

Testimony for the Review Panel on Prison Rape Hearings on Sexual Victimization in U.S. Prisons, Jails, and Juvenile Correctional Facilities

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Thank you for inviting me to testify on the important issue of sexual victimization in custodial settings. I have a long investment in issues of treatment of individuals in custodial settings, dating back to my early years of running a program for women inmates imprisoned in the Minimum Security Prison of the District of Columbia Department of Corrections.¹ Because of my work with women in custody, I learned about sexual victimization in custodial settings and served as class counsel in *Women Prisoners v DC*² from 1993 to 2003. In 2003, I was appointed by then House Minority Leader, Nancy Pelosi (D.CA.) to the National Prison Rape Elimination Commission, where I served from 2003 until August 2009.

While the Commission's tenure has ended, as members we continue to be interested in implementing PREA and weigh in on important issues related to implementation as they emerge. For example, the Commission participated in the rulemaking process with regard to the development of the final proposal rule which resulted in the final PREA Standards³ and participated in a recent Government Accounting Office (GAO) report on the Department of

¹ Brenda V. Smith, *AN END TO SILENCE: WOMEN PRISONERS' HANDBOOK ON IDENTIFYING AND ADDRESSING SEXUAL MISCONDUCT* (1998) *available at* http://www.wcl.american.edu/endsilence/documents/NWLC_Silence_Final.pdf.

² *Women Prisoners of the D.C. Dep't of Corr. v. Dist. of Columbia*, 93 F.3d 910, 929 (D.C. Cir. 1996).

³ National Standards to Prevent, Detect, and Respond to Prison Rape 28 C.F.R. § 115 (2012).

Homeland Security's implementation of PREA.⁴ While we are here today to talk about sexual abuse in custody, it goes without saying that PREA is about much more than abuse. As many have said including Dostoevsky, Mandela and de Tocqueville, the mark of a civilization is in how we treat those we punish. I submit to you today, that while the U.S. has made progress with the promulgation of the final PREA standards, there is still much work to be done.

While I have litigated and served as an expert in sexual abuse cases in correctional settings, and served in programmatic capacities within institutions, I have also been involved as a scholar pondering issues of sexuality and victimization in custody since my article *Rethinking Prison Sex: Self-Expression and Safety*⁵ and *Uncomfortable Places, Close Spaces: Female Correctional Workers Sexual Interactions with Men and Boys in Custody*.⁶ My work in investigating the legal construct of employment in correctional setting is also longstanding dating back to my initial work on cross-sex supervision in custody, *Watching You, Watching Me*⁷ in 2004 and more recently, *After Dothard: Female Correctional Workers and the Challenge to Employment Law*⁸ in 2013.

Given that you will hear ample information about the disproportionate involvement of female staff in sexual interactions with men and boys in custody relative to their numbers in the

⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-38, IMMIGRATION DETENTION: ADDITIONAL ACTIONS COULD STRENGTHEN DHS EFFORTS TO ADDRESS SEXUAL ABUSE (2013).

⁵ Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, Symposium on Sexuality and the Law, 15 Colum. J. Gender & L. 185 (2006)

⁶ Brenda V. Smith, *Uncomfortable Places, Close Spaces: Theorizing Female Correctional Officers' Sexual Interactions with Men and Boys in Custody*, 59 U.C.L.A. L. Rev. 1690 (2012)

⁷ Brenda V. Smith, *Watching You, Watching Me*, 15 Yale J. L. & Fem. 223 (2004)

⁸ Brenda V. Smith, *After Dothard: Female Correctional Workers and the Challenge to Employment Law*, 8 FIU L. REV. 2 (2013).

correctional workforce⁹ – at least with regard to the data reported by individuals in custody -- my testimony today will address legal issues imbedded in efforts to prevent, address and respond to female staff involvement in sexual abuse of men and boys in custody. While my testimony is directly related to abuse of boys in custody, the legal issues I will discuss are as pertinent in addressing women’s involvement in sexual abuse of men in custody.

Before starting my prepared testimony, I would like to mention the issue of youthful inmates. One of the most singular achievements of the PREA Standards was to provide additional protections for youth who are imprisoned in adult settings. Though there is disagreement about the scope of problem – as evidenced by the different estimates of the prevalence on sexual abuse of these youth in adult settings in the most recent BJS survey,¹⁰ compared to that in the RIA¹¹ that accompanied the standards and BJS’s earliest survey¹² on this

⁹ ALLEN J. BECK ET AL., BUREAU OF JUST. STAT., NCJ 241708, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2012 (2013) available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4656> (finding that female perpetrators were involved in 92.1% of victimization of boys in custody); ALLEN J. BECK & CANDACE JOHNSON, BUREAU OF JUST. STAT., NCJ 237363, SEXUAL VICTIMIZATION REPORTED BY FORMER STATE PRISONERS, 2008 15 (2012), available at <http://www.bjs.gov/content/pub/pdf/svrfsp08.pdf> (finding that female officers accounted for 80% of all staff sexual misconduct).

¹⁰ ALLEN J. BECK ET AL., BUREAU OF JUST. STAT., NCJ 241399, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12 (2013) available at <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> (finding no statistically significant difference between the overall rate of sexual victimization of youthful inmates aged 16-17 (4.5% in prisons and 4.7% in jails) and adult inmates (4.0% in prisons and 3.2% in jails).

¹¹ United States Department of Justice, Initial Regulatory Impact Analysis for Notice of Proposed Rulemaking Proposed National Standards to Prevent, Detect, and Respond to Prison Rape Under the Prison Rape Elimination Act (PREA) January 24, 2011 available at http://www.ojp.usdoj.gov/programs/pdfs/prea_nprm_iria.pdf (“The BJS inmate surveys rely solely on self-reporting of sexual abuse experiences. This introduces the risk of false negatives, or underreporting, for many inmates who have experienced sexual abuse may be unwilling or unable to talk about it. Whether a rape occurs inside or outside prison walls, victims are often so mentally and emotionally traumatized by their experience that they lack the wherewithal to discuss it.”).

¹² BECK, A. J., & HARRISON, P. M. BUREAU OF JUST. STAT., NCJ 214646, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2005 (2006) available at <http://www.bjs.gov/content/pub/pdf/svrca05.pdf> (finding that in 2005 inmates under the age of 18 made up 21 percent of all victims of substantiated incidents of sexual abuse in adult prisons and jails).

issue-- I continue to be concerned that this an exceedingly vulnerable population made even more vulnerable because of their age and development and because of their complicated legal status-- minors for some purposes such as being unable to participate in surveys but adults for other purposes e.g. housing, sentencing and discipline. For example, recent data from Michigan where there is a pending federal law suit challenging conditions that result in the sexual abuse of youthful inmates paint a stark picture of a vulnerable population.¹³ From 2010 to 2013, 48% of the youth population in the Thumb Correctional Center spent time in segregation compared to 20% of the adult population. They spent an average of 36 days compared to 22 days for adults. The ratio of segregation placements to population was five times higher for youth (1.6 vs. .30). These numbers suggest an environment where youth are vulnerable.

Moving back to my prepared testimony, the first issue I want to address is prevention. In the Final PREA Rules there are specific measures intended to prevent abuse perpetrated by female staff of juveniles in juvenile facilities. The first measure is a prohibition in juvenile facilities on cross gender searches—including pat searches-- except in exigent circumstances.¹⁴ The second is the requirement for agencies to perform appropriate background checks for hiring and promoting staff as well as on a five year cycle.¹⁵ The third preventive measure that I will discuss is that related to sanctions¹⁶ for staff. The fourth is appropriate training for staff¹⁷ and

¹³ Doe v. Michigan Department of Corrections et. al, No. 2:13-cv-14356 (E.D. Michigan 2013)

¹⁴ 28 C.F.R. § 115.315(b) (2012).

¹⁵ § 115.317(C).

¹⁶ § 115.371.

¹⁷ §§ 115.331, 115.332.

youth.¹⁸ The final preventive measure is services for victims of sexual abuse—specifically the lack of services for boys.¹⁹ These recommendations are baseline recommendations that PREA requires. For that reason, the motivations of female staff, while important, do not preclude taking immediate actions that will prevent harm to youth, to agencies and to public safety and trust. I agree with Professor Buchanan about the need for additional research, both qualitative and quantitative and will address that in greater detail below.

First, while the standards²⁰ and case law²¹ permit a greater degree of protection from cross-gender searches and supervision for youth in custody, many jurisdictions still permit these practices. It is also important to note that male “youthful inmates” i.e. individuals under the age of 18, prosecuted in adult court and confined in a jail or prison, will still be subject to cross-gender searches. Though there are equal employment imperatives that require jurisdictions to provide similar opportunities to women that they provide to men,²² agencies must also be attentive to the safety of youth in custody and take appropriate preventive measures including those that limit female staff from searching male and Trans youth and from viewing them while in states of undress. A number of jurisdictions have taken the position that the greater latitude that courts permit for women to search male or female youth suggests that women should do all searches of Trans youth. This practice has the potential to violate the rights of both Trans youth and the equal employment rights of female staff. Moreover, these practices create the

¹⁸ § 115.333.

¹⁹ § 115.353.

²⁰ § 115.315(b).

²¹ *E.g.*, *Mashburn v. Yamill County*, 698 F. Supp. 2d 1233 (D. Or. 2010) (finding that children are given greater protections than adults when determining when a search is ‘reasonable’ in corrections settings).

²² Equal Employment Opportunities, 42 U.S.C. § 2000e-2(a) (2012).

opportunity for abuse and create vulnerability for youth in custody. I make this point even though I am aware that the numbers of female staff in both adult and juvenile corrections is increasing.²³ According to correctional leaders, this increase is a result of men's lower educational attainment and inability to pass background checks.²⁴ Women are more likely have a high school diploma or associates degree and less likely to have criminal convictions

The second issue relates to the requirement for robust background checks. The PREA standards require background checks for any incidents involving sexual abuse and sexual harassment, and prohibit agencies from hiring staff with past convictions or substantiated incidents of sexual abuse in a facility or sexual activity in the community by force or without consent.²⁵ Agencies must conduct these checks on three occasions—at the point of hire, when being considered for a promotion and finally in a general five-year cycle. The PREA Standards enumerate the following offenses that bar hiring or promotion of staff:

- (1) engaging in sexual abuse in a prison, jail, lockup, community confinement facility, juvenile facility, or other institution (as defined in 42 U.S.C. 1997); (2) convicted of engaging or attempting to engage in sexual activity in the community

²³ In 2001, women made up just 24.5% of the correctional workforce. Joann Brown Morton, *ACA & Women Working in Corrections*, CORR. TODAY, Oct. 1, 2005. This percentage increased to more than 40% within 7 years. *E.g.*, ALLEN J. BECK, PAIGE HARRISON & PAUL GUERINO, BUREAU OF JUST. STAT., NCJ 228416, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008-09 1 (2010); Brooke Hauser, *The Changing of the Guard*, N.Y. TIMES, Sept. 26, 2008, <http://www.nytimes.com/2008/09/28/nyregion/thecity/28guar.html> (stating that women represent 45% of employees in the New York City Department of Corrections).

²⁴ See, e.g., CITY OF N.Y. DEPT OF CITYWIDE ADMIN. SERVS., NOTICE OF EXAMINATION, CORRECTION OFFICER, available at <http://www.nyc.gov/html/dcas/downloads/pdf/noes/201303301000.pdf> (noting the requirements for correctional officer employment in New York City, including educational requirements and the ability to pass a drug screening). But see EEOC ENFORCEMENT GUIDANCE NO. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, available at http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf. (“An employer's neutral policy (e.g., excluding applicants from employment based on certain criminal conduct) may disproportionately impact some individuals protected under Title VII, and may violate the law if not job related and consistent with business necessity (disparate impact liability)).”

²⁵ 28 C.F.R. § 115.317.

facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or (3) has been civilly or administratively adjudicated for engaging or attempting to engage in sexual activity in the community facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse .²⁶

While good on its face, the background check standard assumes a reporting culture in correctional environments that often does not exist.²⁷ The recent scandal in the Baltimore City Detention Center illustrates this problem. In April of this year, twenty five people including thirteen corrections officers were indicted for a widespread smuggling scheme of drugs, cell phones and other contraband into the facility.²⁸ One inmate was discovered to have impregnated four officers.²⁹ This scandal was so widespread that other staff members either knew or turned a blind eye to the misconduct.

Because most youth in custody are under the age of majority, any allegation of abuse should be reported to state agencies for investigation under mandatory reporting laws and when applicable licensing statutes.³⁰

²⁶ *Id.*

²⁷ The Code of Silence is very prevalent in the corrections setting and results in staff staying silent about abuse, refusal to cooperate with investigations and actively hiding evidence of misconduct. *See, e.g.,* Kathleen M. Dennehy & Kelly A. Nantel, *Improving Prison Safety: Breaking the Code of Silence*, 22 WASH. U. J.L. & POL'Y 175 (2006); Lois Henry, 'Code of Silence' Pervades Prison System, BAKERSFIELD CALIFORNIAN (July 27, 2011) available at <http://www.bakersfield.com/news/columnist/henry/x468147796/Code-of-silence-pervades-prison-system>.

²⁸ Ian Duncan et al., *Inside a Jail Run From Within*, THE BALTIMORE SUN (Apr. 28, 2013) available at <http://www.baltimoresun.com/news/maryland/bal-black-guerrilla-family-tavon-white-prison-corruption-20130425.0.7483161.html>

²⁹ *Id.* ("Corrections department investigators discovered BGF documents outlining that new recruits are trained to target female officers with "low self-esteem, insecurities and certain physical attributes," according to the affidavit.").

³⁰ *See e.g., Using Existing State Mandatory Reporting Statutes to Improve Disclosure of Sexual Violence in Correctional Settings*, Project on Addressing Prison Rape (2013) available at http://www.wcl.american.edu/endsilence/documents/Mandatory_Reporting_Feb2013WhitePaper.pdf.

Another forum that could provide a red or yellow flag about staff conduct would be prosecution of sexual abuse of youth in custody. While we know from BJS reports, substantiated incidents of sexual abuse of youth in juvenile facilities is higher; there is no evidence that prosecutions of staff perpetrators are equally higher. Often agencies pursue administrative sanctions such as termination or resignation. While appropriate, they are not a substitute for referral to prosecution and prosecution.

The third preventive measure is appropriate sanctions. Based on our review of almost 300 reported cases involving female staff abuse from 1990 to present, female staff are rarely prosecuted for abusing men or boys in custody.³¹ And even, when prosecuted, female staff often pleads to less serious offenses that do not require registration as sex offenders.³² While there is significant legitimate critique of sex offender registration, much of which I share, there needs to be a national “do not hire” list similar to IADLEST³³ or the registries in Idaho³⁴ and Florida³⁵ that allow governmental agencies that provide services to vulnerable populations – youth, elderly, disabled, inmates -- to have information on custodial staff who have been involved in misconduct. More often than not, female staff are allowed to resign or are terminated in lieu of criminal or administrative sanctions and scant information about the reasons for the separation

³¹ *Correctional Staff Sex Abuse Offender Project*, Project on Addressing Prison Rape (forthcoming 2014) (empirical research on file with author)

³² *Id.* See also, Nate Rau, *Sex Abuse Allegations Plague TN Juvenile Detention Center*, THE TENNESSEAN, (February 08, 2010) (article discussing multiple instances of female staff members being “cleared” after sexual abuse was reported- one kitchen staff member was investigated for five separate incidents of sexual abuse of boys within her two years of employment and eventually resigned, none of the investigations were ‘indicted”).

³³ *National Decertification Index*, International Association of Directors of Law Enforcement, *available at* <https://www.iadlest.org/Projects/NDI20.aspx>.

³⁴ IDAHO CODE ANN. § 18-8323.

³⁵ FLA. STAT. ANN. §§ 943.046, 943.043, 775.21(c).

from employment are revealed to prospective employers; often, leaving these individuals to find employment in other settings with vulnerable populations—mental health facilities, rehabilitative agencies and/ or elderly care facilities. Appropriately sanctioning female staff for sexual relations with youth in custody would focus on the illegal act, and move beyond discussing the motivations and gender stereotypes associated with the misconduct.³⁶

The fourth preventive measure is appropriate training for staff and for youth. Having conducted training on issues of sexual abuse in custody for almost 20 years,³⁷ I welcome the developments in knowledge and the attendant improvement in staff training that has occurred; there needs to be more, however. Staff training must address the particularities of sexual abuse as it applies to female staff abuse of men and boys in custody. There continues to be a perception that female abuse of boys is less serious; that boys cannot be abused by women; that boys are “lucky” when they have sex with “older” women or women in authority; and/or that the female staff are really the victims and are manipulated by predatory men and boys. Staff training must address these perceptions and make it clear that staff is the author of their own destiny; that a basic requirement for staff is to be accountable and responsible for their actions in much the same way the public expects accountability for individuals in custodial authority.

³⁶ See Lauren A. Teichner, *Unusual Suspects: Recognizing and Responding to Female Staff Perpetrators of Sexual Misconduct in U.S. Prisons*, 14 MICH. J. GENDER & L. 259 (2008) (arguing for the active prosecution of both female and male staff who engage in sexual misconduct under a new standard that moves beyond the gender stereotype).

³⁷ See, An End to Silence: The Project on Addressing Prison Rape found at: <http://www.wcl.american.edu/endsilence> (Since 2000, The American University, Washington College of Law (WCL) Project on Addressing Prison Rape has been funded by government and private grantors to address and respond to sexual abuse of people in custody. The Project on Addressing Prison Rape has continually provided training, technical assistance and guidance to high level corrections decision makers on key issues in addressing and responding to The Prison Rape Elimination Act.)

Recently, the Project on Addressing Prison Rape was contacted by a non-profit agency working with a correctional agency about developing training for boys in custody. The agency contacted us because of graphic novels we have developed for training youth on sexual abuse in custody.³⁸ Our materials were some of the only materials available that discussed female abuse of boys in custody. This is not an infomercial for our very rudimentary materials – although we make them available without charge on our website-- but it points to a serious gap in thinking and services for male survivors of sexual abuse, both in custody and in the community and a lack of ability to talk to boys about abuse by women.

There are several reasons for this lack of information. First, because of gender stereotypes and notions of masculinity men rarely see sex with older females as abuse. Second, resources to address sexual victimization of men are scarce; historically the majority of funding for sexual victimization goes to organizations addressing sexual victimization of women. Often these agencies, founded on the theory of feminism, will not serve men or boys and will not serve inmates or formerly incarcerated persons. While there seems to be a small shift in that thinking given the passage of PREA Standards on medical and mental health care³⁹ and the 2013 reauthorization of the Violence Against Women Act,⁴⁰ the lack of knowledge and established resources for men and boys abused by women is frankly a contributor to the notion that abuse of boys by women is not a problem.

³⁸ End Silence: Youth Speaking out About Sexual Abuse in Custody, Project on Addressing Prison Rape (2012) *available at* http://www.wcl.american.edu/endsilence/inmate_edu.cfm.

³⁹ 28 C.F.R. §§ 115.81-83; 115.182; 115.282-283; 115.381-383.

⁴⁰ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 STAT. 54 (2013).

While there is abundant data to suggest that females are more likely than males to be sexually victimized, I am concerned that because of the stigma of victimization and notions of masculinity, men do not define sex with women as abusive and secondly that they will be even less likely to report abuse by men, women or other boys.⁴¹ The only way to combat this reluctance is with education, training and sexual abuse services for boys and men.⁴²

I want to end by thanking the Review Panel for addressing this important issue in its hearing. Besides the recommendations I have made above -- full implementation of the PREA Standards especially those related to cross gender supervision, background checks, sanctions, education and training, and sexual abuse services for boys -- I would like to echo Professor Buchanan's call for additional research and data. I would like to make a strong pitch for continuing the existing data collections to see the changes that occur because of PREA implementation and to also look at the sanctioning outcomes of the reported incidents. Here are my research questions. Is staff found involved placed on child abuse registries or sex offender registries? Are agencies doing robust background checks? What are they finding in those checks? What are best practices for background checks? What is the status of development of educational materials targeted to staff and youth on sexual victimization of males in custody? What is the status of development of sexual abuse services and treatment for men and boys in custody? Many of these questions may be answered by information resulting from PREA

⁴¹ ALLEN J. BECK ET AL., BUREAU OF JUST. STAT., NCJ 241708, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2012 (2013) available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4656>.

⁴² Extensive research has been done to support the importance of talking to men and boys about sexual victimization. See e.g., Guy Holmes, *See No Evil, Hear No Evil, Speak No Evil: Why Do Relatively Few Male Victims Of Childhood Sexual Abuse Receive Help For Abuse-Related Issues In Adulthood?*, CLINICAL PSYCHOLOGY REVIEW (1997); Richard B. Gartner, Ph.D., *Talking About Sexually Abused Boys, and the Men They Become, When Difficult Talk is Healing Talk*, PSYCHOLOGY TODAY, (January 30, 2011).

audits. Others may require more discreet projects. I hope that as we move forward in defining and understanding the contours of sexual abuse and custody we will answer these and other important questions.

Thank you.