

## MENSTRUAL JUSTICE IN IMMIGRATION DETENTION

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### *Abstract*

The menstrual injustices experienced by noncitizens detained in immigration facilities – a particularly vulnerable subset of menstruators in carceral spaces – are largely ignored. Menstruating detainees are forced to rely on the immigration system to provide adequate access to menstrual products, and on detention facilities to engage in safe menstrual management and corresponding dignity. Unfortunately, the immigration system fails many detainees, and the defining characteristics of immigration detention—the lack of access to counsel and significant geographic and social isolation that people in custody face—exacerbate the problem. Despite these isolating factors, detainees are finding ways to share their struggles with menstrual injustices. This Essay aims to categorize, amplify, and contextualize these experiences, and the need for thoughtful reform.

### INTRODUCTION

Menstrual justice combats systems that oppress people related to menstruation.<sup>1</sup> Immigration detention is one such system depriving menstruators of privacy and dignity. For example, Customs and Border Patrol (“CBP”) detained sixteen-year-old “Maria” for four hours in a room with 100 people. Guards told her to “do it on” herself when she asked for the restroom; they also threw away her extra clothing. CBP transported her to another facility, to a 10x14 foot room containing a sink and toilet “bathroom area” with only three five-foot-high walls. Children held up blankets for privacy. Toilet paper was replenished only once a day. Maria and another girl had their periods and were each provided one menstrual pad daily. Guards failed to provide soap, more than one shower, a change of clothes, or “extra” pads, even when a girl visibly bled through her pants.

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<sup>1</sup> Margaret E. Johnson, *Asking the Menstruation Question to Achieve Menstrual Justice*, 41 COLUM. J. GENDER & L. 158 (2021).

Without an alternative, stained clothes and soiled underwear were worn throughout detention.<sup>2</sup>

While stories like Maria's are rarely heard, they are not rare. In the immigration detention system, girls, women, transgender boys and men, and nonbinary individuals rely exclusively on facility provision of adequate menstrual products and safe, dignified menstruation experiences. This Essay identifies and contextualizes detainees' experiences with menstruation and the structures that keep them hidden. Part I explains why and where noncitizens may be detained. Part II identifies existing menstrual injustices. Part III outlines proposals for reform and calls on stakeholders to talk directly with detainees to improve law and policy to provide menstrual justice in immigration detention. Ultimately, rather than opine about what menstrual justice could look like in these spaces, this Essay concludes with a call to center the voices of noncitizens with past and current experience related to menstruation in immigration detention to develop responses that provide true menstrual justice to menstruators trapped in those spaces.

## I. The Immigration Detention System

Immigration detention is a form of civil detention that largely mirrors the carceral settings in the criminal justice system. Most individuals, however, are not detained pursuant to a criminal conviction; they are held to await an immigration agency decision about whether they can stay in the United States. As a result, they have less access to counsel, to a stable physical location, or to community, social, and religious support systems.<sup>3</sup>

The Department of Homeland Security ("DHS") may detain individuals in an agency or subcontractor facility in several situations. Individuals suspected of being in or trying to enter the United States unlawfully may be detained in short-term facilities, called hold rooms, for up to seventy-two hours by CBP or up to twelve hours by Immigration and

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<sup>2</sup> Alma Poletti, Decl., *California v. McAleenan*, 2:19-cv-07390 (C.D. Cal.) ¶¶ 7-9, 19, 20 (Aug. 23, 2019) (detailing children's experiences in unsanitary and overcrowded CBP hold rooms in 2018-2019).

<sup>3</sup> These distinguishing characteristics are highlighted to emphasize that there must be solutions tailored to address the unique situation of menstruators in immigration detention, not to minimize the injustices faced by menstruators incarcerated in the criminal justice system. *See* notes 31-33 and accompanying text.

Customs Enforcement (“ICE”).<sup>4</sup> People stay until processed and are usually later transferred to long-term detention or deported through an expedited removal.

Noncitizens awaiting an immigration court hearing or deportation are held in longer-term immigration detention facilities. Detainees may include individuals near the border who have requested an asylum-screening interview, are contesting removability in pending immigration proceedings, or are awaiting deportation. ICE operates or works with subcontractors to operate these centers, where immigrants may wait days, weeks, months, or years. ICE also contracts with private, for-profit companies to operate detention facilities, and with government subcontractors, who reserve space in state and county and city jails or prisons. Generally, conditions for immigrants detained in longer-term facilities are barely distinguishable from those for individuals serving criminal sentences.<sup>5</sup> Schedules, movement, meals, phone calls, possessions, and visitors are all controlled.

DHS may detain unaccompanied noncitizen children for a short time; thereafter, the Department of Health and Human Services’ Office of Refugee Resettlement (“ORR”) assumes custody while an appropriate sponsor is determined. ORR subcontracts with state-licensed facilities to provide long-term care for children, such as foster homes or shelters.

Adults detained with their children may reside together in “family residential centers,” which must comport with certain child-welfare standards.<sup>6</sup> Conditions are less restrictive than those in adult detention, but the facilities still control schedules, visitations, phone calls, mealtimes, and movement.

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<sup>4</sup> CBP enforces the borders, operating under the 2020 CBP National Standards on Transport, Escort, Detention and Search. *See* U.S. CUSTOMS AND BORDER PROTECTION NATIONAL STANDARDS ON TRANSPORT, ESCORT, DETENTION, AND SEARCH (October 2015) [hereinafter TEDS standards]. ICE enforces internal immigration, operating immigration-only detention facilities under the 2011 Performance Based National Detention Standards (“PBNDs”) and other detention facilities under the 2019 National Detention Standards (“NDS”) (collectively “NDS”). *See* U.S. IMMIGR. CUSTOMS AND ENF’T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS (2011); U.S. IMMIGR. CUSTOMS AND ENF’T, NATIONAL DETENTION STANDARDS (2019).

<sup>5</sup> CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* 88-89 (2019).

<sup>6</sup> U.S. IMMIGR. CUSTOMS AND ENF’T, *FAMILY RESIDENTIAL STANDARDS 1* (2020); *see* Stipulated Settlement Agreement at 8, *Flores v. Reno*, No. CV 85-4544-RJK (1996); *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016).

Many of these facilities are in remote locations, severely limiting access to the outside world. Detainees rely primarily on phone calls to connect with family, social and religious support, and advocates. Consequently, the ability to ask questions, share stories, or express grievances depends on commissary funds to make (often overpriced) outgoing phone calls.<sup>7</sup>

Additionally, ICE exercises broad discretion in choosing the venue of immigration proceedings and the location of where to place detainees. Despite policies that purportedly limit ICE's ability to transfer detainees to areas far from support systems or retained counsel, ICE maintains the final word on transfers and can transfer detainees to any of its owned or contracted facilities.<sup>8</sup> Detainees rarely succeed in challenging a transfer, especially if the transfer does not demonstrably interfere with pre-existing legal representation.<sup>9</sup> These unique geographic and jurisdictional characteristics impose barriers that inhibit learning about and asserting rights related to detention, including safe and dignified menstruation.

## II. Menstrual Injustices in Immigration Detention

Menstruating detainees must rely on the immigration enforcement system to provide adequate access to menstrual products (e.g., pads, tampons, soap, underwear, clothing, pain relievers) and facilities (e.g., private toilets and showers, running water, laundry, waste receptacles) required to engage in safe and dignified menstrual management.<sup>10</sup> Unfortunately, the system fails to deliver.

Proper menstrual practices require access to information about menstruation, products, facilities, and privacy. It also requires respect and elimination of associated

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<sup>7</sup> Michelle Conlin, *Eleven Dollar Toothpaste: Immigrants Pay Big For Basics at Private ICE Lock-Ups*, CNBC (Jan. 18, 2019), <https://www.cnbc.com/2019/01/18/11-toothpaste-immigrants-pay-big-for-basics-at-private-ice-lock-ups.html> [<https://perma.cc/B2TB-NB7V>]; First Supplemental Complaint for Injunctive and Declaratory Relief at 12, *Lyon v. ICE*, 308 F.R.D. 203 (N.D. Cal. 2015).

<sup>8</sup> U.S. IMMIGR. CUSTOMS AND ENF'T, POLICY 11022.1: DETAINEE TRANSFERS 1 (2012).

<sup>9</sup> See e.g., *Arroyo v. Dept. of Homeland Security*, No. SAVC 19-815JGB, 2019 WL 2912848 at \*15 (C.D. Cal. Jun. 20, 2019); *Reyna as Next Friend of J.F.G. v. Hott*, 921 F.3d 204, 210–11 (4th Cir. 2019).

<sup>10</sup> TRAC Immigration, ICE Data snapshot as of July 2019, <https://trac.syr.edu/phptools/immigration/detention/> [<https://perma.cc/ALD7-YGNH>] (9,176 women and 8 "gender unknown" reported in detention).

stigma and discrimination against menstruating detainees.<sup>11</sup> Currently, as Maria’s story highlights, the immigration detention system fails here too, and isolation, power dynamics, and lack of control exacerbate menstrual injustices. Generally, the standards governing hold rooms and long-term detention facilities do not sufficiently consider menstruation-related needs. Specifically, they fail to provide adequate access to products and menstruation-friendly facilities; dignity, privacy, or reproductive justice; and enforcement of the limited existing standards.

### A. Lack of Access to Products and Facilities

The standards governing hold rooms and long-term detention facilities do not provide for all menstruation-related needs. Under the TEDS standards governing hold rooms, menstrual products must be provided “in a manner consistent with short-term detention and security needs”; the NDS specify that menstruators must be issued and may retain sufficient products for use during the menstrual cycle. Despite these standards, as Maria’s story shows, detainees do not have quality menstrual products access—or enough products—as needed.

The standards do not mention how detainees may access or request menstrual products or require product quality.<sup>12</sup> Consequently, when available, products often are of poor quality, without adhesion or wings, and provided without choice to the detainee. When periods come unexpectedly, something that is especially common for young menstruators, facilities lack ready access to a supply. Collectively, this results in staining, bloody products falling out of clothing, re-use of “dirty” products, and creating makeshift products out of toilet paper or other items, which collectively can lead to health consequences.<sup>13</sup>

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<sup>11</sup> Margaret E. Johnson, *Menstrual Justice*, 53 U.C. DAVIS L. REV. 1, 41-45 (2019) (describing claims related to strip searches, forced removal of menstrual products from naked detainees, and failure to provide products when needed).

<sup>12</sup> See Margaret E. Johnson, Marcy L. Karin & Elizabeth B. Cooper, *Stop the Stigma Against Menstruation: Starting with the Bar Exam*, NAT’L JURIST (July 28, 2020), <https://www.nationaljurist.com/national-jurist-magazine/stop-stigma-against-menstruation-starting-bar-exam> [<https://perma.cc/9856-J3Z2>] (noting that there is not a “one size fits all” menstrual product and menstruators use products of different sizes, absorbency ability, and components).

<sup>13</sup> *Id.* (observing that using the “wrong” product may lead to toxic shock syndrome, vaginal itching, or other medical reactions); Poletti, *supra* note 2; See BRAWS & UDC LEGISLATION CLINIC, PERIODS, POVERTY, AND THE NEED FOR POLICY 3 (2018), <http://bit.ly/BRAWSBriefingReport> [<https://perma.cc/VV8U-UVYK>].

Other products and facilities used to address menstruation also are restricted or denied. ICE's standards do not mention showers and CBP is only required to provide bathing when someone "approach[es] seventy-two hours in detention," and soap "when operationally feasible."<sup>14</sup> Toilets, running water, and waste receptacles are not required. Rather, officials must facilitate access to restrooms outside of hold rooms when necessary. Access to pain management is non-existent, limited, or prohibited, depending on the item.

Long-term detention centers must provide private bathing and toilet access. Individuals are entitled to shower, perform bodily functions, and change clothing out of the view of "opposite" gendered staff.<sup>15</sup> Facilities also must provide clean linens regularly, undergarments daily, and outer garments twice a week. In practice, however, showers are denied, and people regularly must re-wear dirty, blood-stained clothing.

Finally, while some facilities may have commissaries, they may not be stocked with products, or a menstruator may not have access or sufficient funds to purchase the overpriced menstrual products.<sup>16</sup>

### **B. Degradation, Lack of Bodily Integrity, and Reproductive Injustice**

From 2016 to 2017, while Martha Gonzalez was detained, she worked in the kitchen and the laundry room as part of the prison's "Voluntary" Work Program. When she requested a day off, something she was entitled to do under the voluntary program, guards punished her by denying her access to sanitary pads.<sup>17</sup> Under the applicable standards, products may not be withheld as punishments. As Martha's story demonstrates, however, detention offers opportunities for menstruation-related indignities.

First, officials may use access to products and facilities as a control measure. Second, the need to ask for and rely on guards for this access by itself is demeaning, especially when it involves disclosing personal information to non-menstruating guards that may not understand why detainees' access needs vary. Third, guards may taunt detainees.

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<sup>14</sup> TEDS Standards, *supra* 4, at 4.11.

<sup>15</sup> Transgender and intersex detainees also may shower separately from other detainees.

<sup>16</sup> *See e.g.*, Conlin, *supra* 7.

<sup>17</sup> Victoria Law, Opinion, *End Forced Labor in Immigration Detention*, N.Y. TIMES (Jan. 19, 2019), <https://www.nytimes.com/2019/01/29/opinion/forced-labor-immigrants.html> [<https://perma.cc/DC58-Y6CA>].

Collectively, these degradations “seep into self-esteem and serve as an indelible reminder of one’s powerlessness.”<sup>18</sup>

Fourth, menstruation, which is a biological process involving the uterus and an ovary, is part of the reproductive system for which detainees are also subjected to injustices. For example, forced hysterectomies and other nonconsensual reproductive-system surgeries occur in detention at disarmingly high rates.<sup>19</sup> Other reproductive care is denied outright, such as the ability to medically suppress or control menstruation through birth control.<sup>20</sup> Prescription medication purchased at the commissary is subject to confiscation, promised appointments never materialize, and detainees are subjected to unnecessary, irreversible, and negligent procedures related to this system.<sup>21</sup>

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<sup>18</sup> Chandra Bozelko, *Prisons that withhold menstrual pads humiliate women and violate basic rights*, THE GUARDIAN (Jun. 12, 2015), <https://www.theguardian.com/commentisfree/2015/jun/12/prisons-menstrual-pads-humiliate-women-violate-rights> [<https://perma.cc/3GDX-EFE9>] (explaining why prisons “keep sanitation just out of reach”).

<sup>19</sup> See Letter from Project South to Joseph Cuffari, Inspector Gen., DHS et al. (Sept. 14, 2020), <https://projectsouth.org/wp-content/uploads/2020/09/OIG-ICDC-Complaint-1.pdf> [[perma.cc/SSW7-JYDA](https://perma.cc/SSW7-JYDA)] (detainee observing, “this was like an experimental concentration camp . . . they’re experimenting with our bodies”).

<sup>20</sup> Human Rights Watch, *DETAINED AND DISMISSED* (March 17, 2009), <https://www.hrw.org/report/2009/03/17/detained-and-dismissed/womens-struggles-obtain-health-care-united-states> [<https://perma.cc/VN22-AHQJ>] (noting the lack of available hormonal contraceptives including for the purpose of menstrual management).

<sup>21</sup> *Oldaker v. Giles*, No. 7:20-cv-00224-WLS-MSH (M.D. Ga. Dec. 21, 2020) par. 250, 357 (alleging menstruation-related problems with medical care, including a doctor assaulting someone brought in for an irregular period without a translator, and the denial of previously used pain reduction treatments and birth control to regulate menstruation); Project South, *supra* note 19 (allegations included removing a wrong ovary); Molly O’Toole, *ICE is Deporting Women at Irwin Amid Criminal Investigation into Georgia Doctor*, L.A. TIMES (Nov. 18, 2020), [www.latimes.com/politics/story/2020-11-18/ice-deporting-women-at-irwin-amid-criminal-investigation-into-georgia-doctor](http://www.latimes.com/politics/story/2020-11-18/ice-deporting-women-at-irwin-amid-criminal-investigation-into-georgia-doctor) [[perma.cc/A55C-3RHZ](https://perma.cc/A55C-3RHZ)] (allegations of unnecessary gynecological procedures involving scraping uterine tissue); Nore Ellmann, *Immigration Detention is Dangerous for Women’s Health and Rights*, CENTER FOR AM. PROGRESS (Oct. 2019) <https://www.americanprogress.org/issues/women/reports/2019/10/21/475997/immigration-detention-dangerous-womens-health-rights/> [<https://perma.cc/6J3L-WTP4>] (sharing someone’s miscarriage after being denied medical help).

Fifth, a lack of privacy related to menstruation may be particularly harmful. To limit abortions, ORR inappropriately tracked menstrual cycles of unaccompanied children.<sup>22</sup> Further, detainees using restrooms are generally subject to monitoring.<sup>23</sup> Overcrowding makes the process of using toilets, including the placement, insertion or removal of a pad or tampon, visible to others. And menstruators who identify other than as a woman or girl may suffer an involuntary, harmful outing.<sup>24</sup> These indignities are further exacerbated by the societal, religious, and cultural taboos surrounding menstruation, where talking about menstruation, especially with non-menstruators, may cause anxiety or violate actual or perceived religious practices.<sup>25</sup>

Finally, none of these practices are trauma-informed; most deny detainees' rights to make informed choices about their bodies, especially if (young) detainees lack needed information to understand why or how to address their bleeding.

### C. Lack of Enforcement and No Right to Counsel

The government fails to properly enforce the few existing standards that do address menstruation, even when violations are raised.<sup>26</sup> Power dynamics and lack of access to counsel also hinder detainee complaints surrounding menstruation. DHS transfers detainees between facilities governed by varying standards without educating people about the practical impact of those differences, obfuscating knowledge about menstruation-related rights.<sup>27</sup> The potential for illegal retaliation further chills detainees from seeking better conditions or correcting existing problems.<sup>28</sup>

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<sup>22</sup> Jennifer Wright, *The U.S. is Tracking Migrant Girls' Periods to Stop Them From Getting Abortions*, HARPER'S BAZAAR (Apr. 2, 2019), [www.harpersbazaar.com/culture/politics/a26985261/trump-administration-abortion-period-tracking-migrant-women/](http://www.harpersbazaar.com/culture/politics/a26985261/trump-administration-abortion-period-tracking-migrant-women/) [perma.cc/9Z7H-WYU8].

<sup>23</sup> See e.g., Poletti, *supra* note 2, at ¶ 77 (reporting cameras close to the "bathroom").

<sup>24</sup> See Laura Gómez, *Migrants held in ICE's only transgender unit plead for help, investigation in letter*, AZ MIRROR (Jul. 10, 2019), <https://www.azmirror.com/2019/07/09/migrants-held-in-ices-only-transgender-unit-plea-for-help-investigation-in-letter/> [perma.cc/88TE-E738] (non-binary and transgender detainees calling for an investigation into "the violation of our rights, our vulnerability before ICE. . .").

<sup>25</sup> Johnson, *supra* note 11, at 16-19.

<sup>26</sup> See Ellmann, *supra* note 21 (according to a DHS report, ICE only imposed two penalties on subcontractors from 2015-2018, "despite documenting thousands of . . . failures to comply with detention standards").

<sup>27</sup> *Id.* (observing someone could be transferred to four facilities, governed by four different standards).

<sup>28</sup> O'Toole, *supra* note 21.



Moreover, detainees are not entitled to government-appointed legal counsel,<sup>29</sup> and most go unrepresented. People detained in facilities outside of cities or their hometowns also struggle to find attorneys. Further, indigent detainees lack the connections or commissary funds to make outside calls to secure counsel and may be dependent on pro bono firms with long waitlists. While new litigation has raised claims involving menstrual injustices, the process is slow and only governs the facilities and people under the relevant jurisdiction's purview.<sup>30</sup> Systemic reform is needed.

### III. Centering Menstruating Detainees in the Policy Response

Many of these menstrual injustices occur in other carceral spaces too.<sup>31</sup> In response, the federal government and fourteen states have enacted laws that focus on increasing access to menstrual products in prisons, jails, or detention.<sup>32</sup> Because DHS contracts with federal and state facilities to detain some noncitizens, these relatively new laws theoretically benefit some menstruating detainees.<sup>33</sup> While promising, they do not go far enough and fail to alter power dynamics or improve enforcement. Further, thirty-seven states lack the most basic standards regarding menstruation.<sup>34</sup>

Efforts are afoot to change this reality. Notably, the Menstrual Equity for All Act proposes to make pads and tampons available in all carceral spaces, directing DHS to

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<sup>29</sup> 8 U.S.C. §1229a(b)(4).

<sup>30</sup> See e.g., Poletti, *supra* note 2; Jennifer Weiss-Wolf, Opinion, *Forcing Immigrant Girls to Bleed Through Their Underwear Is Cruel, Degrading and Dangerous*, NEWSWEEK (Aug. 30, 2019), <https://www.newsweek.com/forcing-immigrant-girls-bleed-through-their-underwear-cruel-degrading-dangerous-opinion-1457040> [perma.cc/BCZ8-LVFU] (including these stories in “formal court record[s]” matters; further situating menstrual inequities in immigration detention into carceral and other systemic reforms).

<sup>31</sup> See Kimberly Haven, *Why I'm Fighting for Menstrual Equity in Prison*, ACLU (Nov. 8, 2019), <https://www.aclu.org/news/prisoners-rights/why-im-fighting-for-menstrual-equity-in-prison> [perma.cc/722R-LHAN].

<sup>32</sup> See, e.g., FIRST STEP Act, Pub. L. 115-391 § 611 (2018); LA REV. STAT. § 15:892.1; TEX. GOV'T CODE ANN. § 501.0675.

<sup>33</sup> Questions remain, however, about the degree to which state laws can regulate private ICE contractors or interfere with existing contracts. See David S. Rubenstein & Pratheepan Gulasekaram, *Privatized Detention & Immigration Federalism*, 71 STAN. L. REV. ONLINE 224 (2019).

<sup>34</sup> ACLU & Period Equity, *THE UNEQUAL PRICE OF PERIODS* at T. 1 (2019), <https://www.aclu.org/report/unequal-price-periods> [perma.cc/26MQ-LLMZ].

distribute and make free products accessible to detainees in agency-operated and private facilities.<sup>35</sup>

Recently, in response to reports of overcrowding and unsanitary practices, federal legislation also was introduced to remedy broad inhumane conditions. For example, bills attempt to codify existing or create new detention standards to improve access to menstrual products and facilities.<sup>36</sup> Others require access to phones for “free, unmonitored calls” to counsel, additional contacts with service providers, and no-cost connections to the outside world, which could alleviate *some* isolation and possibly improve standards enforcement.

While promising, these lack bipartisan support and are unlikely to be enacted soon—even under the Biden Administration. They also relate primarily to access issues and not the full landscape of menstrual injustices. For example, they do not improve detainee education about their menstruation-related rights or how to enforce them. Similarly, most do not address the isolation that masks existing injustices. Thus, more work is needed to improve the day-to-day realities of detained menstruators.

## CONCLUSION

Proposed legislation, increases in litigation, and calls for reform show the importance of storytelling, seeking out, and listening to the experiences of menstruating detainees.<sup>37</sup> This Essay shows how menstrual injustice is directly tied to detainees’ deprivation of liberty and basic dignity. Put simply, menstruation matters. And until Congress, DHS, ICE, CBP, ORR, and other stakeholders hear menstruators’ stories, public policy will not go far enough to address existing lived experiences and provide menstrual justice in immigration detention.

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<sup>35</sup> H.R. 1882, 116th Cong. § 3 (2019).

<sup>36</sup> *See, e.g.*, H.R. 3918/S. 2113, 116th Cong. (2019) (“regular access to showers, sinks, and toilets”); H.R. 3239/S. 2135, 116th Cong. (2019) (“opportunity to bathe daily” in a “private and secure” shower); H.R. 2415/S. 1243, 116th Cong. (2019) (requiring product storage and disposal containers); H.R. 3524, 116th Cong. (2019) (“regular access to” counsel); H.R. 6537/S. 3645, 116th Cong. (2020) (pandemic-responsive hygiene practices).

<sup>37</sup> *See, e.g.*, ABA Resolution Criminal Justice Section Report to the House of Delegates 109 C, 2019 Midyear (detainees should have “unrestricted access [to] a range of free” products “in sufficient quantities”); PHILIP G. SCHRAG, *BABY JAILS: THE FIGHT TO END THE INCARCERATION OF REFUGEE CHILDREN IN AMERICA* (2020) (detailing how litigation improved standards for detained children).