



# Human Rights Advocates

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**Report on the United States of America to the  
Committee on the Elimination of Racial Discrimination  
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## **INTRODUCTION**

This report is submitted on behalf of Human Rights Advocates (HRA), the Rocky Mountain Collective on Race, Place and Law (RPL), and the University of San Francisco School of Law (USF) Center for Law and Global Justice to address the third report submitted by the United States of America in 2013 to the Committee on the Elimination of Racial Discrimination.<sup>1</sup>

HRA is a California non-profit corporation founded in 1978 with national and international membership. It endeavors to advance the cause of human rights to ensure that the most basic protections are afforded to everyone. HRA has Special Consultative Status in the United Nations and has participated regularly at the meetings of both Charter and treaty based human rights bodies, as well as filed petitions with the Inter-American Commission on Human Rights. HRA has submitted friends of the court briefs in both state and federal cases involving individual and group rights where international standards offer assistance in interpreting both state and federal statutes and constitutions. Cases where it has filed briefs include those involving affirmative action and juvenile death penalty. Its *amicus curiae* brief in the case holding the juvenile death penalty unconstitutional was cited twice by the United States Supreme Court.

Rocky Mountain Collective on Race, Place and Law is a group of Colorado legal academics working together to identify and address racial inequities in the U.S. and around the globe. It offers a critical lens on the complex dynamics of power, locality, and law, and their impact on subordinated communities. RPL recognizes the intersectionality of all individuals; through teaching, scholarship and activism it aims to expose and challenge law's role in perpetuating inequities based on race, class and gender and other sources of disadvantage. RPL employs the collective efforts and expertise of its members to effect change and pursue social justice.

The USF Center for Law and Global Justice is a focal point for USF School of Law's commitment to international justice and legal education with a global perspective. The Center generates student externships around the globe, protects and enforces human rights through litigation and advocacy, manages and participates in international rule of law programs in developing nations, develops partnerships with world-class foreign law schools, provides a forum for student scholarship, and nurtures an environment where student-organized conferences and international speakers explore topics relating to global justice.

- Most recently the Project completed a report entitled "Cruel and Unusual: U.S. Sentencing Practices in a Global Context," available at <http://www.usfca.edu/law/clgj/criminalsentencing/>.

The Center has advocated for juvenile justice reform through its Project to End Juvenile Life Without Parole, which assisted juvenile defenders and justice advocates challenging juvenile life without parole sentences.

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<sup>1</sup> This report was prepared by the following persons: Professor Connie de la Vega, University of San Francisco School of Law; Paula Rhodes, Associate Professor, University of Denver Sturm College of Law; Ryan Burchell, Faculty Research Fellow, University of Denver Sturm College of Law. Alen Mirza, an HRA member and former Frank C. Newman Intern, provided research assistance, and Human Rights Advocates Board members provided editorial assistance.

## **EXECUTIVE SUMMARY**

1. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>2</sup> is the United Nations' main treaty elaborating on Article 1(3) of the Charter of the United Nations, which emphasizes “promoting and encouraging respect for human rights and for fundamental freedoms from all without distinction as to race....”<sup>3</sup> This report addresses the requirements of special measures or affirmative action<sup>4</sup> as they relate to education and employment in the United States in Section 1 and Juvenile Life Without Parole Sentences in Section 2.

## **SECTION 1: SPECIAL MEASURES/AFFIRMATIVE ACTION** **Articles 1(4), 2, 5, and 7**

2. While the United States has taken steps in the last half century to eliminate *de jure* discrimination in America, *de facto* and structural racial discrimination continue. Extreme racial disparities in education, employment, criminal justice, health care, and political participation persist. Significant social science research has shown that this discrimination is the result of unconscious or implicit bias,<sup>5</sup> and the United States itself stated in its 2007 report: “subtle, and in some cases overt forms of discrimination still persist, reflecting attitudes that persist from a legacy of segregation, ignorant stereotyping and disparities in opportunity and achievement.”<sup>6</sup> In its 2013 report, the United States acknowledged “that the path toward racial equality has been uneven, racial and ethnic discrimination still persists, and much work remains to meet our goal of ensuring equality for all.”<sup>7</sup> While the United States is to be commended for its efforts to end *de facto* as well as *de jure* discrimination, the former persists throughout society and in particular in education.

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<sup>2</sup> International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “CERD”), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969.

<sup>3</sup> Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945, art. 1(3).

<sup>4</sup> *See* CERD, art. 1(4).

<sup>5</sup> *See e.g.*, Linda Hamilton Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995), Charles R. Lawrence, III, *The Id, The Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Mahzarin Banaji and Anthony G. Greenwald, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOLOGICAL REVIEW 1, 4-27 (1995).

<sup>6</sup> United States, *Periodic Report of the United States of America to the U.N. Committee on the Elimination of Racial Discrimination Concerning the International Convention of the Elimination of Racial Discrimination*, ¶ 53 at 15 (April, 2007).

<sup>7</sup> United States, *Periodic Report of the United States of America to the U.N. Committee on the Elimination of Discrimination*, Reports Submitted by States Parties – 7-9, CERD/C/USA/7-9, ¶ 2 (2013).

### **CERD Treaty Provisions and Committee Jurisprudence**

3. Article 1(1) of CERD defines discrimination as any distinction which has the “purpose or effect” (emphasis added) of discrimination and therefore covers *de facto* discrimination. CERD requires State Parties to take affirmative steps to establish special measures aimed at prohibiting and *preventing* racial discrimination. Almost all of the substantive, right-granting articles impose affirmative duties on State Parties to ensure equality. Article 1(4) explicitly sanctions what many in the United States label “affirmative action.” Article 1(4) states, “*special measures* taken for the sole purpose of *securing adequate advancement* of certain racial or ethnic groups or individuals...shall not be deemed racial discrimination.” (Emphasis added.) Article 2 elaborates on Article 1(4), requiring State Parties to take “special and concrete measures” in order to achieve equality of “human rights and fundamental freedoms.”

4. Other articles also place such affirmative duties on State Parties. Article 3 recognizes the commitment State Parties make not only to condemn but also to “*prevent, prohibit, and eradicate all practices*” of segregation and apartheid. Article 4 requires specific measures for the purpose of condemning propaganda and organizations that promote racial hatred, discrimination or theories of superiority of one race over another. In addition, Articles 5 and 7 require that State Parties take affirmative, special measures to ensure equality in education, economic, social, political, and other areas. Article 7 demands that State Parties take “immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and promoting understanding, tolerance and friendship among...racial or ethnic groups.” Article 7’s mandate promoting tolerance and understanding explicitly targets the type of discrimination that persists in America but is not legally prohibited,<sup>8</sup> *i.e.*, unintentional discrimination and unconscious bias which result in *de facto* discrimination. Since the last review of the United States, the Committee has adopted General Recommendation 32, which further describes these requirements.<sup>9</sup>

5. Committee jurisprudence also suggests that CERD’s affirmative measures are mandatory. The reports disclose that the treaty’s measures are designed to eliminate structural inequalities and should address *both de jure* and *de facto* discrimination. For instance, in its 2001 review of the second and third periodic reports of the United States, the Committee expressed concern with the United States’ position “that the provisions of the Convention permit, but do not require State parties to adopt affirmative action measures...”<sup>10</sup> Further, in its 2008 review of the United States, the Committee recommended that the US review its definition of discrimination to comply with CERD’s definition not only regarding intent but also effect.<sup>11</sup> The Committee has expressed

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<sup>8</sup> *Washington v. Davis*, 426 U.S. 229, 247 (1976) requires proof of intentional discrimination for a law, regulation or practice to be invalidated.

<sup>9</sup> For a detailed analysis of General Recommendation 32, see Connie de la Vega, *The Special Measures Mandate of the International Convention on the Elimination of All Forms of Racial Discrimination: Lessons from the United States and South Africa*, 16 ILSA J. INT’L & COMP. L. 627, 671-673 (Eng.) 751, 803-805 (Spa.) (2010).

<sup>10</sup> CERD Annual Report 10/30/2001, U.N. Doc. CERD/A/56/18 at ¶ 398.

<sup>11</sup> CERD Concluding Observations, U.N. Doc. CERD/C/USA/CO/6 (2008) at ¶ 10.

similar concern with Colombia's lack of legal provisions addressing persistent structural discrimination problems relating to housing and the right to health (among others),<sup>12</sup> and has commended countries, like the United States,<sup>13</sup> Brazil,<sup>14</sup> and Fiji,<sup>15</sup> when they have incorporated programs designed to achieve racial equality through equal access to education and employment.

### United States' Standards

6. Sixty years ago, the United States Supreme Court declared that "separate but equal" in the context of education was "inherently unequal."<sup>16</sup> Since *Brown*, various decisions have reinterpreted how disparate educational and employment opportunities due to past racism should be remedied. The Supreme Court has determined that in general, any law based on a race classification shall be held to a strict standard of review when challenged in court, regardless of the goal of the law.<sup>17</sup> In practice, laws that have survived this review are only those that either seek to remedy a specific pattern of past discrimination,<sup>18</sup> or those that seek diversity as an end goal.<sup>19</sup> In *Grutter*, the U.S. Supreme Court upheld the use of race-conscious policies in higher education for diversity purposes.<sup>20</sup> While the majority of the Court did not uphold these policies' use for purposes of remedying *de facto* discrimination, in a concurring opinion, Justice Ginsberg did note that the decision comported with U.S. treaty obligations under CERD.<sup>21</sup> The U.S. Supreme Court recently considered whether the University of Texas's use of race as one factor in its holistic approach to admissions was constitutional. The Court followed its decision in *Grutter* but adopted a more stringent test for when race-based admissions policies would be allowed.<sup>22</sup> However, the U.S. Supreme Court has since upheld an initiative passed in Michigan that prohibits the state from implementing the measures that had been upheld in *Grutter*.<sup>23</sup> The collective impact of these recent Supreme Court cases

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<sup>12</sup> CERD Annual Report 9/30/1996, U.N. Doc CERD/A/51/18 at ¶ 53.

<sup>13</sup> See Committee on the Elimination of Racial Discrimination, concluding observations of the Committee on the Elimination of Racial Discrimination –United States of America, CERD/C/USA/CO/6 (2008).

<sup>14</sup> CERD Annual Report 10/1/2004, U.N. Doc CERD/A/59/18, ¶ 49.

<sup>15</sup> CERD Annual Report 10/23/2003, U.N. Doc CERD/5/58/18, ¶ 77.

<sup>16</sup> *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (hereinafter, "*Brown*").

<sup>17</sup> See *Adarand Constructors v. Peña*, 515 U.S. 200, 202 (1995)

<sup>18</sup> See *City of Richmond v. J.A. Croson*, 488 U.S. 469, 510-11 (1989). For a history of jurisprudence on this issue, see Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law could Help Immensely*, 65 U. Cin. L. Rev. 423, 462-471 (1997).

<sup>19</sup> *Gratz v. Bollinger*, 539 U.S. 244, 258 (2003) (discussing Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-315 (1978), finding that the benefits of a racially diverse student body is a compelling government interest).

<sup>20</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>21</sup> *Id.* at 344.

<sup>22</sup> *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (June 24, 2013) (determining the constitutionality of the University of Texas's use of race as one factor in its holistic approach to admissions, which aimed to increase unrepresented racial groups in its student body). As the United States noted in its 2013 report to the Committee on Elimination of Racial Discrimination, the government filed a brief in support of upholding the practice. See Periodic Report of the United States of America, *supra* note 7, ¶ 16.

<sup>23</sup> *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623 (Apr. 22, 2014). Justice Sotomayor in her dissenting opinion concludes that the majority's decision allowing the majority of voters to ban the use

is that they continue to emphasize and even strengthen U.S. law as relating to intentional discrimination but have failed to recognize CERD's "effects" standard as the Committee recommended in 2008.

### **Education and Employment Inequality in the United States**

7. Stark educational segregation in the U.S. demonstrates that the objective of equality has not been achieved. The average White child in America attends a school where 78% of her/his fellow students are also White, whereas the average Black student attends a high school where only 30% of his fellow classmates are White and the Latina student attends a school where only 28% of the other students are White. Significantly, the average Black/African American student is attending a school where over half (53%) of her fellow students are also Black, while for the Latina student, 55% of her fellow classmates are Latino/a.<sup>24</sup>

8. A number of states in the United States have passed laws prohibiting the use of race in admissions decisions for universities and hiring decisions for employment. One example is California, which in 1996 passed Proposition 209, severely limiting the use of affirmative action in higher education.<sup>25</sup> One effect has been increased *de facto* discrimination at its premier public university: despite the fact that 44.8% of high school graduates are Latinos, Blacks, and Native Americans, those groups comprise only 15.3% of the entering class at University of California at Berkeley in 2007.<sup>26</sup> Washington, Florida, and Michigan all followed California, and similar initiatives were pursued in Missouri, Colorado, Oklahoma, Arizona, and Nebraska in the November 2008 elections.

9. The impact of such legislation is clearly illustrated in California. In 1995 before passage of Proposition 209, UCLA admitted 693 Black students (6.6%). By 2005, the Black student enrollment at UCLA had dropped to just 103 students out of a freshman class of 4,800 (2%).<sup>27</sup> The 2012-13 entering class included 116 Black students in a freshman class of 5821 (2%).<sup>28</sup>

10. In fall 1996, Black students made up just over 6% of the students enrolled at UCLA School of Law; the following year, after passage of Proposition 209, that number dropped to 2.6%. The University of California Berkeley's law school saw its Black student enrollment plummet from 8% in 1996 to 0.4% the following fall. Tellingly, the White enrollment at UCLA's law school *increased* from 63.5% in 1996 to 71.2% in

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of affirmative action "eviscerates" the political process doctrine which protected minorities' equal protection rights. *Id.* at 1682.

<sup>24</sup> Gary Orfield and Chungmei Lee, *Racial Transformation and the Changing Nature of Segregation*, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, Jan. 2006, p. 8, available at: <http://files.eric.ed.gov/fulltext/ED500822.pdf>.

<sup>25</sup> See de la Vega, *supra* note 9, at 646 (Eng.).

<sup>26</sup> *Id.* at 647 (Eng.).

<sup>27</sup> Samantha Levine, *UCLA Tweaks Its Admissions Process to Stop the Black Student Enrollment Decline*, U.S. NEWS AND WORLD REPORT, May 27, 2007.

<sup>28</sup> See New Freshman and Transfers: 2012-13 Undergraduate Profile, available at <http://www.aim.ucla.edu/pdf/UGProfile12-13.pdf>.

1997.<sup>29</sup> Those numbers are more shocking in the context of the racial make up of California, which in 2007 was 43.8% White, 35% Latino, 12% Asian, and 6 % Black.<sup>30</sup>

11. Michigan, where the recent Supreme Court case of *Schuette v. Coalition to Defend Affirmative Action* originated, has seen a drastic reduction in the enrollment of Black students since its affirmative action ban went into effect. The University of Michigan has seen a 30% reduction in Black enrollment since 2006, the year before the ban came into effect.<sup>31</sup> In 2006, Black enrollment was 7.1%, but, in 2013, it fell to a shocking 4.2%.<sup>32</sup> At Wayne State University in Detroit, Black enrollment fell from 26.2% in 2006 to 18.2% in 2013.<sup>33</sup> Similarly, at Wayne State's law school, Black enrollment fell from 10.9% in 2006 to 6.9% in 2013.<sup>34</sup> The numbers at Wayne State are particularly striking given that the population of Detroit is 82.7% Black.<sup>35</sup> At Michigan State University, Black enrollment fell from 7.7% in 2006 to 6.2% in 2013.<sup>36</sup> These reductions in Black enrollment at Michigan colleges and universities are also happening against a backdrop of stark unemployment for the Black community in the state. In the fourth quarter of 2012, the Black unemployment rate in Michigan was 18.7%, compared to 7.5% for Michigan Whites.<sup>37</sup> If the ban on affirmative action is to remain in effect, there seems to be a statistical impossibility that the Black community will ever be on a level playing field with its White counterparts.

12. The significance of this segregation is undeniable when one considers the disparity in education between schools with large minority populations and schools that are predominantly White. For example, in Chicago, Black students are 40 times more likely than their White counterparts to attend one of the state's 351 "worst of the worst 'academic watch' schools," and nearly 40% of the state's Black children attend such schools.<sup>38</sup> In addition, these students are six times more likely to be instructed by teachers

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<sup>29</sup> University of California Office of the President, University of California Law School Enrollment Data (2007)

<sup>30</sup> Nancy McCarthy, *Changing the Color of the California Bench*, CALIFORNIA BAR JOURNAL, April 2007, p. 1, citing the U.S. Census Bureau.

<sup>31</sup> Greg Stohr, *Black Enrollment Falls as Michigan Rejects Affirmative Action*, BLOOMBERG.COM, available at <http://www.bloomberg.com/news/2013-09-24/black-enrollment-falls-as-michigan-rejects-affirmative-action.html>.

<sup>32</sup> Information from the University of Michigan's Registrar website, available at <http://ro.umich.edu/enrollment/ethnicity.php?limit=none#r816> (last visited June 8, 2014).

<sup>33</sup> Information from Wayne State University's Registrar website, available at [http://budget.wayne.edu/IRA\\_quickfacts\\_Enroll.aspx](http://budget.wayne.edu/IRA_quickfacts_Enroll.aspx) (last visited June 8, 2014).

<sup>34</sup> *Id.*

<sup>35</sup> Information obtained from the 2010 US Census, available at <http://quickfacts.census.gov/qfd/states/26/2622000.html> (last visited June 8, 2014).

<sup>36</sup> Information from Michigan State University registrar website, available at <http://reports.esp.msu.edu/ReportServer/Pages/ReportViewer.aspx?%2fROReports2005%2fUE-ComparisonEthnicOrigin> (last visited June 8, 2014).

<sup>37</sup> Mary Gable & Douglas Hall, *Ongoing Joblessness in Michigan: Unemployment rate for African Americans tops in nation, more than double the state's white rate*, ECONOMIC POLICY Issue Brief, Brief No. 356, May 15, 2013, available at <http://www.epi.org/files/2013/ib356-unemployment-michigan.pdf>.

<sup>38</sup> Paul Street, *Segregated Schools: Educational Apartheid in Post-Civil Rights America* 52 (Routledge 2005) (citing a *Chicago Tribune* story from May 9, 2004).

who lack full certification, and are in classrooms of larger sizes.<sup>39</sup> A 2004 study found that Illinois spent an average of \$2,834 more per student on children in the richest 25% of its districts than on children in the most impoverished ones.<sup>40</sup> A similar pattern repeats itself in other cities all over the country.<sup>41</sup>

13. Over the past several years, there have been considerable efforts to erode Supreme Court precedent aimed at correcting education segregation, despite the fact that structural inequalities in this sphere are still present. In a 2006 decision, White parents successfully sued a school district in Seattle that used race as a tiebreaker when a high school both received more applicants than it could accept and had a non-White population more than fifteen percent higher than the school district's White population.<sup>42</sup> Under CERD Article 2(2), such remedial measures are not only sanctioned but required, so long as "they shall not be continued after the objectives for which they were taken have been achieved." Interestingly, the local governments were attempting to implement programs in an attempt to promote integration of their school districts. Rather than support the school district, the U.S. government filed an *amicus* brief in support of the White parents in the Seattle case challenging the district's affirmative action plans.<sup>43</sup>

14. Disparities in the American educational system extend beyond segregation. Racial disparities in the attainment of educational milestones are significant and persistent, as evidenced by the following statistics from the U.S. Census Bureau.<sup>44</sup> Among people 25 years old and over, those who have at least a high school degree is 84.6%. However, for Whites 25 years old and over, that number jumps nearly 5% to 89.4%. Blacks who are 25 years old and over receive high school diplomas at a rate of just 80%, nearly 10% less than their White counterparts. The statistics are even starker for the Latino/Hispanic population in the United States where only 57% has at least a high school diploma. The disparity persists and worsens as the level of education increases.

15. As the United States describes in its report, the federal "No Child Left Behind" program aims to curb some of these systematic disparities and improve the quality of education available to grade school children by giving students at schools identified for improvement the opportunity to attend a better public school. The program has been widely criticized. Reports show that around 2% of children eligible to transfer out of failing schools have exercised the option and fewer than one in six students who qualify

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 53.

<sup>41</sup> In the 2002-2003 school year, predominantly Black and Hispanic Philadelphia area schools received an average of 46.2% less funding per student than predominantly White schools; in the Detroit area, approximately 25% less; in the Milwaukee area, 22% less; in the Boston area, 38% less; and in the New York City area, 47% less. Jonathon Kozol, *The Shame of the Nation: The Restoration of Apartheid Schooling in America* 321 (Appendix) (Crown Publishers 2005) (collecting data from various state departments of education).

<sup>42</sup> *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

<sup>43</sup> *Id.*, Amicus Brief of the United States of America to the Supreme Court.

<sup>44</sup> U.S. Census Bureau, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2003: POPULATION STATISTICS, 3, June 2004, available at <http://www.census.gov/prod/2004pubs/p20-550.pdf>.

(For purposes of this report, White refers to White, Non-Hispanic and Hispanic includes persons of any race of Hispanic origin.)



for tutoring are getting it. In addition, critics cite that minority and low-income students are often disproportionately stuck with instructors who are inexperienced or teaching out of their field, as better teachers have chosen to avoid schools labeled as “failing.”<sup>45</sup> The program’s goal to close racial and ethnic gaps has been thwarted by schools that are uninterested in transfer students with low achievement, poor attendance and other problems that might bring the schools’ average test scores down, thus jeopardizing federal funding.<sup>46</sup> Rather than expanding educational opportunities for low-income students and students of color, the law has, in many communities, further reduced the quality of education for these students, thereby further embedding structural inequalities.

16. The structural inequalities that have characterized the American public school system not only result in educational disparities, but also have contributed to psychological societal bias toward certain race groups. This bias often materializes in the form of discriminatory hiring practices. Although private employers are subject to the Civil Rights Act, which prohibits discrimination in the workplace, they are not subject to Supreme Court holdings that target the public sector. However, private employers can be affected by state or federal legislation that has a legitimate aim of remedying a specific pattern of past discrimination.<sup>47</sup> It should be noted that overcoming bias or remedying past discrimination in general is not a sufficient justification for these programs.<sup>48</sup>

17. The increased segregation that began in the late 1980’s has had an impact on certain professions such as medicine, law, accounting, architecture, and pharmacology. Statistical evidence demonstrates the huge disparities in employment by race. Nationally, Blacks are 12% of the workforce generally, but comprise only 5% of the lawyers and 30% of the refuse collectors.<sup>49</sup> In California, the statistics are starker. A 2007 report showed that despite the fact that Whites were only 43.8% of the population, they made up 84.4% of the attorneys; Latinos were 35% of the population but only 3.8% of the lawyers; Blacks were 6% of the population but only 1.7% of the lawyers; and Asians were 12% of the population but only 5.3% of the lawyers.<sup>50</sup>

18. A profession with a particular dearth of minority members is certified public accounting. Black CPAs constituted a paltry 0.03% of all CPAs in 1930; almost 70 years later, Blacks still comprise less than 1% of all CPAs.<sup>51</sup> This nearly complete exclusion is the result of bias in the business community and the apprenticeship requirement for a license.<sup>52</sup> Surveys confirmed that actual bias of clients, primarily White individuals who

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<sup>45</sup> Jason L. Riley, *A Law Best Left Behind*, WALL STREET JOURNAL Online Edition A14 (Sept. 28, 2007), available at <http://online.wsj.com/news/articles/SB119094445748442219>.

<sup>46</sup> Linda Darling-Hammond, *Evaluating ‘No Child Left Behind,’* THE NATION (May 21, 2007).

<sup>47</sup> See *Fullilove v. Klutznick*, 448 U.S. 448, 473 (1980) (upholding federal set-aside program for minority owned contractors).

<sup>48</sup> See *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (lay-off plan to achieve racial balancing in general violated the Equal Protection Clause).

<sup>49</sup> Census 2000 EEO Data Tool, U.S. Census Bureau, <http://www.census.gov/eo2000/> (follow “Employment by Census Occupation Codes” hyperlink).

<sup>50</sup> California Bar Journal, *supra* note 30.

<sup>51</sup> Theresa A. Hammond, *A White-Collar Profession: African American Certified Public Accountants Since 1921*, THE UNIVERSITY OF NORTH CAROLINA PRESS, 2002.

<sup>52</sup> *Id.*

did not want Blacks involved in their financial affairs, as well as firm perceptions of client bias and the firms' own biases, presented substantial barriers to Blacks seeking employment as CPAs. Additionally, given the lengthy apprenticeship requirements, many Blacks are unable to afford gaining the requisite experience.<sup>53</sup> One of the most striking displays of bias is revealed in a study that found that employers would rather hire a White man recently released from prison than a Black man with a high school diploma, all other things being equal.<sup>54</sup>

### **Recommendations on U.S. implementation of CERD**

19. As the stark educational and employment statistics make clear, state legislatures and the federal government are failing to act to remedy systematic segregation. As evidenced by the *Seattle School District* case, in many instances, when local bodies and public schools attempt to address *de facto* segregation, they have been prohibited from doing so unless there has been specific discrimination or there is an attempt to attain diversity, a worthy goal but not one that is sufficient for addressing structural discrimination. Implementation of the special measures as mandated by CERD could start to resolve the lack of equality in the United States.

20. As a result of the continuing segregation, lack of equality in the enjoyment of basic rights, and the existence of bias, the United States should address the following questions:

- a. How have the special measures that were reported to have been taken helped to address the increasing segregation in education and employment in certain professions across the United States and in particular states like California?
- b. What measures have been taken to address structural inequality in the United States?
- c. What steps has the United States taken to address actions by states that prohibit special measures/affirmative action by local entities and schools of higher education, in violation of the obligations under CERD?
- d. What special measures have been undertaken to address both *de facto* as well as *de jure* discrimination?
- e. What special measures has the United States undertaken to combat prejudices that lead to racial discrimination and to promote understanding, tolerance and friendship among nations and racial or ethnical groups as well as propagating the purposes of CERD, as required by Article 7?
- f. Has the United States assessed the potential impact on segregation in education of the decisions in *Fisher v. University of Texas at Austin* and *Schuetz v. Coalition to Defend Affirmative Action*?

21. Recommended Action

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<sup>53</sup> *Id.*

<sup>54</sup> David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L. Q. 921 (1996).

1. The United States should conduct additional studies regarding segregation in education and provide the states information and incentives for remedying remaining segregation.
2. The United States should undertake a plan to address the impact of state laws that have had the effect of increasing racial segregation in public schools.
3. The United States should undertake a study to assess the impact of the decisions in *Fisher v. University of Texas at Austin* and *Shuette v. Coalition to Defend Affirmative Action*. If the admissions policy in Texas is upheld, the United States should assess whether it has decreased racial segregation in that state, and if so, take steps to encourage other states to undertake similar changes in their admissions policies.

**SECTION 2 – JUVENILE LIFE WITHOUT PAROLE SENTENCES**  
**Articles 1, 2, and 5**

23. Human Rights Advocates addressed the racial disparities in the use of juvenile life without parole sentences in its 2007 report to this Committee. In its 2008 Concluding Observations on the United States, the Committee referred to other treaty bodies’ recommendations regarding life without parole sentences for offenders younger than 18 at the time of their crime.<sup>55</sup> As the United States indicated in its 2013 report, recent court decisions have limited the use of this sentence.<sup>56</sup> However, the United States is the only country in the world that sentences juveniles to life without parole in practice<sup>57</sup> and it does so at a staggering rate: as of April, 2011, an estimated 2,594 juveniles were serving life without parole sentences across the country.<sup>58</sup> Before the Supreme Court decision in *Miller v. Alabama*, which held that mandatory juvenile life without parole sentences are unconstitutional cruel and unusual punishment, 26 of these States had mandatory juvenile life without parole for certain crimes.<sup>59</sup> States have been slow to change their laws in response to the Supreme Court decisions. A recent report makes the following findings:

- While the Court struck down laws in 28 states, only 13 of those states have passed new sentencing laws.
- Some statutes passed since *Miller* set the minimum sentence for youth convicted of homicide for as much as 40 years.
- Of the 13 states that have passed new legislation only four allow for the *Miller* decision to be applied retroactively. Six state Supreme Courts have ruled in favor of applying the decision retroactively, as well.

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<sup>55</sup> CERD Committee, Concluding observations on the United States of America, *supra* note 13, ¶ 21.

<sup>56</sup> Periodic Report of the United States, *supra* note 7, ¶ 71.

<sup>57</sup> Connie De La Vega, Amanda Solter, Soo-Ryun Kwon, Dana Isaac, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 61 (2012) [hereinafter CRUEL AND UNUSUAL].

<sup>58</sup> *Sentencing Juveniles*, NYTimes.com, <http://www.nytimes.com/interactive/2011/04/20/us/juveniles.html?ref=us> (last visited December 17, 2012).

<sup>59</sup> *Id.* See also *State by State Legal Resource Guide*, USFCA.edu, [http://usfca.edu/law/jlwop/resource\\_guide/](http://usfca.edu/law/jlwop/resource_guide/) (last visited December 17, 2012).

- Only twelve states and the District of Columbia ban juvenile life without parole (JLWOP).<sup>60</sup>

The racial impacts of these sentences also continue despite the recent decisions.

24. While *Miller* abolished mandatory juvenile life without parole sentences, it did not touch on discretionary juvenile life without parole. Thus, so long as states rewrite their statutes to require individualized consideration of a number of enumerated factors during the sentencing period, they may continue to sentence youth to life without parole.<sup>61</sup> Nor did the decision in *Miller* provide any guidance as to how it should affect those already serving mandatory juvenile life without parole sentences. Thus, states can decide whether or not the *Miller* holding should apply retroactively to the thousands of individuals already serving juvenile life without parole sentences.<sup>62</sup>

25. Finally, *Miller*'s narrowly tailored holding applies only to those sentences that are actually called "juvenile life without parole" and does not take into account other sentencing schemes which operate as *de facto* life without parole sentences for minors. Accordingly, judges may sentence juveniles to consecutive sentences for each component part of a crime, resulting in a sentence that is equivalent to life without parole but is unaffected by the decision in *Miller*.<sup>63</sup> Nor does *Miller* foreclose the possibility of sentencing a juvenile to extremely long sentences, such as 90 years, which amount to life sentences without meaningful review.<sup>64</sup>

26. A petition pending before the Inter-American Commission on Human Rights includes information regarding the racial impact of these sentences.<sup>65</sup> While the petitioners are from the state of Michigan and the facts are focused on the racial impact of the sentencing practices in that state, the petition includes information on the overuse of juvenile life without parole sentences on Black youth nationwide, which has resulted from "racially tinged" legislative reform due to racially biased reporting by the media about juvenile violence.<sup>66</sup> The result of this bias at the national level has meant that Black youth "are serving life without parole at a rate that is ten times higher than that of White youth. While 23.3% of juveniles arrested on suspicion of killing a White person are African-American, African-American youth constitute 42.4% of those receiving

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<sup>60</sup> Joshua Rovner, The Sentencing Project, [Slow to Act: State Responses to the 2012 Supreme Court Mandate on Life without Parole](#) (2004).

<sup>61</sup> *Miller*, 132 S. Ct. 2455.

<sup>62</sup> See *Michigan v. Carp*, No. 307758, slip op. (Mich. Nov. 15, 2012) (wherein the Michigan Supreme Court held that *Miller* does not apply retroactively and thus has no effect on existing juvenile life without parole sentences).

<sup>63</sup> CRUEL AND UNUSUAL, *supra* note 57, at 7.

<sup>64</sup> See *id.* at 60 (describing the case of Bobby Bostick who was sentenced to 241 years in prison). *But see People v. Argeta*, No. TA103939, slip op. (L.A. Cnty. Ct. Nov. 13, 2012) (holding that a 100-year sentence handed down to a 15-year-old offender is *de facto* juvenile life without parole under *Miller*).

<sup>65</sup> *Hill v. United States of America*, Case. No. 12.866, Petitioners' Observations & Responses Concerning the March 25, 2014 Hearing before the Inter-American Commission on Human Rights, pp. 9-14 (June 13, 2014).

<sup>66</sup> *Id.* at 11-13.

juvenile life without parole sentences for this crime. White youth, in stark contrast, comprise 6.4% of those arrested on suspicion of killing an African-American, but only 3.6% of those serving juvenile life without parole sentences for such killings.”<sup>67</sup>

### **Recommendations on US Implementation of CERD**

27. In light of the continuing racial discrepancy in the use of juvenile life without parole sentences, the United States should address the following questions:

- a. What steps has the United States undertaken to ensure state implementation of the recent Supreme Court decisions limiting this sentence?
- b. What steps has the United States undertaken to address the racially biased reporting that led to the extreme sentences being applied to youth?
- c. Has the United States undertaken any programs to educate state legislators about the racial impact of extreme sentences on youth?

28. Recommended Action

1. The United States should conduct additional studies regarding the effects of life without parole sentences and provide the states information and incentives for changing the laws that allow these sentences.
2. The United States should undertake a plan to address the impact of state laws that have had the effect of increasing the incarceration of racial minorities.
3. The United States should continue to pursue changing the federal laws that allow the use of life without parole for persons who were under 18 at the time they committed their crime, as well as the use of convictions for crimes committed under the age of 18 to enhance adult sentences.
4. The United States should undertake programs to educate state legislators and policy makers regarding the international prohibition of life without parole sentences for juvenile offenders.

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<sup>67</sup> *Id.* at 13, citing Ashley Nellis, The Sentencing Project, *The Lives of Juvenile Lifers: Findings from a National Survey* 15 (2012).