

NATIONAL LGBTQ TASK FORCE TESTIMONY REGARDING FEDERAL CORRECTIONS

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In 1984, when the Sentencing Reform Act was passed, the federal prison population was just over 34,000.ⁱ By 1994, the population had surpassed 95,000,ⁱⁱ and by 2004, it had nearly doubled again to 180,328.ⁱⁱⁱ As of July 3, 2014, there were 216,746 prisoners in the custody of the federal government.^{iv} The severity of current sentencing guidelines contribute to a crisis of mass incarceration in the United States, which exacts alarming human and economic tolls on our society. The federal government cannot maintain a federal prison system that, since 1980, has grown at the astonishing rate of almost 800 percent.

Reducing the prison population is essential to reducing the untenable cost of the prison system. In 2012, on the federal, state, and local levels it cost \$80 billion to incarcerate 2.3 million people in this country. Spending on federal prisons alone exceeds \$6 billion a year, or more than 25 percent of the entire budget for the Department of Justice (DOJ). DOJ has indicated that spending on federal prisons is now crowding out resources available for federal prosecutors and law enforcement, crime victim services, and crime prevention programs, all of which promote public safety. Reducing this overcapacity and the associated cost is a primary focus of the Task Force, and is particularly relevant for communities that face significant over-policing.

This testimony, and the related testimony submitted by the National Center for Transgender Equality focusing on Bureau of Prisons (BOP) issues, outlines only the broadest strokes of the issues facing the LGBTQ community in the penal system. They are meant to provide the Task Force with a base of information. For more information on recommendations that would address these issues, please see “A Roadmap for Change: Federal Policy

Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV” (Roadmap).

Drivers of LGBTQ Mass Incarceration

Lesbian, gay, bisexual, transgender, and queer (LGBTQ) people and people living with HIV/AIDS (PLWH), especially LGBTQ people and PLWH who are people of color, are significantly overrepresented in all aspects of the penal system, from policing and adjudication to incarceration and community supervision. According to a recent national study, a startling 73% of all LGBTQ people and PLWH surveyed have had face-to-face contact with police during the last five years.^v Five percent of those respondents also report having spent time in jail or prison. Yet their experiences are often overlooked, and little headway has been made in dismantling the cycles of criminalization that perpetuate poor life outcomes and push already vulnerable populations to the margins of society.

LGBTQ youth and youth questioning their sexual orientation or gender identity face increased rates of family rejection,^{vi} victimization in schools,^{vii} and criminalization.^{viii} They are disproportionately represented in child welfare and juvenile justice systems,^{ix} and lack protections against employment discrimination in a majority of states. Surveys of LGB youth suggest that they are more likely to smoke cigarettes, drink alcohol, smoke marijuana, use cocaine, use inhalants, use ecstasy, use heroin, and use methamphetamines than their heterosexual peers.^x According to the U.S. Sentencing Commission, Federal prisons are now 32 percent over capacity, and drug trafficking offenders account for 50 percent of the federal prison population.

While data on adult LGBTQ populations is less robust, we know that most of these disparities continue into adulthood. We also know that all of these inequities are even more pronounced for LGBTQ people who are also members of other groups that are disadvantaged on the basis of factors such as race, ethnicity, geography, or disability. As a result of these systemic factors, LGBTQ people experience disproportionately high rates of profiling, arrest, and incarceration.

Tracing Entrance of LGBTQ People into the Criminal Justice System

The policing of gender and sexuality pervades law enforcement and the operation of courts and the penal system, often operating within the larger context of racial profiling and targeting of homeless and low-income communities, and disproportionately affecting LGBTQ people of color. Furthermore, LGBTQ people, and particularly transgender women of color and LGBTQ youth of color, are endemically profiled as being engaged in sex work, public lewdness, or other sexual offenses. Police in many jurisdictions use possession of condoms as evidence supporting arrests for prostitution-related offenses. Policing tactics that hyper-sexualize LGBTQ people, and presume guilt or dishonesty based on sexual orientation or gender identity, are deployed by law enforcement every day.

In addition to the discriminatory application of existing laws that criminalize the behavior of LGBTQ people, there exists a patchwork of state laws across the country that criminalize PLWH for consensual sex and for conduct, such as spitting and biting, that poses no measurable risk of HIV transmission. Though these laws do not require evidence of intent to harm for conviction, most of these laws are serious felonies, and ten of them attach sex offender status to those

convicted under them. There are parallel policies in the U.S. armed forces that have resulted in the discharge or incarceration of PLWH in the military.

One in every 51 adults in the U.S. were on probation or parole at the end of 2013. LGBTQ supervisees face particular concerns in the supervision system, including unsafe conditions in community corrections facilities, discriminatory treatment from supervision officers, and retraumatization in sex offender programming.^{xi}

While law enforcement is generally conceived of as a state or local issue, the federal government has considerable influence over the operation of state and local law enforcement agencies through federal funding. Congress can and should continue to pass laws addressing discrimination that preempt antithetical policies at the state and local level. The Roadmap details our recommendations for change; the items below are examples of positive reforms:

- Congress should pass the End Racial Profiling Act, with provisions that prohibit profiling based on gender, gender identity and expression, and sexual orientation.
- DOJ should issue guidance to state and local governments on the constitutionality and cost-effectiveness of anti-homeless ordinances, intervene in litigation challenging such ordinances, incorporate investigation of civil rights abuses of homeless people as a standard practice in federal pattern and practice investigations, and include provisions addressing discriminatory policing of homeless people in federal consent decrees.
- The Centers for Disease Control and Prevention (CDC) and DOJ should issue and publicize guidance condemning reliance on mere possession or presence of condoms as evidence of intent to engage in criminal activity, and encouraging local law enforcement agencies to adopt policies prohibiting this practice.

- CDC should create incentive mechanisms, such as research and prevention project grants, that encourage states to modernize existing laws criminalizing HIV.

A Focus on Sentencing

Homophobia and transphobia within the criminal justice system are compounded by the racism, misogyny, and class bias that are endemic to the system. Race, ethnicity, culture, economics, gender, gender identity, sexuality, and age all play a role in determining who enters the criminal justice system, and how harsh their sentence will be. Racial disparities in drug offense incarceration are staggering: while whites engage in drug offenses at a higher rate, African-Americans are incarcerated at a rate that is ten times greater than that of whites. While statistical data is scarce on the disparities faced by the LGBTQ community, the available data shows that LGBTQ people are disproportionately incarcerated. Therefore, the National LGBTQ Task Force strongly supports significant reform of sentencing laws, as well as eradication of mandatory minimum sentencing.^{xii}

Advocates of mandatory minimum sentences believe they are an important law enforcement tool, supplying the police and prosecutors with the leverage necessary to secure the cooperation and testimony of low-level offenders against their more senior confederates.^{xiii} U.S. Sentencing Commission data indicates, however, that defendants are actually more likely to plead guilty if they qualify for a reduced sentence below the mandatory minimum than if they do not. In 2012, drug trafficking defendants charged with a mandatory minimum penalty had a plea rate of 99.6 percent if they qualified for a reduced “safety valve” sentence, and a rate of 93.9 percent if they did not. Sentencing guidelines should reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.^{xiv}

ⁱ U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DECEMBER 31, 1984 12 tbl. 1 (1987).

ⁱⁱ U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1994 66 tbl. 5.1 (1996).

ⁱⁱⁱ U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2004 3 tbl. 3 (2005).

^{iv} Federal Bureau of Prison, Population Statistics, (July 3, 2014), http://www.bop.gov/about/statistics/population_statistics.jsp

^v Lambda Legal, “Protected and Served? Survey of LGBT/HIV Contact with Police, Prisons, Courts and Schools” (2014), fact sheet with preliminary findings available from author.

^{vi} Ryan, C., Russell, S.T., Huebner, D, Diaz, R. Sanchez, J. (2009). *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*. Journal of the American Academy of Pediatrics, 123, 346-352. (Finding that LGB young adults who reported higher levels of family rejection during adolescence were 8.4 times more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to report illegal drug use, and 3.4 times more likely to report having engaged in unprotected sexual intercourse, compared with peers from families with no or low levels of family rejection.) Available at <http://pediatrics.aappublications.org/content/123/1/346.full.pdf+html>

^{vii} Kosciw, J. G., Greytak, E. A., Bartkiewicz, M. J., Boesen, M. J., & Palmer, N. A. (2012). *The 2011 National School Climate Survey: The experiences of lesbian, gay, bisexual and transgender youth in our nation’s schools*. New York: GLSEN. (Finding that 63.5% of LGBTQ youth surveyed felt unsafe because of their sexual orientation, and 43.9% because of their gender expression.)

^{viii} Katayoon Majd et al. (2009) *Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts*. (Finding that although LGBTQ youth only comprise about 5 to 7% of the nation’s youth, 13 to 15% of youth in the juvenile justice system are LGBTQ).

^{ix} *Id.*

^x Kann, L, et al. 2011. *Sexual identity, sex of sexual contacts, and health-risk behaviors among students in grades 9-12 – Youth Risk Behavior Surveillance, selected sites, United States, 2001-2009*. MMWR 60(SS07): n. vi. Available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6007a1.htm>

^{xi} Conditions in prison can translate to difficulty in reentry. A study cited in the National Prison Rape Elimination Commission’s Report found that the rate of sexual abuse was significantly higher among gay prisoners than heterosexual prisoners – 41 percent compared to 9 percent, respectively.^{xi} Transgender women are especially at risk, though gay men, lesbians, and bisexual women are also frequent targets.^{xi} The NPREC report found that readjustment after release from jail or prison was particularly hard for former inmates who had experienced sexual assault while incarcerated.^{xi}

^{xii} Substantial evidence demonstrates that additional severity has a relatively small deterrent effect. Interviews with convicted felons found that a mere 2 percent had even an inkling about potential punishments for the crimes they committed. Another 18 percent knew nothing at all about potential punishments, and more than a third reported that they had not thought about punishment at all at the time of the crime. Significant sentencing reform is essential to ensure sentencing guidelines are fair, efficient, and commensurate with the best available data.

^{xiii} Bernick, Evan and Paul Larkin. “Reconsidering Mandatory Minimum Sentences: The Arguments for and Against Potential Reforms.” The Heritage Foundation. <http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms>

^{xiv} Contrary to opponents’ claims, studies within prison populations demonstrate that the vast majority of offenders commit few crimes; a core group of serious offenders commits a comparatively large portion of crimes.^{xiv} Society is not particularly well served when those offenders who commit less serious crimes are incarcerated for long periods: few crimes are avoided, and offenders who have served long sentences have more difficulty successfully reentering their communities.