



R E S E A R C H   A N D   A D V O C A C Y   F O R   R E F O R M



# **Shadow Report of The Sentencing Project to the Committee on the Elimination of Racial Discrimination**

**Regarding Racial Disparities in the United States  
Criminal Justice System**

**July 2014**

**In Collaboration With:**

Correctional Association of New York

Drug Policy Alliance

Grassroots Leadership

Justice Strategies

Lawyers' Committee for Civil Rights Under Law

The Leadership Conference on Civil and Human Rights

National Association for the Advancement of Colored People (NAACP)

National Law Center on Homelessness & Poverty

New Jim Crow Action Group – Atlanta

Southern Center for Human Rights

United Methodist Church, General Board of Church and Society

1. Established in 1986, The Sentencing Project works for a fair and effective U.S. criminal justice system by promoting reforms in sentencing policy, addressing unjust racial disparities and practices, and advocating for alternatives to incarceration. In this report we will address racial disparities in the criminal justice system,<sup>1</sup> juvenile life without parole,<sup>2</sup> the death penalty and its racial implications,<sup>3</sup> and finally, felony disenfranchisement.<sup>4</sup> All of these issues fall under the purview of Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).
2. The United States emphasizes in paragraph 17 of its report that “[r]acial discrimination by the government is prohibited at all levels.”<sup>5</sup> Through its laws and policies, the government suggests strides have been made in securing the government’s compliance with the ICERD. While there has been change in U.S. laws and policies to address racial discrimination, disparities in the justice system remain profound with disturbing consequences for participation in society.

### **ARTICLE 5(I) (A): THE RIGHT TO EQUAL TREATMENT BEFORE TRIBUNALS AND OTHER ORGANS ADMINISTERING JUSTICE**

3. Regarding **paragraph 20 of the Committee’s Concluding Observations**, general recommendation No. 31(2005), and the **United States’ response in paragraphs 66-68, the racial disparities in the administration and functioning of the criminal justice system continue to prove problematic.**
4. Racial disparity pervades the U.S. criminal justice system. African-American males are six times more likely to be incarcerated than white males and Hispanic males are 2.5 times more likely.<sup>6</sup> Not only are racial minorities incarcerated disproportionately, they are also likely to be sentenced more harshly than white defendants for similar crimes.<sup>7</sup>
5. The U.S. government cites a report by The Sentencing Project to suggest that disparities in the prison population may be diminishing. However, this reduced racial disparity largely pertains to women and in significant part is a function of more white women being sentenced to prison, rather than action by the government to reduce current disparities.<sup>8</sup> Racial and ethnic disparities among women remain prevalent, although less substantial than disparities among men.<sup>9</sup>

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<sup>1</sup> International Convention On the Elimination of All Forms of Racial Discrimination, Feb. 18 – March 7, 2008, *Concluding Observations of the Committee on the Elimination of Racial Discrimination*, ¶ 20, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008) [hereinafter *Observations*]; U.S. COMMITTEE REPORT TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION ¶¶ 66-68 (Jun. 12, 2013) [hereinafter U.S. REPORT], available at <http://www.state.gov/documents/organization/210817.pdf>.

<sup>2</sup> *Observations*, *supra* note 1, at ¶ 21; U.S. REPORT, *supra* note 1, at ¶¶ 71-74.

<sup>3</sup> *Observations*, *supra* note 1, at ¶ 23; U.S. REPORT, *supra* note 1, at ¶¶ 40-41.

<sup>4</sup> *Observations*, *supra* note 1, at ¶ 27; U.S. REPORT, *supra* note 1, at ¶ 54.

<sup>5</sup> U.S. REPORT, *supra* note 1, at ¶ 17.

<sup>6</sup> E. ANN CARSON & WILLIAM J. SABOL, U.S. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011 8 tbl.8 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf>.

<sup>7</sup> See, Cassia Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, in 3 POLICIES, PROCESSES, AND DECISIONS OF THE CRIMINAL JUSTICE SYSTEM 427, 481-82 (2000), available at <http://www.justicestudies.com/pubs/livlink3-1.pdf> (concluding that race and ethnicity play a role in sentencing decisions accounting for the seriousness of the offense and the offender’s prior criminal record).

<sup>8</sup> MARC MAUER, THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF WOMEN’S INCARCERATION (2013) available at [http://sentencingproject.org/doc/publications/rd\\_Changing%20Racial%20Dynamics%202013.pdf](http://sentencingproject.org/doc/publications/rd_Changing%20Racial%20Dynamics%202013.pdf).

<sup>9</sup> *Id.*

6. The War on Drugs has exacerbated racial inequalities in the criminal justice system through discriminatory law enforcement practices and disparities in sentencing laws, including the application of harsh mandatory minimum sentences. While the federal Fair Sentencing Act (FSA) of 2010 reduced the crack/cocaine sentencing quantity disparity triggering mandatory minimum penalties from 100:1 to 18:1, there is still disparate treatment in the sentencing of individuals convicted of offenses involving these two pharmacologically identical drugs.<sup>10</sup> Because African Americans constitute 80% of those sentenced under federal crack cocaine laws, the disparity in sentencing laws leads to harsher sentences for black defendants for committing similar offenses to those of their white or Latino counterparts convicted of powder cocaine offenses.<sup>11</sup>
7. Furthermore, the FSA did not alter the harsh federal mandatory minimum sentences imposed for a majority of drug offenses. In 2010, the number of black male offenders convicted of a federal offense subject to a mandatory minimum sentence was nearly double that of convicted white males.<sup>12</sup> Even though the U.S. Sentencing Commission voted to apply the guidelines changes associated with the FSA retroactively, those persons sentenced prior to adoption of the law are still subject to the previous mandatory minimum levels.<sup>13</sup>
8. **Regarding paragraph 21 of the Committee's Concluding Observations and the United States' response in paragraphs 71-74, while the Supreme Court in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) held mandatory juvenile life without parole (JLWOP) sentences to be in violation of the Eighth Amendment, there are still about 2,500 individuals in the United States serving such sentences for crimes committed before the age of eighteen.**<sup>14</sup>
9. The United States stands alone in the imposition of such severe sentences; currently no other country imposes JLWOP sentences.<sup>15</sup> At the time of the *Miller* ruling, seven states plus the District of Columbia had banned JLWOP and only four states have joined their ranks in the two years since.<sup>16</sup> Thus, in most states, juveniles may still be sentenced to LWOP as long as it is not imposed as a mandatory penalty.<sup>17</sup> Additionally troublesome is that only six state Supreme Courts have interpreted *Miller* to apply retroactively, and at least three state Supreme Courts' including Pennsylvania, which has the most individuals (472) serving JLWOP sentences, have ruled that *Miller* is not retroactive.<sup>18</sup>

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<sup>10</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 51 (The New Press 2012); KARA GOTSCH, *THE SENTENCING PROJECT, BREAKTHROUGH IN U.S. DRUG SENTENCING REFORM: THE FAIR SENTENCING ACT AND THE UNFINISHED REFORM AGENDA* 9 (Washington Office on Latin America, 2011), available at [http://sentencingproject.org/doc/dp\\_WOLA\\_Article.pdf](http://sentencingproject.org/doc/dp_WOLA_Article.pdf).

<sup>11</sup> U.S. SENTENCING COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl.34 (2012).

<sup>12</sup> U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 142 fig.7-15 (Oct. 2011).

<sup>13</sup> *Fair Sentencing Act*, ACLU, <https://www.aclu.org/fair-sentencing-act> (last visited June 16, 2014).

<sup>14</sup> JOSHUA ROVNER, *THE SENTENCING PROJECT, POLICY BRIEF: JUVENILE LIFE WITHOUT PAROLE 1*(2014) available at [http://sentencingproject.org/doc/publications/jj\\_Juvenile%20Life%20Without%20Parole.pdf](http://sentencingproject.org/doc/publications/jj_Juvenile%20Life%20Without%20Parole.pdf).

<sup>15</sup> *Id.* at 1.

<sup>16</sup> JOSHUA ROVNER, *THE SENTENCING PROJECT, TWO YEARS LATER, STATES RESIST SUPREME COURT MANDATE ON JUVENILE LIFE WITHOUT PAROLE 3* (June 2014).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1-2.

10. The racial disparities among those persons subject to these penalties make their use even more problematic. Of the 2,500 individuals currently serving JLWOP sentences 61% are African American, 27% are white, and 12% are “other.” “The proportion of African Americans serving JLWOP sentences for the killing of a white person (43.4%) is nearly twice the rate at which African American juveniles are arrested for taking a white person’s life (23.2%). Conversely, white juvenile offenders with black victims are only about half as likely (3.6%) to receive a JLWOP sentence as their proportion of arrests for killing blacks (6.4%).”<sup>19</sup>
11. Additionally, the Juvenile Justice and Delinquency Prevention Act, the nation's only federal policy specifically designed to handle the nation's juvenile justice systems, has not been reauthorized in over five years. A reauthorized Act could significantly strengthen the Act's mandate to address the severe racial and ethnic disparities which plague juvenile justice systems nationwide by requiring states to take concrete steps to reduce and monitor disparities.
- 12. Regarding paragraph 23 of the Committee’s Concluding Observations and the United States’ response in paragraphs 69-70, while six states have repealed the death penalty in the past seven years, more than 3,000 people remain on death row.<sup>20</sup> In the past ten years 42 people on average have been executed each year and 20 people have already been executed in 2014.<sup>21</sup>**
13. It is also important to note the pronounced racial disparity in death penalty cases. This disparity manifests itself in two forms. First, those convicted of killing whites are more likely to be sentenced to death than those convicted of killing blacks even when controlling for crime-specific variables.<sup>22</sup> Second, black defendants are more likely to be sentenced to death regardless of the race of their victims.<sup>23</sup> When these two factors are taken together, the impact of race on capital sentencing is staggering. As far back as 1990, the U.S. General Accounting Office found that “[i]n 82% of the studies [reviewed], race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found more likely to be sentenced to death than those who murdered blacks.”<sup>24</sup> Such statistical disparities have led many of the most respected American jurists to call for the abolition of the death penalty because of its racially disparate impact, among other factors.<sup>25</sup>
- 14. Regarding paragraph 27 of the Committee’s Concluding Observations and the United States’ response in paragraph 102, felony disenfranchisement remains a significant**

<sup>19</sup> ASHLEY NELLIS, THE SENTENCING PROJECT, THE LIVES OF JUVENILES LIFERS: FINDINGS FROM A NATIONAL SURVEY 3 (2014) available at [http://www.sentencingproject.org/doc/publications/jj\\_The\\_Lives\\_of\\_Juvenile\\_Lifers.pdf](http://www.sentencingproject.org/doc/publications/jj_The_Lives_of_Juvenile_Lifers.pdf)

<sup>20</sup> *States With and Without the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited June 17, 2014); *Death Row Inmates By State and Size of Death Row by Year*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year?scid=9&did=188#year> (last visited June 17, 2014).

<sup>21</sup> *Executions by Year Since 1976*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/executions-year> (last visited June 17, 2014).

<sup>22</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO GGD-90-557, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES, 5 (Feb. 1990) [hereinafter GAO GGD-90-557].

<sup>23</sup> David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998); GAO GGD-90-557, *supra* note 23, at 6.

<sup>24</sup> *National Statistics on Death Penalty and Race*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976> (last visited June 17, 2014).

<sup>25</sup> See, e.g., William Brennan, Jr., *Neither Victims Nor Executioners*, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 4 (1994).

consequence of criminal justice policy in the United States as an estimated 5.85 million persons are ineligible to vote as a result of a current or previous felony conviction.<sup>26</sup> Over two million of the currently disenfranchised are African Americans as the racial disparities which pervade the criminal justice system are paralleled in the disenfranchised population.<sup>27</sup> One of every thirteen African Americans of voting age is disenfranchised, a rate more than four times greater than non-African Americans.<sup>28</sup>

15. In the United States, thirty-five of the fifty states impose post-sentence restrictions on individuals' voting rights.<sup>29</sup> Further, twelve states deny voting rights even to those who have successfully fulfilled their prison, parole, or probation sentences.<sup>30</sup> While the Democracy Restoration Act, a proposed bill that would restore voting rights in federal elections to those who have been released from prison, would be a way for the government to make inroads even with very restrictive policies in many states, there has been little support in Congress for advancing this legislation.<sup>31</sup> The scope and severity of disenfranchisement policies in the United States makes it unique in regard to comparable nations.<sup>32</sup> Many industrialized nations impose no restrictions on voting and of those that do they are generally limited only to persons in prison. Several major court decisions have also upheld the right to vote for incarcerated persons. In 2005 the European Court of Human Rights determined "that a blanket ban on voting from prison violates the European Convention on Human Rights, which guarantees the right to free and fair elections."<sup>33</sup> The Constitutional Court of South Africa and Supreme Courts of Canada and Israel have similarly upheld the right to vote for people with felony convictions, with the Israeli court recognizing the importance of separating "'contempt for this act' from 'respect for [the prisoner's] right.'"<sup>34</sup>

## RECOMMENDED QUESTIONS

1. The 2014 comprehensive report of the National Research Council, *The Growth of Incarceration in the United States*, finds that:

"The incremental deterrent effect of increases in lengthy prison sentences is modest at best. Because recidivism rates decline markedly with age, lengthy prison sentences, unless they specifically target very high-rate or extremely dangerous offenders, are an inefficient approach to preventing crime by incapacitation."<sup>35</sup>

Given these findings, and the disproportionate effect of lengthy prison terms on people of color, what measures is the government undertaking to try to reduce the use of such sentences?

<sup>26</sup> Christopher Uggen, Sarah Shannon & Jeff Manza, STATE-LEVEL ESTIMATES OF DISENFRANCHISEMENT IN THE UNITED STATES, 2010 1 (The Sentencing Project 2012).

<sup>27</sup> *Id.* at 15.

<sup>28</sup> *Id.* at 1-2.

<sup>29</sup> *Id.* at 2.

<sup>30</sup> JEAN CHUNG, THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 1 (2014) available at [http://www.sentencingproject.org/doc/publications/fd\\_Felony%20Disenfranchisement%20Primer.pdf](http://www.sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf).

<sup>31</sup> *Democracy Restoration Act*, BRENNAN CENTER FOR JUSTICE (May 16, 2014), <http://www.brennancenter.org/legislation/democracy-restoration-act#Support>.

<sup>32</sup> Marc Mauer, *Voting Behind Bars: An Argument for Voting by Prisoners*, 54 HOW. L. J. 549, 563 (2011).

<sup>33</sup> CHUNG, *supra* note 31, at 5.

<sup>34</sup> Marc Mauer, *Voting Behind Bars: An Argument for Voting by Prisoners*, 54 HOW. L. J. 549, 564 (2011).

<sup>35</sup> NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 5 (The National Academies Press 2014).

2. In 2013 the U.S. Attorney General directed federal prosecutors to avoid charging defendants with charges that would lead to imposition of a mandatory minimum penalty in cases where the individual does not have a significant role in the drug trade or significant criminal history, and other factors. What has been the impact of this policy to date and has it had an effect on reducing racial disparities in prosecution?

## **SUGGESTED RECOMMENDATIONS**

1. Given the injustices and unfairness produced by mandatory sentencing policies, the government should strive to see such policies either repealed or substantially scaled back in scope. In addition, policies such as the Fair Sentencing Act which have corrected injustices in the system should be applied retroactively to persons convicted of relevant sentences prior to adoption of the legislation.
2. As a result of the 2012 U.S. Supreme Court ruling in *Miller v. Alabama* persons under the age of 18 may no longer be sentenced to life without parole without judicial consideration of less punitive options. As the states come into compliance with this ruling they should establish a minimum term before parole consideration of no longer than 15 years in prison, based on young people's capacity to change and to take advantage of rehabilitation opportunities in prison.