



Via E-mail: OHCHR.CERD@UN.ORG

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UN Committee on the Elimination of Racial Discrimination

Re: NGO contributions to the development of list of themes for United States government report

Dear Sir/Madam:

We write to urge the Committee to focus on racial discrimination in sentencing and imprisonment as part of its List of Themes for the review of the United States' periodic report under the International Convention on the Elimination of All Forms of Racial Discrimination. Our recommendations are informed by long practice in the criminal legal field through litigation, research, public education and advocacy. The American Civil Liberties Union (ACLU) is the largest and oldest civil liberties organizations in the United States which for decades has been combating racial injustice and mass incarceration. The Sentencing Project (TSP) is a national research and advocacy organization founded in 1986 which works to promote effective and humane responses to crime that minimize imprisonment and criminalization of youth and adults by ensuring racial, ethnic, economic and gender justice. Both the ACLU and TSP work directly at the federal, state and local level with directly impacted communities advocating and organizing for racial justice in the criminal legal system. Our recommendations are informed by that direct experience, knowledge, and perspective.

The proportion of people of color who are incarcerated in the nation compared with their representation in the general population epitomizes the need to achieve racial justice. The nation incarcerates almost two million people¹—more than any other country in the world—and over five times more per capita than just 40 years ago.² But the burden of criminal sentencing and imprisonment is not inflicted equally. Black and Latinx residents are incarcerated at rates five and three times higher than white residents, respectively.³ One of every 81 Black adults in the U.S. is in prison.⁴

These staggering disparities create individual and community barriers to full and equal participation in American society. Criminal convictions and imprisonment can prevent individuals from voting and gaining employment, undermine access to safe housing, negatively impact the life outcomes of children, and substantially lower lifetime earnings, amongst other social, political and economic disadvantages.⁵ While these are individual consequences, there are also societal consequences: high levels of imprisonment in communities bring about crime, poverty and neighborhood deterioration through decreased political power that fuels greater disparities.⁶ This cycle of suffering, social exclusion and disempowerment is primarily experienced by African Americans and other people of color.

The enormous racial disparities, discrimination and inequality created by the United States' system of mass incarceration did not occur by happenstance. They are the product of deliberate legal and policy choices created by a dominant white population supported by a culture of white supremacy. For instance, it is now clear that the so-called "War on Drugs" which greatly accelerated America's mass incarceration build-up starting in the 1970's was initiated as a deliberate effort by President Richard Nixon and his administration to disrupt, vilify and oppress communities of color for political gain and control, rather than a legal initiative primarily concerned about improving public safety.⁷

These racist underpinnings of the criminal legal system in the United States must be acknowledged in order for meaningful reform to be accomplished and human rights to finally be upheld. Despite the centrality of racial disparities in the criminal legal system, and in sentencing and imprisonment in particular, these critical areas of race discrimination and disparate impact receive scant attention in the U.S. government's combined tenth to twelfth periodic reports submitted to the Committee on the Elimination of Racial Discrimination in 2021.⁸ The report summarily addresses sentencing and imprisonment in paragraphs 114-115; cites to racism in the application of the death penalty in paragraph 116; and focuses on issues for youth in the adult and juvenile justice systems in paragraphs 117 through 120.⁹ Below, we briefly address key areas of racial disparity in sentencing and imprisonment that require further attention, review and action by the U.S. government in order to comply with its treaty obligations.

Race Discrimination in Sentencing & Imprisonment

There are significant racial disparities in sentencing decisions in the United States.¹⁰ Sentences imposed on Black males in the federal system are nearly 20 percent longer than those imposed on white males convicted of similar crimes.¹¹ Black and Latinx defendants sentenced in state and federal courts face significantly greater odds of incarceration than similarly situated white defendants and receive longer sentences than their white counterparts in some jurisdictions.¹² Nationally, one in 81 Black adults in the U.S. is serving time in state prison. In some states, this rate is significantly higher, in Wisconsin for example, one of every 36 Black Wisconsinites is in prison.¹³ And in 12 states, more than half the prison population is Black: Alabama, Delaware, Georgia, Illinois, Louisiana, Maryland, Michigan, Mississippi, New Jersey, North Carolina, South Carolina, and Virginia.¹⁴

Research further demonstrates that Black male federal defendants receive longer sentences than white defendants arrested for the same offenses and with comparable criminal histories.¹⁵ In addition, racial disparities in sentencing can result from sentencing policies that have significant disparate racial effects, particularly tough-on-crime and federal drug sentencing policies. These include imposing harsher sentences on people designated as so-called "habitual offenders" or "career offenders," enhanced sentences for violations occurring in or near a school zone, and federal policies adopted by Congress in the 1980s and 1990s that established mandatory minimum sentencing laws.¹⁶

While progress has been made by the United States Congress to reduce the severity of federal mandatory minimum sentences for some drug offenses involving people with limited criminal histories, these steps are insufficient and federal sentencing reforms still preserve excessive

sentencing for drug offenses and other offenses that disproportionately impact people of color. All existing mandatory minimum sentencing laws must be repealed and Congress must cease passing new ones. Between 1980 and 2021, the federal prison population grew by 530%, and that growth is due to lengthy drug sentences.¹⁷

Race Discrimination in the Imposition of Life Imprisonment

Racial disparities increase with the severity of the sentence imposed. Today, more than 200,000 people are serving a life sentence in the United States and two-thirds of those individuals are people of color.¹⁸ Although Black people constitute only about 13% of the U.S. population, 46% of those sentenced to life in prison are Black. Among people serving life without parole (LWOP), the most extreme life sentence, 55% are Black. In Georgia, Illinois, Louisiana, and Maryland, more than two-thirds of the life-sentenced population is African American.¹⁹ In 2020, 1 in 5 Black men in prison and 1 in 9 Black women were serving a life sentence.²⁰

The racial disparity is even higher among people sentenced as juveniles to serve life-without-parole. The existing data demonstrates that 62% of people serving juvenile life-without-parole (JLWOP) sentences are Black.²¹ While just 23% of juvenile arrests for murder involve an African American suspected of killing a white person, 42% of JLWOP sentences are for an African American convicted of killing a white person. In contrast, white youth suspected of killing African American victims are only about half as likely to receive a JLWOP sentence as their proportion of arrests for killing an African American.²²

Racial disparity is even more significant for individuals sentenced to LWOP for nonviolent offenses. Based on data provided to the ACLU by the U.S. Sentencing Commission and state Departments of Corrections, the ACLU estimates that nationwide, 65.4% of people serving LWOP for nonviolent offenses are Black compared to the 17.8% who are white and the 15.7% who are Latinx. According to data collected and analyzed by the ACLU, Black people comprise a glaring 91.4% of the nonviolent LWOP prison population in Louisiana (the state with the largest number of people serving LWOP for a nonviolent offense), 78.5% in Mississippi, 70% in Illinois, 68.2% in South Carolina, 60.4% in Florida, 57.1% in Oklahoma, and 60% in the federal system.

Race Discrimination in the Sentencing of Youth

Disparities in the sentencing and treatment of youth of color and their white counterparts are also glaring. As referenced above, the most extreme punishment available for youth, JLWOP, is disproportionately inflicted on youth of color, and especially Black youth. Indeed, decisions to subject youth to the harsher treatment of the adult system rather than allow them to benefit from the rehabilitative services of the juvenile system disproportionately fall on youth of color.

National data establish that there are disproportionate rates in the transfer of youth from youth facilities to adult facilities.²³ In 2018, despite the fact that Black youth made up less than 15% of the total youth population in the U.S., they comprised 63% of the total youth detained pending judicial waiver to the adult system or awaiting an adult criminal court hearing.²⁴ According to the most recent data available, Black youth were nine times more likely than white youth to be given an adult prison sentence. Similarly, Tribal youth were twice as likely, and Latinx youth were 40% more likely than white youth to be prosecuted as adults.²⁵ Youth of color remain

exposed to the physical and emotional harms of the adult system at enormously disproportionate rates, despite decades of research and experience demonstrating that such exposure increases the likelihood of further involvement in the criminal justice system and fewer opportunities for a successful life as an adult.²⁶

The staggering racial disparities in the adult system are further replicated in the juvenile justice system. For U.S. children, the racial disparities grow with each step into the criminal legal system—from arrest, to referral, to secure confinement. While Black youth account for just 15% of all youth, they constitute 35% of all juvenile arrests and 41% of youth in custody.²⁷ Black youth are more than four times as likely to be detained or committed to juvenile facilities as their white peers.²⁸ Similarly, according to nationwide data collected in October 2019 and recently released, Latinx youth were 28% more likely to be detained or committed in juvenile facilities than their white peers,²⁹ and Tribal youth were three times more likely.³⁰ While differential conduct may account for some disparity, where research has compared Black youth and white youth with nearly identical crimes and no previous incarceration in a juvenile prison, data established that Black youth were six times more likely to be sentenced to prison as their white peers.³¹

Race Discrimination in the Application of the Death Penalty

Racial bias also continues to taint the capital punishment system in the United States, from the decision to seek the death penalty, to jury selection and the imposition and execution of death sentences. The death penalty is disproportionately imposed on people of color.³² In 2019, 42% of people under sentence of death in the United States were Black, and 42.3% were white,³³ although Black people make up only 13% of the overall population. Further, numerous studies from across the country conclusively demonstrate that the murder of white people results in capital prosecution in far higher percentages than murders of people of color.³⁴ The disparities based on the race of the victim are often heightened in cases where the accused individual is Black.

A study of the federal death penalty released in 2000 found that 89% of defendants prosecuted capitally were people of color.³⁵ Fifty-five percent of the people on the federal death row are either Black or Latinx.³⁶ Despite these glaring racial disparities, the federal government has not made any discernable progress in rooting out racial discrimination in the administration of the federal death penalty.

Race Discrimination in Collateral Consequences

The U.S. rate of incarceration—with nearly one of every 100 adults in prison or jail—is five to ten times higher than rates in Western Europe and other democracies.³⁷ The National Research Council of the National Academies found that changes in criminal justice policy propelled a growth in incarceration that had disproportionate effects on African American and Latinx residents. Criminal justice practices partly became more punitive due to the conflation of the civil rights movement and 1960s uprisings and the resulting use of crime policy as a strategy to appeal to a white electorate. The policy choices of harsher criminal penalties are unique factors³⁸ that shaped mass incarceration. For some, incarceration has become a normal life event among recent cohorts of African Americans that did not complete high school.³⁹

The laws and regulations that result in diminished rights and privileges of those convicted of crimes also expanded. Excessive collateral consequences were adopted following an era of rising crime and an intense period of political and social transformation that substantially impacted race relations. According to the National Employment Law Project, an estimated 70 million individuals have criminal records in the United States.⁴⁰ More than 19 million have felony convictions triggering civil sanctions including deportation as well as voting and welfare bans.⁴¹

- *Deportation:* One of the most significant collateral consequences is the deportation of immigrants with criminal records, analogous to the practice of exile. Foreigners with criminal convictions are generally denied admission to the United States, but the Immigration Reform and Control Act of 1986 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 resulted in Congress substantially expanding the categories of crimes that subject an immigrant to deportation.⁴²
- *Felony Disenfranchisement:* Due to the growth of incarceration, a substantial number— 5.17 million people — of American citizens, especially Black residents and the poor, are excluded from key aspects of civic and public life through the right to vote. Racial disparities in the criminal legal system also translate into higher rates of disenfranchisement among communities of color; one of every sixteen African Americans of voting age, or approximately 6.2%, are disenfranchised compared to 1.7 percent of the non-Black population.⁴³
- *Welfare Bans:* The 1996 Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) imposed a denial of federal benefits to people convicted in state or federal courts of felony drug offenses. The ban is imposed for no other offenses than drug crimes, and its provisions subject individuals who are otherwise eligible for the federal Supplemental Nutrition Assistance Program (“SNAP”) or Temporary Assistance for Needy Families (“TANF”) benefits to a lifetime disqualification that applies in all states unless the states act to opt out of the ban through legislation.⁴⁴ This welfare ban disproportionately impacts African Americans and other racial minorities because of racial disparities caused by America’s “war on drugs” despite data on illicit drug use collected by the Department of Health and Human Services consistently demonstrating over time that whites, African Americans, and Latinx residents use drugs at roughly comparable rates while racial disparities are found in sentencing and collateral consequences.⁴⁵ During the fifteen-year period from 1996 to 2011, an estimated 180,100 women in states that did not opt out of the ban may have been affected by the TANF ban at some point in their lives.⁴⁶

The United States practice of socially excluding persons with felony convictions from civic, economic, and social life continues to surface fundamental questions about the criminal legal system’s role in mediating full political and civil rights. The COVID-19 crisis has made people with criminal system contact more vulnerable. The restrictions that already make reintegration to the community following incarceration difficult under regular circumstances create an impenetrable barrier to successful reintegration during a pandemic — a crisis that has created mass unemployment, a looming housing crisis, and stretched health care systems thin.⁴⁷

We welcome the opportunity to make this submission and urge the Committee to take up the issue of racial disparities in sentencing in the United States as part of its list of themes and issues to be addressed during the country review session later this year. We request that the Committee recommend that the government of the United States amend its sentencing laws both prospectively and retroactively to account for discriminatory impact, and take other measures to rectify the individual and community impacts of unjust and discriminatory sentences against Black people and other people of color. For further information about this submission, please contact jdakwar@aclu.org and afettig@sentencingproject.org.



Jamil Dakwar
Director, Human Rights Program
American Civil Liberties Union



Amy Fettig
Executive Director
The Sentencing Project

¹ E. Ann Carson, *Prisoners in 2020*, Table 4 (2021).

² The Sentencing Project, *Trends in U.S. Corrections* (2021).

³ *supra* at note 1.

⁴ A. Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project (2021).

⁵ Todd Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Communities Worse* (2009); D. Pager, *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration* (2007); Bruce Western, *Punishment and Inequality in America* (2007); C. Wildman, A.W. Goldman, and K. Turney, *Parental Incarceration and Child Health in the United States*, *Epidemiologic Reviews*, 40(1), at 146-158 (2018).

⁶ *supra* at note 4, Clear, *Imprisoning Communities* (2009).

⁷ Dan Baum, *Legalize it All: How to Win the War on Drugs*, *HARPER'S MAGAZINE* (April 2016), available at <https://harpers.org/archive/2016/04/legalize-it-all/>.

⁸ *Combined tenth to twelfth periodic reports submitted by the United States of America under article 9 of the Convention, due in 2017*, CERD/C/USA/10-2, ¶¶ 114-120 (June 2, 2021), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fUSA%2f10-12&Lang=en.

⁹ *Id.*

¹⁰ See, e.g., Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Charging and its Sentencing Consequences*, U of Michigan Law & Econ, Empirical Legal Studies Center Paper No. 12-002 (2012); Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 *Prison Journal* (2011); The Sentencing Project, *Racial Disparity In Sentencing: A Review Of The Literature* (2005), available at http://www.sentencingproject.org/doc/publications/rd_sentencing_review.pdf.

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- ¹² Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, in 3 *Crim. Just.* 427 (2000), available at <http://www.justicestudies.com/pubs/livelink3-1.pdf>.
- ¹³ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project, 5 (2021), available at <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.
- ¹⁴ *Id.*
- ¹⁵ *supra* note 11; note 10 Starr & Rehavi, *Racial Disparity in Federal Criminal Charging* (2012).
- ¹⁶ M. Crow & K. Johnson, *Race, Ethnicity, and Habitual-Offender Sentencing*, 19 *Crim. Just. Policy Review* 63 (2008).
- ¹⁷ Federal Bureau of Prisons, *Statistics*, available at https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops (at tab “View Past Totals”).
- ¹⁸ Ashley Nellis, *No End in Sight: America’s Enduring Reliance on Life Imprisonment*, The Sentencing Project, 4 (2021), available at <https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment/>.
- ¹⁹ *supra* at 18.
- ²⁰ *supra*.
- ²¹ The Sentencing Project, *Juvenile Life Without Parole: An Overview*, 4 (2021), available at <https://www.sentencingproject.org/publications/juvenile-life-without-parole/>.
- ²² *supra*.
- ²³ Marcy Mistrett and Mariana Espinoza, *Youth in Adult Courts, Jails, and Prisons*, The Sentencing Project, 2 (2021), available at <https://www.sentencingproject.org/publications/youth-in-adult-courts-jails-and-prisons/>.
- ²⁴ *supra*.
- ²⁵ *supra*.
- ²⁶ *supra* at 2-5.
- ²⁷ Josh Rovner, *Racial Disparities in Youth Commitments and Arrests*, The Sentencing Project, 1 (2016), available at <https://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests/>; Josh Rovner, *Black Disparities in Youth Incarceration*, The Sentencing Project, 1 (2021), available at <https://www.sentencingproject.org/publications/black-disparities-youth-incarceration/>.
- ²⁸ *supra* at note 27, Rovner, *Black Disparities in Youth Incarceration* (2021).
- ²⁹ Josh Rovner, *Latinx Disparities in Youth Incarceration*, The Sentencing Project, 1 (2021), available at <https://www.sentencingproject.org/publications/latino-disparities-youth-incarceration/>.
- ³⁰ Josh Rovner, *Disparities in Tribal Youth Incarceration*, The Sentencing Project, 1 (2021), available at <https://www.sentencingproject.org/publications/native-disparities-youth-incarceration/>.
- ³¹ Eileen Poe-Yamagata and Michael A. Jones, *Building Blocks for Youth, and Justice for Some: Differential Treatment of Youth of Color in the Justice System* (2000), available at <http://ccjp.org/documents/BBY/jfs.pdf>.
- ³² U.S. Dep’t of State, *Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights* (Dec. 30, 2011), available at <http://www.state.gov/j/drl/rls/179781.htm>.
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- ³⁴ *See, e.g.*, Katherine Beckett, et al., *The Role of Race in Washington State Capital Sentencing, 1981-2012* (Jan. 27, 2014), available at <http://www.deathpenaltyinfo.org/documents/WashRaceStudy2014.pdf>; David Baldus, et al., *Racial Discrimination in the Administration of the Death Penalty: the Experience of the United States Armed Forces (1984-2005)*, 101 *J. Crim. Law & Criminology* 1227 (Fall 2011); Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 *Ariz. L. Rev.* 305 (2009); Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 *Hous. L. Rev.* 807, 812 (2008).

³⁵ Ronald Weich & Carlos Angulo, *Justice on Trial: Racial Disparities in the American Criminal Justice System* 195 (2000).

³⁶ Federal Capital Habeas Project, *Federal Death Row Population by Race*, available at <https://2255.capdefnet.org/General-Statistics/Federal-Death-Row-Population-By-Race>.

³⁷ *supra* note 36 (The United States has an incarceration rate of 750 inmates per 100,000 people. Russia has the next highest rate of incarceration with 628 inmates per 100,000 people. Id. England and Wales have a rate of 148 per 100,000. The rate in Germany is 93 per 100,000, and the rate in France is 85 per 100,000).

³⁸ Jeremy Travis, et al., *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 34, Nat'l Research Council of Nat'l Academies (2014). Factors include political, social and political unrest following World War II, especially in the 1960s; a major electoral realignment as the Democratic Party divided over civil rights and other issues as the Republican Party became competitive in the South for the first time since Reconstruction; a decades-long escalation in national crime rates beginning in 1961; and major transformations in urban economies that included the disappearance of many well-paid jobs for certain workers.

³⁹ *supra* note 38 at 34 (“[T]he lengthening of sentences and greatly expanded drug law enforcement and imprisonment for drug offenses . . . had disproportionately large effects on African Americans and Latinos.”)

⁴⁰ Staff, National Employment Law Project, *Ensuring People with Convictions Have a Fair Chance at Work* (2021).

⁴¹ Sarah Shannon et al., *Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948–2010*, at 7, 12 (Princeton Univ., Working Paper No. 111687, 2011), available at <http://paa2011.princeton.edu/papers/111687>.

⁴² Margaret H. Taylor, Detention and Related Issues, *Understanding the 1996 Immigration Action: The Illegal Immigration Reform and Immigration Responsibility Act of 1996*, at 5-1 (Juan P. Osuna ed., 1997).

⁴³ Chris Uggen, Ryan Larson, Sarah Shannon, and Arleth Pulido-Nava, *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction* (2021), available at <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>.

⁴⁴ Center for Law and Social Policy, *Opting Out of Federal Ban on Food Stamps and TANF*, available at <https://www.clasp.org/publications/report/brief/no-more-double-punishments> (last visited Jan 11, 2022).

⁴⁵ See, e.g., U.S. Department of Health & Human Services Substance Abuse & Mental Health Services Admin., *Results from the 2020 National Survey on Drug Use and Health: Survey of National Findings* (Oct 2021), available at <https://www.samhsa.gov/data/report/2020-nsduh-annual-national-report>.

⁴⁶ Marc Mauer & Virginia McCalmont, *A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits*, The Sentencing Project (2014), available at <https://sentencingproject.org/wp-content/uploads/2015/12/A-Lifetime-of-Punishment.pdf>.

⁴⁷ Amreeta Mathai, Twyla Carter, and Dylan Hayre, *The Looming Unspoken Crisis: How a Pandemic Exacerbates the Unjust Exclusions Wrought by the Criminal System*, ACLU (July 21, 2020), available at <https://www.aclu.org/news/criminal-law-reform/the-looming-unspoken-crisis-how-a-pandemic-exacerbates-the-unjust-exclusions-wrought-by-the-criminal-system/>.