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### Statement of Betsy Ginsberg, Clinical Associate Professor of Law & Director, Civil Rights Clinic, Benjamin N. Cardozo School of Law U.S. Commission on Civil Rights Public Briefing: Women in Prison: Seeking Justice Behind Bars

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# CARDOZO LAW

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## CIVIL RIGHTS CLINIC

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Statement of Betsy Ginsberg, Clinical Associate Professor of  
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U.S. Commission on Civil Rights Public Briefing:  
Women in Prison: Seeking Justice Behind Bars  
Friday, February 22, 2019

Thank you to the Commissioners for inviting me to speak to you today. I am honored to be here, and in particular, honored to be among the esteemed panelists speaking to you today. My name is Betsy Ginsberg and I am a clinical law professor and Director of the Civil Rights Clinic at the Benjamin N. Cardozo School of Law.

The Civil Rights Clinic at Cardozo operates at the intersection of civil rights and criminal justice. Along with my team of law students, we primarily engage in litigation on behalf of individuals and groups whose constitutional and statutory rights have been violated by law enforcement. The majority of the clinic's work challenges the unconstitutional prison and jail conditions on behalf of prisoners and detainees. Since the clinic's inception we have litigated cases involving the right to adequate medical care, prisoner sexual assault, religious freedom, excessive force and long-term use of solitary confinement. Before I began teaching approximately 12 years ago, I was a Staff Attorney at the Prisoners' Rights Project of the Legal Aid Society of New York and prior to that a Staff Attorney at the Prison Law Office in California. Throughout my career representing prisoners, I have represented women in cases involving physical and mental health and sexual assault.

I am heartened that the Commission chose to address the issue of women in prison for today's briefing. Although men make up a significant majority of the country's prison population, the United States has the highest rate of incarceration of women in the world.<sup>1</sup> In recent years, women have been the fastest growing segment of our population in jails and prisons. The significant but insufficient decline we have seen with respect to the overall prison population eclipses or obscures the trend we have seen in the imprisonment of women. While the trends vary from state to state, the overall picture for women has been far worse than for men. In most states the women's population has either grown, outpaced men's population, and/or declined less dramatically than the men's population.<sup>2</sup> Like prisoners generally, women in

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<sup>1</sup> Estalyn Marquis, "Nothing Less Than the Dignity of Man": Women Prisoners, Reproductive Health, and Unequal Access to Justice Under the Eighth Amendment, 106 Cal. L. Rev. 203, 204 (2018) citing Aleks Kajstura & Russ Immarigeon, States of Women's Incarceration: The Global Context, PRISON POL'Y INITIATIVE, <http://www.prisonpolicy.org/global/women> [<https://perma.cc/9G2K-TPDC>].

<sup>2</sup> [https://www.prisonpolicy.org/reports/women\\_overtime.html](https://www.prisonpolicy.org/reports/women_overtime.html)

prisons are disproportionately people of color, overwhelmingly poor, survivors of trauma and abuse, and have high rates of both physical and mental illness as well as substance abuse.<sup>3</sup> But because prisons are closed institutions, they operate far from public scrutiny and without adequate oversight. I was encouraged by the recent public outcry in response to the recent conditions and abuses at the Metropolitan Detention Center in my home borough of Brooklyn. What made that situation unique was not the treatment of detainees, but that federal, state and local lawmakers and a federal judge made their way inside the facility to inspect and speak with those detained inside. Though I would have liked to have seen similar outrage and attention expressed when several women were raped at that same jail and the conditions for women were deemed “unconscionable” by the National Association of Women Judges just two years prior, I am hopeful that attention is being paid, including by this body.

In my written testimony, I address:

1. The issue of women’s health care in prisons and some of the legal barriers prevent women from receiving adequate care
2. The lack of adequate legal protections with respect to health and safety of transgender women

### **Health Care**

Although access to proper health care is a dire issue facing our entire prison population, there are certain problems that women experience in prison that are in some ways distinct from the those faced by the male population. These problems are often exacerbated by the prison setting in no small part because our prison system and its programs are designed primarily with men in mind. The research shows that women are more likely to enter prison with a history of abuse, trauma and mental health problems. They have certain distinct physical health needs, such as pregnancy and other reproductive health issues, nutrition, menopause, and substance use disorders. Studies of women in jails show that they have an alarmingly high rate of serious mental illness (including major depression, schizophrenia, and bipolar disorder) and experience

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<sup>3</sup> ELIZABETH SWAVOLA, ET AL., VERA INST. OF JUSTICE & SAFETY & JUSTICE CHALLENGE, OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM 6 (2016),

these mental illnesses at a rate that is double the rate of jailed men and six times the rate of the general public.<sup>4</sup> In addition, the rate of women entering jail with medical problems is 53%.<sup>5</sup>

In the words of Judy Clark, a woman incarcerated at Bedford Hills Correctional Facility in New York since 1983, “Health care is a human right that should not be diminished by incarceration. It is also expensive and difficult to deliver. Thus, our pursuit of adequate care can, at times, come into conflict with those in charge, be it through grievances, class-action lawsuits or critical reports.”<sup>6</sup>

Prison authorities have an “obligation to provide medical care for those whom it is punishing by incarceration,” and their failure to do so may violate the Eighth Amendment’s prohibition on cruel and unusual punishment.<sup>7</sup> In order to show that inadequate medical treatment rises to the level of an Eighth Amendment violation, one must show that prison officials showed deliberate indifference to a serious medical need.<sup>8</sup> This requires both an objective showing that the medical condition was sufficiently serious and a subjective showing that the officials were aware of the condition and failed to adequately address it. While federal courts are quick to point out that an Eighth Amendment violation requires “more than mere medical malpractice or negligence” state and federal prisons can be held liable for those torts when they provide negligent medical care.

Despite formal legal protections, women prisoners are frequently denied basic medical care and in particular their reproductive health care and mental health treatment needs are overlooked. There are a number of factors that explain why these problems persist despite

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<sup>4</sup> Id. at 10.

<sup>5</sup> Id.

<sup>6</sup> Tamar Kraft-Stolar, *Reproductive Injustice, The State of Reproductive Health Care for Women in New York State Prisons*, A Report of the Women in Prison Project of the Correctional Association of New York (2015).

<sup>7</sup> *Estelle v. Gamble*, 429 U.S. 97, 103–05, 97 S. https://storage.googleapis.com/vera-web-assets/downloads/Publications/overlooked-women-and-jails-report/legacy\_downloads/overlooked-women-and-jails-report-updated.pdf Ct. 285, 50 L.Ed.2d 251 (1976).

<sup>8</sup> Id.

legal protections. Both practical and doctrinal barriers make it difficult for women to access the legal system in order to bring claims alleging unlawful deprivation of medical care. The barriers that I have seen have the greatest and most detrimental impact include the lack of access to counsel, the exhaustion and attorney's fees provisions of the Prison Litigation Reform Act ("PLRA"), and the Eighth Amendment standard and the federal courts' interpretation of that standard in cases involving women's health.

The majority of prisoners seeking to vindicate their constitutional rights do so without counsel. The vast majority of prisoners are indigent and there is no right to counsel in prisoner civil rights cases. Moreover, courts do not have resources or authority to appoint counsel and must rely on volunteers even where they see a need for counsel. Finally, some of the doctrinal barriers addressed below contribute to prisoners' difficulty securing counsel. Next, the PLRA erected a series of hurdles that apply to prisoners seeking to enforce their rights through the federal courts. Two of these hurdles, the administrative exhaustion provision<sup>9</sup> and the attorney's fees provision<sup>10</sup>, make it particularly difficult for prisoners to have their cases heard in court. While requiring prisoners to bring their complaints to prison officials before taking them to court might seem sensible, it allows prison officials to control prisoners' access to courts. They do this by making grievance forms unavailable, making the process complicated and technical and/or retaliating against prisoners who file grievances.<sup>11</sup> The attorneys' fees provision of the PLRA essentially guts fee-shifting that is otherwise available in civil rights actions by drastically reducing the fees that lawyers can recover after bringing a successful prisoners' rights case. The purpose of the fee-shifting provisions in civil rights cases is to encourage lawyers to take on these cases and its removal has the expected effect.

Finally, the Eighth Amendment standard and courts' interpretation of that standard places a heavy burden on prisoners to show that prison officials had the requisite intent. This standard,

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<sup>9</sup> 42 U.S.C. § 1997e(a)

<sup>10</sup> 42 U.S.C. § 1997e(d)

<sup>11</sup> Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1657 (2003)

established in the Supreme Court cases of *Estelle v. Gamble*<sup>12</sup> and *Farmer v. Brennan*<sup>13</sup> allows – even encourages – prison officials to remain ignorant of risk.<sup>14</sup> It also does not account for the informational asymmetry between prisoner-plaintiff and prison officials. The subjective standard also allows courts to pay tremendous deference to prison officials, often characterizing a prisoner’s Eighth Amendment claim as a disagreement with medical staff that does not rise to the level of deliberate indifference.<sup>15</sup> The challenge of pleading and proving an Eighth Amendment claim has been exacerbated by the previously mentioned lack of access to counsel. Courts are frequently presented with pro se prisoner medical claims in which only the Defendants have submitted legal arguments and the body of law that develops from these cases has been unfriendly to plaintiffs.

While litigation continues to be an important mechanism for change, it remains a difficult path. Successes are achieved, like last month’s injunction against the Virginia Department of Corrections finding Fluvanna Correctional Center for Women to be providing constitutionally deficient care, including a three-year delayed colonoscopy resulting in undiagnosed and untreated stage 4 cancer.<sup>16</sup> But such successes are long, hard, battles fought by large teams of lawyers whose resources do not permit enough replication of these cases.

In addition to these practical and doctrinal barriers, there is simply not adequate independent oversight of prisons. Most jurisdictions in the United States have not developed independent prison oversight mechanisms to monitor and enforce civil rights in prisons and jails. Independent government oversight bodies could provide additional transparency and accountability in correctional facilities.<sup>17</sup> Additionally, the Civil Rights of Institutionalized Persons Act (“CRIPA”) has not achieved its potential as a driver of prison reform.<sup>18</sup> CRIPA gives

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<sup>12</sup> 429 U.S. 97 (1976)

<sup>13</sup> 511 U.S. 825 (1994)

<sup>14</sup> Margo Schlanger, Restoring Objectivity to the Constitutional Law of Incarceration, ACS Issue Brief (Sept. 2018).

<sup>15</sup> See, e.g., *Rideau v. Small*, 402 F. App’x 165, 166 (9th Cir. 2010)

<sup>16</sup> *Scott, et al, v. Clarke*, 12-CV-00036 (W.D. Va. Jan. 2 2019).

<sup>17</sup> Michelle Deitch, The Need for Independent Prison Oversight in a Post-PLRA World, *Federal Sentencing Reporter*, April 2012.

<sup>18</sup> 42 U.S.C. § 1997.

DOJ, through its Special Litigation Section, authority to gain full access to prisons to conduct investigations and to initiate civil lawsuits to remedy unconstitutional conditions in prisons and jails. However, DOJ has historically underused its authority.<sup>19</sup> In the most recent fiscal year, DOJ filed no complaints and entered into no settlements, but it terminated two cases and a part of another and closed six (and began five) investigations.<sup>20</sup> Although one might expect to see significant fluctuations in the way different administrations wield their CRIPA authority, the current and previous administrations' use of the statute does not differ tremendously.

### **Transgender Women**

Transgender women who are in prison bear special mention. Although this is an even smaller population than women generally (which is a significantly smaller population than male prisoners) it is important that the Commission become aware of and attempt to address the issues involving these women as well. Transgender women are incarcerated at far higher rates than the general population, a rate that jumps even higher for black transgender women.<sup>21</sup> Among the abuses trans women face, is a lack of appropriate medical treatment, including failure to continue or begin or interruption of hormone therapy, gender-based harassment, abuse by or condoned by correctional staff, sexual assault by staff and other prisoners, and gender-based isolated confinement.

A New York-based survey of trans women prisoners found that “every person who was interviewed reported encountering some form of harassment and/or assault during their imprisonment. The persistent physical, emotional, and sexual abuse reported included verbal

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<sup>19</sup> John J. Gibbons & Nicholas De B. Katzenbach, *Confronting Confinement A Report of the Commission on Safety and Abuse in America's Prisons*, 22 Wash. U. J.L. & Pol'y 385, 501 (2006).

<sup>20</sup> DOJ Activities under the Civil Rights of Institutionalized Persons Act, FY 2017 Report to Congress <https://www.justice.gov/crt/case-document/file/1081841/download>

<sup>21</sup> Grant, J. M., Mottet, L. A., Tanis, J., Harrison, J., Herman, J. L., & Keisling, M. (2011). *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*. (p. 163). Washington, DC: National Center for Transgender Equality & National Gay and Lesbian Task Force (finding that 21% of all transgender women have been incarcerated at some point in their lives as opposed to a 5% rate for the rest of the population and that 47% of black trans women have been incarcerated).



harassment, physical and sexual assault, humiliation, and rape.”<sup>22</sup> The same report also found that transgender prisoners face constant harassment at the hands of other prisoners.<sup>23</sup> A 2007 study from the University of California, Irvine found that, in the California prison system, transgender prisoners report more sexual assault by a factor of 13.4 compared to the non-transgender prisoners (59% to 4.4%).<sup>24</sup> The Bureau of Justice Statistics noted in May, 2013 that all of the its victim self-report surveys conducted under PREA found that prisoners with the highest rates of sexual victimization are those who identified as LGBT.<sup>25</sup>

Although there appear to be no current studies on the prevalence of relying on solitary confinement (typically called protective custody) to house prisoners who have alleged they have been raped or otherwise sexually assaulted in custody and to house transgender women in these settings purportedly for their protection, there is strong anecdotal evidence from around the country that this happens with great frequency.<sup>26</sup> The severe psychological and physical impact of long and even medium term solitary confinement is well documented and is compounded when an individual is placed in that setting on the heels of a traumatic experience or simply by virtue of one’s gender expression. Trans women have reported years-long placements in isolated confinement solely because of prison officials’ belief that this is the only way to safely house them.<sup>27</sup>

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<sup>22</sup> SYLVIA RIVERA LAW PROJECT, “IT’S A WAR IN HERE”: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN’S PRISONS (2007) AT 19.

<sup>23</sup> *Id.* at 25

<sup>24</sup> JENNESS, MAXSON, MATSUDA & SUMNER, VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT 31 (2007). *available at* <http://www.wcl.american.edu/endsilence/documents/ViolenceinCaliforniaCorrectionalFacilities.pdf>.

<sup>25</sup> U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-2012, AT 31, *available at* <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>. *See also* JODY MARKSAMER, HARPER JEAN TOBIN, STANDING WITH LGBT PRISONERS: AN ADVOCATE’S GUIDE TO ENDING ABUSE AND COMBATING IMPRISONMENT, NATIONAL CENTER FOR TRANSGENDER EQUALITY 3 (2013).

<sup>26</sup> Victoria Law, For People Behind Bars, Reporting Sexual Assault Leads to More Punishment, Truthout, September 30, 2018, <https://truthout.org/articles/for-people-behind-bars-reporting-sexual-assault-leads-to-more-punishment/>

<sup>27</sup> Even where alternatives to isolation exist, prisons and jails nonetheless rely on isolation. For example, in New York City, DOC placed nearly the same number of trans women in its trans housing unit as it did in 23-hour isolation, despite the trans housing unit not having been full. *See* Victoria Law, For People Behind Bars, Reporting Sexual Assault Leads to More Punishment, Truthout, September 30, 2018, <https://truthout.org/articles/for-people-behind-bars-reporting-sexual-assault-leads-to-more-punishment/>

As with lawsuits about medical care and other prison abuses, the public learns quite a bit about the treatment of trans women in prison from litigation. Public filings and media attention to successful cases allows for the public to learn about the rampant sexual abuse and harassment of trans women in prison and their plight to receive appropriate medical treatment – in particular to receive hormone replacement therapy, gender-affirming surgery and other treatments that allow them to live more comfortably in their bodies. We should not, however, mistake the publicity of these important successes for adequate progress and more importantly we should not take from these successes that litigation, at least under the current legal regime, is anywhere close to an appropriate check on these abuses.

Two recent successful cases are illustrative of the challenges trans women face in prison. Two months ago, a federal court in Idaho granted Adree Edmo, a trans woman prisoner, a preliminary injunction requiring prison officials to provide her with gender confirmation surgery. The court found her gender dysphoria to be a serious medical condition, relying on the fact that even with hormone treatment, Ms. Edmo was in extreme emotional pain that led her to attempt self-castration. For every Adree Edmo (who was represented by a team of experienced counsel) there are scores of trans women who never file claims, whose claims are dismissed on PLRA exhaustion grounds, or who, typically without assistance of counsel, are denied treatment on the grounds that their condition is not sufficiently serious or that prison officials did not have sufficient knowledge of her need. In fact, shortly before Ms. Edmo won her case, Serenity Williams, a pro se trans woman in a Louisiana state prison was denied the same treatment based on the court's finding that prison officials, who provided some treatment, were not deliberately indifferent.<sup>28</sup>

In December, Strawberry Hampton a trans woman in Illinois was transferred to a women's prison after having been beaten, sexually abused, isolated, and constantly harassed with transphobic slurs at a men's prison. Ms. Hampton was represented by several experienced

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<sup>28</sup> Williams v. Kelly, No. CV 17-12993, 2018 WL 4403381, at \*4 (E.D. La. Aug. 27, 2018), report and recommendation adopted, No. CV 17-12993, 2018 WL 4386178 (E.D. La. Sept. 14, 2018)

prisoners' rights lawyers who fought off attempts to dismiss her case on PLRA exhaustion grounds. Her experience in men's prisons is representative of so many other trans women, including my own clients', but her ability to secure a transfer through litigation is far more unique. Most states will not house trans women in women's prisons and the federal government recently rolled back protections for transgender individuals in federal prisons. The new guidelines use biological sex as the initial determination for housing assignments, allowing for housing a trans prisoner by her gender identity "only in rare cases."<sup>29</sup>

These successes show that litigation can drive change in this arena but only where significant resources are available to clear the many hurdles standing in the way of prisoners' success in the courts.

## **Conclusion**

In Sum, we lack the adequate legal protections and oversight necessary to ensure that women in prison are afforded the basic human right to adequate medical care and personal safety. I applaud the Commission's attention to this topic and urge the Commission to take steps to ensure that it receives significant input from women who are or who have previously been incarcerated in addition to the esteemed panelists brought in today. I thank the Commission again for the opportunity to testify before you, and look forward to answering any questions that you have.

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<sup>29</sup> Federal Bureau of Prison Transgender Offender Manual, <https://www.bop.gov/policy/progstat/5200-04-cn-1.pdf>