

Testimony to the Review Panel on Prison Rape
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I am a Professor of Law at the University of California–Berkeley. Before accepting my current position in April, I was a Professor of Law at UCLA.

I graduated with honors from Harvard Law School in 1998. Before beginning my academic career, I was a law clerk for Judge Dorothy Nelson of the Ninth Circuit Court of Appeals (1998-99) and for Justice Stephen Breyer of the U.S. Supreme Court (2000-01). I have also worked for the U.S. Department of Justice as an Attorney-Advisor at the Office of Legal Counsel (1999-2000), and a Summer Law Clerk at the Civil Rights Division (summer 1997).

My scholarly and teaching interests have included antidiscrimination law, race and sexuality, law and psychology, constitutional law, and media and entertainment law. A primary focus of my research and writing has been the interdisciplinary study of race and sexual orientation and the intersection between these two categories in various social and legal contexts.

My scholarship builds on a theory called “intersectionality,” which was developed by Kimberlé Crenshaw. *See, e.g.,* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). Intersectionality examines how multiple identities overlap to produce distinct forms of oppression. Whereas Crenshaw focused on black women, my scholarship concentrates on non-heterosexual men of color. Sites of inquiry for examining these questions of intersectionality include the gay rights movement, HIV/AIDS, and government policies that classify on the basis of sexual orientation. My scholarship seeks to reveal the complex experiences of sexual and gender minorities and challenge constructions of “gay” and “LGBT” identities that ignore race, gender and class.

My testimony is based on research that I conducted over four years in preparing an article, *Masculinity as Prison: Sexual Identity, Race and Incarceration*, which will be published by *California Law Review* in October 2011. I have submitted the final draft of the article, along with this testimony. This project investigates a special unit of the Los Angeles County Men’s Jail (the K6G unit) that is set aside for gay and transgender inmates. I interviewed numerous formerly incarcerated persons, including people formerly incarcerated in the K6G unit, law enforcement officers, government officials, lawyers, and advocates to illuminate how the jail identifies gay and trans inmates and the extent to which the identification process was shaped by

popular stereotypes of gay, bisexual and transgender identities. Although the article's primary focus is the L.A. Jail, I interviewed officials associated with the San Francisco and New York jails in order to understand the policy choices made by L.A. County and learn about potential alternative policies.

I. Policies that rely on segregation to keep inmates safe are difficult to implement and create special dangers.

All three of these jurisdictions—Los Angeles, San Francisco and New York—used to have “queens tanks,” special units set aside for transgender, gay, and/or lesbian inmates. My investigation suggests that policies that rely on sexual orientation segregation are difficult to implement and often harmful to sexual minorities, especially people of color. They also tend to be vastly underinclusive. In short, they fail to protect many vulnerable inmates, including sexual minorities who do not conform to stereotypes and inmates who are heterosexual but vulnerable. In approaching segregationist policies, it is important not to forget that government used segregation to oppress African-Americans until the Supreme Court began to dismantle Jim Crow in *Brown v. Board of Education*, 347 U.S. 483 (1954). During the same period and well afterwards, however, state and local governments segregated sexual minorities based on homophobia. See, e.g., GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890–1940*, at 91-92 (1994) (noting that prisons in New York segregated effeminate homosexuals in a “Fag Annex” as early as 1910). Some prison and jail officials believed that LGBT people posed a “threat to institutional order and security.” Regina Kunzel, *Lessons in Being Gay: Queer Encounters in Gay and Lesbian Prison Activism*, 100 RADICAL HIST. REV. 11 (2008); Dreibelbis v. Marks, 742 F.2d 792, 795 (3d Cir. 1984) (upholding prison regulation preventing male prisoners from wearing long hair because it “assists in controlling homosexuality within the correctional institution”). Homophobic prison administrators worried that putting men in close confinement and denying them access to women would make prisons “faggot factories.” Helen M. Eigenberg, *Correctional Officers and Their Perceptions of Homosexuality, Rape, and Prostitution in Male Prisons*, 80 PRISON J. 415, 416 (2000) (quoting prison scholars in the 1950s and 60s, grappling with “situational homosexuality”). Sadly, overtly homophobic segregation is not a thing of the past. In 2009, media reports surfaced of officials in a Virginia women’s prison who created a special wing to keep “butch” women from their feminine partners. See *Women Who “Looked Gay” Segregated at Virginia Prison*, JEZEBEL.COM (Jun. 11, 2009, 11:00 AM), <http://jezebel.com/5286986/women-who-looked-gay-segregated-atvirginia-prison>. Therefore, segregation in incarceration has typically reflected homophobic attitudes and assumptions.

Even when segregation does not arise from such impulses, it has frequently resulted in gay, bisexual and transgender inmates being isolated from general services and sources of support. See Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIVIL RTS. L. REV. 515, 517 (2009).

Some facilities have responded to the vulnerability of gay and transgender prisoners by automatically and involuntarily segregating them. In other facilities, segregation is often reactive and arises only when an inmate complains about being assaulted, threatened or harassed. The facility's response often is to assign the perpetrator to punitive segregation and the victim to administrative segregation. *Id.* at 541. Yet, despite these different labels, the conditions of punitive and administrative segregation are often quite similar. *Id.*

L.A., the only one of the three cities in my study to continue to segregate gay inmates, claims to have cured these problems and refined segregation. However, L.A. also engaged in the ugly practice of homophobic segregation. As L.A. Deputy Sheriff Bart Lanni admitted in his testimony before the National Prison Rape Elimination Commission, L.A. used to mark gay inmates with "faggot pins." Deputy Sheriff Bart Lanni, Testimony before the National Prison Rape Elimination Commission (Aug. 19, 2005). Historian Regina Kunzel's research found that butch lesbians were held in a "Daddy Tank" in L.A. "under harsh and maximum security conditions" regardless of the charged offense. Kunzel, *Lessons, supra*, at 15. In light of this history, the federal government ought not blindly trust Los Angeles' claim that its policy efficiently advances LGBT inmate safety.

My research suggests that the L.A. Jail policy raises additional serious problems, including the requirement that inmates come out publicly as gay in order to obtain protection and "confirm" their gay identity by reciting mainstream gay culture. While it claims to offer housing in K6G to all gay and transgender people, the screening process leaves out many vulnerable people, especially blacks and Latinos. With respect to gay men, the L.A. Jail requires the inmate to "come out" as gay to staff during intake. After a person is arrested, he or she is typically taken to an inmate reception center for processing. A custody assistant, sitting behind a panel of glass, calls each inmate to a window, directs the inmate to pick up a telephone, and collects various pieces of personal information, including asking the inmate "are you homosexual?" Even after an inmate has identified as gay, prison officials seek to "verify" gay identity by testing the inmate on his knowledge of gay culture. However, the questions asked are largely associated with white, affluent gay men's culture. The deputies ask about culture in West Hollywood, the wealthy gay neighborhood in Los Angeles. For example, they might ask the inmates to describe the annual gay pride parade, which takes place in West Hollywood or to recite the cover charges and describe the signs at various West Hollywood bars. The deputies expect men to know slang terms that they associate with a "gay lifestyle"—for example, "glory hole" and "Prince Albert." This cultural focus disadvantages men of color and others who simply do not affiliate with the gay mainstream. Black men in particular are likely to have a tangential relationship to the mainstream, relatively affluent and white gay community. *See, e.g.,* Thomas C. Mills et al., *Health-Related Characteristics of Men Who Have Sex with Men: A Comparison of Those Living in "Gay Ghettos" with Those Living Elsewhere*, 91 *Am. J. Pub. Health* 981, 981 (2001) (finding that men who reside in gay enclaves are more likely to be white, less likely to identify as bisexual than those who live elsewhere and have higher incomes than those who live elsewhere).

In L.A. County, many of the incoming inmates are black, Latino, and often economically disadvantaged. Yet prison officials expect them vocally to identify as gay in a public space that affords no privacy protections and often includes homophobic epithets. For example, one informant reported that “when they’d say, yes, I am gay. [The Jail staff would respond:] ‘Well, get over here, you faggot!’” Another inmate who expressed a need for HIV medication was met with the response, “Oh, another one of them faggots is sick.” This identification is especially risky because some inmates who identify as gay are later deemed by the Jail *not* to be gay and sent to the general population newly stigmatized. The K6G screening process favors whites because black and Latino men who have sex with men or “MSM” are less likely to identify as gay and less likely to disclose their sexual conduct in a hostile law enforcement context. Public health studies have consistently shown that men of color who have sex with men are less likely to feel that the label “gay” represents them. *See, e.g.,* Gary Goldbaum et al., *Differences in Risk Behavior and Sources of AIDS Information Among Gay, Bisexual, and Straight-Identified Men Who Have Sex with Men*, 2 AIDS & Behav. 13, 16 (1998) (finding that black men at gay public sex venues were more likely to identify as bisexual or straight than white men). Moreover, the L.A. policy explicitly bars bisexuals from access to K6G, even though men of color are more likely to identify and behave bisexuality. *See* Gregorio Millett et al., *Focusing “Down Low”: Bisexual Black Men, HIV Risk and Heterosexual Transmission*, J. NAT’L MED. ASS’N, July 2005, at 52S, 53S (“Studies clearly show that black MSM [men who have sex with men] are more likely than MSM of other races and ethnicities to identify themselves as bisexual and to be bisexually active.”); J.P. Montgomery et al., *The Extent of Bisexual Behaviour in HIV-Infected Men and Implications for Transmission to Their Female Sex Partners*, 15 AIDS CARE 829, 831 (2003) (reporting that the following percentages of HIV-positive MSM reported sex with women in the last five years: 34% black, 26% Hispanic, 19% Asian/Pacific Islander, 13% American Indian/Alaska Native, and 13% white). For this reason, most HIV-related research and public health interventions avoid using the term “gay” because it will repel MSM who need HIV-related services. The L.A. Jail does not understand this. The Jail’s assumption that there is a singular “gay lifestyle” irrespective of race and class differences ignores the life experiences of many MSM.

These hurdles likely produce a disparate racial impact, making the segregated unit whiter than it would otherwise be. Moreover, because only gay and transgender inmates can qualify for access to the L.A. protective unit, the Jail reinforces the stereotype that gay and transgender inmates are inherently weak and heterosexual and bisexual men are stronger. No matter how vulnerable a heterosexual man may be (because of disability and/or youth, for example), he is categorically barred from K6G because of his sexual orientation. The Jail requires all K6G inmates to wear powder blue uniforms—a pointed contrast to the dark blue worn by heterosexuals in the general population.

II. Facilities should consider every inmate’s potential vulnerabilities and protect all vulnerable inmates.

The proposed PREA regulations recognize that many traits correlate with vulnerability to sexual violence, including mental or physical disability, young age, and slight build. The San Francisco and New York policies reflect the spirit of the proposed rule in that they require an individualized assessment of each inmate and allow the inmate to raise any trait that he or she thinks may produce vulnerability. By contrast, L.A. focuses only on sexual orientation and gender identity, rendering the many other vulnerability traits largely irrelevant.

The L.A. model is troubling in part because the Jail gives inmates no opportunity to discuss the extent to which they feel vulnerable and want to be segregated. Intake officers ask inmates “are you homosexual?”, yet they fail to explain why they are asking that question. Although sophisticated inmates know why the officers ask this question, many first-time offenders do not. Further, if an inmate responds “yes,” he is channeled to the segregated unit without any discussion of the pros and cons of being segregated and whether it is in his best interests. By contrast, officials in San Francisco give all inmates an opportunity to discuss safely concerns and do not limit the conversation to a yes/no question about gay identity. This open-ended conversation benefits not just heterosexuals but also MSM. A MSM who is anxious about coming out as gay in jail may choose to emphasize other traits that make him vulnerable, such as being a first-time offender or having enemies in the general population.

The L.A. procedure for transgender inmates also denies autonomy. Jail officers single out inmates who “look transgender” to them and automatically assign them to the segregated unit. Again, the Jail denies them an opportunity to decide whether segregation is in their best interests. Moreover, the Jail does not give inmates who consider themselves to be transgender—but do not happen to “look transgender” to a particular officer—an opportunity to disclose their identity and discuss safety concerns with a jail official. Segregation should not be understood as a panacea for sexual violence. My research indicates that inmates who know of the possibility of segregation weigh various costs and benefits of segregation, including the culture in the segregated unit and separation from relatives, friends and lovers who are assigned to the general population. In some cases, gay and trans-identified inmates cover their identities in order to avoid segregation. In other cases, gay and trans-identified inmates coach heterosexual and bisexual inmates on how to appear gay so they can gain access to the K6G unit.

III. Facilities should strengthen oversight of systems designed to protect vulnerable inmates by including people whose racial and sexual identities are similar to that of vulnerable populations.

For over 25 years, the L.A. Jail has employed a classifications scheme that systematically disadvantages men of color. Despite this bias, the gay press has celebrated the K6G unit and the two officers who oversee the classification of homosexual inmates. Those officers, Deputies Randy Bell and Bart Lanni, have even served as grand marshals of the West Hollywood Gay Pride Parade, judged transgender beauty contests, and been featured in the leading gay publication, the *Advocate*. See, e.g., Richard Andreoli, *Angels for Gay Inmates*, ADVOCATE,

May 25, 2004, at 30. Although Deputies Randy Bell and Bart Lanni have consulted with white gay men from time to time, L.A. has not sufficiently engaged communities of color, especially the poor communities from which many of its inmates come. In general, auditors should make special efforts to include groups that have often excluded, such as people of color, bisexual and transgender people. Such people are better situated to assess whether the facilities' policies are meeting the specific needs of marginalized communities.