



**Written Testimony of the American Civil Liberties Union to the
House Oversight and Government Reform Committee**

*Hearing on Criminal Justice Reform
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**Submitted by the
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ACLU Criminal Law Reform Project**

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The American Civil Liberties Union (ACLU) values the opportunity to provide testimony to the House Oversight and Government Reform Committee for its hearing on Criminal Justice Reform. For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. With more than a million members, activists, and supporters, the ACLU fights in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

Today's hearing is an important one. Our nation's jails and prisons hold almost 2.3 million people on any given day,¹ at an annual cost to taxpayers of more than \$80 billion.² The criminal justice system disproportionately impacts African-Americans and Latinos, perpetuating a harmful legacy of racism that stretches back to our nation's founding. It has criminalized entire communities, often lacks fundamental due process protections for low-income people and people of color, in some cases hands down unreasonably long sentences, and makes it all but impossible for a formerly incarcerated person to rebuild his or her life after doing time – all the while wasting trillions of taxpayer dollars on efforts that have no clear connection to increasing public safety. It is time for change. Given this hearing's broad scope, we offer recommendations to Congress in five areas: sentencing, early release, re-entry and collateral consequences, police practices, and indigent defense.

I. Sentencing

The federal prison population has increased from approximately 25,000 in FY 1980 to slightly more than 208,000 today.³ The budget of the federal Bureau of Prisons (BOP) has also doubled over the past decade, reaching \$7.2 billion in the President's FY 2016 budget request, approximately 25 percent of the overall budget of the Department of Justice (DOJ). Indeed, in 2014, the BOP's budget grew at

almost twice the rate of the budget of the rest of the DOJ.⁴ Federal prisons are now at 125 percent of their capacity, with even higher overcrowding in medium- and high-security facilities. This overcrowding undermines staff and inmate safety, as well as prisoner rehabilitation.

Harsh sentencing, including mandatory minimums, has contributed to an unsustainable increase in the BOP population without any clear connection to an increase in crime control.⁵ Data from the Urban Institute show that the number of federal drug offenders has doubled since 1994, and they now comprise half of the federal prison population. Last year, drug offenders were the largest group of federal offenders sentenced. Of the more than 22,000 sentenced in FY 2013, 60 percent faced mandatory minimum prison sentences of 5, 10, 20 years, or life without parole in federal prison. One in four of those offenders did not receive the mandatory minimum because they met the unnecessarily strict criteria of the drug “safety valve” at 18 U.S.C. § 3553(f), but far too many low-level, nonviolent drug offenders continue to receive mandatory minimum sentences that Congress intended for major and serious drug dealers and kingpins. Furthermore, mandatory minimum sentences defeat the purpose of sentencing by reducing judicial discretion and instead handing it to prosecutors, who then use the threat of lengthy sentences to frustrate defendants seeking to assert their constitutional rights.

Mandatory minimum drug sentencing reform is essential to reducing the Justice Department’s prison costs and creating a fairer criminal justice system. In order to address the central reason for the explosion in the federal prison population, the ACLU strongly supports the Smarter Sentencing Act (SSA) of 2015 (H.R. 920/S. 502) and the SAFE Justice Reinvestment Act of 2015 (H.R. 2944). A 2013 Urban Institute report estimated that reducing mandatory minimum sentences for certain drug offenders by half or more, as the SSA proposes, would have a monumental effect on the prison system. According to the Congressional Budget Office, passage of the SSA would save \$3 billion over 10 years.⁶ DOJ found that the SSA would save \$24 billion over 20 years, including money taxpayers

would not have to spend to build new prisons and hire thousands of additional correctional officers. These savings could be used to increase rehabilitative programming in and out of prisons and bolster services for victims.

Current mandatory minimum drug sentences are too long, too expensive, and not contributing to enhanced public safety. While the SSA would change mandatory minimum sentences for drug traffickers, it is incorrect to conclude that all drug sellers and traffickers are therefore major and serious dealers and kingpins and violent criminals. The person most likely to receive a mandatory minimum sentence is a street-level dealer, not a high-level supplier or importer: 68 percent of street-level drug sellers convicted in FY 2010 received no relief from the mandatory minimum sentence, through either the safety valve or substantial assistance. These dealers are the assembly-line employees of the drug trade, easily and immediately replaced once they are arrested. The U.S. Sentencing Commission and other experts have found little incapacitative or deterrent value in giving these offenders lengthy mandatory minimum prison terms.

II. Early Release

Reducing prisoners' actual time in institutional custody can also help to reduce the number of people in the federal prison system, and at the same time incentivize good behavior and educational and rehabilitative efforts for the prisoners themselves. Under the Sentencing Reform Act of 1984, Congress authorized BOP to request that a federal judge reduce an inmate's sentence for "extraordinary and compelling" circumstances, also known as "compassionate release." The request can be based on either medical or non-medical conditions that the judge could not reasonably have foreseen at the time of sentencing. In 2013, BOP expanded the medical criteria that can be considered for inmates seeking compassionate release. In addition, the Attorney General announced revised criteria for other

categories of inmates seeking reduced sentences, including older prisoners and certain inmates who are the only possible caregiver for their dependents.

Building on existing policy, Congress should clarify the statutory language allowing an inmate to earn good time credit of up to 54 days per year.⁷ This change would save approximately \$400 million over ten years, according to BOP.⁸ Congress should also implement a proposal supported by BOP that would create a new good time credit earned for successful participation in recidivism-reduction programs.⁹

III. Re-entry and Collateral Consequences

More than 65 million adults in the United States have criminal records. These records carry collateral consequences that persist long after a person has completed his or her sentence, erecting numerous barriers for individuals who wish to rebuild their lives as productive members of society, and, perversely, contributing to recidivism at extremely high cost to taxpayers. These barriers limit their access to housing, temporary support via the Supplemental Nutrition Assistance Program (SNAP) and Temporary Assistance for Needy Families (TANF), higher education, and employment – barriers that increase the likelihood that even the most well-intentioned returning citizens could recidivate and re-enter the prison system.

Public housing agencies and landlords providing federally subsidized housing have wide discretion to consider criminal records in tenant admission and termination decisions. Federal law permits them to deny housing to people with drug-related or other criminal histories, drug users, and alcohol users, whether or not those individuals truly present a threat to the safety of their neighbors. Federal law also requires a so-called “no-fault eviction” of any family with a household member who has been found to have engaged in “drug-related criminal activity on or off” the premises, a provision that would leave a grandmother homeless if her grandson is convicted of drug possession 20 miles

from their apartment. Congress should limit the discretion of public housing agencies and owners of federally assisted housing to deny housing to individuals with drug-related or other criminal histories, drug users, and alcohol users, except for those individuals who truly present a threat to public safety,¹⁰ as well as repeal the “no-fault eviction” provision at 42 U.S.C. 1437d(l)(6).

Anyone with a state or federal felony drug conviction can also face a lifetime ban on receipt of SNAP or TANF cash assistance. These benefits provide crucial support for individuals on the brink of poverty, which is too often the case for people who have just left prison. Since 1996, the bans have affected hundreds of thousands of low-income individuals and their families. Congress should repeal the drug felon ban on SNAP and TANF cash assistance.¹¹

Higher education, practically a requisite for economic solvency today, also remains elusive for people in prison and formerly incarcerated individuals. In particular, the Violent Crime Control and Law Enforcement Act of 1994 eliminated access to federal Pell Grants for people in state or federal prison. Before 1995, there were 350 college degree programs in prisons; a decade later, there were only 12. This sharp decline marks a profoundly wasted opportunity. A 2013 RAND Corporation study found that on average, “inmates who participated in correctional education programs had 43 percent lower odds of recidivating than inmates who did not.”¹² Congress should restore access to Pell Grants for individuals in federal and state prison, as proposed in the Restoring Education and Learning (REAL) Act of 2015 (H.R. 2521)¹³, and revisit statutory restrictions on access to federal financial aid for individuals with drug trafficking or possession records.

Finding a job can be the most challenging part of rebuilding life on the outside for a person who has spent years or decades in prison. Public and private employers nationwide rely on the Federal Bureau of Investigations’ fingerprint-based criminal records system. Between 2009 and 2013, about 120 million checks were conducted for non-criminal justice purposes, including the screening of

applicants for employment. Yet 50 percent of FBI records are incomplete. As a result, people whose records are inaccurate may be adversely impacted when they seek employment. To improve the reliability of the FBI criminal records system, Congress should support remedies proposed in the Fairness and Accuracy in Employment Background Checks Act of 2013.¹⁴

The ACLU supports the Record Expungement Designed to Enhance Employment (REDEEM) Act of 2015 (H.R. 1642/S. 675), which proposes some, though not all, of these important statutory fixes.¹⁵

In addition to the legal barriers, individuals leaving prison must adjust to freedom and an ever-changing society after years or decades on the inside. Effective counseling, meaningful substance abuse treatment, mentoring, education, and job training can provide invaluable assistance to ensure that formerly incarcerated people have the tools they need to rebuild their lives and avoid cycling back into the criminal justice system. To that end, Congress should support the Second Chance Reauthorization Act, robust appropriations for offender reentry programs and research at the U.S. Department of Justice as authorized by the Second Chance Act of 2007, and robust appropriations for the Reintegration of Ex-Offenders (RExO) program managed by the Employment & Training Administration at the U.S. Department of Labor.

IV. Police Practices

Recent incidents across the country – from Los Angeles to Cleveland, from Ferguson to New York City, and from North Charleston to Baltimore – offer an opportunity to change the culture of policing. This culture, as it currently exists in some cases, results in a relationship based on mistrust between law enforcement and low-income communities and communities of color.

Concerns range from racial profiling, to excessive use of force, to militarization of state and local law enforcement agencies. Yet we do not have a complete picture of domestic policing – the

stops, searches, arrests, excessive uses of force, and homicides by law enforcement – because we do not have data. As an example, in 2013 the FBI Uniform Crime Report indicates that there were 461 justifiable homicides by law enforcement, the highest in two decades. These numbers fail to represent the complete universe of police killings, however, because they are self-reported homicides.¹⁶ The ACLU’s May 2015 report *Picking Up the Pieces – Policing in America, a Minneapolis Case Study* found that African-Americans in Minneapolis are 8.7 times more likely than white people to be arrested for low-level offenses.¹⁷ An earlier ACLU report, *The War on Marijuana in Black and White*, concluded that, on average, African-Americans are almost 4 times more likely than white people to be arrested for marijuana possession, even though the populations use marijuana at similar rates.¹⁸ We also know that in at least 70 police departments, African-Americans are arrested at a rate 10 times greater than those who are not African-American.¹⁹ All of these studies suggest some degree of bias in law enforcement. And certainly, as the situation in Ferguson demonstrates, there is a need for greater police force diversity. The Ferguson Police Department is 94 percent white in a town that is two-thirds black.²⁰

In the immediate aftermath of the death of Michael Brown, the nation saw a highly and dangerously militarized response by law enforcement. Media reports indicate that the Ferguson Police Department, in conjunction with other state and local agencies, responded to protests and demonstrations with “armored vehicles, noise-based crowd-control devices, shotguns, M4 rifles like those used by forces in Iraq and Afghanistan, rubber-coated pellets, and tear gas.”²¹ The protests and demonstrations that followed a grand jury’s decision not to indict the police officer who killed Michael Brown were also met with armored vehicles.²²

Militarized policing is not limited to situations like those in Ferguson or emergency situations – like riots, barricade and hostage scenarios, and active shooter or sniper situations – that Special

Weapons and Tactics (SWAT) teams were originally created for in the late 1960s.²³ Rather, SWAT teams are now overwhelmingly used to serve search warrants in drug investigations. The ACLU's June 2014 report *War Comes Home: The Excessive Militarization of American Policing* found that 79 percent of the incidents reviewed involved the use of a SWAT team to search a person's home, and more than 60 percent of the cases involved searches for drugs.²⁴

We need comprehensive law enforcement reform. The controversies of the past year resulted in a White House Task Force on 21st Century Policing that offered recommendations in March, including to "collect, maintain, and report data to the Federal Government on all officer-involved shootings," to "adopt and enforce policies prohibiting profiling," that "training on use of force should emphasize de-escalation," and that there be "some form of civilian oversight of law enforcement," all consistent with ACLU recommendations.²⁵

Congress should support implementation of the Task Force recommendations through current or new federal funding and programs that can incentivize police reforms. Crucial reforms include 1) the collection and reporting of data, that is disaggregated by race and sex, by state and local law enforcement and is regularly provided to a national federal database; 2) the prohibition of profiling and biased policing by state and local law enforcement; 3) the adoption of use of force policies that emphasize de-escalation by state and local law enforcement; 4) the implementation of body-worn cameras with the appropriate privacy protections by law enforcement; and 5) the installation of civilian review boards with meaningful authority in all communities. Additionally, Congress should eliminate federal resources for state and local procurement of military weapons and equipment, including the Department of Defense 1033 program, and prohibit the use of military weapons and associated equipment for immigration and border enforcement by Customs and Border Protection (CBP). Finally, Congress and the federal government should reform all federal policies and programs that encourage

unacceptable police practices at all levels, including civil asset forfeiture and entanglement of police with federal immigration enforcement, and lead by example in ensuring that all federal law enforcement agencies adopt best practices.

V. Indigent Defense

More than 50 years after *Gideon*, the promise of equal access to justice remains unfulfilled. In deciding *Gideon* in 1963,²⁶ the Supreme Court held that our Constitution guarantees the right to counsel for anyone accused of a felony offense, even if he or she cannot afford one. Subsequent Supreme Court decisions affirmed this mandate and went further, with the Court extending the right to counsel to those incarcerated for a misdemeanor offense in *Argersinger v. Hamlin*.²⁷

Nevertheless, the right to counsel eludes many in our criminal justice system. Approximately 80 percent of criminal defendants cannot afford counsel.²⁸ Nationwide, public defenders or assigned counsel are ill equipped to meet this demand. They are often forced to juggle hundreds of cases at once, without resources to investigate, conduct legal research, or prepare in even the most basic fashion for hearings and trial. Often, public defenders meet their clients for the first time minutes before critical proceedings. In many courts around the country, cases are adjudicated without the presence of counsel at all. Additionally, public defenders frequently have far fewer resources than prosecutors armed with larger staffs and partnerships with local police departments.

Congress should 1) explore legislation that would create a national clearinghouse to support state and local indigent defense systems and provide training to improve the quality of representation provided to indigent clients²⁹; 2) consider legislation that would give the Attorney General the authority to obtain appropriate equitable and declaratory relief to eliminate a pattern or practice of conduct that deprives persons of their rights to assistance of counsel³⁰; and 3) examine the impact of sequestration on federal public defender offices. In order for the federal public defender

system to continue serving as a model for indigent representation, funding may need to be restored to pre-sequestration levels.

Nationwide, the bipartisan commitment to criminal justice reform is strong. This Congress has a unique opportunity to transform this commitment into real change. The ACLU urges Congress to adopt our recommendations, which would help to increase fairness and justice at every stage in the system.

¹ This number includes almost 1.6 million individuals held in state and federal prisons, plus approximately 785,000 in county and city jails and 55,000 in U.S. Marshals custody., E. ANN CARSON, PH. D., BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013 (2014), available at <http://www.bjs.gov/content/pub/pdf/p13.pdf>; TODD D. MINTON & DANIELA GOLINELLI, PH.D, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2013 – STATISTICAL TABLES (2014) (Revised Aug. 12, 2014), available at <http://www.bjs.gov/content/pub/pdf/jim13st.pdf>; U.S. MARSHALS SERV., OFFICE OF PUB. AFFAIRS, FACT SHEET: FACTS AND FIGURES 2015, available at <http://www.usmarshals.gov/duties/factsheets/facts.pdf>. Congress funds U.S. Immigration and Customs Enforcement (ICE) to hold an additional 34,000 people in detention facilities daily, though ICE does not publicly release its daily detention population. For more information, see National Immigrant Justice Center, Eliminate the Detention Bed Quota, <http://www.immigrantjustice.org/eliminate-detention-bed-quota#.VO-1yfldUIJ> (last visited July. 14, 2015).

² U.S. DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 1 (2013), available at <http://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf> (hereinafter SMART ON CRIME).

³ FEDERAL BUREAU OF PRISONS, STATISTICS: TOTAL FEDERAL INMATES, (2015), available at http://www.bop.gov/about/statistics/population_statistics.jsp.

⁴ MICHAEL E. HOROWITZ (INSPECTOR GENERAL, BUREAU OF PRISONS), TOP MANAGEMENT AND PERFORMANCE CHALLENGES FACING THE DEPARTMENT OF JUSTICE 2014 (2014).

⁵ DR. OLIVER ROEDER, LAUREN-BROOKE EISEN & JULIA BOWLING, BRENNAN CTR. FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE? 4 (2015), available at https://www.brennancenter.org/sites/default/files/analysis/What_Caused_The_Crime_Decline.pdf.

⁶ CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE: S. 1410 SMARTER SENTENCING ACT OF 2014 (2014), available at https://www.cbo.gov/sites/default/files/s1410_0.pdf.

⁷ 18 U.S.C. § 3624(b).

⁸ U.S. Gov't Accountability Office, Bureau of Prisons: Information on Efforts and Potential Options to Save Costs 46 (Sept. 2014) available at <http://www.gao.gov/assets/670/666254.pdf>.

⁹ Statement of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons, Before the Charles Colson Task Force on Federal Corrections (Jan. 27, 2015), available at <http://www.colsontaskforce.org/wp-content/uploads/2015/01/SamuelsStatement-1-27-15.pdf>.

¹⁰ The relevant provisions are located at 42 U.S.C. §§ 13661 and 13662. The U.S. Department of Housing and Urban Development has already urged public housing agencies and owners of federally assisted housing to balance legitimate concern for the safety of all residents with the importance of allowing formerly incarcerated individuals to reunite with their families, but it is not clear that this directive has led to measurable change in practice on the ground. See Letter from Shaun Donovan, Sec'y of Housing and Urban Dev., & Sandra B. Henriquez, Assistant Sec'y for Public Housing and Indian Housing, to PHA Executive Director (June 17, 2011), available at http://csgjusticecenter.org/documents/0000/1130/HUD_letter.pdf; Letter from Shaun Donovan, Sec'y of Housing and Urban Dev., & Carol J. Galante, Acting Assistant Sec'y for Housing to Owners and Agents (Mar. 30, 2012), available at http://csgjusticecenter.org/documents/0000/1344/3.30.12_MFamily_properties_Reentry_memo_6_2_.pdf.

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- ¹¹ 21 U.S.C. § 862a.
- ¹² LOIS M. DAVIS, ET AL. RAND CORP., *EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION*, p.xvi (2013), available at http://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR266/RAND_RR266.pdf.
- ¹³ H.R. 2521, 114th Cong. (2015).
- ¹⁴ H.R. 2865, 113th Cong. (2013). The Accurate Background Check Act of 2013, H.R. 2999, 113th Cong. (2013), also presents a good model.
- ¹⁵ H.R. 1642, 114th Cong. (2015); S.675, 114th Cong. (2015)
- ¹⁶ Kevin Johnson, *Police killings highest in two decades*, USA TODAY (Nov. 11, 2014), <http://www.usatoday.com/story/news/nation/2014/11/11/police-killings-hundreds/18818663/>.
- ¹⁷ ACLU, *PICKING UP THE PIECES – POLICING IN AMERICA, A MINNEAPOLIS CASE STUDY* (May 2015), available at <https://www.aclu.org/feature/picking-pieces>.
- ¹⁸ ACLU, *THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS*, 4 (June 2013), available at <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>.
- ¹⁹ Brad Heath, *Racial gap in U.S. arrest rates: 'staggering disparity'*, USA TODAY (Nov. 19, 2014), available at <http://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/>.
- ²⁰ Taylor Wofford, *After midterms, little changes in troubled Ferguson*, NEWSWEEK (Nov. 11, 2014), available at <http://www.newsweek.com/after-midterms-little-change-troubled-ferguson-283777>.
- ²¹ David Nakamura & Niraj Chokshi, *Obama orders review of military equipment supplied to police*, WASH. POST (Aug. 23, 2014), available at http://www.washingtonpost.com/politics/obama-orders-review-of-military-equipment-supplied-to-police/2014/08/23/6316b8aa-2b03-11e4-8593-da634b334390_story.html.
- ²² Representative Hank Johnson, Op-Ed., *Why does Ferguson still look like Iraq? Congress can stop the military police*, THE GUARDIAN (Nov. 26, 2014), available at <http://www.theguardian.com/commentisfree/2014/nov/26/ferguson-congress-military-police-streets>.
- ²³ DARYL GATES, *CHIEF: MY LIFE IN THE LAPD 131* (Bantam, 1992). For an excellent summary of the creation and evolution of SWAT, see RADLEY BALKO, *RISE OF THE WARRIOR COP* (PublicAffairs, 2013).
- ²⁴ ACLU, *WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING*, 3 (June 23, 2014), available at <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rel1.pdf>.
- ²⁵ PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, , *INTERIM REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING*(Mar. 4 2015), available at http://www.cops.usdoj.gov/pdf/taskforce/interim_tf_report.pdf. LAURA W. MURPHY, *WRITTEN TESTIMONY OF THE AMERICAN CIVIL LIBERTIES UNION SUBMITTED TO THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING LISTENING SESSION ON BUILDING TRUST AND LEGITIMACY* (Jan. 13, 2015), available at https://www.aclu.org/sites/default/files/assets/testimony_of_aclu_laura_w_murphy_final_for_police_tf.pdf.
- ²⁶ 372 U.S. 335 (1963).
- ²⁷ 407 U.S. 25 (1972).
- ²⁸ Lincoln Caplan, *The Right to Counsel: Badly Battered at 50*, N.Y. TIMES (Mar. 9, 2013), available at http://www.nytimes.com/2013/03/10/opinion/sunday/the-right-to-counsel-badly-battered-at-50.html?_r=0.
- ²⁹ Representative Ted Deutch’s (D-FL) National Center for the Right to Counsel Act, H.R. 2063, would create such a resource. H.R. 2063, 114th Cong. (2015).
- ³⁰ The Gideon’s Promise Act, S. 597, sponsored by Senator Patrick Leahy (D-VT) in the last Congress, would provide the Attorney General with this authority. S. 597, 113th Cong. (2013).