
CHAPTER 13:
REDUCING INCARCERATION AND ENDING ABUSE IN PRISONS



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More than 2 million Americans today are behind bars, with African-Americans are more than six times as likely to be incarcerated as whites, and Latinos are more than twice as likely to be incarcerated.¹ Transgender people also face stark disparities. Nearly one in six transgender people (16%) (including 21% of transgender women) have been incarcerated at some point in their lives—far higher than the rate for the general population. Among Black transgender people, nearly half (47%) have been incarcerated at some point—mirroring the stark racial disparities in all incarceration.² These high rates of incarceration are driven by pervasive discrimination, disproportionate poverty, homelessness, participation in street economies, and bias and abuse by law enforcement officers.

Mandatory minimum sentencing requirements, federalization of crimes and the abolishment of parole for federal prisoners all play a role in the increased incarceration rates at both the state and federal levels. Those incarcerated under federal minimum sentencing guidelines are overwhelmingly racial minorities and the poor.³ Poverty, homelessness, and race have the most significant impact on incarceration rates: almost half (49%) of the National Transgender Discrimination Survey's homeless respondents reported being incarcerated at some point, more than three times the rate of those who were not homeless; transgender people of color reported being incarcerated more often and for longer sentences.⁴

Trans people are also at high risk for abuse in prisons, jails, and juvenile detention.⁵ The categorical denial of transition-related medical care is common, as is prolonged isolation of trans people, which has been shown to have devastating effects on mental health and has been declared by the courts to be a type of torture.⁶ These abuses occur within the context of a broken, overcrowded, and increasingly privatized prison system. Addressing both the harmful policies that drive mass incarceration and the intolerable conditions of prisons, jails, and detention facilities are urgent issues for trans people and our communities.

Policy Advances

- The Department of Justice (DOJ) filed a first-ever court brief arguing that blanket limits on medical care for transgender prisoners are unconstitutional. (2015)
- The DOJ and the US Sentencing Commission implemented reforms to reduce federal sentences for non-violent drug crimes. (2013-2014)
- The PREA Resource Center issued positive guidance for prisons and jails on screening and searching transgender prisoners. (2013-2014)
- The Federal Bureau of Prisons agreed to review its solitary confinement policy. (2013)
- The National Institute of Corrections released an LGBT policy guide for state and local jail and prison facilities and began offering online LGBT training. (2013)
- DOJ issued final Prison Rape Elimination Act (PREA) regulations that included some transgender-specific protections, such as the ability to shower privately if requested, and the right to have an individual assessment with regard to being housed in male or female facilities. (2012)

¹ Pew Research Center, *King's Dream Remains an Elusive Goal: Many Americans See Racial Disparities* (2013), http://www.pewsocialtrends.org/files/2013/08/final_full_report_racial_disparities.pdf.

² *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, at 163.

³ American Sociological Association, *Race, Ethnicity, and the Criminal Justice System*, available at, <http://www.asanet.org/images/press/docs/pdf/ASARaceCrime.pdf>.

⁴ For more on these issues, see Catherine Hanssens, Aisha C. Moodie-Mills, Andrea J. Ritchie, Dean Spade, and Urvashi Vaid. 2014. "A Roadmap for Change: Federal Policy Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV." New York: Center for Gender & Sexuality Law at Columbia Law School.

⁵ National Prison Rape Elimination Commission, *Report*, at 73 (2009); Valerie Jenness et al., *Violence in California correctional facilities: An empirical examination of sexual assault*. Irvine, CA: Center for Evidence-Based Corrections (2009).

⁶ See, e.g., Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, A/66/268 (United Nations, Aug. 5, 2011); Jeffrey L. Metzner and Jamie Fellner, *Solitary Confinement and Mental Illness in US Prisons: A Challenge for Medical Ethics*, *J. Am. Acad. Psychiatry and Law* 38:1:104-108 (March 2010).

Needed Policy Changes

- Congress should pass the Smarter Sentencing Act and the Justice Safety Valve Act, which would make federal sentencing laws smarter, less costly, and more humane.
- Congress should reform the Prison Litigation Reform Act to repeal or reform the requirements that a person have a physical injury and must exhaust all internal complaint processes at the prison before suing, and remove the law's application of the law to minors, all of which create excessive barriers to meritorious civil rights litigation.
- Congress should expand federal funding for drug treatment and community re-entry programs.
- Congress should consider reinstating parole for federal offenders and repealing unnecessary minor federal criminal statutes.
- The Department of Justice should take action to address state and local laws that effectively criminalize homelessness and poverty, such as loitering and vagrancy laws and bans on sitting or eating in public or panhandling. DOJ should issue guidance to states and municipalities on the constitutionality and cost-effectiveness of such laws, intervene in litigation challenging such laws, 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 Departments of Justice, Housing and Urban Development, and other agencies should leverage federal funding criteria to discourage laws and practices that effectively criminalize homelessness and poverty.
- The Department of Justice should vigorously enforce the Prison Rape Elimination Act (PREA) by ensuring strict compliance with audit, certification, accreditation, and penalty procedures, and by providing training and resources to state and local agencies.
- The Department of Justice should, by guidance or regulation, clarify that PREA standards apply to police cars and other temporary locations of police detention.
- The Federal Bureau of Prisons should adopt rules prohibiting the use of solitary confinement for periods of longer than 14 days, and for any period for minors, pregnant persons, and those with mental illness.
- The Federal Bureau of Prisons should comply with PREA by using a multidisciplinary committee, with input from outside experts, to place transgender prisoners in facilities consistent with their gender identity whenever appropriate, regardless of anatomy or birth sex, and should publicly report data on how transgender people are housed.
- The Federal Bureau of Prisons should establish a standardized process for transgender prisoners to make an election whether to be subject to physical searches by male or female officers.

See Ending Anti-Trans Violence for more on law enforcement, anti-trans violence, and sex work.