Negative: Retaliation for Reporting

By “Coach Vance” Trefethen

***The United States Federal Government should significantly reform its policies regarding convicted prisoners under federal jurisdiction***

WARNING #1: This NEG brief deals with some sensitive and mature issues involving sexuality, gender roles, rape and violence. It was not our choice to bring up this topic. This NEG brief is in response to an existing Affirmative case written by someone else outside of Monument Publishing and being run in the NCFCA debate league. Students need to be able to argue against this case. If this topic is offensive to you, throw away this brief and don’t read any further. But understand that you will still have to debate this topic if the other team brings it up. You would be better off having this NEG brief than not having it, since the more often this case is defeated, the less often it will be used. I have written this brief in such a way that I would have allowed my homeschooled daughters to read it when they were of high school age. Your standards may differ, so make your own decision. If you don’t want students exposed at all to any material of this nature, you should probably drop out of team policy debate, at least for this season. Prisons are bad ugly nasty places and so bad ugly nasty things are going to come up in debates about prisoners. Your debate league voted to debate those topics. Neither Monument Publishing nor Coach Vance are responsible for that choice.

WARNING #2: This brief discusses arguments regarding gender theory and feminism that you probably don’t agree with. The point of the brief is not that you personally agree with these, but that the Affirmative’s experts do. And since their experts say certain beliefs about feminism and gender theory are part of the solution they advocate, the Affirmative needs to advocate those theories in order to meet the standards of their own evidence. The issue is not that the Negative advocates those theories. It’s that the Affirmative DOESN’T advocate them that is the problem.

Case Summary: The AFF implements a bill modeled after a New Jersey proposal to prevent retaliation upon prisoners who report sexual abuse by guards. Status Quo federal law already does everything in that law. AFF forgot to check whether there are any existing policies – they just heard that “abuses are occurring so we need a law!” That’s like saying murders are occurring, so we need to make murder illegal.

Negative: Retaliation for Reporting 3

NEGATIVE PHILOSOPHY 3

1 big oversight in the Affirmative case overshadows the entire round 3

TOPICALITY 3

1. No policy change 3

Status Quo law & policy already make abuse and retaliation illegal in federal prison 3

INHERENCY 4

1. Existing federal law already does the AFF plan 4

Standards are binding on Federal Bureau of Prisons 4

Prison Rape Elimination Act (PREA) standards apply to all Federal prisons under existing law 4

Retaliation for reporting is illegal and prisons are required to have policies to prevent it 4

2. Anonymous reporting 5

Status Quo law (PREA) already requires federal prisons to allow anonymous reporting of abuse 5

PREA standards require anonymous and independent avenues for reporting abuse 5

3. Audits 5

Status Quo requires outside audits 5

HARMS / SIGNIFICANCE 6

1. State “harms” evidence doesn’t apply 6

Federal prisons are safer and better managed than state prisons. 6

Impact on the round: AFF must read harms evidence showing significant problem in federal prisons to justify the Plan 6

2. A/T “Problems at Dublin federal women’s prison” 6

Everything at Dublin was already illegal under current law and the perpetrators have been arrested 6

3. Increase in reporting, not increase in abuse 6

Turn AFF harms: Increase in reported abuses proves Status Quo is working. Better procedures in place make it easier and safer for abuses to be reported, and that’s why we’re hearing more about them 6

SOLVENCY 7

1. Affirmative evidence denies Affirmative methodology #1: Gender theory 7

Link. Affirmative source says - Reforms ONLY work if gender and violence theory help craft them 7

Link: What’s the Affirmative source’s “gender theory” that is needed to make plan work? We must accept gender as a “social construct,” not a characteristic designed by the Creator 7

Link: Affirmative doesn’t mention, promote, or mandate use of “social construct” gender theory 7

Impact: No solvency. Affirmative’s own evidence says they won’t solve 7

2. Affirmative evidence denies Affirmative methodology #2: Feminism 8

Link: AFF source says we “MUST” include input from feminism as part of the solution to prison sexual violence 8

Failure: AFF doesn’t include feminism or feminist voices 8

Impact: No solvency, according to their own expert. 8

3. Nothing will change because reporting only matters if they do something with the reports 8

AFF Source says: Nothing happens when abuse is reported because of Supreme Court rulings on the 8th Amendment 8

4. More laws won’t help 9

Any further improvements will have to come from better prison facility leadership 9

DISADVANTAGES 9

1. Masking disadvantage 9

AFF plan creates false hope and assurance of “doing something” but ignores the real problem 9

Negative: Retaliation for Reporting

NEGATIVE PHILOSOPHY

1 big oversight in the Affirmative case overshadows the entire round

The Affirmative team made a mistake that’s fairly common among many debaters. They found a news article that said “abuses are happening and retaliation is happening” at a federal prison. They the wrote their plan to make it illegal to retaliate for reporting abuse. But they forgot one thing: They forgot to check current laws and policies to research whether that abuse and retaliation is or is not already illegal under existing law.

The fact that something bad is happening doesn’t mean we need a new law passed to make it illegal. For example, murders happen every year. It would be silly to say we can solve murder by passing a new law making murder illegal – because it’s already illegal! Instead of passing new laws, what we should be doing is trying to find ways to make the existing laws and policies more effective.

In this debate round, we’ll show you that everything that happened in their harms evidence is already illegal under existing law. This entire debate round will simply be about making something illegal that is already illegal. In other words, not a very good use of our time, and surely a justification for a Negative ballot.

TOPICALITY

1. No policy change

Status Quo law & policy already make abuse and retaliation illegal in federal prison

Becca Fink 2012. (journalist) 12 May 2012 “Politics of Prison Rape: How PREA Came To Be” <https://citylimits.org/2012/05/12/politics-of-prison-rape-how-prea-came-to-be/> (accessed 7 Apr 2022) (brackets added) (The blacked out section deals with some graphic material that you probably don’t want to see. It refers to a state prison in Georgia, so it does not affect this case. It does not contradict the arguments being made here nor change author’s intent. If you really want to see it, you can change the color formatting in MS Word and uncover it)

PREA [Prison Rape Elimination Act] was the first federal law to address rape in prison. It requires a zero-tolerance policy on all sexual acts for all forms of detention. It came after years of advocacy, research and lawsuits. The 1984 Georgia case *Cason v. Seckinger* featured women who claimed they were forced into sexual acts with staff, and one woman claimed she was made to have an abortion after a staff member impregnated her; it led to consent decrees that changed prison policies in Georgia. A 1996 decision in *Lucas v. White,* a case involving women in a federal prison who said they were “sexually assaulted, physically and verbally, sexually abused and harassed, subjected to repeated invasions of privacy and subject to threats, retaliation and harassment when they complained about this wrongful treatment,” prompted the Federal Bureau of Prisons to issue a plan aiming to eliminate sexual abuse.

INHERENCY

1. Existing federal law already does the AFF plan

Standards are binding on Federal Bureau of Prisons

**[The Federal government can’t fiat the States, so instead they threaten the states with losing 5% of their federal Dept. of Justice grants if they don’t follow the standards. This doesn’t affect the AFF’s case, but explains the second sentence in the evidence below.]**

Federal Register Vol. 77 No. 119 20 June 2012 <https://www.ojp.gov/sites/g/files/xyckuh186/files/media/document/PREA-Final-Rule.pdf> (accessed 7 Apr 2022)

The standards are to be immediately binding on the Federal Bureau of Prisons. 42 U.S.C. 15607(b). A State whose Governor does not certify full compliance with the standards is subject to the loss of five percent of any Department of Justice grant funds that it would otherwise receive for prison purposes, unless the Governor submits an assurance that such five percent will be used only for the purpose of enabling the State to achieve and certify full compliance with the standards in future years. 42 U.S.C. 15607(c).

Prison Rape Elimination Act (PREA) standards apply to all Federal prisons under existing law

Federal Register Vol. 77 No. 119 20 June 2012 <https://www.ojp.gov/sites/g/files/xyckuh186/files/media/document/PREA-Final-Rule.pdf> (accessed 7 Apr 2022)

The standards contained in this final rule apply to facilities operated by, or on behalf of, State and local governments and the Department of Justice. However, in contrast to the proposed rule, the final rule concludes that PREA encompasses all Federal confinement facilities.

Retaliation for reporting is illegal and prisons are required to have policies to prevent it

Federal Register Vol. 77 No. 119 20 June 2012 <https://www.ojp.gov/sites/g/files/xyckuh186/files/media/document/PREA-Final-Rule.pdf> (accessed 7 Apr 2022)

The standards also require agencies to develop policies to prevent and detect any retaliation against persons who report sexual abuse or who cooperate with investigations. Allegations must be investigated properly, thoroughly, and objectively, and documented correspondingly, and must be deemed substantiated if supported by a preponderance of the evidence.

2. Anonymous reporting

Status Quo law (PREA) already requires federal prisons to allow anonymous reporting of abuse

**[Context of this evidence is referring to the abuses at Dublin federal women’s prison]**

Keith Burbank 2022. (journalist, Bay City News Serrvice) 7 Mar 2022 “Members of Congress demand investigation into 'rampant' abuse at Dublin prison” <https://www.pleasantonweekly.com/news/2022/03/07/members-of-congress-demand-investigation-into-rampant-abuse-at-dublin-prison> (accessed 7 Apr 2022)

The "media reports uncovered that inmates at the facility had made the first internal complaints to staff members about five years ago, but they were largely ignored," the leaders said. "This is unacceptable considering PREA (Prison Rape Elimination Act) Standard 51(b) requires agencies to 'provide at least one way for inmates to report abuse or harassment to a public or private entity or office that is not part of the agency, and that it is able to receive and immediately forward inmate reports of sexual abuse and sexual harassment to agency officials, allowing the inmate to remain anonymous upon request,'" the members of Congress said.

PREA standards require anonymous and independent avenues for reporting abuse

Federal Register Vol. 77 No. 119 20 June 2012 <https://www.ojp.gov/sites/g/files/xyckuh186/files/media/document/PREA-Final-Rule.pdf> (accessed 7 Apr 2022)

The standards require that agencies provide at least two internal reporting avenues, and at least one way to report abuse to a public or private entity or office that is not part of the agency and that can allow inmates to remain anonymous upon request. An agency must also provide a way for third parties to report such abuse on behalf of an inmate.

3. Audits

Status Quo requires outside audits

Federal Register Vol. 77 No. 119 20 June 2012 <https://www.ojp.gov/sites/g/files/xyckuh186/files/media/document/PREA-Final-Rule.pdf> (accessed 7 Apr 2022)

The final rule resolves an issue left undecided in the proposed rule by including standards that require that agencies ensure that each of their facilities is audited once every three years. Audits must be conducted by: (1) A member of a correctional monitoring body that is not part of, or under the authority of, the agency (but may be part of, or authorized by, the relevant State or local government); (2) a member of an auditing entity such as an inspector general’s or ombudsperson’s office that is external to the agency; or (3) other outside individuals with relevant experience. Thus, the final standards differ from the proposed standards in that audits may not be conducted by an internal inspector general or ombudsperson who reports directly to the agency head or to the agency’s governing board

HARMS / SIGNIFICANCE

1. State “harms” evidence doesn’t apply

Federal prisons are safer and better managed than state prisons.

ABC News 2021 (journalist Bill Hutchinson) 21 Dec 2021 “Derek Chauvin wants to go to federal prison, even though it means he'll do more time” <https://abcnews.go.com/US/derek-chauvin-federal-prison-means-hell-time/story?id=81845835> (accessed 14 Mar 2022)

When asked if there is a big difference between federal and state prisons, experts agreed that federal prisons are better. "The general reason is federal prison just tends to be safer and nicer than state prison and local jails," former federal prosecutor Neama Rahmani told ABC News. "There are many reasons for that. They're just managed better by the Bureau of Prisons, where state and local jails just are not."

Impact on the round: AFF must read harms evidence showing significant problem in federal prisons to justify the Plan

Proving it’s a problem in state prisons has no evidential value in this debate round.

2. A/T “Problems at Dublin federal women’s prison”

Everything at Dublin was already illegal under current law and the perpetrators have been arrested

Michael Balsamo & Michael Sisak 2022. (journalists) 4 Mar 2022 “House Dems demand to see investigation into rapes at Dublin women's prison” <https://www.ktvu.com/news/house-dems-demand-to-see-investigation-into-rapes-at-dublin-womens-prison> (accessed 7 Apr 2022)

Those arrested at Dublin include the prison’s former warden, [Ray Garica](https://apnews.com/article/prisons-california-san-francisco-sexual-abuse-e9b0b3c8bf508bafc66399c95c02a1df), who is accused of molesting an inmate as she tried to push him away. ~~Garcia made her and another inmate strip naked as he did rounds and took pictures that were found on his personal laptop computer and government-issued cellphone when the FBI raided his office and home last summer, prosecutors said~~. The inspector general’s office has been involved in several of those cases, including Garcia’s case, and those investigations remain ongoing. Two of the arrested men, James Theodore Highhouse, the prison’s former chaplain, and Ross Klinger, a recycling technician, [have pleaded guilty](https://apnews.com/article/coronavirus-pandemic-health-california-oakland-prisons-5085536a92b12afa46bbfcf00cba46d9) and are awaiting sentencing. Several other Dublin workers are under investigation.

3. Increase in reporting, not increase in abuse

Turn AFF harms: Increase in reported abuses proves Status Quo is working. Better procedures in place make it easier and safer for abuses to be reported, and that’s why we’re hearing more about them

Federal Register Vol. 77 No. 119 20 June 2012 <https://www.ojp.gov/sites/g/files/xyckuh186/files/media/document/PREA-Final-Rule.pdf> (accessed 7 Apr 2022)

Notably, the standards are generally not outcome-based, but rather focus on policies and procedures. While performance-based standards generally give regulated parties the flexibility to achieve regulatory objectives in the most cost-effective way, it is difficult to employ such standards effectively to combat sexual abuse in confinement facilities, where significant barriers exist to the reporting and investigating of such incidents. An increase in incidents reported to facility administrators might reflect increased abuse, or it might just reflect inmates’ increased willingness to report abuse, due to the facility’s success at assuring inmates that reporting will yield positive outcomes and not result in retaliation. Likewise, an increase in substantiated incidents could mean either that a facility is failing to protect inmates, or else simply that it has improved its effectiveness at investigating allegations. For these reasons, the standards generally aim to inculcate policies and procedures that will reduce and ameliorate bad outcomes, recognizing that one possible consequence of improved performance is that evidence of more incidents will come to light.

SOLVENCY

1. Affirmative evidence denies Affirmative methodology #1: Gender theory

Link. Affirmative source says - Reforms ONLY work if gender and violence theory help craft them

AFFIRMATIVE SOURCE Michele C. Nielsen 2017. (JD from UCLA School of Law) “Beyond PREA: An Interdisciplinary Framework for Evaluating Sexual Violence in Prisons” UCLA LAW REVIEW <https://www.uclalawreview.org/wp-content/uploads/2019/09/Nielsen-64-1.pdf> (accessed 6 Apr 2022) (EFFICACIOUS is pronounced “ef – ick – kay – shuss and it means effective and solving for its intended purpose)

I argue that prisoners who return to their communities after the harrowing experience of prison, especially when sexual violence has been part of that experience, are more likely to normalize, accept, and perpetuate disturbing patterns of sexual violence already present. Therefore, to decrease or eliminate crime, recidivism, further violence, and sexual inequality, we should seek efficacious reforms to the institution of prisons. These reforms will only be effective if gender and violence theory help to craft them.

Link: What’s the Affirmative source’s “gender theory” that is needed to make plan work? We must accept gender as a “social construct,” not a characteristic designed by the Creator

**[A social construct is something invented by human reasoning or tradition and subject to change by human fiat. It means that men are “men” and do “man” things or women are “women” and do “woman” things only because society says so, and not because the Creator designed us to be distinctly “men” and “women.” Nielsen believes we have to view gender and gender roles as changeable and subject to human opinion, rather than part of the Creator’s plan for human life.]**

AFFIRMATIVE SOURCE Michele C. Nielsen 2017. (JD from UCLA School of Law) “Beyond PREA: An Interdisciplinary Framework for Evaluating Sexual Violence in Prisons” UCLA LAW REVIEW <https://www.uclalawreview.org/wp-content/uploads/2019/09/Nielsen-64-1.pdf> (accessed 6 Apr 2022)

As feminism has long recognized, gender is a social construct that societies tie to hierarchy, and this dynamic exists within prison walls as well. For example, prison culture involves social rankings based on one’s sexual preferences and behaviors.

Link: Affirmative doesn’t mention, promote, or mandate use of “social construct” gender theory

It’s not in their evidence, it’s not in their goal and it’s not in their plan.

Impact: No solvency. Affirmative’s own evidence says they won’t solve

They can’t indict Nielsen as a source because they quoted her themselves. They have to accept Nielsen’s statement that you can’t solve this problem the way AFF is trying to solve it.

2. Affirmative evidence denies Affirmative methodology #2: Feminism

Link: AFF source says we “MUST” include input from feminism as part of the solution to prison sexual violence

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By better understanding violence, the sacred, and the profane, and by bringing these concepts into dialogue with feminists, the efficacy of various reform measures designed to reduce or eliminate the sexual violence of prisons becomes clearer. Feminists, social theorists, and prison reformers’ ideas all work together and bring valuable insights to the table that should steer policy, advocacy, and future legislation.
**END QUOTE. SHE GOES ON IN LATER IN THE SAME CONTEXT TO CONCLUDE QUOTE:**
Reform efforts must acknowledge PREA’s flaws and move beyond this piece of legislation to consider new, innovative measures to address the persistent problem of prison sexual violence. In considering new measures, these interdisciplinary voices must all be part of the conversation.

Failure: AFF doesn’t include feminism or feminist voices

It’s not mentioned in their goal, their plan nor their evidence.

Impact: No solvency, according to their own expert.

And again, they can’t indict Nielsen as a source because they quoted her themselves. They have to accept Nielsen’s statement that you can’t solve this problem the way AFF is trying to solve it.

3. Nothing will change because reporting only matters if they do something with the reports

AFF Source says: Nothing happens when abuse is reported because of Supreme Court rulings on the 8th Amendment

AFFIRMATIVE SOURCE Michele C. Nielsen 2017. (JD from UCLA School of Law) “Beyond PREA: An Interdisciplinary Framework for Evaluating Sexual Violence in Prisons” UCLA LAW REVIEW <https://www.uclalawreview.org/wp-content/uploads/2019/09/Nielsen-64-1.pdf> (accessed 6 Apr 2022) (“the clause” in this context is the 8th Amendment’s ban on “cruel and unusual punishment”)

The U.S. Supreme Court has defined punishment under the clause to require a subjective intent, namely deliberate indifference. Therefore, for prison conditions to violate the U.S. Constitution, the condition or the action creating the condition must be “punishment,” which requires deliberate indifference, defined as subjective intent at the recklessness level on the part of the prison official. Thus, correctional officers who negligently permit a rape to occur, or who negligently fail to fix a water system for days no matter what the harm might be, or who negligently fail to provide an inmate with food, or who negligently fail to provide an inmate with access to vital emergency medical care, all cannot be held liable. This legal standard ignores the realities of prison life, the suffering of prisoners, and the systemic nature of carceral violence. Furthermore, this subjective standard sets the intent requirement for prison officials at too high a level. Requiring deliberate indifference, or recklessness, means sexual abuse goes unaddressed on a systemic level as long as individual officials are too ignorant to acknowledge it or too clever and convincing to get caught when denying knowledge.

4. More laws won’t help

Any further improvements will have to come from better prison facility leadership

Federal Register Vol. 77 No. 119 20 June 2012 (brackets added) <https://www.ojp.gov/sites/g/files/xyckuh186/files/media/document/PREA-Final-Rule.pdf> (accessed 7 Apr 2022)

The success of the PREA [Prison Rape Elimination Act] standards in combating sexual abuse in confinement facilities will depend on effective agency and facility leadership, and the development of an agency culture that prioritizes efforts to combat sexual abuse. Effective leadership and culture cannot, of course, be directly mandated by rule. Yet implementation of the standards will help foster a change in culture by institutionalizing policies and practices that bring these concerns to the fore.

DISADVANTAGES

1. Masking disadvantage

AFF plan creates false hope and assurance of “doing something” but ignores the real problem

Since the real problem in the Status Quo is enforcement and implementation of the existing abuse and retaliation policies, not the absence of such policies, the Affirmative distracts us with the false promise of a solution. The goal of achieving justice for the victims will be set back because an Affirmative ballot will make everyone think the problem has been solved (that’s what Affirmative is assuring us) when it really hasn’t. No one will make efforts to solve a problem if everyone thinks it’s already been solved, and the problems get worse with no one making any effort to solve them.