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Submission by the American Civil Liberties Union and The Sentencing Project

Racial Disparities in Sentencing in the United States

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I. Introduction

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.

II. Case Studies

1. Two striking cases of racial discrimination were the result of misuse and abuse of prosecutorial discretion during the jury selection of two Black men who faced the death penalty.

In 1987, Timothy T. Foster was convicted of homicide by an all white jury in Georgia, and sentenced to death. During the jury selection process, the prosecution used their peremptory strikes to remove all of the qualified Black jurors. Notes obtained through the state's open records law revealed that the prosecution blatantly identified Black jurors with green highlighting, circled the race "Black" on the prospective juror questionnaires, and singled out Black jurors with notations such as "B#1" and "B#2." None of these annotations were used with white jurors. The Supreme Court of the United States in *Foster v. Chatman* (2016) ruled that the prosecution discriminated against and excluded Black jurors. The removal of jurors from Timothy Foster's trial was not "color-blind."

In 1997, Curtis Flowers was arrested in relation to four homicides and eventually sentenced to death in Mississippi. Unique to Curtis' case is that he was put on trial *six times* by the state of Mississippi for these crimes. During the first four trials, the prosecution used all of their peremptory strikes to remove Black jurors - for a total of 36 dismissals. Notably, the Mississippi Supreme Court ruled that the prosecution used racially discriminatory practices to remove potential jurors during the third trial. At the conclusion of the sixth trial, Flowers was once again convicted, but on appeal the Supreme Court of the United States in *Flowers v. Mississippi* (2019) found their use of discretionary jury dismissals to be discriminatory. Ultimately, the charges were dismissed and Curtis did not face a seventh trial, but this does not excuse the multiple decades Curtis Flowers' life was forever altered by the unlawful actions of the prosecution.

2. Nationwide, 25 percent of all arrested youth are detained prior to their court hearing; for African American youth, 30 percent are detained upon their arrest.¹⁰ One example

of the aggressive and unnecessary use of detention for children of color in the United States took place in Murfreesboro, Tennessee, where many children witnessed a fight between two kindergarteners and a fifth grader. The fight was videotaped and posted to YouTube, whereupon local police arrested eleven children – all of them Black and all of them in elementary school – for witnessing the fight and not breaking it up (which is not a crime in Tennessee).

The ten children, some of them in handcuffs, were brought to the Rutherford County Juvenile Detention Center. They were run through an undefined “filter system” that determined some needed to be detained. In Rutherford County, 48% of the youth who are arrested are detained compared to the statewide average of 5% held for detention. According to Rutherford County Judge Donna Scott Davenport, who approved the detentions of these young children of color, “Being detained in our facility is not a picnic at all. It’s not supposed to be. It’s a consequence for an action.”¹¹

An internal investigation by the responsible police department resulted in only 1 to 3-day suspensions for the police officers and school resource officers involved, despite the fact that they each directly supported the arrest and incarceration of eleven young children for a charge that does not exist in the state’s criminal law. The judicial officers involved were never held accountable.¹²

III. CERD Committee Position

In previous sessions, the CERD Committee has called upon the United States “to take concrete and effective steps to eliminate racial disparities at all stages of the criminal justice system.”¹³ The International Convention on the Elimination of All Forms of Racial Discrimination requires States Parties “to amend, rescind or nullify any laws and regulations that have the effect of creating or perpetuating racial discrimination wherever it exists.”¹⁴ In 2014, the Committee found that the United States disproportionately subjects racial and ethnic minorities to harsher sentences.¹⁵ The Committee attributed this finding, in part, to mandatory minimum drug sentencing policies.¹⁶ In General Recommendation 31 (2005), the Committee advised all state parties to pay particular attention to these kinds of “minimum punishments,” as they disproportionately impact racial and ethnic minority groups.¹⁷ Consequently, the Committee recommended that the United States amend any such laws and policies that result in racially disparate sentencing.¹⁸

The CERD Committee’s legislative recommendations also included a federal moratorium on the death penalty and the abolition of juvenile life imprisonment without the possibility of parole.¹⁹ When issuing these recommendations, the Committee highlighted findings that the United States imposed these sentences on racial and ethnic minorities at a disproportionate rate as well.

IV. U.S. Government Response

In its 2021 periodic report, the U.S. Government reported that the federal prison population had dropped nearly 31% since 2013. In the intervening period, Congress enacted the First Step Act

(2018), which notably lowered mandatory minimum sentences for certain drug offenses. It also retroactively applied the Fair Sentencing Act of 2010, resulting in sentence reductions for citizens who received heightened sentences for possession of crack cocaine compared to powder cocaine. 91% of those receiving sentence reductions under the Fair Sentencing Act were Black.²⁰

However, the Government's response does not depict the full reality of sentencing in the United States. First, while the federal prison population is lower today than it was in 2013, it nonetheless grew by the thousands during Biden's presidency.²¹ Second, the implementation of the First Step Act continues to result in racially disparate outcomes. Specifically, the Department of Justice found that the risk assessment tool used in connection with the First Step Act continues to overestimate the number of Black women who will engage in recidivism compared to white women.²²

Third, the United States continues to disproportionately impose its harshest sentences upon racial and ethnic minorities. Black people made up only 13% of the general population in 2019 but accounted for 42% of the people sentenced to death.²³ While the current administration has voiced their support for legislatively ending the federal death penalty,²⁴ previous administrations have not shared the same view. In 2020, the Trump Administration undertook an unprecedented and unjust series of executions, taking the lives of 13 people in the span of six months.²⁵

Several states also continue to sentence juveniles to life imprisonment without the possibility of parole (LWOP). This practice disproportionately impacts children of color. As of March 2022, 93% of children who receive LWOP in Louisiana are Black, as are 90% of children who receive LWOP in Michigan and 89% of children who receive LWOP in Mississippi.²⁶ The Government's report noted that most people serving federal juvenile LWOP sentences have been resentenced "to terms of imprisonment that will allow them an opportunity for eventual release."²⁷ However, racial disparities pervade the resentencing process. The median term after resentencing is 28 years for white youth, but 40 years for Black youth. The lowest term received by Native youth during resentencing is 54 years.²⁸

V. **Other UN and Regional Human Rights Bodies Recommendations**

Over the course of the past five years, numerous human rights bodies have called upon the United States to address the pervasive racial disparities in its sentencing practices. In a 2018 report, the Inter-American Commission on Human Rights "echoe[d] the concerns of the CERD that African Americans continue to be disproportionately . . . subjected to harsher sentences, including life imprisonment without parole and the death penalty."²⁹ It called upon the U.S. to conduct research into the causes of disproportionate sentencing and reform domestic laws that hamper the protection of human rights.³⁰ In 2020, the Human Rights Council's Universal Periodic Review raised similar issues about the United States criminal legal system. Three countries explicitly asked the United States to address racial disparities in its criminal legal practices,³¹ Ireland and Croatia recommended a ban on life without parole for juveniles,³² and over thirty countries called upon the United States to abolish the death penalty.³³

In 2021, the UN further urged its member states, including the United States, to address the racialized harms of the criminal legal system. First, the UN High Commissioner for Human Rights released a report detailing the ongoing inequality experienced by Black people and people of African descent. In it, the High Commissioner brought attention to a recent study finding that Black men and boys receive sentences nearly 20% longer than those received by white men convicted of similar crimes in U.S. federal courts.³⁴ The report ultimately called for reforming the criminal legal systems that “have consistently produced discriminatory outcomes for Africans and people of African descent.”³⁵ Most recently, the UN Special Rapporteur on Minority Issues visited the United States to address existing gaps in the protection of minorities’ human rights. During his visit, the Special Rapporteur examined the sentencing disparities in the U.S. criminal legal system and called for criminal legal reforms to address the over-incarceration of minority groups.³⁶

The United States should heed the recommendations of global human rights entities and reform its domestic laws to eliminate racial disparities in sentencing.

VI. Recommendations³⁷

1. Eliminate Mandatory Sentences for All Crimes.

Mandatory minimum sentences, habitual offender laws, and mandatory transfer of juveniles to the adult criminal system give prosecutors too much authority while limiting the discretion of impartial judges. These policies contributed to a substantial increase in sentence length and time served in prison in the United States, disproportionately imposing unduly harsh sentences on Black and Latinx individuals.

2. Decriminalize Low-Level Drug Offenses.

Discontinue arrest and prosecutions for low-level drug offenses which often lead to the accumulation of prior convictions that accumulate disproportionately in communities of color. These prior convictions generally drive further and deeper involvement in the criminal legal system in the United States and demonstrably increase sentence length due to the impact of criminal history on sentences in most jurisdictions. To redress the historic harms caused by these drug laws, the United States should also offer mass, categorical clemency grants to people serving unjust and excessive sentences, including offenses—such as crack-cocaine offenses—that have marked racial disparities.

3. Abolish the Death Penalty.

The Biden administration should fulfill its commitment to legislatively ending the death penalty at the federal level and encourage the states to follow suit. Peer nations and human rights bodies have condemned the United States’ use of the death penalty for decades. Its application in the United States continues to have a racially disparate impact and its use resulted in the deaths of thirteen people in 2020.

4. Require Prospective and Retroactive Racial Impact Statements for All Criminal Statutes.

States and the federal government should adopt forecasting estimates that will calculate the

impact of proposed crime legislation on different populations in order to minimize or eliminate the racially disparate impacts of certain laws and policies. Several states in the U.S. have passed such “racial impact statement” laws. To undo the racial and ethnic disparity resulting from decades of racially biased laws, policies and practices, the states and the federal government should also repeal existing racially biased laws and policies.

5. Protect Youth from the Adult Criminal Legal System & Minimize the Footprint of the Youth Legal System.

In order to minimize the criminalization of youth of color, the United States must end the prosecution of youth as if they were adults. It must invest in child-centered, trauma informed youth programs and only resort to incarceration after non-carceral interventions have been tried. The United States must also end the detention of youth under 14 years of age, eliminate the detention of all youth for misdemeanor-level offenses, and abolish juvenile life sentences without the possibility of parole (LWOP).

6. Increase Access to Data Related to Arrest, Prosecution, and Incarceration Trends.

To better understand arrest, prosecution, and incarceration trends for youth and adults, the Department of Justice should seek to mimic the Bureau of Labor Statistics and Department of Commerce’s rapid publication of relevant data. Lags in the collection and dissemination of pertinent data undermine the capacity of the government and civil society to engage in meaningful policy and legal reform.

VII. Questions

1. What steps have the U.S. government and the states taken to minimize the impact of a criminal conviction on the ability of communities of color to participate equally in economic, social and political life in the United States? For example, what measures have been taken or will be taken to restore voting rights, ensure access to government benefits, and remove barriers to employment and housing?
2. What steps have the U.S. government and the states taken to address racial bias in sentencing both prospectively and retroactively? Given that Black individuals are significantly more likely to be eligible for federal life sentences,³⁸ what steps is the U.S. government taking to provide opportunities for individuals serving extreme sentences to return to the community? In particular, how is the Administration prioritizing the passage of the following bills:
 - i. The First Step Implementation Act (S. 1014) would retroactively apply major sentencing reforms from the First Step Act of 2018 and provide judges in future cases with increased discretion to give sentences below mandatory minimums. In particular, the FSIA would make retroactive relief from “stacked” 924(c) convictions – a charge [disproportionately](#) used against young Black men. The bill would also implement major reforms for people sentenced as youth, including the opportunity to have lengthy sentences reconsidered.

- ii. The COVID-19 Safer Detention Act (S.312) would expand eligibility for release for elderly individuals, people sentenced prior to 1987, and people vulnerable to covid-19 in federal prisons.
 - iii. The EQUAL Act (S.79) would end the sentencing disparity between crack and powder cocaine retroactively and prospectively by raising the mandatory minimum trigger for crack. Before Congress established the crack-powder disparity in 1986, the average federal drug sentence for Black people was 11% higher than for whites. Just four years later, the average federal drug sentence for Black defendants was 49% higher. In 2019, 81% of people convicted of crack cocaine crimes were Black, even though white and Hispanic people have historically accounted for over 66% of people who use crack cocaine.
- 3. What steps, if any, have been taken or are being considered by the U.S. government or the states to address differential arrest and conviction rates by race and the role criminal histories play in the American criminal legal system in terms of increasingly punitive sentences for people of color?
- 4. Given that housing segregation (by race and ethnicity) is endemic in the United States; most Americans live in census tracts that are not demographically diverse, to what extent are racial and ethnic disparities in youth arrests driven by differences in police presence in largely white, Black, Latinx, Asian, and Tribal neighborhoods and areas and what steps are being taken by federal, state and local governments to alleviate these differential approaches?
- 5. To what extent are differences in arrests and court outcomes for youth of color as opposed to white youth in the United States the result of law enforcements' overly harsh approach to youth of color or leniency toward white youth compared to youth of color? What steps are local, state and federal governments taking to address these differences and their impacts on youth and communities of color.

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

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

³ Carson, *Prisoners in 2020* (2021).

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

⁵ Todd Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Communities Worse* (Oxford, UK: Oxford University Press, 2009); Devah Pager, *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration* (Chicago, IL: University of Chicago Press, 2007); Bruce Western, *Punishment and Inequality in America* (New York, NY: Russell Sage, 2007); C. Wildman, A.W. Goldman, and K. Turney, "Parental Incarceration and Child Health in the United States," *Epidemiologic Reviews*, vol. 40(1) (2018), 146-158.

⁶ Clear, *Imprisoning Communities* (2009).

⁷ Dan Baum, "Legalize it All: How to Win the War on Drugs," *Harper's Magazine* (April 2016), <https://harpers.org/archive/2016/04/legalize-it-all/> (accessed July 9, 2022).

⁸ Government of the United States, "Combined Tenth to Twelfth periodic reports to the Committee on the Elimination of Racial Discrimination," CERD/C/USA/10-12 (June 2, 2021), https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/CERD_C_USA_10-12_7522_E.docx, para. 114-120.

⁹ Ibid.

¹⁰ Josh Rovner, *Too Many Locked Doors: The scope of youth confinement is vastly understated*, (Washington, DC:

The Sentencing Project, 2022), <https://www.sentencingproject.org/publications/too-many-locked-doors/> (accessed July 12, 2020).

¹¹ Meribah Knight and Ken Armstrong, “Black Children Were Jailed for a Crime That Doesn’t Exist. Almost Nothing Happened to the Adults in Charge,” *ProPublica*, October 8, 2021, <https://www.propublica.org/article/black-children-were-jailed-for-a-crime-that-doesnt-exist> (accessed July 12, 2022).

¹² *Ibid.*

¹³ United Nations Committee on the Elimination of Racial Discrimination (CERD), “Concluding observations on the combined seventh to ninth periodic reports of the United States of America,” CERD/C/USA/CO/7-9/, August 26, 2014, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/172/16/PDF/G1417216.pdf?OpenElement>, para. 20 and 34 (“States should ensure that the courts do not apply harsher punishments solely because of an accused person’s membership of a specific racial or ethnic group”).

¹⁴ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969, art. 2(c).

¹⁵ CERD, “Concluding Observations on the combined seventh to ninth periodic reports of the United States,” August 26, 2014, para. 20.

¹⁶ *Ibid.*

¹⁷ CERD, General Recommendation 31, On the prevention of racial discrimination in the administration and functioning of the criminal justice system, U.N. Doc. A/60/18 (2005), https://adatabase.ohchr.org/IssueLibrary/CERD_Recommendation%20No31.pdf, para 35.

¹⁸ CERD, “Concluding Observations on the combined seventh to ninth periodic reports of the United States,” August 26, 2014, para. 20.

¹⁹ *Ibid.*, para. 21.

²⁰ United States, “Combined Tenth to Twelfth periodic reports,” June 2, 2021, para. 114.

²¹ Carrie Johnson, “Activists wanted Biden to revamp the justice system. Many say they’re still waiting,” NPR, December 12, 2021, <https://www.npr.org/2021/12/12/1062485458/biden-criminal-justice-system-clemency> (accessed July 12, 2022).

²² Carrie Johnson, “Justice Department works to curb racial bias in deciding who’s released from prison,” NPR, April 19, 2022, <https://www.npr.org/2022/04/19/1093538706/justice-department-works-to-curb-racial-bias-in-deciding-whos-released-from-pris>, (accessed July 12, 2022); See also, “First Step Act Annual Report: April 2022,” US Department of Justice, Office of the Attorney General, April 2022, <https://www.ojp.gov/first-step-act-annual-report-april-2022>, p. 17, (accessed July 12, 2022).

²³ Ngozi Ndulue, *Enduring Injustice: The Persistence Of Racial Discrimination In The U.S. Death Penalty* 29 (Washington, DC: Death Penalty Information Center, 2020), <https://files.deathpenaltyinfo.org/documents/reports/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf> (accessed July 8, 2020).

²⁴ United States, “Combined Tenth to Twelfth periodic reports,” June 2, 2021, para. 116.

²⁵ Michael Tarm and Michael Kunzelman, “Trump Administration Carries out 13th and Final Execution,” AP, January 15, 2021, <https://apnews.com/article/donald-trump-wildlife-coronavirus-pandemic-crime-terre-haute-28e44cc5c026dc16472751bbde0ead50> (accessed July 13, 2021).

²⁶ Campaign for the Fair Sentencing of Youth, *Racial Disparities in Youth Sentencing* (Washington, DC: CFSY, 2022), <https://cfsy.org/wp-content/uploads/Final-Racial-Disparities-Fact-Sheet-March-2022-1.pdf> (accessed July 8, 2022).

²⁷ United States, “Combined Tenth to Twelfth periodic reports,” June 2, 2021, para. 120.

²⁸ Campaign for the Fair Sentencing of Youth, *Racial Disparities in Youth Sentencing* (2022).

²⁹ Inter-American Commission on Human Rights, “Police Violence Against Afro-descendants in the United States,” OEA/Ser.L/V/II (2018), www.oas.org/en/iachr/reports/pdfs/PoliceUseOfForceAfrosUSA.pdf, para. 136.

³⁰ *Ibid.*, para. 319.

³¹ United Nations Human Rights Council (UNHRC), “Report of the Working Group on the Universal Periodic Review, United States of America,” A/HRC/46/15, December 15, 2020, <https://daccess-ods.un.org/tmp/3719954.1926384.html>, paras. 26.259, 26.262 and 26.263.

³² *Ibid.*, paras. 26.200 and 26.246.

³³ *Ibid.*, paras. 26.59, and 26.178 – 26.211.

³⁴ UNHRC, “Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers,” A/HRC/47/CRP.1, June 28, 2021,

https://www.ohchr.org/sites/default/files/Documents/Issues/Racism/A_HRC_47_CRP_1.pdf, para. 96.

³⁵ *Ibid.*, para. 166.

³⁶ UNHRC, “Visit to the United States of America: Report of the Special Rapporteur on minority issues,” A/HRC/49/46/Add.1, March 14, 2022, https://www.ohchr.org/sites/default/files/2022-03/A_HRC_49_46_Add.1_AdvanceUneditedVersion.docx, paras. 42 and 76.

³⁷ 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.

³⁸ Brian Johnson, Cassia Spohn, and Anat Kimchi, “Life lessons: Examining sources of racial and ethnic disparity in federal life without parole sentences,” *Criminology*, vol. 59 (2021), doi: 10.1111/1745-9125.12288 (accessed July 12, 2022).