factors. Stress on a pregnant woman may result in grave harms to the pregnant woman and her fetus, including preterm labor, low birth weight, and mental health problems for the child.<sup>82</sup>

For these reasons, international standards set by the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders—known as the Bangkok Rules—prohibit the placement of pregnant or nursing women in solitary confinement.<sup>83</sup> States are starting to take notice: Pennsylvania,<sup>84</sup> New York,<sup>85</sup> Massachusetts,<sup>86</sup> and California<sup>87</sup> limit the placement of pregnant people in solitary confinement under statutes, regulations, or settlement agreements. However, most pregnant women in the United States remain vulnerable to the threat of solitary confinement and the terrible risks this practice creates for both women and their pregnancies.

## **E. Birth Behind Bars**

After giving birth, women who are incarcerated must face the additional strain of separating from their newborns. Currently, the overwhelming majority of children born to incarcerated mothers are immediately separated from their mothers after birth and placed with relatives or into foster care.<sup>88</sup> It is estimated that 85% of incarcerated mothers in the United States are involuntarily separated from their child as a result of their incarceration.<sup>89</sup> In-prison nurseries and community based residential parenting programs are available in only a handful of states.<sup>90</sup> Only 42% of mothers in prison reported weekly contact with their children through in-person visits, video communications, telephone, mail, or e-mail.<sup>91</sup> These options tend to be infrequent, unpredictable, and of poor quality. Tragically, more than half of incarcerated mothers reported that they had never experienced an in-person visit with their child.<sup>92</sup>

Pregnant women facing imminent separation from their newborns experience profound trauma.<sup>93</sup> The children who experience this separation are similarly harmed. The separation is considered an adverse childhood experience, which can cause long-lasting emotional and behavioral problems, especially compounded by other adverse experiences common among children with incarcerated parents such as poverty.<sup>94</sup> Empirical evidence shows that the separation of an infant from her mother during the first year drastically impairs her ability to sympathize or show concern for others.<sup>95</sup> Additional common symptoms of maternal separation include attachment disorders; aggression and anger; developmental and behavioral problems; sleeping, eating, or attention disorders; delays in educational development and achievement; excessive hostile behaviors toward peers; problems with social adaptation; greater likelihood to develop addiction to drugs or alcohol or engage in criminal activity; and unhealthy sexual behavior.<sup>96</sup>

## **F. Access to Menstrual Hygiene Products**

Access to sufficient supplies of menstrual hygiene products is a basic health care need that still goes unfulfilled at many institutions. Not all states require adequate access to menstrual products; even some indigent females are forced to purchase some or all of their monthly supply.<sup>97</sup> Because many facilities require women to ask correctional officers for menstrual products, the opportunity for abuse is rampant. Officers may use basic hygiene needs to coerce them for sexual or other favors or to punish them for any reason. They may also use the threat of withholding necessary products to keep women in line or to prevent them from reporting abuse or other harmful conditions. These possibilities are not just abstract; many women have had to navigate the difficulty of accessing menstrual hygiene products that should have been made freely available to them. For example, Maryland legislators heard testimony from women who were denied menstrual hygiene products by officers in order to control them and firmly establish a dangerous power dynamic;<sup>98</sup> a formerly incarcerated woman in Connecticut also recounted the fear and humiliation of having to ask officers for menstrual products knowing that her requests might be derided or even denied.<sup>99</sup>

In one Michigan jail, women were regularly denied access to desperately needed menstrual products.<sup>100</sup> Females there received such products late, after begging for them, or not at all. They were therefore forced to use toilet paper to staunch the bleeding or else bleed into their prison jumpsuits. Because laundry day occurred once a week, women were forced to re-wear

bloody clothes for up to a full week. In addition, prison staff forced women to compete for limited menstrual products, in one case ordering 30 women to share a pack of 12 sanitary napkins. This behavior was cruel and senseless—except as a method of humiliation and control.

Even when policies to provide menstrual hygiene products do exist, they are not always fully implemented. For example, BOP guidelines require provision of menstrual hygiene products, but a review by the OIG determined that women still do not have sufficient access.<sup>101</sup>

## **V. Gender Responsive Programming**

Because women entering prison have trauma histories and needs different from men, correctional institutions must develop and implement gender-responsive programming. Gender-responsive programming includes medical and mental healthcare that is responsive to women's needs. Pregnancy testing, prenatal care, and access to abortion must become standard in all institutions that house women. Some facilities have already begun to do this, but not nearly enough. For example, one study found that fewer than 40% of jails test women for pregnancy upon entrance and fewer than 50% utilize appropriate opioid withdrawal protocol for pregnant women.<sup>102</sup>

A number of states and the federal government have experimented with gender-responsive pregnancy programs. A few states have piloted doula programs, in which pregnant women are given training and emotional support during pregnancy. Women were generally satisfied with these programs and had lower caesarean-section rates, although they did not lessen the grief the mothers felt at having to part with their infants after birth.<sup>103</sup> A more intensive program in Michigan allows some pregnant women to live in a special housing unit during pregnancy, receive intensive specialized prenatal care including substance-abuse treatment, receive other necessary social services, and live and bond with their children for a month after birth. This program has a high success rate, with positive outcomes for the children and lower recidivism rates for the mothers.<sup>104</sup> A federal program allows some women to live and bond with their infants after giving birth. Participants spoke positively of the program and the opportunity to form a bond with their children, but the program is underutilized.<sup>105</sup> These programs show the benefits of pregnancy-focused programming and care, but they have not been sufficiently replicated—prisons can do much more.

Similarly, states and facilities must work to ensure that women have access to menstrual hygiene products. Maryland now leads the way with a law requiring correctional facilities that house women to provide sufficient menstrual hygiene products to their females and to maintain records on the availability of such products.<sup>106</sup> Reporting and review of policies and actual availability is important, as the OIG report showed. Even when a policy exists, outside actors, such as legislatures or independent agencies, may need to step in when it does not translate to true access.<sup>107</sup>

Trauma victims may suffer when guarded during their most private moments by men without a female guard present, in addition to the potential for abuse and degradation.<sup>108</sup> The loss of privacy experienced by people in prison is especially damaging to the many incarcerated women who are also victims of past sexual abuse, since close supervision and discipline by male guards can reinforce feelings of vulnerability and can re-traumatize women who have experienced violence

by men.<sup>109</sup> The presence of male guards in women's facilities also increases the danger of staff sexual misconduct,<sup>110</sup> which remains a serious problem in spite of increased awareness of the issue.<sup>111</sup>

Thus, correctional facilities need to ensure that policies and programs are responsive to trauma. This includes not just counseling services, but a holistic approach to ensure that prison staff do not re-traumatize victims or prevent their recovery. Trauma-responsive programming has been instituted in some places. For example, the BOP has instituted two gender-responsive programs: Resolve and Female-Integrated Treatment Program (FIT). Resolve is a national program offered to women with trauma-related mental illness that includes education, psychological testing, and various types of group therapy intended to teach skills for overcoming symptoms.<sup>112</sup> Women who took the whole program have found it helpful in dealing with past trauma and preparing for life after prison, but staffing is so low that only 3% of women sentenced in BOP can be accommodated at a time.<sup>113</sup> FIT is a more intensive, individualized program tailored to each woman's mental health, substance abuse, and trauma history. However, this program is only offered at one low-security institution and is therefore not available to the vast majority of women in BOP custody.<sup>114</sup>

## V. Conclusion and Recommendations

Women are the fastest growing incarcerated population in the United States, leaving far too many children and families without a mother. Until incarcerating women in this country becomes a punishment of last resort, the criminal legal system has to determine how to deal with the healthcare, childcare and gender programming needs of women in jails and prisons. With the unprecedented rise in the number of women behind bars, federal and state systems must figure out how best to keep women safe and healthy while in custody.

Once incarcerated, women are subjected to a system that was designed by and for men — with glaring voids of resources, treatments and conditions required for women. In order to create a smarter, fairer justice system, we must establish policies specifically designed with women in mind. Until we recognize the unique circumstances, needs and consequences associated with women who come into contact with the criminal legal system, we will never truly address the nation's mass incarceration problem.

Below are a number of recommendations that encourage the criminal legal system to use incarceration as a last option and to focus on keeping women home in society, and with their children and families.

**1. Develop Alternatives to Incarceration.** Compared to men, women—and girls—are more often first-time, low level offenders. Even women convicted of more serious offenses often became involved in criminal activity on behalf of male partners or other family members. Society would be better served if more women were provided with opportunities to avoid incarceration through diversion programs, probation and other rehabilitative alternatives. Ensuring that women can access jobs, education, housing and adequate medical and mental health care would afford greater public safety without punitive and unnecessary incarceration.

**2. Foster Mother-Child Relationships.** Correctional facilities must develop and implement policies that support the bond between a mother and her child, even while the mother remains incarcerated. The mother-child relationship must be fostered through such measures as broader visitation policies, carefully designed in-prison nursery programs, child-friendly visitation areas, video visitation to supplement, rather than replace, in-person visitation, access to email and keeping incarcerated women in close proximity to their home communities.

**3. Ban Shackling and the Use of Solitary Confinement on Pregnant Women.** All states must end the practice of shackling women during pregnancy, delivery and postpartum. The practice is inhumane and unsafe. Those states that have yet to enact anti-shackling laws must do so, and those states with anti-shackling laws need to strengthen their laws to ban the practice outright, as well as fully enforce their laws. Likewise, all states and jurisdictions should enact laws and policies to ban the practice of placing pregnant women in solitary confinement and ensure that those laws and policies are implemented.

**4. Implement Clear Health Policies for Women.** All correctional facilities housing women and girls must develop and implement clear policies regarding their specific health care needs, including but not limited to pregnancy care, postpartum care, the provision of abortions, routine gynecological care, and pre- and post-menopausal care. These policies must conform to the community standard of care and the law.

**5. Train Corrections Staff.** All corrections facilities housing women and girls must appropriately train their custody and medical care staffs to address women’s unique needs, including their trauma history, higher rates of mental health diagnosis, menstrual needs, general health and reproductive health care needs, and their ongoing role as mothers and community members.

**6. Implement Gender-Responsive Programming.** Many correctional facilities have experimented with various gender-responsive programming, including access to pregnancy-care and menstrual hygiene products and trauma-informed approaches to correctional management. Successful programs must be replicated and expanded to provide appropriate programming to all women under correctional supervision.

## Endnotes

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<sup>1</sup>Special thanks to Lauren Kuhlik Equal Justice Works Fellow, Sponsored by Crowell & Moring for drafting portions of this testimony.

<sup>2</sup> Prisoners are nearly always housed according to their sex as assigned at birth. See *Classification and Housing of Transgender Inmates in American Prisons*, 127 HARV. L. REV. 1746, 1748 (2014). “Women in prison” refers to individuals housed in women’s facilities, who may include transgender men and other gender non-conforming people; transgender women, who are often housed in male facilities, also face similar obstacles in prison arising from their own trauma histories and are equally entitled to appropriate gender-responsive programming.

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- <sup>3</sup> THE SENTENCING PROJECT, INCARCERATED WOMEN AND GIRLS (updated 2019), *available at* <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/> [hereinafter INCARCERATED WOMEN]. <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/>
- <sup>4</sup> LAUREN E. GLAZE & DANIELLE KAEBLE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 1, 6 (2014), *available at* <http://www.bjs.gov/content/pub/pdf/cpus13.pdf> [hereinafter BJS STATISTICS].
- <sup>5</sup> Aleks Kajstura, PRISON POLICY INITIATIVE, WOMEN’S MASS INCARCERATION: THE WHOLE PIE 2018 (2018), *available at* <https://www.prisonpolicy.org/reports/pie2018women.html>; E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2016 4 (2018), *available at* <https://www.bjs.gov/content/pub/pdf/p16.pdf>; ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, JAIL INMATES IN 2016 9 (2018), *available at* <https://www.bjs.gov/content/pub/pdf/ji16.pdf>.
- <sup>6</sup> E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013 8 (2014), *available at* <http://www.bjs.gov/content/pub/pdf/p13.pdf> [hereinafter PRISONERS IN 2013].
- <sup>7</sup> *Id.* at 15. In 2013, approximately 63% of women in prison were incarcerated for non-violent offenses. *Id.*
- <sup>8</sup> In the late 1970s, the rate of imprisonment for women was 10 per 100,000 in the state prison system, 49% of whom were sentenced for violent crimes. NATASHA A. FROST ET AL., INSTITUTE ON WOMEN AND CRIMINAL JUSTICE, HARD HIT: THE GROWTH IN THE IMPRISONMENT OF WOMEN, 1977-2004 7, 10 (2006), *available at* <http://csdp.org/research/HardHitReport4.pdf> [hereinafter HARD HIT]. By 2011, the imprisonment rate had risen to 65 per 100,000; however, as of 2012, approximately 37% of women in state prisons were sentenced for violent crimes. *See* PRISONERS IN 2013, *supra* note 5, at 6, 15.
- <sup>9</sup> LEONORA LAPIDUS ET AL., CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES 16 (2005), *available at* [https://www.aclu.org/sites/default/files/field\\_document/asset\\_upload\\_file431\\_23513.pdf](https://www.aclu.org/sites/default/files/field_document/asset_upload_file431_23513.pdf).
- <sup>10</sup> HARD HIT, *supra* note 6, at 24.
- <sup>11</sup> BJS STATISTICS, *supra* note 3, at 15.
- <sup>12</sup> ACLU OF PENNSYLVANIA, REPRODUCTIVE HEALTH LOCKED UP: AN EXAMINATION OF PENNSYLVANIA JAIL POLICIES 2 (2012), *available at* [http://www.aclupa.org/download\\_file/view\\_inline/756/484/](http://www.aclupa.org/download_file/view_inline/756/484/) [hereinafter REPRODUCTIVE HEALTH LOCKED UP].
- <sup>13</sup> FEDERAL BUREAU OF INVESTIGATIONS, ARRESTS BY SEX, 2017 (2018), *available at* <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-42>
- <sup>14</sup> DARRELL STEFFENSMEIR & EMILIE ALLAN, GENDER AND CRIME- DIFFERENCES BETWEEN MALE AND FEMALE OFFENDING PATTERNS (2002), *available at* <http://law.jrank.org/pages/1250/Gender-Crime-Differences-between-male-female-offending-patterns.html>; *see also* Myrna S. Raeder, *Gender-Related Issues in a Post-Booker Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 726-31 (2006) (explaining the “girlfriend problem,” which forces female romantic partners of male drug offenders to decide between leaving those partners—and the security they provide—and participating either actively or passively in their crimes).
- <sup>15</sup> Meda Chesney-Lind, *Women and the Criminal Justice System: Gender Matters* 3, *available at* [https://www.gvsu.edu/cms4/asset/903124DF-BD7F-3286-FE3330AA44F994DE/women\\_and\\_the\\_criminal\\_justice\\_system\\_gender\\_matters.pdf#page=3](https://www.gvsu.edu/cms4/asset/903124DF-BD7F-3286-FE3330AA44F994DE/women_and_the_criminal_justice_system_gender_matters.pdf#page=3).
- <sup>16</sup> *See generally* Raeder, *supra* note 119 (arguing that defense counsel and judges should do more to take women’s backgrounds into consideration during sentencing).
- <sup>17</sup> INCARCERATED WOMEN, *supra* note 2, at 2.
- <sup>18</sup> *See* MARC MAUER, THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF WOMEN’S INCARCERATION 1 (2013), *available at* [http://sentencingproject.org/doc/publications/rd\\_Changing%20Racial%20Dynamics%202013.pdf](http://sentencingproject.org/doc/publications/rd_Changing%20Racial%20Dynamics%202013.pdf).
- <sup>19</sup> *Id.*
- <sup>20</sup> *Id.*
- <sup>21</sup> WENDY SAWYER, PRISON POLICY INITIATIVE, YOUTH CONFINEMENT: THE WHOLE PIE (2018), *available at* <https://www.prisonpolicy.org/reports/youth2018.html>.
- <sup>22</sup> *Offense Profile of Committed Residents by Sex and Race/Ethnicity for United States, 2015*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PROTECTION (2014), [https://www.ojjdp.gov/ojstatbb/ezacjrp/asp/Offense\\_Committed.asp](https://www.ojjdp.gov/ojstatbb/ezacjrp/asp/Offense_Committed.asp).
- <sup>23</sup> CCTF, *Transforming Prisons, Restoring Lives: Final Recommendations of the CCTF* 5 (Jan. 2016), <https://www.urban.org/sites/default/files/publication/77101/2000589-Transforming-Prisons-Restoring-Lives.pdf>.
- <sup>24</sup> *Id.*
- <sup>25</sup> *Id.*

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<sup>26</sup> *Id.*

<sup>27</sup> 21 U.S.C. 841 and 846

<sup>28</sup> ACLU, *A Living Death: Life without Parole for Nonviolent Offenses* 45 (Nov. 2013), <https://www.aclu.org/report/living-death-life-without-parole-nonviolent-offenses>.

<sup>29</sup> *Inmate Gender*, FEDERAL BUREAU OF PRISONS (July 6, 2019), [https://www.bop.gov/about/statistics/statistics\\_inmate\\_gender.jsp](https://www.bop.gov/about/statistics/statistics_inmate_gender.jsp).

<sup>30</sup> U.S. SENTENCING COMM’N, *Quick Facts: Women in the Federal Offender Population* 1 (2018), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Female\\_Offenders\\_FY17.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Female_Offenders_FY17.pdf).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Trends in U.S. Corrections*, THE SENTENCING PROJECT at 4 (last updated June 2019)

<sup>35</sup> *Id.* at 4

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Review of the BOPs’ Management of its Female Inmate Population*, OFFICE OF THE INSPECTOR GEN. (September 2018), <https://oig.justice.gov/reports/2018/e1805.pdf/>.

<sup>39</sup> *Id.* at 45 Appendix 1

<sup>40</sup> LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, PARENTS IN PRISON AND THEIR MINOR CHILDREN 2 (2010), available at <http://www.bjs.gov/content/pub/pdf/pptmc.pdf>.

<sup>41</sup> *Id.* at 3.

<sup>42</sup> *Id.* at 5.

<sup>43</sup> In 2004, 64.2% of mothers in prison reported living with their minor children in the month prior to arrest or just prior to incarceration, compared to 46.5% of men. Further, 41.7% of mothers reported they were single parents in the month prior to arrest or just prior to incarceration. Nearly 11% of mothers in custody reported that their children were currently in foster care, compared to 2.2 % of men. While 88.4% of men in prison reported their children were being cared for by another parent, only 37% of women in prison reported the same. *Id.* at 2, 4-5.

<sup>44</sup> *Violence Against Women*, *supra* note 112, at para. 49; Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1479-83 (2012) (describing how the increasing number of incarcerated black mothers is destroying “critical family and community ties”).

<sup>45</sup> GLAZE & MARUSCHAK, *supra* note 129, at 2.

<sup>46</sup> *See id.*

<sup>47</sup> For an overview of how incarceration can lead to the termination of parental rights—especially of mothers—see Eli Hager & Anna Flagg, *How Incarcerated Parents Are Losing Their Children Forever*, THE MARSHALL PROJECT (Dec. 2, 2018), <https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever> (noting that incarcerated parents who have never been accused of child neglect or abuse are more likely to have their rights terminated than non-incarcerated parents who have physically or sexually assaulted their children). *See also* Adoption and Safe Families Act of 1997 (“ASFA”), Pub. L. No. 105-89, 111 Stat. 2115 (legislation incentivizing adoption of children in foster care in the name of finding a permanent home) (codified in scattered sections of Title 42 of the United States Code); Deseriee A. Kennedy, *Children, Parents & the State: The Construction of A New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78, 104-7 (2011) (describing and criticizing how ASFA in conjunction with state laws has increased terminations of parental rights due to incarceration for more than 15 months); *Violence Against Women*, *supra* note 112, at para. 49 (noting the danger of ASFA leading to termination of parental rights of mothers who leave their children in foster care due to incarceration).

<sup>48</sup> *See Hager & Flagg*, *supra* note 136.

<sup>49</sup> Roberts, *supra* note 133, at 1481-2 (noting that “[s]eparation from imprisoned parents has serious psychological consequences for children, including depression, anxiety, feelings of rejection, shame, anger, guilt, and problems in school”); THE REBECCA PROJECT FOR HUMAN RIGHTS & NAT’L WOMEN’S LAW CTR., *MOTHERS BEHIND BARS: A STATE BY-STATE REPORT CARD AND ANALYSIS OF FEDERAL POLICIES ON CONDITIONS OF CONFINEMENT FOR PREGNANT AND PARENTING WOMEN AND THE EFFECT ON THEIR CHILDREN* 9, 12-13 (2010), available at <https://www.nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf> (noting the prevalence of “significant attachment disorders,” substance abuse, sexual promiscuity, and criminal behavior among children affected by maternal incarceration).

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- <sup>50</sup> Laura M. Maruschak, et al., Bureau of Justice Statistics, Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12 5 (2015), available at <https://www.bjs.gov/content/pub/pdf/mpsfpj1112.pdf#page=5>. However, women in prison are no longer more likely to be diagnosed with HIV than men in prison. Laura M. Maruschak & Jennifer Bronson, Bureau of Justice Statistics, HIV in Prisons, 2015—Statistical Tables 4 (2017), available at <https://www.bjs.gov/content/pub/pdf/hivp15st.pdf>.
- <sup>51</sup> Michael Massoglia, et al., *The relationship between incarceration and premature adult mortality: Gender specific evidence*, 46 SOCIAL SCIENCE RESEARCH 142, 150 (2014), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6123019/> (finding that, after controlling for all known factors that could impact the outcome, incarceration led to increased risk of death for women; for men, socioeconomic factors explained the difference in premature mortality between those who had and had not been incarcerated).
- <sup>52</sup> DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1, 4 (2006), available at <http://www.bjs.gov/content/pub/pdf/mhppji.pdf>.
- <sup>53</sup> *Id.*
- <sup>54</sup> CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS 1 (1999), available at <http://www.bjs.gov/content/pub/pdf/parip.pdf>.
- <sup>55</sup> *Id.* Additionally, in federal prisons, 39.9% of women reported past abuse, compared to 7.2% of men. In jails, 47.6% of women reported past abuse, compared to 12.9% of men. More than a third of women in state prisons or local jails reported being physically or sexually abused before the age of eighteen. *Id.*
- <sup>56</sup> OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS' MANAGEMENT OF ITS FEMALE INMATE POPULATION 6 (2018), available at <https://oig.justice.gov/reports/2018/e1805.pdf> [hereinafter OIG Report].
- <sup>57</sup> *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).
- <sup>58</sup> See PRISONERS IN 2013, *supra* note 5 and accompanying text.
- <sup>59</sup> BUREAU OF JUSTICE ASSISTANCE, BEST PRACTICES IN THE USE OF RESTRAINTS WITH PREGNANT WOMEN AND GIRLS UNDER CORRECTIONAL CUSTODY 3 (2014), available at [https://www.nasmhpd.org/sites/default/files/Best\\_Practices\\_Use\\_of\\_Restraints\\_Pregnant\(2\).pdf](https://www.nasmhpd.org/sites/default/files/Best_Practices_Use_of_Restraints_Pregnant(2).pdf) [hereinafter BJA BEST PRACTICES]; see also Victoria Law, *Pregnant and Behind Bars: How the US Prison System Abuses Mothers-to-Be*, THE GUARDIAN (Oct. 20, 2015), [http://www.theguardian.com/us-news/2015/oct/20/pregnant-women-prison-system-abuse-medical-neglect?CMP=share\\_btn\\_tw](http://www.theguardian.com/us-news/2015/oct/20/pregnant-women-prison-system-abuse-medical-neglect?CMP=share_btn_tw).
- <sup>60</sup> See Law, *supra* note 27; THE REBECCA PROJECT FOR HUMAN RIGHTS & NATIONAL WOMEN'S LAW CENTER, MOTHER'S BEHIND BARS 8 (2010), available at <https://www.nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf#page=8> (describing lack of formal policies related to prenatal care across the country).
- <sup>61</sup> Barbara A. Hotelling, *Perinatal Needs of Pregnant, Incarcerated Women*, 17 J. OF PERINATAL EDUC. 37, 37-42 (2008), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2409166/pdf/JPE170037.pdf>.
- <sup>62</sup> *Id.*
- <sup>63</sup> See Complaint at 4-8, *Guerrero v. Wichita Cty.*, No. 14-00058 (N.D. Tex. May 21, 2014).
- <sup>64</sup> See *id.*
- <sup>65</sup> *County Commissioners Approve Settlement in Nicole Guerrero vs. Wichita County*, TEXOMAS (Dec. 7, 2015), <https://www.texomashomepage.com/news/local-news/county-commissioners-approve-settlement-in-nicole-guerrero-vs-wichita-county/290456878>.
- <sup>66</sup> AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, HEALTH CARE FOR PREGNANT AND POSTPARTUM INCARCERATED WOMEN AND ADOLESCENT FEMALES 2-3 (2011), available at <http://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co511.pdf?dmc=1&ts=20151027T1653481414> [hereinafter ACOG, HEALTH CARE FOR INCARCERATED WOMEN].
- <sup>67</sup> *Id.* at 3.
- <sup>68</sup> Dana L. Sichel, *Giving Birth in Shackles: A Constitutional and Human Rights Violation*, 16 AM. U. J. GENDER SOC. POL'Y & L. 223, 225 (2007).
- <sup>69</sup> Dana Sussman, *Bound by Injustice: Challenging the Use of Shackles on Incarcerated Pregnant Women*, 15 CARDOZO J.L. & GENDER 477, 487 (2009).
- <sup>70</sup> Julie B. Ehrlich & Lynn M. Paltrow, *Jailing Pregnant Women Raises Health Risks*, WOMEN'S ENEWS (Sept. 20, 2006), <https://womensenews.org/2006/09/jailing-pregnant-women-raises-health-risks/>.
- <sup>71</sup> Sussman, *supra* note 47, at 487.

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<sup>72</sup> See Chris DiNardo, *Pregnancy in Confinement, Anti-Shackling Laws and the “Extraordinary Circumstances” Loophole*, DUKE J. L. & GENDER POL’Y 271, 281 (2018).

<sup>73</sup> See ARIZ. REV. STAT. § 31-601; CAL. PENAL CODE §§ 3407, 3423; COLO. REV. STAT. ANN. §§ 17-1-113.7, 17-26-104.7, 19-2-924.7, 26-1-137; DEL. CODE ANN. TIT. 11, § 6603; FLA. STAT. § 944.241; HAW. REV. STAT. §353-122; IDAHO CODE ANN. § 20-902; 55 ILL. COMP. STAT. 5/3-15003.6; 730 ILL. COMP. STAT. ANN. 125/17.5; LA. REV. STAT. ANN. §§ 15:744.2-744.7; ME. REV. STAT. ANN. tit. 30-a, §§ 1581-83; MD. CODE ANN., CORR. SERVS. § 9-601; MASS. GEN. LAWS CH. 127, § 118, *as amended by* 2014 MASS. ACTS CH. 103; MINN. STAT. § 241.87-.88; NEV. REV. STAT. ANN. § 209.376; N.M. STAT. ANN. § 33-1-4.2; N.Y. CORRECT. LAW § 611; 61 PA. CONS. STAT. ANN. § 5905; R.I. GEN. LAWS § 42-56.3-3; TEX. GOV’T CODE ANN. § 501.066; TEX. LOC. GOV’T CODE ANN. § 361.082; VT. STAT. ANN. TIT. 28, § 801a; WASH. REV. CODE §§ 72.09.651, 70.48.500; W. VA. CODE §§ 31-20-30a, 25-1-16.

<sup>74</sup> FIRST STEP Act, H.R.5682, 115<sup>th</sup> Cong. § 301 (2018).

<sup>75</sup> See, e.g., *Reassessing Solitary Confinement: Hearing Before the Senate Judiciary Committee’s Subcommittee on the Constitution, Civil Rights and Human Rights*, 2011-12 LEG. SESSION 4 (N.Y. 2012) (statement of Correctional Association of New York) available at <http://www.correctionalassociation.org/wp-content/uploads/2012/10/testimony-solitary-confinement-june-2012.pdf> (describing challenges pregnant women in isolation can face in trying to access medical care); Complaint at 9, *Seitz v. Allegheny Cty.*, No. 16-1879 (W.D. Pa. Dec. 19, 2016), available at [https://www.aclupa.org/download\\_file/view\\_inline/2943/1055](https://www.aclupa.org/download_file/view_inline/2943/1055).

<sup>76</sup> See, e.g., James Ridgeway & Jean Casella, *Locking Down The Mentally Ill: Solitary Confinement Cells Have Become America’s New Asylums*, THE CRIME REP., Feb. 18, 2010, available at <http://www.thecrimereport.org/news/inside-criminal-justice/locking-down-the-mentally-ill>; MARY BETH PFEIFFER, CRAZY IN AMERICA: THE HIDDEN TRAGEDY OF OUR CRIMINALIZED MENTALLY ILL 42-49 (2007); JENNIFER R. WYNN, ET AL., CORRECTIONAL ASS’N OF NEW YORK, MENTAL HEALTH IN THE HOUSE OF CORRECTIONS: A STUDY OF MENTAL HEALTH CARE IN NEW YORK STATE PRISONS 48 (2004). In some places, mentally ill women awaiting trial in jail may be transferred to solitary confinement at a state prison indefinitely because the cost of treating them at the jail is too high. Allen Arthur & Dave Boucher, *Too Sick For Jail—But Not for Solitary*, THE MARSHALL PROJECT (Feb. 15, 2018), <https://www.themarshallproject.org/2018/02/15/too-sick-for-jail-but-not-for-solitary>.

<sup>77</sup> Gay and bisexual prisoners, both male and female, are far more likely to have experienced solitary confinement than their cisgender straight counterparts. ILAN H. MEYER, ET AL., INCARCERATION RATES AND TRAITS OF SEXUAL MINORITIES IN THE UNITED STATES: NATIONAL INMATE SURVEY, 2011-2012 4 (2017), available at [https://williamsinstitute.law.ucla.edu/wp-content/uploads/Meyer\\_Final\\_Proofs.LGB\\_In\\_.pdf#page=4](https://williamsinstitute.law.ucla.edu/wp-content/uploads/Meyer_Final_Proofs.LGB_In_.pdf#page=4).

<sup>78</sup> Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women’s Prisons*, 42 HARV. CIV. RTS- CIV. LIBRS. L. REV. 45, 66 (2007) (describing sexual abuse of women including the variety of forms the abuse takes).

<sup>79</sup> Alexandria M. Foster, *Unfinished Uniformity in Systematic Sentencing: Oppressive Treatment and Disproportionate Punishment Outcomes for Black Women in Federal Prisons*, 6 IND. J. L. & SOC. EQUITY 267, 276 (2018). The racial disparity of who gets placed into solitary confinement is far more pronounced in women’s institutions than in men’s. For example, Black women account for under 24% of the female prison population but nearly 40% of women in solitary confinement. Black men represent a much higher percentage of the male population at 42.5% and represent 46.1% of the male population in solitary confinement. THE ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS & THE LINMAN CENTER FOR PUBLIC INTEREST LAW AT YALE LAW SCHOOL, REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 23 (2018), available at [https://law.yale.edu/system/files/documents/pdf/Liman/asca\\_liman\\_2018\\_restrictive\\_housing\\_revised\\_sept\\_25\\_2018\\_-\\_embargoed\\_unt.pdf#page=25](https://law.yale.edu/system/files/documents/pdf/Liman/asca_liman_2018_restrictive_housing_revised_sept_25_2018_-_embargoed_unt.pdf#page=25).

<sup>80</sup> Joseph Shapiro, et al., *In Prison Discipline Comes Down Hardest on Women*, NPR (Oct. 15, 2018), <https://www.npr.org/2018/10/15/647874342/in-prison-discipline-comes-down-hardest-on-women>.

<sup>81</sup> See generally Christine Dunkel Schetter & Lynlee Tanner, *Anxiety, depression, and stress in pregnancy: implications for mothers, children, research, and practice*, 25 CURR OPIN PSYCHIATRY 141, 141-48 (2012), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4447112/pdf/nihms-693331.pdf> (describing high rates of depression and anxiety among pregnant people, especially the poor and people of color, and associated negative birth outcomes).

<sup>82</sup> *Id.*

<sup>83</sup> G.A. Res. 65/229, ¶ 7(b), U.N. Doc. A/RES/65/229 (Mar. 16, 2011).

<sup>84</sup> See Settlement at 19, *Seitz v. Allegheny Cty.*, No. 16-1879 (W.D. Pa. Nov. 9, 2017), available at [https://www.aclupa.org/download\\_file/view\\_inline/3230/1055#page=19](https://www.aclupa.org/download_file/view_inline/3230/1055#page=19).

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- <sup>85</sup> Settlement at 37, *Peoples v. Fischer*, No. 11-2694 (S.D.N.Y. Dec. 16, 2015), available at [https://www.nyclu.org/sites/default/files/releases/20151216\\_settlementagreement\\_filed.pdf#page=36](https://www.nyclu.org/sites/default/files/releases/20151216_settlementagreement_filed.pdf#page=36).
- <sup>86</sup> MASS. GEN. LAWS ch. 127, § 39A (2018).
- <sup>87</sup> CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION OPERATIONS MANUAL § 54045.11 (2017), available at [https://www.cdcr.ca.gov/Regulations/Adult\\_Operations/docs/DOM/DOM%202017/2017\\_DOM.PDF#page=493](https://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/DOM%202017/2017_DOM.PDF#page=493).
- <sup>88</sup> Michal Gilad & Tal Gat, *United States v. My Mommy: Evaluation of Prison Nurseries As A Solution for Children of Incarcerated Women*, 37 N.Y.U. REV. L. & SOC. CHANGE 371, 372 (2013).
- <sup>89</sup> *Id.*
- <sup>90</sup> Elizabeth Chuck, *Prison nurseries give incarcerated mothers a chance to raise their babies behind bars*, NBC NEWS (Aug. 4, 2018), <https://www.nbcnews.com/news/us-news/prison-nurseries-give-incarcerated-mothers-chance-raise-their-babies-behind-n894171>.
- <sup>91</sup> Gilad & Gat, *supra* note 72, at 386.
- <sup>92</sup> *Id.*
- <sup>93</sup> See Robin Levi et al., *Creating the “Bad Mother”*: How the U.S. Approach to Pregnancy in Prisons Violates the Right to Be A Mother, 18 UCLA WOMEN'S L.J. 1, 55 (2010).
- <sup>94</sup> LINDSEY CRAMER, URBAN INSTITUTE, PARENT-CHILD VISITING PRACTICES IN PRISONS AND JAILS 2 (2017), available at [https://www.urban.org/sites/default/files/publication/89601/parent-child\\_visiting\\_practices\\_in\\_prisons\\_and\\_jails.pdf#page=6](https://www.urban.org/sites/default/files/publication/89601/parent-child_visiting_practices_in_prisons_and_jails.pdf#page=6).
- <sup>95</sup> Gilad & Gat, *supra* note 72, at 381.
- <sup>96</sup> *Id.*; see also Megan McMillen, *I Need to Feel Your Touch: Allowing Newborns and Infants Contact Visitation with Jailed Parents*, 2012 U. ILL. L. REV. 1811, 1823 (2012) (noting that if the “mother-child bond is disrupted between the ages of six months and four years, a child’s development may be greatly [a]ffected,” including increased anxiety disorders, impairment of the child’s “ability to sympathize or show concern for others” later in life, and—even controlling for other factors—increased risk for future criminal behavior).
- <sup>97</sup> See Lydia O’Connor, *Federal Prisons Made Menstrual Products Free. Now Some States May Follow Suit*, HUFFINGTON POST (Feb. 7, 2018), [https://www.huffingtonpost.com/entry/state-prison-free-pads-tampons\\_us\\_5a7b427be4b08dfc92ff5231](https://www.huffingtonpost.com/entry/state-prison-free-pads-tampons_us_5a7b427be4b08dfc92ff5231).
- <sup>98</sup> See Brian Witte, *No Tampons in Prison? #MeToo Helps Shine Light on Issue*, ASSOCIATED PRESS (Mar. 27, 2018), <https://www.apnews.com/6a1805c4e8204e5b84a0c549ff9b7a31>.
- <sup>99</sup> See Chandra Bozelko, *Prisons that Withhold Menstrual Pads Humiliate Women and Violate Basic Rights*, THE GUARDIAN (June 12, 2015), <https://www.theguardian.com/commentisfree/2015/jun/12/prisons-menstrual-pads-humiliate-women-violate-rights>.
- <sup>100</sup> Complaint at 13-14, *Semelbaucher v. Muskegon Cty.*, No 14-1245 (W. D. Mich. Dec. 4, 2014), available at <https://www.clearinghouse.net/chDocs/public/JC-MI-0010-0001.pdf>.
- <sup>101</sup> OIG Report, *supra* note 24, at 29.
- <sup>102</sup> See C.M. Kelsey, et al., *An Examination of Care Practices of Pregnant Women Incarcerated in Jail Facilities in the United States*, 21 Maternal and Child Health J. 1260 (2017).
- <sup>103</sup> See Hotelling, *supra* note 29, at 41.
- <sup>104</sup> *Id.*
- <sup>105</sup> OIG Report, *supra* note 24, at 26.
- <sup>106</sup> MD. CODE, CORR. SERVS. §§ 4-214, 9-616 (2017).
- <sup>107</sup> See OIG Report, *supra* note 24, at 31-32.
- <sup>108</sup> PREA regulations have prohibited male guards from viewing female prisoners while they shower, change clothes or use the toilet since 2012. 28 CFR § 115.15 (d). However, this still regularly occurs. See Letter from Jocelyn Samuels, Acting Assistant U.S. Attorney General, to Governor Robert Bentley re Investigation of the Julia Tutwiler Prison for Women and Notice of Expanded Investigation 11 (Jan. 17, 2014) available at <https://eji.org/sites/default/files/justice-department-findings-letter-tutwiler-prison-investigation.pdf#page=11> (finding female inmates at Julia Tutwiler Prison for Women in Alabama had no privacy in bathroom or showers and male officers routinely entered shower and bathroom facilities unannounced); Peter Goonan, *Strip-search videotaping of female inmates by male guards ruled unconstitutional by U.S. judge in Springfield*, MASSLIVE (Aug. 27, 2014), (Massachusetts guards watched videotaped strip searches of female inmates). International standards clearly prohibit cross-gender supervision. Rule 53 of the UN Standard Minimum Rules for the Treatment of Prisoners (SMR) explicitly prohibits all cross-gender surveillance and provides for a female guard to accompany any male personnel in a women’s facility. First U.N. Congress on the Prevention of Crime and the Treatment of Offenders, *Standard*

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*Minimum Rules for the Treatment of Prisoners*, Rule 53 (1955), available at [http://www.unodc.org/pdf/criminal\\_justice/UN\\_Standard\\_Minimum\\_Rules\\_for\\_the\\_Treatment\\_of\\_Prisoners.pdf](http://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf) [hereinafter SMR 53]; see also Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, at para. 46 (noting the SMRs are “widely accepted as the universal norm for the humane treatment of prisoners”).

<sup>109</sup> ELIZABETH SWAVOLA, ET AL., VERA INSTITUTE OF JUSTICE, OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM 14 (2016), available at <http://www.safetyandjusticechallenge.org/wp-content/uploads/2016/08/overlooked-women-in-jails-report-web.pdf#page=14> (danger of retraumatization/PTSD due to male guards viewing them at intimate moments).

<sup>110</sup> ALLEN BECK & RAMONA RANTALA, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2009-11 1, 8 (2014) available at <https://www.bjs.gov/content/pub/pdf/svraca0911.pdf> (despite comprising only 7% of the population, women prisoners accounted for 33% of substantiated staff-on-inmate sexual victimization; in local jails, male guards perpetrated 80% of such incidents).

<sup>111</sup> See, e.g., Report of the Special Rapporteur on Violence Against Women: Addendum, para. 34, Mission to the United States of America, 6 June 2011, United Nations General Assembly A/HRC/17/26/Add.5, available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.26.Add.5\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.26.Add.5_en.pdf) [hereinafter *Violence Against Women*] (describing continued sexual abuse of women in custody, both physically forced and otherwise coerced); Buchanan, *supra* note 62 at 55-57 (describing sexual abuse of women including the variety of forms the abuse takes); Elizabeth Chuck, ‘Frequent and severe’ sexual violence alleged at women’s prison in Alabama, MSNBC (May 23, 2012), [http://usnews.nbcnews.com/\\_news/2012/05/23/11830574-frequent-and-severe-sexual-violence-alleged-at-womens-prison-in-alabama?lite](http://usnews.nbcnews.com/_news/2012/05/23/11830574-frequent-and-severe-sexual-violence-alleged-at-womens-prison-in-alabama?lite).

<sup>112</sup> OIG Report, at 7-8.

<sup>113</sup> *Id.* at 19.

<sup>114</sup> *Id.* at 8-9.