

How the FIRST STEP Act Would Restore Dignity to Incarcerated Women



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I. Introduction

The burning smell of bleach filled our nostrils as we sat in the cold, sterile visiting booth. Her long brown hair fell in front of her face as she stared at the floor, her brown eyes brimming with tears. I began to reach my hand out in comfort, to show her a sliver of the compassion she deserved but had never experienced. I glanced out through the yellow tinged plexiglass, noticing the names etched along the sides. My eyes landed on the male guard staring at us from his station a few feet away. I quickly drew back my hand, shutting down the only hope of consoling her as she began to sob, the tears spilling down her cheeks, describing her first night in solitary confinement as a fifteen-year-old pregnant girl.

Stories like this girl's are by no means uncommon these days. In 1970, approximately 8,000 women were incarcerated. This number had ballooned to 110,000 women by 2016, a nearly fifteen-fold increase. Like men, imprisoned women work jobs that pay as much in a month as a minimum-wage worker beyond bars makes in a day. In most jails and prisons, women have to pay for feminine hygiene products, a necessary inconvenience men do not have to contend with. Women have had to forgo cherished phone calls with family members in order to afford these products, and guards have been known to mock women in need of them. The practice of forcing imprisoned women to buy tampons and pads has been appropriately described as dehumanizing, humiliating, and cruel.¹ In addition, despite the fact that they are unlikely to be any danger, pregnant incarcerated women are still regularly shackled by prison guards. They can also be shackled at any time after giving birth.

In January 2017, Senators Cory Booker (D-NJ), Elizabeth Warren (D-MA), Kamala Harris (D-CA), and Dick Durbin (D-IL) introduced the Dignity for Incarcerated Women Act.² That bill, which was ultimately tabled, would have required the Federal Bureau of Prisons (BOP) to provide personal care products, including tampons and sanitary napkins, for free to women incarcerated in federal prisons. Shortly after the bill was introduced, my organization, #cut50, cofounded by CNN commentator and former Obama aide Van Jones and myself, launched the Dignity for Incarcerated Women Campaign led by Topeka K. Sam, a formerly incarcerated woman who is passionate about fighting for the sisters she left

behind. She's worked to put formerly incarcerated women at the helm of the conversation and to pass similar bills throughout the country. This year, a bipartisan coalition of Governors in states including California, Oklahoma, Connecticut, and Kentucky have all signed bills to increase dignity for women inside, while similar bills are currently being considered in New Jersey and Georgia.³

Portions of the federal bill proposed by Booker, Warren, Harris, and Durbin that would provide feminine hygiene products to imprisoned women have since been included in the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person (FIRST STEP) Act.⁴ The Act was crafted as a bipartisan prison reform bill that would end the deadlock on federal prison reform and could feasibly be signed into law by President Trump. If passed, women incarcerated in federal prisons would get necessary personal care items like tampons and pads for free. In addition, incarcerated women would no longer face the cruelty of shackling while giving birth or postpartum. The FIRST STEP Act passed the U.S. House of Representatives by a vote of 360 to 59, is now pending before the Senate, and will likely come to a vote after the November 2018 midterm elections. The Senate version of the bill has also been amended to include key provisions of the Sentencing Reform and Corrections Act, such as retroactivity of relief under the Fair Sentencing Act of 2010.⁵

II. Mandating Feminine Hygiene Products Free of Charge

On May 18, four days before the FIRST STEP Act passed in the House, formerly incarcerated activist Topeka K. Sam spoke on a panel with Senior Advisors to the President Jared Kushner and Brook Rollins, Secretary of Energy Rick Perry, Van Jones, and myself before dozens of others at a White House conference. Sam explained that she went to federal prison for three years on a drug conspiracy charge. What she saw there reflected the statistics that 80% of incarcerated women are mothers and that 86% have experienced trauma, violence, or abuse. When asked what happens to women in prison, Sam told the audience that they are "victimized, traumatized, and stripped of their dignity over and over again." She explained that male guards watch the women undress, that the women have to pay for tampons and pads with their extremely meager

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wages, and that they have to decide between calling their children and buying toothpaste.

Sam detailed for the audience that she had uterine fibroids, which increased the volume of her menstrual bleeding. She had to give a paper bag filled with her used pads to a male guard to examine them, in order to prove that she actually needed the extra pads she was asking for. And unlike many incarcerated women she got to know inside, Sam came from a family that had financial resources and helped support her while she was incarcerated.⁶

Section 411 of the FIRST STEP Act (“Healthcare Products”) mandates that women incarcerated in federal prisons will not have to go through the same humiliating ordeal that Sam did. Section 411(a) states that the Director of the BOP *shall* make tampons and sanitary napkins available for free, “in a quantity that is appropriate to the healthcare needs of each prisoner.”⁷ Subsection (b) requires that the products provided “confirm with applicable industry standards.”⁸

III. Banning the Shackling of Pregnant and Postpartum Women

It is estimated that approximately 2,000 women deliver babies behind bars each year. A stunning 5–10% of women who enter jail or prison are pregnant.⁹ There are no mandatory national standards for prenatal care in prisons, and pregnant and postpartum women are still shackled in federal prisons.¹⁰ Women who deliver babies behind bars are separated from their newborn babies within mere days; given that 3% of women remanded to federal prison are pregnant at sentencing, a substantial number of women are subject to this form of abuse.¹¹ Some prison officials have justified the practice as mitigating escape risks, but no escapes have been reported.¹² Shackling of women’s ankles, wrists, or both without genuine safety concerns still occurs with lax enforcement of the Agency’s internal policy against the practice. Dehumanizing conditions mixed with inadequate prenatal health care have led to long-term trauma for women who have delivered their babies behind bars.¹³

The BOP technically banned shackling of women who are pregnant or in labor in 2008, but human rights organizations and formerly incarcerated women tell a different story. Maria Sosa sued the BOP in 2013, accusing the Agency of allowing guards to shackle her in 2010 while she gave birth in the Federal Detention Center, Miami. Sosa was awaiting a federal Medicare fraud charge and was detained pretrial only because she was considered a “flight risk” because she was born in Cuba (she is a U.S. citizen). Her lawyer told a local paper that “[s]he gave birth with shackles around one wrist and one ankle. She didn’t even have a chance to hold the baby in her arms before they snatched it away from her.”¹⁴ On the floor of the House, Representative Karen Bass (D-CA) recounted the story of another woman who discussed being shackled over her belly after having an emergency Cesarean section. Bass read the woman’s words to her fellow representatives:

“With the weight on my stomach, it felt like they were ripping open my C-section.”¹⁵

Section 301 of the FIRST STEP Act would put the mandate of the 2008 BOP policy memorandum into statutory law, meaning that a subsequent Director of the BOP would not be able to bring shackling back for pregnant and postpartum women in recovery for up to twelve weeks. Exceptions are carved out for extraordinary circumstances, such as when a corrections official determines the prisoner presents “an immediate and credible flight risk that cannot reasonably be prevented by other means” or poses “an immediate and serious threat of harm” to herself or others.¹⁶ If either of these conditions applies, the Act mandates that the least restrictive restraints are used¹⁷ and bans particularly degrading forms of shackling.¹⁸ A grievance procedure¹⁹ and a violations reporting procedure²⁰ would be established, and the Director of the BOP would be required to report compliance to both bodies of Congress annually.²¹

IV. Keeping the Bureau of Prisons Accountable

Very few Americans truly know what happens behind bars. Only the most heinous stories of prisoner abuse tend to make the news cycle.²² Often, the coverage is dominated by prison agency spokespeople, and getting information about happenings behind bars is notoriously difficult. Reporter biases about prisoners and their inherent untrustworthiness are also common in mainstream media outlets.²³ While the National Women’s Law Center has praised the BOP for nominally ending the shackling of pregnant women, it conceded in 2010 that “[t]here is not yet information regarding the implementation of this policy.”²⁴

The dearth of information combined with the BOP’s track record for thwarting the intent of laws that would help incarcerated prisoners means that legislation must be as airtight as possible in order to safeguard women’s dignity. Take, for instance, the Agency’s track record on “good time” credits: 18 U.S.C. § 3624(b) provides fifty-four days off a federal prisoner’s sentence per year, but the Agency interpreted that to actually mean forty-seven days, because it prorates the time. To ensure that women like Topeka K. Sam are not abused for their natural bodily functions, the FIRST STEP Act uses commanding, mandatory language (i.e., “shall,” “prohibited”) with regard to providing feminine hygiene products and banning the shackling of pregnant and postpartum women.

V. Conclusion

The FIRST STEP Act passed by a wide margin in the House of Representatives, while its biggest critics were concerned that the bill did not go far enough to reform the federal criminal justice system. As Representative Sheila Jackson Lee (D-TX) stated on the floor: “Elements of this bill are striking and good. But to a mom, is it more exciting for you to know that your son, who had an excessive sentencing because of mandatory minimums, and you, who are incarcerated, have your sentence reduced than maybe

on the back end²⁵ She ended up voting no on the bill.²⁶ As the bill worked its way through the Senate, a compromise was struck that added key sentencing reform provisions that progressive Democrats applauded. The final fate of the FIRST STEP Act has not been determined at the time of writing.

However, Congress has been deadlocked on federal prison and criminal justice reform for at least a decade. Should the bill die in the Senate, the elements of the bill that Representative Jackson Lee considered “striking and good” will again be tabled for an unforeseen amount of time. Incarcerated women should not be forced to wait that long to have their dignity as human beings affirmed, especially when the BOP can seldom be trusted to respect people’s rights without a congressional mandate.

Notes

- * Jessica Jackson is a human rights attorney and cofounder of #cut50, a national bipartisan initiative to reduce incarceration while keeping communities safe. Ms. Jackson is the former Mayor of Mill Valley, California, where she currently serves on the City Council.
- ¹ Elizabeth Swavala, Kristine Riley & Ram Subramanian, *Vera Institute of Justice & Safety and Justice Challenge, Overlooked: Women and Jails in an Era of Reform* (2016), <http://www.safetyandjusticechallenge.org/wp-content/uploads/2016/08/overlooked-women-in-jails-report-web.pdf>.
- ² Dignity Act, S.1524, 115th Cong. (2017–2018).
- ³ *Dignity for Incarcerated Women, #cut50*, <https://www.cut50.org/dignity>.
- ⁴ FIRST STEP Act, H.R. 5682, 115th Cong. (2017–2018).
- ⁵ Alexander Bolton, *Trump Gives Thumbs Up to Prison Sentencing Reform Bill at Pivotal Meeting*, The Hill (Aug. 3, 2018), <http://thehill.com/homenews/senate/400176-trump-gives-thumbs-up-to-prison-sentencing-reform-bill-at-pivotal-meeting>.
- ⁶ SiriusXM Urban View, Facebook (May 18, 2018), <https://www.facebook.com/sxmurbanview/posts/topeka-k-sam-at-the-white-house-w-van-jones-siriusxm-urban-view/1067702803385000/>.
- ⁷ H.R. 5682 § 411(a).
- ⁸ *Id.* § 411(b).
- ⁹ Jennifer G. Clarke & Rachel E. Simon, *Shackling and Separation: Motherhood in Prison*, 15 *Virtual Mentor* 779 (2013), <https://journalofethics.ama-assn.org/article/shackling-and-separation-motherhood-prison/2013-09>.

- ¹⁰ Carolyn Sufrin, *The Shameful Neglect of Pregnant Women Behind Bars*, UC Press Blog (Mar. 26, 2017), <https://www.ucpress.edu/blog/26328/pregnant-and-behind-bars-the-experience-of-incarcerated-women-and-mothers/>.
- ¹¹ Bureau of Justice Statistics, *Medical Problems of Prisoners* (2008), <https://www.bjs.gov/content/pub/pdf/mpp.pdf>.
- ¹² Adam Liptak, *An Ex-Convict Challenges Shackling Women In Labor*, N.Y. Times (Mar. 5, 2006), <https://www.nytimes.com/2006/03/05/world/americas/an-exconvict-challenges-shackling-women-in-labor.html>.
- ¹³ McKenna Flores & Jaylen Bohman, *Pregnancy & Prison: The Untold Story of Women Who Give Birth Behind Bars*, Universe Narratives (Apr. 4, 2017), <https://universe.byu.edu/narratives/pregnancy-prison/>.
- ¹⁴ Michael E. Miller, *Miami Federal Prison Inmates Give Birth in Shackles, Lawyer Says*, Miami New Times (Feb. 21, 2013), <https://www.miaminewtimes.com/news/miami-federal-prison-inmates-give-birth-in-shackles-lawyer-says-6539320>.
- ¹⁵ 164 Cong. Rec. H4313 (daily ed. May 22, 2018), <https://www.congress.gov/crec/2018/05/22/CREC-2018-05-22-pt1-PgH4302-2.pdf>.
- ¹⁶ H.R. 5682 § 301, 115th Cong. (2018).
- ¹⁷ *Id.*
- ¹⁸ *Id.*
- ¹⁹ *Id.*
- ²⁰ *Id.*
- ²¹ *Id.*
- ²² Seham Elmalak, *Babies behind Bars: An Evaluation of Prison Nurseries in American Female Prisons and Their Potential Constitutional Challenges*, 35 *Pace L. Rev.* 1080, 1080 (2015), <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1903&context=plr>.
- ²³ Kevin Gosztola & Brian Sonenstein, *Fact-Checking the Prison Strike: Marshall Project Reveals Bias against Prisoner-Led Resistance*, Shadowproof (Aug. 29, 2018), <https://shadowproof.com/2018/08/29/fact-checking-prison-strike-marshall-project-reveals-bias-prisoner-led-resistance/> (explaining that the Marshall Project’s coverage “includes the perspectives of activists, but plays into biases against incarcerated people by suggesting they might not be telling the truth about their struggle for human rights”).
- ²⁴ Rebecca Project for Human Rights & National Women’s Law Center, *Mothers Behind Bars* 8 (2010), <https://www.nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf>.
- ²⁵ *Supra* note 15, H4314.
- ²⁶ H.R. 5682: FIRST STEP Act, Govtrack, <https://www.govtrack.us/congress/votes/115-2018/h215>.