



# RACE & ETHNICITY IN AMERICA

**TURNING  
A BLIND EYE  
TO INJUSTICE**





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Top:  
Farm workers labor in difficult conditions.  
-Photo courtesy of  
the Farmworker Association of Florida  
([www.floridafarmworkers.org](http://www.floridafarmworkers.org))

Middle:  
A march to the state capitol  
by Mississippi students  
calling for juvenile justice reform.  
-Photo courtesy of ACLU of Mississippi

Bottom:  
Officers guard prisoners on a freeway overpass  
in the days after Hurricane Katrina.  
-Photo courtesy of Reuters/Jason Reed

Race & Ethnicity in America:  
Turning a Blind Eye to Injustice

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In its work related to this report, the ACLU has and will continue to coordinate efforts with the wide coalition of U.S. social justice and human rights organizations led by the U.S. Human Rights Network (USHRN). This coalition is submitting its own shadow reports to the Committee on the Elimination of Racial Discrimination. For further information concerning the coalition's shadow reports, please visit the USHRN website at: <http://www.ushrnetwork.org/>

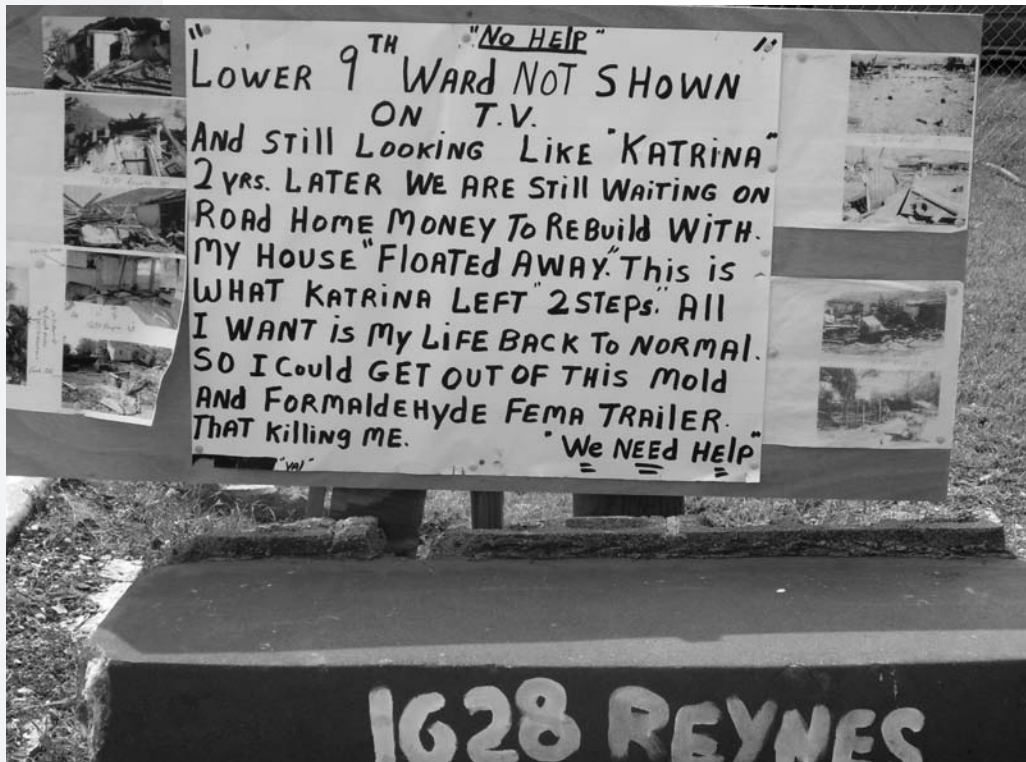
## ABOUT THE ACLU

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization dedicated to protecting human rights and civil liberties in the United States. The ACLU is the largest civil liberties organization in the country, with offices in 50 states and over 500,000 members. The ACLU was founded in 1920, largely in response to the curtailment of liberties that accompanied America’s entry into World War I, including the persecution of political dissidents and the denial of due process rights for non-citizens. In the intervening decades, the ACLU has advocated to hold the U.S. government accountable to the rights protected under U.S. Constitution and other civil and human rights laws. Since the tragic events of September 11, the core priority of the ACLU has been to stem the backlash against human rights in the name of national security.

In 2004, the ACLU created a Human Rights Program specifically dedicated to holding the U.S. government accountable to universal human rights principles in addition to rights guaranteed by the U.S. Constitution. The ACLU Human Rights Program incorporates international human rights strategies into ACLU advocacy on issues relating to racial justice, national security, immigrants’ rights, and women’s rights.

The ACLU’s Racial Justice Program aims to preserve and extend the constitutional rights of people of color. Committed to combating racism in all its forms, the Program’s advocacy includes litigation, community organizing and training, legislative initiatives, and public education. In addition to its Racial Justice Program, the ACLU has a Women’s Rights Project, and Immigrants’ Rights Project, a National Prison Project, a Capital Punishment Project, and a Drug Law Reform Project, whose work is reflected in this report. Many areas of the ACLU’s work are not covered by this report, including LGBT/AIDS, disability issues, free speech, reproductive freedom, disability rights, and privacy and technology. The full breadth of the ACLU’s work can be seen on our web site, at [www.aclu.org](http://www.aclu.org).

The ACLU welcomes the opportunity to comment on the United States’ compliance with the International Convention on the Elimination of All Forms of Racial Discrimination through this shadow report to the Committee on the Elimination of Racial Discrimination. The shadow report is based primarily on the ACLU’s advocacy in federal and state legislatures and courts.



Signs of Hurricane Katrina are visible two years later in New Orleans.

## INTRODUCTION

Since its inception, the ACLU has lived by the principle made famous by Martin Luther King that “injustice anywhere is a threat to justice everywhere.” Throughout its history, the ACLU and its 53 state-based affiliates have fought to ensure that the rights and freedoms articulated in the **Convention on the Elimination of all Forms of Racial Discrimination (CERD)** are fully and equally extended to members of all racial and ethnic minorities.

The ACLU’s 1931 comprehensive report on institutionalized racism, *Black Justice*, was the first report on racial discrimination in America by what was, at the time, a predominantly white advocacy group. The report stated that in the 10 states of the Deep South, “the Negro may not vote. The Negro may not marry according to his choice. The Negro must accept separate accommodations in public schools and on public conveyances.” As the report made strikingly clear, the entire machinery of the American criminal justice system served to perpetuate the racist status quo.

In the years that followed, the ACLU continued to advocate for racial justice. In 1942, the ACLU established a national Committee Against Racial Discrimination and, in 1947, convened a national Emergency Civil Rights Mobilization Committee, which lobbied for a federal anti-lynching law, abolition of the poll tax, integration of the armed forces, and

more effective civil rights enforcement. In 1964, the organization established a Southern Regional Office through which countless affirmative civil rights suits were launched in opposition to racial discrimination and institutionalized segregation in the South. Also in 1964, the ACLU organized the Lawyers Constitutional Defense Committee (LCDC), a coalition of the most significant civil rights

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“Injustice anywhere is a threat to justice everywhere.”

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organizations operating at the time. The LCDC solicited like-minded lawyers who represented civil rights workers in the South and focused on specific civil rights cases.

To remedy the prevalent, deplorable and blatantly racially discriminatory acts and practices, the ACLU vigorously fought and won cases involving housing discrimination, education and access to public services, voting, racial profiling and prisoners’ rights.

Formal legal equality was ultimately established in the U.S., largely as a result of the 1960s civil rights movement. However, as Hurricane Katrina made painfully clear, deeply entrenched, systemic problems of racial discrimination endure, and the link between race and poverty remains strong.

In 2004, nearly 25% of blacks lived below the national poverty line, almost double the rate of 12.7% for all Americans, and these households had the lowest median income of any racial group. (Poverty rates for Native Americans and Hispanics are comparable to those for blacks, and large numbers of South Asians, a significant minority population in the U.S., also live in poverty.) The current unemployment rate for African-Americans is double the rate for white Americans. In 1903, W.E.B. DuBois famously remarked in his treatise, *The Souls of Black Folk*, that “the problem of the 20<sup>th</sup> century is the problem of the color line.” That line persists into the twenty-first century.

This is due not only to the persistence of individual racism, but also to the existence of institutionalized, systemic and structural racism. Racialized ideas shape policies and practices that reinforce color lines and perpetuate problems such as joblessness; thus, questions of race and class cannot be separated from, for example, economic development and housing initiatives. As a result, racial and ethnic discrimination continues to pervade education, employment, the treatment of migrants and immigrants, law enforcement, access to justice for juveniles and adults, court proceedings, detention, incarceration and the death penalty, and the many collateral consequences of incarceration, such as the loss of political rights. The Committee on the Elimination of Racial Discrimination (the Committee), which was created to oversee compliance with the

Convention, has recognized that such discrimination, preferring to call it what it is – oppression – rests on biological differences such as color, incorporates elements like gender, and is supported by powerful, ingrained ideologies. These discriminatory ideologies are perpetuated through education, the legal structure, political processes, clubs, and religion, and the result is poverty and deprivation. The Committee advises that states “implement national strategies or plans of action aimed at the elimination of structural discrimination.”

The U.S. government’s 2007 Report to this Committee (“U.S. Report”) gives us little hope that these issues are being adequately addressed and remedied.



## EXECUTIVE SUMMARY

Racial and ethnic discrimination and inequality remain ongoing and pervasive in the United States, and the U.S. government has not done enough to address these important problems. Hurricane Katrina exposed to the world many of America's grave, persistent economic and social disparities, and their impact on African-American and other minority communities. U.S. policies and practices at the federal, state and local level continue to disproportionately burden the most vulnerable groups in society: racial and ethnic minorities, immigrants and non-citizens, low-wage workers, women, children, and the accused.

Minorities are unfairly victimized by racial profiling, a practice law enforcement uses that is based on race, ethnicity, nationality, religion, or perceived immigration status. Authorities investigate, stop, frisk, search, or use force against individuals based on subjective, personal characteristics, rather than on concrete evidence of unlawful behavior. People of color are profiled while they drive, shop, pray, stand on the sidewalk waiting for work, or travel on airplanes, trains, and buses. While it has most frequently been associated with African-Americans and Latinos, racial and ethnic profiling continues to have a devastating impact on Asians, Native Americans and, increasingly after 9/11, Arabs, Muslims, and South Asians. According to recent government data concerning the profiling of drivers, while

Hispanic, black, and white drivers were stopped by the police about as often, Hispanic drivers or their vehicles were searched 8.8% of the time, black drivers 9.5% of the time, and white drivers only 3.6% of the time.

Immigrants have become the targets of frequent racially discriminatory acts and statements, as well as a governmental crackdown that including workplace raids. Cities and towns across the country have enacted ordinances to penalize those who offer immigrants employment or accommodation and, in some cases, to prohibit the speaking of languages other than English at work. Immigrant workers of color are particularly vulnerable. Most of the industries that employ immigrant workers pay low wages, maintain dangerous working conditions, and frequently violate labor, environmental, and anti-discrimination laws. In the wake of the U.S. Supreme Court's *Hoffman Plastic* decision, undocumented workers have lost anti-discrimination protection, available remedies when injured or killed on the job, overtime pay, workers' compensation, family and medical leave, and other fundamental safeguards. Low-wage South Asian and Muslim workers are particularly vulnerable, as they face anti-immigrant hostility, employment abuse, and post-9/11-related discrimination.

Further compromising their status, the government does not provide non-citizens the right to counsel in immigration proceedings, with the large majority of immigrants having

to challenge their immigration detention and deportation *pro se*. Even if an immigrant has access to counsel, recent legislative actions and court decisions have sharply limited their right to challenge the basis for their detention in the courts, and have created a second class system of justice for non-citizens, especially those held in the so called “War on Terror.”

Women of color face overlapping forms of racial and gender-based discrimination and structural inequalities. Although the CERD Committee requires States Parties to report in detail “factors affecting and difficulties experienced in ensuring for women the equal enjoyment, free from racial discrimination, of rights under the Convention,” social conditions and government policies disproportionately burden minority women of color, who continue to face unequal treatment in the educational, employment and criminal justice systems. Female victims of domestic violence remain unprotected against discrimination in housing and employment; low-wage migrant women workers are discriminated against and economically and sexually exploited; and female domestic workers are sometimes held in indentured servitude.

Moreover, domestic and agricultural laborers — most of whom are migrants and racial or ethnic minorities — are not afforded many basic worker protections under either the National Labor Relations Act or under other federal and state labor laws.

Even children’s rights are not sacrosanct. The U.S. government continues to detain dispro-

portionate numbers of children of color in juvenile detention and to rely on incarceration as a means of addressing children’s social, mental or behavioral issues. In 2005, UNICEF estimated that one million children and adolescents are in confinement worldwide.<sup>1</sup> In 2003, the number of juveniles incarcerated in the U.S. alone reached nearly 100,000.<sup>2</sup> According to the U.S. Bureau of Justice Statistics, in June 2004 an estimated 7,083 persons under the age of 18 were held in adult jails, accounting for 1% of the total jail population.<sup>3</sup> Once in state custody, children are victimized by sexual abuse, denied adequate education, denied adequate physical or mental healthcare, subjected to physical and emotional violence, improperly housed with adult populations, and provided insufficient contact with their parents and families. Children’s right to counsel in delinquency proceedings is in jeopardy with courts permitting “waiver of counsel” in such proceedings before a child consults with an attorney. As a result, American society’s most vulnerable individuals — children of color — are often left without any form of defense in an already discriminatory criminal justice system.

For those who are detained, a population that is disproportionately comprised of minorities, inhuman and cruel conditions of confinement remain pervasive in prisons/jails, juvenile facilities and immigration detention centers, where guards, law enforcement officials and correctional authorities continue to use restraint chairs and electro-shock weapons, including taser guns, resulting in the

loss of many lives. In the context of Hurricane Katrina, in Orleans Parish Prison and in other Gulf Coast facilities, incarcerated people were denied adequate or safe food and water, denied adequate medical care, locked in unsafe and unsanitary conditions and transported unsafely, victimized by violence and brutality at the hands of guards, subjected to pervasive and widespread racial discrimination and abuse, and denied contact with families before, during, and after the storm.

Even before they encounter the criminal justice system, minorities are selectively targeted, and disproportionately arrested, charged, indicted, and prosecuted. For poor, largely minority citizens, the right to counsel in criminal cases has become illusory, with indigent defense systems woefully inadequate and under funded in many parts of the country resulting in indigent people not receiving adequate legal representation. The absence of oversight by either the federal, state or local governments has perpetuated a system that lacks accountability and fundamental fairness and unsurprisingly, minorities are convicted in greater numbers and greater proportions than whites. Moreover, sentencing disparities have resulted in the discriminatory overrepresentation of minorities in jails and prisons. While more than 8 out of 10 individuals prosecuted by the U.S. government under the crack cocaine mandatory minimum laws is African-American, only one third of crack cocaine users are African-American.

The system of education in the United States is fraught with inadequacies and inequities. More than fifty years after the seminal U.S. Supreme Court decision in *Brown v. Board of Education* mandated educational desegregation, many students of color throughout the U.S. continue to struggle in racially isolated, under funded and inadequate schools. Too often, schools, especially those with high minority concentrations, do not have the resources to provide students with an adequate education, and as a result students fare poorly under the high-stakes testing mandated by federal law, and their rates of graduation from high school suffer. Minority students are also subjected to discriminatory discipline, usually for non-violent behavior. Often they have special educational needs and face policies and practices that channel them out of schools and into the juvenile and criminal justice systems, often referred to as the “school to prison pipeline.”

Affirmative action, policies designed to close the gap between American ideals of equal opportunity and the stubborn realities of structural racism, sexism and institutional exclusion in education, employment and contracting practices, is once again under attack. This carries enormous implications for the lives of women – white and minority – as well as African-Americans, Latinos, Native Americans, Asians, South Asians and Arabs, all of whom have been historic and contemporary beneficiaries of the policy. Opponents of affirmative action, including the current U.S. administration, have

attacked the policy in the federal courts, and highly-funded and well-organized detractors have financed referenda to repeal programs in several states. Most recently, in 2006, the state of Michigan passed a ballot amendment to the Michigan Constitution that eliminates affirmative action at the state's public colleges and in government contracting.

Regarding the purportedly cherished right to vote, America is far out of step with the world, barring 5.4 million disproportionately minority citizens from voting in federal and state elections, often for no more than writing a bad check. Federal laws banning racial discrimination in elections are barely enforced, and the government has obstructed private citizens' use of laws aimed at improving the administration of elections. Additionally, there is a long history of racial discrimination against Native Americans in voting and in political representation.

Remedies for civil rights violations have also been "rolled back." Beginning in the 1980s, federal courts, in a series of decisions in key areas of the law such as educational equality, employment discrimination, sexual harassment and prison abuse, have limited the ability of people to file and win cases. These decisions restrict access to courts and erode remedies for practices that discriminate against racial and ethnic minorities, women, and other vulnerable populations.

Finally, the U.S. asserts that information about state-level implementation is present

throughout the report and refers the Committee to its annex on four states. It is not only the federal government that is bound by the Convention. State and local governments are equally bound. While state-level information is scattered throughout the report, the four states the U.S. has chosen to draw the Committee's attention to — Illinois, New Mexico, Oregon and South Carolina — are highly unrepresentative. In addition, the information provides a highly misleading portrait of racial discrimination in those four states because it is incomplete. Even more notably, it excludes populous California and Texas, states with large migrant communities and where some of the nation's most egregious racial discrimination takes place. The U.S. Report also blatantly overlooks states with large Native American populations. We further regret that the U.S. chose to disregard racial discrimination in the Gulf Coast states of Louisiana and Mississippi, where Hurricane Katrina exposed the terrible social and economic inequities attendant upon those states' minority and underprivileged populations.

The ACLU calls upon the U.S. to improve its abysmal performance in these areas and to take immediate, robust action to bring the U.S. into compliance with its obligations under this vital Convention.

## ARTICLE 1 DEFINITION OF RACIAL DISCRIMINATION

The U.S. government effectively rejects CERD’s universally accepted definition of “racial discrimination” which embraces “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the **purpose or effect** of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

The U.S.’ restricted use of an effects-based standard, combined with its inadequate extension of CERD protections to vulnerable communities such as non-citizens, render U.S. compliance with the Convention appallingly inadequate. To prove violations of equal protection under the U.S. Constitution, a victim of racial or ethnic discrimination must prove the perpetrator *intended* to discriminate, an impermissibly high burden of proof. Unsurprisingly, these claims rarely succeed, deterring victims of discrimination from seeking legal redress. Even if they do seek redress, there are limited judicial remedies available for discrimination claims.

## ARTICLE 2 ELIMINATE RACIAL DISCRIMINATION & PROMOTE RACIAL UNDERSTANDING

While the U.S. acknowledges that the federal Constitution proscribes discrimination at the federal, state, and local levels, it fails to give concrete examples of how federal (or state) officials are trained *not* to discriminate, formally or otherwise. The U.S. also fails to adequately enforce anti-discrimination laws and policies concerning employment, education, housing and lending, and under-enforces anti-discrimination laws in the states and U.S. territories. While the U.S. claims to take effective measures to review policies that create or perpetuate racial discrimination, it provides no examples of such review. While purporting a strong commitment to prohibiting discrimination, the U.S.’ actions are inconsistent with this laudable objective. Examples of contradictory government actions include its flawed approach to remediating education problems as reflected in the No Child Left Behind Act; its chronic failure to enact the End Racial Profiling Act of 2005; and its denial of Help America Vote Act protections to voters when they most needed its protections.

Importantly, the U.S. infrequently implements affirmative policies to eradicate systemic racism, and fails to effectively enforce existing affirmative action policies to equalize opportunities for racial and ethnic minorities, including women of color, all of

whom are victims of historic and contemporary forms of discrimination. Considered one of the most successful policies designed to close the gap between American ideals of equal opportunity and the stubborn realities of structural racism, sexism and institutional exclusion, affirmative action remains under attack in the U.S. Well-financed detractors of affirmative action programs are waging a nationwide, frontal assault on measures seeking to remedy racial imbalances and historical racial inequalities in higher education and employment. Joining in these attacks, the government has supported numerous legal challenges to race-conscious policies. Additionally, the federal government has brought very few traditional race-discrimination cases, and the FBI has initiated few investigations to redress civil rights abuses.

Hurricane Katrina exposed to the world many of America's grave and persistent economic and social disparities, and their impact on African-American and other minority populations. While the U.S. government's failure to construct an effective flood control system and ensure the safe evacuation of all people resulted in the tragic deaths of over 1,800 people in Mississippi and Louisiana, it was in the context of the evacuation that the U.S. most visibly violated the right to non-discrimination of the impacted, largely minority communities. During and after the storm, those perceived to be undocumented immigrants were denied access to shelter and relief. After the storm, the local, state and federal government did little to alleviate the

impacted communities' suffering, whether related to lost homes, the need for health care, employment, education or other recovery-related relief.

### **ARTICLE 3 CONDEMN AND ERADICATE ALL RACIAL SEGREGATION**

Many urban areas in the U.S. remain highly segregated. The government's failure to remedy housing segregation has affected minority communities' access to vital community resources. Public and affordable housing in the U.S. is insufficient, substandard, and subject to unfair restrictions, especially on minority domestic violence victims and minorities with past criminal convictions. The education system is also highly segregated, as many students of color throughout the U.S. continue to struggle in racially isolated, under-funded and inadequate schools.

### **ARTICLE 5 EQUAL TREATMENT BEFORE THE LAW**

Although formal, explicit barriers to equality and racial desegregation have been removed, less explicit forms of discrimination and injustice persist. Too often, law enforcement officers use excessive force on people of color. Officers also selectively target, or enforce the law against, people of color and indigenous people, and engage in rampant racial and ethnic profiling as a proxy for crim-

inal activity. One example concerns officers' raiding worksites as part of the government's effort to "flush out" undocumented workers. In what may be called "post-9/11 profiling", Muslims and those perceived to be Muslim — Sikhs, Hindus, Indian Christians, Christian Arabs — are discriminated against when they apply for jobs, seek housing, or attempt to travel. Furthermore, they are unduly interrogated by the FBI in their homes, and find their U.S. naturalization applications stalled for no valid reason other than their racial or ethnic origin, or their real or presumed faith.

Selective targeting of minorities is followed by their disproportionate arrest, conviction, sentencing (including deportation) and confinement. Poorly funded and mismanaged indigent defense system, on which these individuals depend, are a significant contributing factor. Once confined in prisons, jails, or juvenile or immigration detention, minorities are also disproportionately abused by guards and officers, and endure grossly inadequate medical and psychiatric care, which has caused numerous deaths in custody.

Criminal incarceration in the U.S. is skyrocketing at an unprecedented rate. There has been a 500% increase in the U.S. prison population over the last 30 years, with 2.2 million people now behind bars nationwide. The U.S. has 25% of the world's prisoners but only 5% of its population. As prisons and jails struggle with this frenzy of incarceration, minorities are bearing a disproportionate share of the consequences. Nationally, at

the last decennial census in 2000, the population was 69.1% white, 12.5% Latino, 12.3% black, 3.6% Asian, and .9% American Indian. The 2006 prison population, in contrast, was about 46% white, 41% black, and 19% Latino.

Sexual violence against indigenous women is rampant, the majority of it perpetrated by white abusers. Making matters worse, their communities have inadequate resources to either prevent or care for rape victims. In addition, there are inadequate accountability mechanisms to prosecute their rapists. Migrant female domestic workers also suffer abuse at the hands of diplomat employers who bring them to the U.S. and who are "immune" from criminal or civil liability for their abusive actions.

Critically, documented race bias persists in application of the federal and state death penalty statutes. It has also been shown that state juvenile "life without parole" and "three strikes" laws have a grossly disproportionate impact on minorities.

As to the right to vote, over 5 million remain disfranchised by restrictive state laws that also bar voting in national elections. Also significant, the federal government has utterly failed to enforce key anti-discrimination provisions of voting rights laws, and has denied private parties their right to sue thereunder, effectively impeding the voting rights of minorities, already the most disfranchised segment of society.

Schools are increasingly re-segregating. In recent companion cases, *Parents Involved in Community Schools v. Seattle School District* and *Meredith v. Jefferson County Board of Education*, the U.S. Supreme Court limited the types of voluntary integration programs schools may implement. School discipline, too, is discriminatory: “zero tolerance” school discipline policies, with their dramatically greater impact on minority students, are proliferating, and armed police officers patrol minority-attended schools. Minority students are also disproportionately transferred to “alternative schools” that often fail to provide them with adequate educational services.

Since Congress has failed to pass comprehensive immigration policy, states have taken it upon themselves to enforce federal immigration laws. Border agents and “minute-men” conduct ‘border protection’ activities in discriminatory and inhumane ways. States and localities are passing mean-spirited anti-immigrant legislation that is often also discriminatory and unconstitutional. Deplorably, officials have been enforcing immigration laws before dispensing aid in emergency situations. The federal government’s incarceration of asylum seekers and undocumented persons, including children and pregnant women, has risen sharply with approximately 261,000 people held in more than 400 immigration detention facilities last year, over triple the number of people in detention just nine years ago.

## ARTICLE 6 ENSURE EFFECTIVE PROTECTION & REMEDIES FOR RACE DISCRIMINATION

Since 2001, the Justice Department’s Civil Rights Division has abandoned much of the traditional civil rights enforcement work it once pursued. For instance, the Voting Section encouraged states to limit, rather than expand, the franchise. In addition, the Employment Litigation Section has filed few disparate impact cases concerning workplace discrimination. Moreover, the Housing and Civil Enforcement Section announced that it would no longer pursue disparate impact housing cases even though there is data indicating that housing discrimination is a major impediment to achieving integrated neighborhoods.

Court decisions have severely curtailed some of the tools with which discrimination may be identified and combated. For example, private individuals can no longer sue for discrimination under civil rights statutes unless they can prove that the discrimination was “intentional.” The Prison Litigation Reform Act has imposed significant barriers to prisoners seeking judicial relief for abuses inflicted during incarceration, including by requiring a showing of physical injury for any federal civil action, thereby denying judicial recourse to inmates suffering racial discrimination and many forms of sexual abuse. Furthermore, there is no federal judicial remedy to compensate women of color for violence by private actors, and no federal



remedy to compensate for the failure of states to protect women from domestic violence. Immigrant workers of color are particularly vulnerable, and as a result, most of the industries employing immigrant workers pay low wages, maintain dangerous working conditions, and frequently violate labor, environmental, and anti-discrimination laws. In the wake of the U.S. Supreme Court's *Hoffman Plastic* decision, and its progeny in federal and state courts, undocumented workers have lost both anti-discrimination protections and remedies.

## **ARTICLE 7**

### **MEASURES IN TEACHING, EDUCATION & CULTURE TO COMBAT DISCRIMINATION & PROMOTE TOLERANCE**

Although certain government entities have publicly denounced racial profiling, the government has failed to promote federal legislative efforts to eliminate racial profiling, as the End Racial Profiling Act awaits passage for the *tenth* year in a row. The U.S. reports that it has made significant strides to prevent and punish race-based hate crimes, especially in the wake of 9/11, yet Muslims – and those perceived to be Muslim - experience intolerance and abuse at truly astronomical and rising rates. In addition, little effort is made to educate the public about human rights, including those guaranteed by CERD.



# RECOMMENDATIONS TO THE UNITED STATES

## ARTICLE 1

### DEFINITION OF RACIAL DISCRIMINATION

- Enact federal, state and local legislation adopting the Convention’s definition of “racial discrimination.” That definition protects all minority groups, indigenous communities and non-citizens under U.S. jurisdiction and control, from both *de jure* and *de facto* discrimination.

## ARTICLE 2:

### ELIMINATE DISCRIMINATION & PROMOTE RACIAL UNDERSTANDING

- Conduct concerted, routine reviews of federal and state policies to analyze their discriminatory impact on minorities and non-citizens.
- Continue to monitor and enforce all school desegregation orders, and review policies with the goal of dismantling the “school-to-prison” pipeline.
- Eradicate racial profiling and racial disparities in investigation, prosecution and sentencing.
- Eliminate discriminatory housing policies and practices including in lending to minorities and in affording

housing to minority women victims of domestic violence as well as members of racial and ethnic groups with criminal convictions.

- Promote affirmative measures and policies to ensure the full enjoyment of human rights by members of minority groups; to eliminate structural racism, sexism and institutional exclusion; and expand its use in redressing past discrimination suffered by minorities including women and indigenous communities, particularly in the areas of education and employment;
- Remove barriers to affirmative action policies and programs including barriers to school desegregation and equitable pay for minorities.
- Effectively plan for crises such as Hurricane Katrina, including by seeking the meaningful participation of the impacted community in reconstruction efforts.
- Eradicate the persistent poverty in the Katrina region and increase efforts to provide equal access to housing, education and health care to minority communities in the Gulf Coast areas.

## ARTICLE 3

### CONDEMN AND ERADICATE ALL RACIAL SEGREGATION

- Amend housing and zoning policies and adopt specific measures with the

Photos courtesy of the Farmworker Association of Florida ([www.floridafarmworkers.org](http://www.floridafarmworkers.org))



Labor protection laws need to apply to domestic workers and farm workers.

goal of eliminating *de facto* housing segregation.

- Increase the availability of affordable public housing for minorities.
- Develop and implement policies and projects aimed at avoiding separation of communities, in particular in the areas of housing and education.

## ARTICLE 5 EQUAL TREATMENT BEFORE THE LAW

### *Respect the Rights of Criminally Accused & Disproportionately Confined Minorities*

- Require states to properly fund and supervise their indigent defense systems.
- Prohibit juvenile waiver of counsel and the pre-adjudication detention of juveniles.
- End the disproportionate confinement of people of color, including women and children of color, in prisons, jails, and immigration and juvenile detention facilities.
- Ensure that the arrest, detention or imprisonment of children is used only as a measure of last resort and for the shortest appropriate period of time.
- Improve medical and psychiatric care, and educational services, in prisons, jails, immigration detention and juvenile detention facilities for minorities, including women and children of color.
- Develop policies and practices for girls of color in juvenile detention that acknowledge their unique needs,

eliminate dangerous and excessively punitive practices, and establish meaningful and independent oversight and accountability mechanisms.

- Eliminate discrimination against non-citizens, especially against undocumented migrant workers. Ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens.

#### *Repeal Laws with Disproportionate Impact on Minorities*

- Repeal all 21 states' "three strikes" laws as they disproportionately affect minority groups.
- Amend the federal sentencing guidelines to prevent any discriminatory impact on minorities including by further reducing disparity in penalties for crack and powder cocaine offenses.
- Require that all labor protection laws, such as the National Labor Relations Act, the Fair Labor Standards Act, and the Occupational Health and Safety Act apply to domestic workers and farm workers;

#### *Conduct Independent and Prompt Investigations of Allegations of Abuse*

- Thoroughly and promptly investigate all allegations of discriminatory

abuse of minorities in U.S. prisons, jails and detention facilities.

- Establish independent oversight bodies to investigate complaints by minorities of discriminatory abuse by law enforcement and correctional officers, and to monitor conditions in all prisons, jails, and detention centers.
- Hold accountable all individuals, including government officials, members of the armed forces, correctional officers, police, prison guards, medical personnel, and private government contractors who have authorized, condoned or committed torture and other cruel, inhuman or degrading treatment or punishment against citizens and non-citizens held in U.S. custody.
- Effectively investigate, prosecute and punish perpetrators of acts of sexual violence, including rape, of Native American women.

#### *End Racial & Ethnic Profiling*

- Ban all ethnic and racial profiling practices by state law enforcement officers and ensure that states comply with bans already in place including the collection of racial profiling data.
- Urge the U.S. Congress to pass the End Racial Profiling Act of 2005.
- Ensure that all air-traffic related searches of individuals are based on suspicion and conducted within appropriate parameters and employ the least intrusive measures possible.

### *End Capital Punishment and Juvenile Life Without Parole*

- Ban all capital punishment, and impose a national moratorium on its use until race bias in the application of federal and state death penalty statutes has been eliminated.
- Abolish the sentence of life without parole for children convicted of federal crimes. Enable child offenders serving life without parole to have their cases reviewed by a court for reassessment with the possibility for parole.

### *Cease Discrimination & Violence against Muslims, Migrants & Women*

- Halt government programs and policies that target Muslims without a basis for suspicion, including FBI interrogations and delays by ICE in processing U.S. naturalization applications.
- Ban the use of tasers by law enforcement officials and correctional officers at the federal, state, and local levels, pending the outcome of an independent inquiry into their safety and use, including racial disparities in their deployment.
- Return jurisdiction of sexual offenses to tribal courts allowing these courts to prosecute cases of sexual violence against indigenous women, and provide indigenous communities adequate resources to prevent and care for rape victims.
- Take effective measures to provide culturally-sensitive training for all law enforcement officers that accounts for

the specific vulnerability of Native women and racial and ethnic minority women to gender-based violence.

- Take measures to address the situation of intersectional discrimination, in particular regarding women and children from the most disadvantaged and poor racial and ethnic groups.
- Urge the UN to adopt codes of conduct regulating the treatment and protection of migrant domestic workers and require their staff to abide by that code, taking disciplinary action in the event of violations.

### *Expand and Enforce Political Rights*

- Allow all citizens, regardless of their criminal history, to vote. In the alternative, require all states to restore voting rights to people upon release from prison.
- Enforce the primary anti-discrimination provision of the Voting Rights Act, and allow private parties to always enforce rights under the Help America Vote Act.

### *Restore Rights of Non-Citizens*

- Reform immigration policy immediately; ensure its compliance with human rights standards; and ensure it does not have a disparate impact upon persons on the basis of race, color, descent, or national or ethnic origin.
- Eliminate the penalty of criminal incarceration for violation of immigration laws.

- Support and fully fund alternatives to detention programs so that the detention of migrant children and families with children is a measure of last resort and only for the most exceptional circumstances.
- Mandate states to refrain from enforcing federal immigration laws, especially during national and state crises and emergencies.
- Ensure that border protection activities are conducted in a manner consistent with the Convention and other human rights standards.
- Discontinue all federal and state efforts to target, stigmatize, stereotype or profile non-citizens, including workers, in the absence of individualized suspicion of wrongdoing.
- Discourage states and localities from enacting unlawful and/or mean-spirited anti-immigrant legislation.
- Ensure that counter-terrorism measures do not discriminate in purpose or effect on the grounds of race, color, descent, or national or ethnic origin.
- Take necessary measures to ensure access to justice for all persons within United States jurisdiction without discrimination.

*Assure Equal Access to Health Care & Equal Medical Treatment*

- Improve standards of government health programs and ensure equal access for all persons to public med-

ical care, and the equal, non-discriminatory treatment of all persons.

*Reform Education Policies to Alleviate Discriminatory Impact*

- Ensure that Congress reauthorizes the No Child Left Behind Act amended to provide for accountability for “Push-Outs”; strong provisions for Out-of-District Transfers; improved accountability for graduation rates; and adequate support for schools and districts “in need of improvement.”
- Increase government funding of minority-attended schools.
- Require schools to develop adequate and fair disciplinary criteria and referral procedures, explain racial disparities in disciplinary referrals, maintain accurate discipline records, and report all incidents of racial and ethnic harassment.
- Encourage states to use voluntary integration programs and discourage rezoning of school districts adverse to minority students’ interests.
- Ban “zero tolerance” school discipline policies and prohibit the presence of armed police officers in schools except where legitimate security concerns require it.
- Discourage involuntary transfers to “alternative schools” that often fail to provide adequate educational services.

## **ARTICLE 6**

### **ENSURE EFFECTIVE PROTECTION & REMEDIES FOR RACE DISCRIMINATION**

- Ensure that federal judicial remedies, supplementing state jurisdiction, be available to redress discrimination and denial of constitutional and related statutory rights of immigrants, minorities, women, undocumented persons, and persons detained in the “war on terror”.
- Guarantee the right of every person within U.S. jurisdiction to an effective remedy against the perpetrators of acts of racial discrimination as well as the right to seek just and adequate reparation for the damage suffered.
- Ensure the U.S. Department of Justice’s Civil Rights Division returns to prosecuting traditional anti-discrimination cases, including those based on employment, housing, education and voting laws.
- Increase Congressional oversight of the Civil Rights Division’s housing, employment, education and voting sections.
- Encourage expansion of federal and state laws that protect domestic violence victims from housing and employment discrimination.
- Strengthen protections in state anti-discrimination, tort and workers’ compensation laws for undocumented persons.

## **ARTICLE 7**

### **MEASURES IN TEACHING, EDUCATION & CULTURE TO COMBAT DISCRIMINATION & PROMOTE TOLERANCE**

- Undertake meaningful outreach to educate the federal, state and local judiciaries, as well as the American public, about U.S. government obligations under the Convention.
- Promulgate legally enforceable measures to combat all racial and ethnic profiling, and race and ethnicity-related hate crimes; implement a nationwide collection of disaggregated data based on racial and ethnic groups, as well as gender.
- Establish a national human rights institution for the promotion and protection of human rights with a firm mandate to combat all forms of discrimination. In doing so, the government should consider the Principles relating to the Status of National Institutions (Paris Principles).



## THE FAILURE OF THE UNITED STATES TO COMPLY WITH THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

### ARTICLE 1 DEFINITION OF RACIAL DISCRIMINATION

Article 1(1) mandates the eradication of racial discrimination. The article defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.” CERD extends this protection equally to non-citizens and to “all persons who belong to different races, national or ethnic groups or to indigenous peoples.”<sup>4</sup> In its Concluding Observations of 2001, this Committee made it abundantly clear that CERD’s definition of racial discrimination includes indirect discrimination<sup>5</sup> and that the Committee’s test of discrimination is whether actions have an “unjustifiable disparate impact” upon a minority group.<sup>6</sup> Thus, for purposes of compliance with CERD, member states must

ensure that racial equality exists both *de jure* and *de facto*, and extends to citizens and non-citizens alike.<sup>7</sup>

### U.S. REDEFINES CERD’S “DISPARATE IMPACT” STANDARD

The U.S. effectively rejects this internationally recognized definition of racial discrimination. The U.S. posits that, by “unjustifiable disparate impact,” the Committee means “race-neutral practices that create statistically significant racial disparities and are unnecessary,”<sup>8</sup> a characterization that converts the Committee’s more protective “unjustifiable” standard into a less protective one. The U.S. government’s entire report must be assessed bearing in mind its insufficiently expansive view of “racial discrimination.”

### U.S. LAW PROVIDES LIMITED USE OF DOMESTIC DISPARATE IMPACT STANDARD

We should also bear in mind that, under U.S. law, a disparate impact standard may only be

used when bringing claims under the Voting Rights Act of 1965, Title VII of the 1964 Civil Rights Act, the regulations implementing Title VI of the same act, and the Fair Housing Act of 1968. For all constitutional violations of equal protection, intent to discriminate must be shown. The burden of proof of intent to discriminate is generally very high and, thus, such claims rarely succeed.<sup>9</sup> As a result, it is very hard, if not impossible, to bring and prevail in intentional discrimination cases, deterring many victims from seeking legal remedies.

Finally, as detailed in Article 6, the U.S. fails to address the general “rollback” in judicial remedies. In addition to rulings that claims of racial or national origin discrimination must be accompanied by proof of intentional discrimination, actions of the federal legislative and judicial branches of the U.S. have also seriously imperiled both the equal application of rights and availability of effective (or, in some cases, any) remedies. Over the last decade, there has been a serious erosion in the ability of, among others, immigrants, prisoners, and detainees in the “war on terror” (almost all of whom are racial or ethnic minorities) to use the writ of habeas corpus in U.S. courts to challenge the constitutionality of their ongoing detention. In addition, courts have severely circumscribed remedies for undocumented migrant workers, including back pay, state tort remedies and workers’ compensation, and have allowed plaintiffs’ immigration status to be relevant in such litigation. Rights available to women

have been similarly curtailed, with the Court striking down a civil remedy under the Violence Against Women Act and refusing to apply the federal civil rights remedy to local officials who ignore a prior mandatory judicial protective order.

### RESERVATIONS, DECLARATIONS & UNDERSTANDINGS

The U.S. intends to retain its *understanding* concerning federalism and its *declaration* that CERD remain a non self-executing treaty, a significant obstacle in domestic implementation and enforcement of CERD. As to the latter, this Committee has expressed its preference for the direct inclusion of the Convention into the domestic law of the States Parties. But the U.S. maintains that while it is “aware of the Committee’s preference” and some non-governmental organizations would also prefer that human rights treaties be made “self-executing” in order to serve as vehicles for litigation, the U.S.’ declaration “reflects [its] choice... [to retain] existing remedies for private parties.”<sup>10</sup>

As in its reports to the monitoring bodies of the International Covenant on Civil & Political Rights (ICCPR) and the Convention Against Torture (CAT), the U.S. asserts that existing U.S. law provides protections and remedies sufficient to satisfy the requirements of CERD.<sup>11</sup> In fact, the government rarely consults its treaty obligations in passing domestic legislation, and much national policy and legislation provides less protec-

tion than CERD except as it concerns freedom of speech and of religion and belief. Thus, the U.S. makes clear that it has no intention of enacting any new laws to ensure CERD is enforced other than through current domestic law, which this report will show is grossly inadequate to this task. The government's lack of compliance with CERD is particularly worrisome as the U.S. has only ratified three human rights treaties: CERD, the ICCPR and the CAT.

## **ARTICLE 2**

### **ELIMINATE DISCRIMINATION & PROMOTE RACIAL UNDERSTANDING**

Article 2, Section 1 requires member states to:

- (1) Ensure that all public authorities and public institutions, both national and local, do not practice discrimination;
- (2) Take measures to ensure against the sponsorship, defense or support of racial discrimination by any persons or organization;
- (3) Review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations that have the effect of creating or perpetuating racial discrimination;
- (4) Take measures, including legislation, to prohibit racial discrimination by any person, group, or organization; and

- (5) Take measures to encourage appropriate integrationist multiracial organizations and movements to eliminate barriers between races and to discourage racial division.

Article 2, Section 2 requires member states to use “special and concrete” measures in social, economic, cultural and other fields to ensure adequate development and protection of certain minority groups and their individual members.

### *ELIMINATE ALL FORMS OF RACIAL DISCRIMINATION & PROMOTE UNDERSTANDING (ARTICLE 2 (1))*

#### **U.S. MUST ENSURE PUBLIC AUTHORITIES AND INSTITUTIONS DO NOT DISCRIMINATE**

The U.S. states that the federal Constitution proscribes discrimination at the federal, state and local levels and covers the acts of all public authorities and institutions, and proceeds to give examples of its enforcement activities. We note that the substantive protections under U.S. law are not as expansive as those CERD offers (not to mention the U.S.’ more limited view of what constitutes racial discrimination).

The U.S. fails to show how law enforcement personnel, including prison guards, are trained not to discriminate. In this regard, the Committee has written that the fulfillment of Article 2(1) (and Article 5) “obliga-

tions...very much depends upon national law enforcement officials who exercise police powers, especially the powers of detention or arrest, and upon whether they are properly informed about the obligations their state has entered into under the Convention...officials should receive intensive training to ensure that in the performance of their duties they respect as well as protect human dignity and maintain and uphold the human rights of all persons ...”<sup>12</sup>

### **U.S. MUST TAKE MEASURES NOT TO SPONSOR, DEFEND, OR SUPPORT RACIAL DISCRIMINATION**

Historically, the Civil Rights Division of the Department of Justice has been the primary administrative protector against illegal racial, ethnic, religious and gender discrimination in the U.S. Since 2001, its role has changed to the detriment of those that need it. Across administrations, the Division used to have a reputation for expertise and professionalism in its civil rights enforcement efforts. Given the sensitive and controversial nature of civil rights work, there has always been potential for conflict between political appointees, ultimate decision makers, and career attorneys. The conflict was usually resolved, often by career staff and respected by political appointees. Since 2001, there has been dramatic change. Political appointees will not draw on the expertise of career attorneys. New hiring policies have virtually eliminated any career staff input into hiring career attorneys. As a result, partisan political concerns

have influenced decision-making as well as hiring.<sup>13</sup> Traditional involvement in race issues has diminished.<sup>14</sup> That shift accounts for a major difference in the types of cases being brought; for example, the Civil Rights Division is bringing fewer voting rights and employment cases involving systematic discrimination against African-Americans, and more alleging reverse discrimination against whites and religious discrimination against Christians.<sup>15</sup>

The U.S. is therefore advised to implement the Committee’s general recommendation to “prevent all direct influence by pressure groups [and] ideologies...on the functioning of the system of justice...which may have a discriminatory effect on certain groups.”<sup>16</sup>

### **Enforcement of Employment Rights**

The U.S. offers examples of enforcement actions taken both by the Equal Employment Opportunity Commission (EEOC), which enforces federal civil rights laws concerning discrimination in public and private sector workplaces, and the U.S. Department of Justice’s Civil Rights Division (DOJ), which is also charged with investigating employment discrimination.

However, government enforcement has diminished since 2001. In the past, the DOJ pressured employers to take prophylactic measures. The number of Title VII lawsuits filed is down considerably from prior administrations, and the mix of cases has also

changed. Most importantly, the number of “disparate impact” cases (cases seeking systemic reform and not requiring evidence of intentional discrimination or discriminatory motive) has significantly declined. These cases are complex, expensive for plaintiffs to pursue, and present resource issues for private plaintiffs; as a result, it is especially important for DOJ to bring them. And the DOJ is filing few cases alleging race discrimination against African-Americans and other people of color. Finally, the DOJ has reduced its efforts to reach out to groups of employers like police chiefs and professional groups, to discuss selection procedure assessment and reform.

Specifically, since 2001, the DOJ has filed 32 Title VII cases. By contrast, in just the 2 years between 1993 and 1995, the DOJ filed 34 cases. A close look at the cases filed since 2001 is even more troubling. The Attorney General has the authority to file suit on behalf on individuals as well as to file what are called “pattern and practice” cases.

In terms of individual cases, individuals initially file their cases with the EEOC, and the latter may refer cases to DOJ. DOJ typically receives 500 referrals per year, and after review, files suit on about 10 to 14 of them. These cases are brought under the disparate treatment theory, which requires the plaintiff to prove intent to discriminate. Since 2001, twenty-four such cases have been filed, five alleging race discrimination. Since 2000, the EEOC has referred over 3,200 individual

charges of discrimination. It seems incredible that only 5 were deemed litigation-worthy. Between 1993 and 2000, 73 Section 706 cases were filed and of them 12 alleged race discrimination.

As for “pattern and practice” cases, they often have the greatest impact as they affect a large number of employees and frequently break new legal ground. Since 2001, 9 such cases were filed, 5 of which raised race discrimination allegations. Two of the cases raised “reverse discrimination” allegations of discrimination against whites, and one case was filed by the New York U.S. Attorney’s Office. Only one “pattern or practice” case in 5 years alleged discrimination against African-Americans and one alleged discrimination against Native Americans. By contrast, in the 2 years between 1993 and 1995, the Department filed 13 such cases, 8 of which raised race discrimination claims.

The seven cases the U.S. cites in its report as examples of enforcement involve, respectively, the selective enforcement of uniform policies, discriminatory employment policies, disparate impact of hiring requirements of both public and private actors, and race-driven employee dismissals. Although the cases involved serious instances or patterns of discrimination, the government required affirmative measures to remedy the discrimination in only two cases, both involving public actors.<sup>17</sup> In all the other cases, the US simply sought relief for the immediately affected clients, and

imposed minimal affirmative or ongoing obligations on the discriminating entity.<sup>18</sup>

These discrepancies exist despite the government's own concession that African-Americans and Hispanics face higher rates of unemployment—and vastly higher rates of poverty—and that minorities fare even more poorly in representation in management, professional, and related occupations, and are far better represented in lower-status and lower-paying professions like “service professions” and “production, transportation, and material moving occupations.”<sup>19</sup> The U.S. continues to disregard the CERD Committee's recommendation to employ affirmative remedies where necessary.<sup>20</sup> We strongly suggest employment discrimination is such an area.

This is made more urgent by the Supreme Court's recent decision in *Ledbetter v. Goodyear Tire and Rubber Co.* Ruling for Goodyear, the U.S. Supreme Court overturned forty years of bedrock principles of wage discrimination law, holding that workers cannot sue for the later effects of past wage discrimination. This ruling makes it substantially more difficult to challenge pay discrimination under Title VII of the Civil Rights Act of 1964, a claim historically utilized by women and minorities to seek pay equity. A narrow majority of the Court ruled that the window for filing a wage discrimination complaint was within 180 days of the employer's first discriminatory decision, regardless of when the employee learns of

the relative inequity between her salary and those of other similarly situated employees. This case reversed the long-held principle that each paycheck received after a discriminatory wage decision is tainted by and carries forward the employer's intentionally discriminatory decisions about an employee's compensation. The U.S. House of Representatives passed legislation in July 2007 to remedy the ruling, and the Senate is expected to take up the issue next year. President Bush, however, has indicated that he will veto any such legislation.<sup>21</sup>

### **Enforcement of Housing and Lending Rights**

According to the U.S., the federal Department of Housing and Urban Development (HUD) has taken action to address housing discrimination. Housing discrimination is protected against and enforced by HUD's Fair Housing Office, which receives complaints and investigates cases. The administration has a number of programs designed to improve housing availability for racial and ethnic minorities, and low-income households.<sup>22</sup> HUD is also said to be pursuing an initiative to improve housing services for people with limited English proficiency.<sup>23</sup>

However, by selectively insuring home loans on an explicitly racial basis, HUD has historically perpetrated housing discrimination. Banks would refuse to offer loans or other services in minority areas. Now, minorities

are singled out for high-cost, high-risk mortgages. According to a recent study by the Consumer Federation of America, which examined 4.4 million mortgage originations nationwide where borrowers identified their gender, although the evidence suggested that women were better bets for lenders, they were 32% more likely to receive more expensive mortgages at all income levels than men. Black and Latino women, in particular, suffered the highest incidences of “subprime” lending, and the gap between them and white men increased as incomes rose. Black women earning double the area median income were nearly five times as likely to receive subprime loans than white men with similar incomes, and Latino women earning twice the area median income were about four times more likely to receive subprime loans than white men with similar earnings. These high rates are likely to make it harder to sustain homeownership.<sup>24</sup> In another national study of 50,000 subprime loans, blacks and Hispanics were found to be charged higher interest rates, even among borrowers with similar credit ratings.<sup>25</sup>

On the local level, a study focused on **New York** City reached consistent conclusions: the 10 neighborhoods with the highest rates of subprime mortgages have black and Hispanic majorities, and the 10 areas with the lowest rates were mainly non-Hispanic white.<sup>26</sup> Blacks were five times more likely and Hispanics almost four times as likely to pay higher interest rates.<sup>27</sup>

The U.S.’ failure to remedy housing segregation has affected minority communities’ access to community resources such as education and basic social services. Moreover, most of the people living in government-subsidized housing in the U.S. are minorities, many of them also indigent women raising young children.<sup>28</sup> Public and affordable housing in the U.S. is insufficient, substandard, and subject to unfair restrictions. For example, public housing policies sometimes discriminate against the victims of domestic violence and their dependents. Many also discriminate against or deny admission to individuals with felony and/or drug convictions, a group that, like those in public housing overall, is disproportionately minority.<sup>29</sup>

According to the U.S., the Department of Justice’s Civil Rights Division is also charged with ensuring non-discriminatory access to housing, public accommodations, and credit. During fiscal year 2006, the Housing Section filed 31 lawsuits, including 19 pattern or practice cases.<sup>30</sup> Lawsuits brought by the Civil Rights Division also defend the rights of Americans to purchase homes.<sup>31</sup> In the cases the government cites (other than two that are still pending<sup>32</sup>) the U.S. sought relief for its clients. To its credit, the government also required the discriminating entities to rewrite their policies (albeit with little more guidance than the instruction that the new policies comply with existing law).

### *Hurricane Katrina*

Hurricane Katrina was the deadliest U.S. hurricane in seven decades and most expensive natural disaster in American history. Over 500,000 people, mostly minorities, were evacuated, and nearly 90,000 square miles were declared a disaster area (roughly the land mass of the United Kingdom). Although 2 years have passed, infrastructure reconstruction efforts continue to lag.

In its report, the U.S. only mentions Katrina in the housing context, to wit: “concern has been expressed about the disparate effects of Hurricane Katrina on housing for minority residents of New Orleans.” The report suggests that some efforts have been made to

ensure housing is provided to those who lost homes, adding “many commentators conclude” that the problems with Katrina were the result of “poverty (i.e., the inability of many of the poor to evacuate) rather than racial discrimination *per se*.”<sup>33</sup>

At least—though by no means only—in terms of alleviating the housing crisis post-Katrina, the facts clearly belie this contention. In **Louisiana**, for example, several local ordinances passed since the storm have led to the exclusion of minority groups from post-Katrina recovery efforts. In 2006, St. Bernard Parish passed an ordinance that permitted only blood relatives of current residents to purchase or rent housing therein.<sup>34</sup> Because 93% of St. Bernard Parish home-



Destruction like this was common in New Orleans after Hurricane Katrina.



owners are white, only whites would be able to rent single family homes in most circumstances.<sup>35</sup> The parish has stayed enforcement of the ordinance pending a legal challenge to it.<sup>36</sup> After the hurricane, several parishes also passed bans or restrictions related to trailer parks, in an attempt to keep evacuees out.<sup>37</sup> Nearly 60% of the landlords included in one investigation discriminated against African-American testers searching for rental housing in the Greater New Orleans area.<sup>38</sup> All this on top of the fact that HUD, since the storm, has closed many public housing complexes, some now surrounded by fences and razor wire. HUD also demolished thousands of units, even though tens of thousands of low-income residents remain displaced.<sup>39</sup> In **Mississippi**, well over 100,000 homes sustained damage or were destroyed, and at least 27,000 affordable housing units may need to be rebuilt in the coastal counties to provide for the area's substantial lower-income population.<sup>40</sup> The region must employ transparency in the process to protect the interests of these lower-income communities in need of affordable housing. Mississippi has a population that is about 40% minority, and nearly 20% of its population lives in poverty.<sup>41</sup> But the Mississippi Development Authority initially restricted public commentary on the Small Rental Assistance Program—which provides loans to owners of small rental properties to assist them in offering affordable rental housing in areas most affected by Katrina, effectively shutting the poorest and most affected Mississippi citizens out of the debate. In

2007, the ACLU of Mississippi and a coalition of concerned organizations successfully petitioned Mississippi Governor Barbour to restore and extend the 15-day public commentary period.<sup>42</sup>

### Enforcement of Education Rights

According to the U.S. Report, “the mainstay of the Justice Department’s Civil Rights Division’s work in the area of education is a substantial docket of open desegregation cases under which school districts remain under court orders.”<sup>43</sup> However, the Department’s work on the dismissal of these old cases has detracted from its strict enforcement work. Additionally, while lauding its efforts on desegregation cases, the Department simultaneously opposed voluntary desegregation plans by school districts, discussed in detail in Article 5, *infra*. The Report offers little concrete information about these anti-integrationist government actions, or about the very troubling and racialized educational disparities, also detailed in Article 5. Instead, it describes an assortment of policy statements and bureaucratic structures, as well as policies of the Department of Justice and other executive agencies, which in fact operate to exacerbate rather than ameliorate educational inequality.

Schools that had been integrated in or after the 1960s have been rapidly re-segregating; minority-majority schools suffer from inadequate resources, and the phenomenon of the school-to-prison pipeline, all discussed in

Article 5, are hallmarks of this decay. In recent years, government agencies have shirked their duties to investigate and eradicate such discrimination.<sup>44</sup> Educational discrimination also has a gender component. Vocational education programs are overwhelmingly sex-segregated, leaving women, including women of color, with poorly remunerated, traditionally female skills, yet the Department of Justice's Office of Civil Rights is failing to conduct statutorily mandated compliance reviews of such programs.<sup>45</sup> In addition, the government's recent changes to the regulations under the federal law banning sex-discrimination in education make it easier for public schools to segregate classes by gender.<sup>46</sup> Because these "new solutions" are often tested in failing schools, and, due to the government's perpetuation of racial disparities in housing (*i.e.* most failing schools are in predominantly minority neighborhoods) these sex-segregated educational policies disparately impact racial minority girls.<sup>47</sup>

### **Enforcement of Anti-Discrimination Laws in U.S. Territories**

The U.S. asserts that the Department of Justice's Civil Rights Division has prosecuted human trafficking cases and brought suits to protect prisoners' rights in U.S. territories.<sup>48</sup> The Department proudly notes that "during FY 2007, the Civil Rights Division, working with US Attorneys' Offices around the nation, has initiated 60 investigations, charged 26 defendants in

eight cases and obtained 36 convictions involving human trafficking,"<sup>49</sup> and "[i]n FY 2006, the Division and U.S. Attorneys' Offices initiated 168 investigations, charged 111 defendants in 32 cases and obtained 98 convictions involving human trafficking..."<sup>50</sup> *However, these numbers represent only a small fraction of the human beings trafficked to the U.S. Between 14,500 and 17,500 victims are trafficked into the U.S. annually.*<sup>51</sup> As these numbers make clear, there is only about a 0.6% chance that a person who commits an act of trafficking in the U.S. will be convicted of that crime. Victims are generally from Asia, South Asia, Central and South America, and Eastern Europe, many unable to speak and understand English and therefore isolated and unable to communicate with service providers, law enforcement and others who might be able to help them.

With regard to prisoners' rights, the ACLU is only aware of a single case the government has filed: a 1986 suit against the Golden Grove Adult Correctional Facility in St. Croix, Virgin Islands. Despite the DOJ Civil Rights Division's pending lawsuit, Golden Grove remains a dangerous, understaffed, and overcrowded facility. In February 2007, one Golden Grove prisoner was able to secure a gun inside the prison and shoot four fellow prisoners.<sup>52</sup> Moreover, the problems in the territorial prisons go beyond Golden Grove: in St. Thomas, for example, the ACLU's National Prison Project represents prisoners<sup>53</sup> seeking to improve unconstitutional jail conditions. Although an agree-

ment was reached in 1994 to remedy these conditions, *thirteen* years later, a judge found that the jail remained in violation of court orders, citing the defendants' willful failure to comply with those orders and provisions, and held territory and corrections officials in civil contempt *for the third time in six years*. The judge has ordered the Government to improve medical and mental health care, and to hospitalize the most seriously mentally ill prisoners.

### **Enforcement of Anti-Discrimination Laws by the States**

The U.S. reports that "most states have state civil rights or human rights commissions or offices that administer and enforce state laws prohibiting discrimination in areas such as education, employment, housing, and access to public accommodations," adding that "most state entities have work-sharing agreements with the EEOC and [HUD] to ensure that complainants' rights are protected under both state and federal law, regardless of where they choose to bring their complaints."<sup>54</sup>

The government overstates the efficacy of these commissions. The commissions are inadequate because, overall, they are not institutionally independent, not required to make bipartisan appointments, have narrow mandates and jurisdiction (enforcement, prevention and training of anti-discrimination legislation), are often unaware of and do not follow ratified treaties, and operate with a "distinctly low public profile."<sup>55</sup>

The government also overstates the amount of government financial and staff support that these commissions receive. For example, in the state of **Oregon**, the Civil Rights Division (CRD) of Oregon's Bureau of Labor and Industries (BOLI) suffered when BOLI underwent systematic budget cuts between 1999 and 2005. In its own Annual Performance Progress Report for 2004-2005, the CRD said that it "still faces many obstacles in achieving (goals)" and that budget cuts "have had a lasting impact on the Division's ability to meet statutory timelines and provide thorough investigations." Furthermore, the Oregon Commissions on Black Affairs, Asian Affairs, and Women's Affairs have never been fully funded. In fact, state funding for these programs was eliminated during the 2003 budget crisis. While funding was restored in 2005, the Commissions on Black, Asian and Hispanic Affairs have since been consolidated under a single staff person.

### **U.S. MUST TAKE MEASURES TO REVIEW POLICIES AND TO WITHDRAW LAWS OR REGULATIONS THAT CREATE OR PERPETUATE RACIAL DISCRIMINATION**

The U.S. reports that it continues to satisfy its obligations to take effective measures to review policies that have the effect of creating or perpetuating racial discrimination.<sup>56</sup> In its Report, the U.S. reiterates its earlier position on the extent of private conduct it will regulate and cites a list of recent Executive and Administrative review meas-

ures.<sup>57</sup> The reports notes that Congress, too, routinely reviews and amends its legislation,<sup>58</sup> and that the judiciary constantly assesses the actions of the other two branches of government. In effect, the U.S. assures the Committee that racial discrimination is prohibited by U.S. federal law, while glossing over the constraints on suing private parties and the burdensome intent requirement of most discrimination lawsuits.

Although positing that “the same ongoing executive, legislative, and judicial review occurs in the states,” the U.S. provides no examples of such review.<sup>59</sup> In any event, states that have tried to review significant race-related laws and policies in order to improve matters have failed to do so. For example, racial profiling continues unabated, even in states that have, on their own initiative, instituted anti-profiling policies. For instance, more than three years of continuous statistics from Rhode Island and Missouri show no improvement, or deterioration in racial stop and search disparities, with no response from the federal government. Such efforts cannot be deemed “effective,” as the U.S. claims in its Report.<sup>60</sup>

### **U.S. MUST TAKE MEASURES, INCLUDING BY LEGISLATION, TO PROHIBIT RACIAL DISCRIMINATION BY ALL PERSONS, GROUPS OR ORGANIZATIONS**

The U.S. asserts that policies at all levels reflect this undertaking. As an example, the government offers that several administration initiatives are in place to strengthen federal protections in the area of *education*:<sup>61</sup> “[t]he President’s Board of Advisors on Historically Black Colleges and Universities (HBCUs)...administered by the Department of Education...designed to strengthen and ensure the viability of the historically black colleges and universities; a similar executive order to support tribal colleges and universities; the No Child Left Behind Act (NCLB); and the D.C. Choice Incentive Program.<sup>62</sup>

Notwithstanding somewhat increased support for HBCUs in recent years,<sup>63</sup> support for programs that increase minority access to traditional universities has decreased. The President’s proposed budget for fiscal year 2007 contains unprecedented funding cuts to the TRIO programs, which are designed to increase college access for low-income persons.<sup>64</sup> Additionally, NCLB, covering elementary and secondary education, is inadequate, due to its imposition of impracticably stringent educational standards, without a corresponding increase in resources to local educational agencies. In particular, the failure to provide resources to low-performing schools or waivers to states regarding com-

pliance requirements with NCLB undermines NCLB's own goals. As a result, substantial disparities persist in the educational performance of racial minority students and white students, and of students of low-socio economic status and economically advantaged students.

### Racial Profiling

In this context, the U.S. also refers to efforts it has made in the area of *racial profiling*. The Report states that the mission of the Department of Justice's Civil Rights Division is combating racial profiling. The U.S. claims that it issues policy guidance to federal law enforcement officials concerning racial profiling, and that it has established a new grant program to strengthen prohibitions on racial profiling.<sup>65</sup>

The government specifically cites a June 17, 2003 policy guidance issued by the Department of Justice to ban federal law enforcement officials from engaging in racial profiling.<sup>66</sup> This guidance is, to say the least, inadequate and has been ineffective for the following reasons: "it does not cover profiling based on religion, religious appearance, or national origin; does not apply to state or local law enforcement agencies; does not include enforcement mechanisms; does not specify punishment for violating officers/agencies not in compliance; and contains a blanket exception for 'national security' and 'border integrity' cases. [Finally,] the guidance is advisory, and hence is not legally

binding."<sup>67</sup> Rather than curtail racial profiling, the exceptions in the guidance have actually encouraged the profiling of Latinos, Arabs, Muslims and South Asians in the wake of the 9/11 attacks. Because it does not require legal proof of criminal suspicion, the U.S. has disproportionately targeted Arabs, Muslims and South Asians through a variety of mechanisms including FBI questioning of Muslims, a special registration program (National Security Entry-Exit Registration System — a special registration program for immigrants already in the U.S. from primarily Arab, Muslim or South Asian countries, requiring them to be fingerprinted, photographed and questioned), border crossing stops, no-fly lists, and religious and financial surveillance.<sup>68</sup>

Worse still, the guidance has had the effect of creating a justification for state and local law enforcement agencies to racially profile Arabs, Muslims and South Asians in routine traffic stops, where national security concerns are minimal.<sup>69</sup> Thus, the policy guidance, in effect, *encourages* racial profiling, particularly because of its "national security" exception. The guidance hardly constitutes the "resolute action" this Committee requires "to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of 'non-citizen' population groups..."<sup>70</sup> It also flouts the Committee's direction to consider the "potential indirect discriminatory effects of ...domestic legisla-

tion...[concerning] terrorism [or] immigration...[on] non-citizens....”<sup>71</sup>

Regarding the Section 1906 grant program,<sup>72</sup> the U.S. established the program in 2005, but this effort was also inadequate in terms of identifying and ending racial profiling. As a voluntary program, the grants would tend to attract self-motivated agencies but not those who denied the existence of, or wished to suppress, racial profiling problems in their agencies. In addition, the U.S. fails to mention that it has continuously refused to enact the End Racial Profiling Act (ERPA), which has been continuously introduced in the U.S. House of Representatives and U.S. Senate since 1997. Unlike the Section 1906 provision, ERPA would *require* all law enforcement agencies to ban racial profiling; create and implement anti-racial profiling policies; and collect and report data on stop and search activities by race and gender. ERPA would also provide for the loss of federal funding for agencies found to have engaged in racial profiling, and would create a private cause of action for racial profiling victims.<sup>73</sup>

We also note that the U.S. has undertaken no new racial profiling prosecutions of law enforcement agencies or individual officers, even in the face of mounting evidence of racial disparities in police uses of force, especially in the deployment of tasers and electronic stun guns.<sup>74</sup> In 2003, President George Bush declared that racial profiling is “wrong, and we will end it in America.”<sup>75</sup> The U.S. report has provided little evidence

that the U.S. has the will, or a timetable, to fulfill its promise to end racial profiling. The U.S. is thus in violation of this Committee’s directive to “take the necessary steps to prevent questioning, arrests and searches which are...based solely on the physical appearance...color or features or membership of a racial or ethnic group....”<sup>76</sup>

The U.S. also refers to the passage of certain legislative measures that aim to eradicate different types of discrimination, among them the Help America Vote Act (HAVA), also discussed in Article 5 below. However, the U.S. enacted but then, when its protections were most needed, deprived HAVA of any force it might otherwise have had. In the weeks leading up to the 2004 presidential election, the Department of Justice argued in multiple litigations that private citizens could not enforce *any* rights under HAVA, only the Department itself could do so.<sup>77</sup> As a result, voters using “provisional ballots” were disfranchised if they cast their votes in the wrong precinct (but right city). This transformed the provisional balloting scheme into a meaningless sham—presenting the voter with a decoy ballot while effectively disfranchising him or her.

***TAKE AFFIRMATIVE ACTION TO ENSURE DEVELOPMENT AND PROTECTION OF MINORITY GROUPS IN SOCIAL, ECONOMIC, CULTURAL AND OTHER FIELDS (ARTICLE 2 (2))***

The U.S. asserts that the proper goal of affirmative action is to remedy the effects of past and

present discrimination. Remedial measures, while they may or may not be race-based, must not result in quotas or “numerical straightjackets,” nor give preference to “unqualified individuals,” unduly burden others, or operate after their purposes are served, and must be narrowly tailored to serve a “compelling government interest.”<sup>78</sup> The U.S. cites some measures that may fit this description.<sup>79</sup>

In 2001, the Committee expressed concern at the U.S. claim that the “Convention *permits*, but does not *require*” affirmative action, emphasizing that such action is not permissible when warranted by the circumstances such as “persistent disparities.”<sup>80</sup>

Acknowledging that the Convention requires special measures when warranted, the U.S. claims that, “when circumstances warrant,” the precise measures are matters to be determined by the U.S.<sup>81</sup> The U.S. also notes that, to date, its highest federal court, the U.S. Supreme Court has not recognized the goal of achieving broad diversity as “compelling” outside of the educational setting, and that the “debate concerning reverse discrimination...continues.”<sup>82</sup>

The U.S. points out that, nevertheless, there are numerous such “special and concrete measures” in place, including efforts to promote fair employment, affirmative action in federal contracting practices, race-conscious educational admission policies and scholarships, as well as direct support for historically black colleges and universities, Hispanic-serving institutions,

and Tribal Colleges and Universities.<sup>83</sup> We address these initiatives below.

Affirmative action is one of the most successful policies designed to close the gap between American ideals of equal opportunity and the stubborn realities of structural racism, sexism and institutional exclusion. The debate over affirmative action carries with it enormous implications for the lives of women and people of color, since such programs have created opportunities too long denied them. A 2005 analysis of affirmative action in U.S. law schools found that ending affirmative action would leave many Latinos and African-Americans behind. According to that analysis, as of 2005, there were “roughly 80,000 Latino and African-American attorneys and judges in the U.S., compared with about 6,200 in 1970, much of this remarkable thirteen-fold increase due to the presence of affirmative action policies at law schools.”<sup>84</sup> Indeed, where such programs are eliminated, the numbers of minority and women drop dramatically.<sup>85</sup> At law schools in **California, Texas** and **Washington**, where affirmative action in admissions is now prohibited, African-Americans were 6.65% of the enrolled population before the ban,<sup>86</sup> and now comprise a mere 2.25% of the enrolled population.<sup>87</sup> The Latino population also dropped from 11.8% to 7.4% at these schools.<sup>88</sup> In the California law school, in the 3 years before the ban, 13 Filipinos were admitted there, and in the 3 years following its passage, only 3 Filipinos were admitted.

Despite its role in providing opportunity to countless individuals across scores of American institutions, affirmative action has suffered severe “reputational harms” from the concerted efforts of highly-funded and well-organized detractors. Opponents of affirmative action have attacked these policies in the federal courts with increased frequency, as discussed below. Foes of affirmative action programs also attack the policy by financing referenda to repeal race-conscious programs in the states. Most recently, a well-funded conservative group from California placed on Michigan’s November 2006 ballot an amendment to the Michigan Constitution to eliminate affirmative action and outreach programs involving state and local governments. The proposal, passed by the voters, was deceptively titled the “Michigan Civil Rights Initiative.” Similar initiatives are being considered in other states.

### FEDERAL GOVERNMENT DIMINISHES INVOLVEMENT IN TRADITIONAL CIVIL RIGHTS WORK

Since 2001, the federal government has sought to recast its role in the civil rights arena, notably by diminishing its traditional involvement in race issues.<sup>89</sup> Likewise, the Federal Bureau of Investigation (FBI) is investigating fewer civil rights abuses,<sup>90</sup> and hiring in the Justice Department has shifted in favor of those with strong conservative credentials over those with civil rights experience.<sup>91</sup> That shift accounts for a major dif-

ference in the types of cases being brought. The division is bringing fewer voting rights and employment cases involving systematic discrimination against African-Americans, and more alleging reverse discrimination against whites and religious discrimination against Christians.<sup>92</sup>

### FEDERAL GOVERNMENT CREATES BARRIERS TO AFFIRMATIVE ACTION

Rather than promoting access to equal and adequate educational opportunities for minorities, the federal government has created barriers, as the following examples demonstrate. The Supreme Court recently ruled that school districts may not take race into account to remedy racial segregation in public schools.<sup>93</sup> The U.S. submitted an *amicus* brief in support of white parents, who had sued to end the desegregation plans adopted voluntarily by the school districts. In another set of cases concerning affirmative action,<sup>94</sup> the administration filed *amicus* briefs opposing a university’s program, which was designed to encourage a diverse student body.<sup>95</sup> In order to deflect criticism, the administration announced plans to increase funding to historically black colleges and universities (“HBCUs”) and Hispanic-serving colleges and institutions (“HCIs”).<sup>96</sup> Notwithstanding somewhat increased support for HBCUs in recent years,<sup>97</sup> support for programs that increase minority access to traditional universities has decreased. The President’s proposed budget for fiscal year 2006 included funding cuts to



TRIO programs.<sup>98</sup> The programs, among them Talent Search and Upward Bound, often benefit minorities who are the first in their families to attend college. Such an approach, combined with the administration's position in the Seattle and Louisville cases, reveals a failure on the part of the government to appreciate or support the well-documented benefits of integrated education.

Rather than recognizing the benefits of affirmative action, the U.S. Commission on Civil Rights (USCCR) released a report on August 28, 2007, warning that affirmative action might harm minority students.<sup>99</sup> The USCCR based the report largely on questionable and contested data implying that the race-conscious admissions system resulted in a mismatch of minority students. This was allegedly due to the fact that some minority students are admitted to top institutions in the nation but fail to obtain their law school degrees or fail to pass the bar on the first attempt.<sup>100</sup> The report also claimed that minorities in race-blind systems are capable of achieving greater success in law school and the legal profession than those in a race-based admissions system.<sup>101</sup> This research was criticized by other academics as incomplete and vague, and because it failed to account for other factors that may have contributed to lower performance by minority law students, such as economic status prior to and while attending law school.

Beyond its failure to support most affirmative action policies, the federal government

has been criticized for turning those policies on their head, by using them to protect whites rather than minorities. For example, the current administration ordered the Department of Justice' Civil Rights Division to sue Southern Illinois University on behalf of white men opposing fellowships offered to minority and female students.<sup>102</sup> The University dropped the program in order to avoid a protracted and expensive court battle.<sup>103</sup>

The federal government fails to support minority contractors. For example, in the aftermath of Katrina, minority firms got few contracts.<sup>104</sup> Rather than giving the contracts to the high number of minority-owned businesses in the region, a spokesman for the federal government said that the "no-bid awards were given out to known players who could quickly provide help in an emergency situation."<sup>105</sup> He continued: "It was about saving lives, protecting property, and going to who you go to, to get what you need."<sup>106</sup> Indeed, after Katrina, there was a weakening of affirmative action rules for contractors as well as a suspension of the "prevailing wage" law, which was seen by many as likely to hurt workers of color.<sup>107</sup>

Relatedly, the federal government not only fails to adequately protect minorities from pay inequity, but also, in some cases, is directly responsible for wage discrimination. In 2007, a federal arbitrator ruled that the merit-pay system implemented by the Securities and Exchange Commission (SEC)

in 2003 discriminated against African-Americans and older workers.<sup>108</sup> Action had been brought by the National Treasury Employees Union, which presented evidence that African-Americans, particularly those in higher salaried positions, received unequal pay raises under the SEC's system. In addition, the Equal Employment Opportunity Commission (EEOC) continues to receive roughly 1,000 complaints a year regarding wage discrimination and has recovered approximately \$43 million for victims of wage discrimination since 1997.<sup>109</sup> Despite the persistence of wage discrimination, however, the U.S. submitted an *amicus* brief in support of the defendant company in the U.S. Supreme Court case, *Ledbetter*. The Court ruled that discriminatory salary decisions have no continuing effect but must be challenged within a short time of the first paycheck rather than when the employee learns of the relative inequity between her salary and those of others similarly situated employees—makes it more difficult to challenge pay discrimination, a claim historically utilized by women and minorities to seek pay equity.<sup>110</sup> While some in Congress have indicated that they will try to pass legislation to remedy the ruling, President Bush has indicated that he will veto any such legislation.<sup>111</sup>

### ARTICLE 3 CONDEMN AND ERADICATE ALL RACIAL SEGREGATION

Article 3 requires States Parties to condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate “all practices of this nature.” This Committee has asserted that these practices includes segregation in housing, where “group differences in income, which are sometimes combined with differences of race, color, descent and national or ethnic origin, so that inhabitants are stigmatized and suffer a form of discrimination in which racial grounds are mixed with other grounds.”<sup>112</sup> Thus it is insufficient for the U.S. to state that no formal segregation or apartheid-like policies or practices are permitted in U.S. territories, and that such practices should be condemned and eradicated wherever they are found.<sup>113</sup>

Many cities in the U.S., including the capitol, Washington, D.C., remain, in effect, residentially segregated. In Washington, between 1980 and 2000, the percentage of racial diversity of the “typical neighborhood of a white person” declined from 63% white in 1980 to 61% white in 2000.<sup>114</sup> This minor shift in racial integration is also evident when looking at the “typical neighborhood of a black person,” which declined from 86% black in 1980 to 80% black in 2000.<sup>115</sup> (This *de facto* segregation is further clarified when viewing income levels vis-à-vis housing costs. In 2003, the median income for

blacks and whites was \$33,658 and \$74,291, respectively.<sup>116</sup> These income levels, when viewed in relation to the District's home prices, greatly limit the physical areas available to blacks in relation to whites.)

Major U.S. cities are more segregated now than they were in 1860,<sup>117</sup> the year before the Civil War.<sup>118</sup> According to a popular index on housing integration, a score of zero represents "perfect integration" while a score of 100 represents "absolute segregation."<sup>119</sup> The scores many of the major cities receive are nothing less than startling: 80.8 for Chicago, 81.1 for New York City, 65.7 for Boston, 60.9 for San Francisco, and 72.3 for the birth place of America, Philadelphia.<sup>120</sup> These figures suggest that, unless the U.S. begins to remedy the widespread and protracted incidence of residential segregation in the U.S., it must be considered in violation of Article 3.<sup>121</sup>

As discussed in Article 2, the U.S.' failure to remedy housing segregation has affected minority communities' access to vital community resources such as education and social services.

## ARTICLE 5 ENSURE EQUAL TREATMENT BEFORE THE LAW

Article 5 requires member states to eliminate discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color or national origin, to equality before the law in the enjoyment of these

rights: equal treatment before judicial organs; security against public or private violence; political rights; free movement; to leave and return; to nationality; to marry, and of choice; to freely own property; to inherit; to freedom of thought and expression; to peaceful assembly and association; to work and freely choose employment; equitable work conditions; protection against unemployment; pay-work equity; and just and favorable remuneration.

Article 5 is of central importance to CERD. States must ensure the rights listed in Article 5 are available to all. If there is any restriction on these rights, it must not be racially discriminatory in purpose or effect. Moreover, this list is not exhaustive. "To the extent that *private* institutions influence the exercise of rights or the availability of opportunities, the state party must ensure that the result has neither purpose nor effect of perpetuating racial discrimination."<sup>122</sup>

People of color are substantially more likely to be poor, have less access to quality education and employment opportunities, and in part because of these factors, more likely to become court-involved. The legal and political successes of the civil rights movements of the 1950s and 1960s involved, mainly, the removal of formal, explicit barriers to equality and racial desegregation. An important first step, this was followed by gains in educational attainment, income, and political and civic participation. Since then, the chal-

lenge has been to address less explicit forms of discrimination and injustice.

***ENSURE EQUAL TREATMENT BY COURTS, POLICE & PRISON AUTHORITIES***

**RIGHTS OF THE CRIMINALLY ACCUSED TO COUNSEL**

Fundamental to a criminal justice system that is fair to all is the right of a person accused of a crime to be assisted by competent counsel. CERD Article 5 provides for the right to equal treatment before all judicial bodies. The Committee has stated that all arrested persons should be guaranteed a right of assistance by counsel.<sup>123</sup> This principle is also embodied in the Bill of Rights to the U.S. Constitution. In 1928, the U.S. Supreme Court ruled that the Sixth Amendment to the U.S. Constitution required the federal government to provide counsel to indigent persons charged with felonious wrongdoing in federal court proceedings. Forty years ago, in the landmark case *Gideon v. Wainwright*, the Supreme Court extended that holding to the states, ruling that states must provide counsel to indigent felony defendants in state court proceedings. The Supreme Court thereafter expanded the right to indigent adults charged with misdemeanor offenses and juveniles charged with delinquent conduct. It also ruled that the Sixth Amendment's right to counsel was actually the right to "effective assistance of counsel."<sup>124</sup>

Approximately 80% of felony criminal defendants rely on the federal or state government to appoint counsel to represent them. The U.S. asserts that "counsel for indigent defendants is provided without discrimination based on race, color, ethnicity, and other factors," and that the federal and state governments employ "a variety of methods for delivering indigent criminal defense services, including public defender programs, assigned counsel programs, and contract attorneys."<sup>125</sup> The U.S. points to a study that found that "conviction rates for indigent defendants and those with their own lawyers were about the same in both federal and state courts."<sup>126</sup> A closer reading of that report reveals that while indigent defendants and non-indigent are "convicted" (i.e. found guilty) at about the same rate in both the state and federal courts, indigent defendants are "incarcerated" more than non-indigent defendants; 11% more at the federal level and 17% more at the state level.<sup>127</sup>

These latter statistics more faithfully reflect the poor state of indigent defense systems nationwide. The right to counsel for the indigent accused, for both juveniles and adults, is fast becoming illusory in many U.S. states, in both nature and extent, and state public defender programs remain grossly underfunded, with the brunt often borne by racial minorities who are confined, given discriminatory policing and selective prosecution, at disproportionate rates.<sup>128</sup> Examples of seriously deficient indigent defense systems are set forth below, and include systems administered by counties in Michigan,

Washington State, Louisiana, Mississippi and Texas. Montana, which has remedied its indigent defense system, may provide a model for these other states.

By failing to adequately fund and supervise their indigent defense systems, which are relied upon principally by people of color, states violate Article 5, the Sixth and Fourteenth Amendments to the U.S. Constitution, and analogous provisions of state constitutions.

### **Failing Indigent Defense System in Michigan**

**Michigan**, “[i]n 1855, was one of the first states to require by statute that counsel be appointed and compensated for indigent defendants,” placing the obligation of defense services on the counties, where it remains today.<sup>129</sup> Still, it remains Michigan’s obligation to ensure that these legal services meet basic constitutional standards. Six counties have a public defender office, while the remaining counties used contracted counsel or (a majority) assigned counsel.<sup>130</sup> As of 2002, at least 46 states provided some or all of the funding for indigent defense, and Michigan is not one of them.<sup>131</sup> “In the last 30 years, Michigan has launched two major reform efforts...one commissioned by the Chief Justice in 1975, and another by the State Bar in 1988.”<sup>132</sup> These efforts failed, and Michigan is at the bottom of the list in terms of the quality of its indigent defense services. More than one-

third of all assigned defense counsel seek to be removed from the rosters each year, leaving inexperienced attorneys to represent defendants. “In some areas, attorneys’ fees have been cut by 10 percent and are at 1970 levels...often paid months late.”<sup>133</sup> While 38 states have statewide standards for appointed attorneys, Michigan has none.<sup>134</sup>

### **Failing Indigent Defense System in Washington State**

In a 2004 report, the ACLU documented the problems with **Washington State’s** indigent defense system, where “public defense services are handled at the city and county level.”<sup>135</sup> Although the state passed legislation requiring local governments to adopt standards for the delivery of indigent defense services in 1989, 15 years later, a majority of counties had not adopted them, the result being “a checkered system of legal defense with no guarantee that a person who is both poor and accused receives a fair trial.”<sup>136</sup> Although indigent defense systems are publicly supported with tax dollars, they are not held to the standards of accountability generally expected of government programs.

In December 2004, the ACLU and Columbia Legal Services sued Grant County, the Washington State County with the most deficient indigent defense system, for violating the Sixth and Fourteenth Amendments to the U.S. Constitution as well as provisions of the Washington State constitution. Grant county suffered from systemic inadequacies in its

public defense system including the failure to monitor and oversee the public defense system; to provide adequate funds for it; to ensure that public defenders were qualified and that they had reasonable caseload limits, adequately communicated with clients, did not overlook important evidence concerning innocence, did not fail to interview witnesses, did not waive important rights without properly advising clients of them; and did not fail to file critical motions.<sup>137</sup> As a result, indigent defendants in Grant County made decisions about their rights or contested issues without adequate factual or legal investigation by their attorneys, were deprived of meaningful opportunities to present defenses, as well as the services of investigators and experts. The lawsuit was settled in November 2005, with Grant County agreeing to overhaul its public defense system, by improving its quality, complying with standards endorsed by the state bar association, and submitting to comprehensive monitoring.

### **Failing Indigent Defense System in Louisiana**

When the levees broke on August 30, 2005 in **Louisiana**, there were approximately seven thousand men and women awaiting trial in New Orleans who needed counsel. Nearly 5,000 were in Orleans Parish Prison. Most remain confined there or elsewhere. The majority still have not had access to counsel, including some who have fully served their sentences.<sup>138</sup> Louisiana is the only state in the nation to attempt to fund the

majority of its constitutional obligation to provide indigent defense services through court costs assessed primarily on traffic tickets. For over 30 years, the state has been on notice that its funding structure threatens the integrity of the entire system of criminal justice. In fact, Louisiana fails nine and a half of the “Ten Principles of a Public Defense Delivery System” adopted by the American Bar Association (ABA) in 2002. The Ten Principles were created as a “practical guide” for the delivery of indigent defense services. They provide for, among other things, the assignment of counsel as soon as possible after arrest, reasonable attorney caseloads, and the supervision and systematic review of public defenders’ skills and performance.<sup>139</sup> Louisiana’s failures are due to its unstable funding combined with its failure to enact, enforce and monitor compliance with nationally recognized standards.<sup>140</sup> While some modest reforms were passed in 2006 (advancing uniformity in the system and improving oversight), much more remains to be done.

Orleans Parish, which once had 41 public defenders (all part-time), about the time of the storm had only seven. At that time, there was also no way to fund their work, as traffic tickets were not being assessed at the same rate as they were before Katrina. These attorneys had enormous caseloads, such that at least two judges halted prosecutions on indigent defendants in their courtrooms.<sup>141</sup> Bond hearings have lasted less than one minute.<sup>142</sup> Additionally, attorneys are seek-

ing the release of over 4,000 individuals being held in pretrial detention without counsel since the storm in August 2005.<sup>143</sup> In October 2006, when there were 11 attorneys in the public defender's office, these lawyers shared a staggering 3,000 cases.<sup>144</sup>

Although the system was broken long before Hurricane Katrina, it took the storm to bring about change. Katrina made people aware that the criminal justice system, and indigent representation in particular, was in crisis.<sup>145</sup> In April 2006, Orleans Parish judges appointed new members to the indigent defense board after the old board, responsible for overseeing the public defender's office, collapsed.<sup>146</sup> Important changes were made that required all attorneys to work full-time as public defenders. A practice of "vertical representation" was instituted that assigned attorneys to represent criminal defendants upon arrest rather than after charges were filed by the district attorney's office.<sup>147</sup>

In summer 2007, the Louisiana legislature passed a bill overhauling the indigent defense system in Louisiana.<sup>148</sup> It created a new statewide board and regional boards to supervise indigent defense, and raises funding from about \$20 million to about \$27 million.<sup>149</sup> Notwithstanding significant improvements in the public defender's office over the past year, the office is barely functioning. Attorneys struggle with overwhelming case-loads, often working seven days a week.<sup>150</sup> Lack of funding remains the biggest challenge.<sup>151</sup> A U.S. Department of Justice study

estimates that the Orleans public defender's office would need about \$10.7 million in its first year, and about \$8.2 million annually thereafter, in order to adequately represent its clients and serve the community.<sup>152</sup>

The costs of inadequate defense are borne by the criminal justice system and the community at large. When defendants are not adequately represented, they spend unnecessary time in jail, disrupting their own lives and costing taxpayers money. Public defender's systems also protect public safety.<sup>153</sup> "If you have an active, involved public defender's office that shows the weaknesses of a case to prosecutors, that advocacy puts pressure on prosecutors to make sure that police are investigating and building cases in a meaningful way...Adequate indigent defense benefits society as a whole, by reducing crime and promoting a more effective and fair criminal justice system."<sup>154</sup>

### **Failing Indigent Defense System in Texas**

Unable to afford effective counsel, poor African-American and Hispanic criminal defendants in East **Texas** are forced to rely on court-appointed attorneys. These attorneys often lack the resources, time or the will to vigorously defend their poor African-American and Hispanic clients. The overwhelmingly white court appointed attorneys work hard to secure quick plea agreements in order to maintain good relationships with the district attorney and district judges, who have

On September 1, 1993, an all-White jury in state court in Madison County, Texas convicted Lester Davis, a Black man, of delivery of a controlled substance (cocaine) to White undercover officer Robert Guard on or about May 17, 1990. After refusing to accept a plea agreement of 5 years, Lester Davis, at the request of the District Attorney was sentenced to 99 years in prison and fined \$10,000 for delivery of less than 28 grams of cocaine. He was sentenced 99 years although no drugs, money or weapons were found on his person or property. During trial, the State's own informant testified that Mr. Davis was not present during the drug transaction. Mr. Davis' court appointed attorney refused to subpoena and interview witnesses to testify on Mr. Davis' behalf, including a key eyewitness who later swore under oath that if called on to testify he would have testified that Mr. Davis was not present at the drug transaction nor was he the person who sold the undercover officer drugs. The testimony of this eyewitness would have corroborated the testimony of the State's informant that Lester Davis was not present during the drug transaction. Instead Lester Davis, an innocent man, served 10 years in prison before being released on parole. Lester Davis is currently on probation for the rest of his life.

considerable discretion in determining whether or not they continue to receive court-appointed work. As a result, poor defendants are often forced to accept quick plea agreements or face long prison sentences. The story of Lester Davis highlights this common trend in East Texas.

### **Failing Indigent Defense System in Mississippi**

Mississippi's constitution obligates the state to provide counsel for indigent defendants, yet the state provides no funding for indigent defense, burdening county governments with this expense.<sup>155</sup> The failure of the state to contribute to the defense of the poor has created a system of inadequate legal defense and a patchwork judicial system. "In some counties, an indigent defendant may wait up to a full year before he has his *first* conversation...with a court-appointed attorney."<sup>156</sup> These attorneys lack the resources to conduct basic investigations or gather evidence in these cases; indeed, several counties in the state share a single public defender.<sup>157</sup> In addition, some pre-trial detainees spend months, even years, in overcrowded jails before they're released or go to trial.<sup>158</sup>

### **A Mended Indigent Defense System in Montana**

In **Montana**, the ACLU brought a class-action suit in February 2002 seeking to remedy the state's failure to provide sufficient



funding or guidance to county-based indigent defense systems in violation of the Sixth and Fourteenth Amendments to the U.S.

Constitution and also sections of the Montana Constitution and state laws.<sup>159</sup> Montana, like Michigan and **Washington**, had a fragmented indigent defense system with counties responsible for design and administration of indigent defense programs. The state, required to set standards for the provision of such services, failed to do so, or to exercise any supervision to ensure that services were constitutionally adequate. The state failed to require the counties to hire qualified defenders, train them in criminal defense, issue written practice standards, or monitor or limit excessive workloads. The State also permitted counties to under-fund these services such that the lack of financial resources actually impeded the delivery of representation, refusing to guarantee full reimbursement of allowed expenses. This obstructed defense lawyers' ability to engage in the legally required adversarial advocacy and indigent clients suffered multiple deprivations of rights, including being unable to present meritorious defenses, challenge the evidence against them, receiving harsher sentences than warranted by the facts. The state had been aware of these problems since 1976.<sup>160</sup>

Recognizing these problems, in June 2005, the Montana legislature passed the Montana Public Defender Act, groundbreaking public defender legislation creating a new statewide office.<sup>161</sup> Passed in the wake of the ACLU lawsuit, the Montana bill is the first in the

nation crafted with the intent of addressing the ABA principles described above.

### **Juvenile Waiver Of Counsel in Ohio**

Children should not be left to navigate complex and adversarial delinquency proceedings on their own. Juvenile delinquency court judges and officers, and the rules under which they operate, should ensure that children's due process rights are protected at all costs. The U.S. Supreme Court has held that juveniles facing delinquency proceedings have a right to the aid of counsel to protect their interests.<sup>162</sup> In their standards, leading professional bodies concur, and state further that children should never be permitted to waive appointment of counsel. In 2005, the National Council of Juvenile and Family Court Judges, a membership organization consisting of over 1,700 juvenile and family court judges, commissioners, magistrates and referees, issued national juvenile delinquency guidelines, calling for juvenile court administrators to ensure that "counsel is available to every youth at every hearing."<sup>163</sup> The Council advised that judges should only permit children to waive counsel after consultation with an attorney.<sup>164</sup> Also in January 2005, the American Council of Chief Defenders and the National Juvenile Defender Center promulgated core national criteria by which indigent defense delivery systems and the branches of government responsible for provision of counsel may provide these services, beginning with "uphold[ing] juveniles' right to counsel throughout the delinquency process and recog-

nize[ing] the need for zealous representation to protect children.”<sup>165</sup> That principle further notes that the “system should ensure that children do not waive appointment of counsel.”<sup>166</sup>

A few states prohibit waiver, others require children to consult with an attorney before waiving their right to counsel, and still others, like **Ohio**, even permit waiver without consultation. In Ohio, the right to counsel in juvenile delinquency proceedings simply does not exist.<sup>167</sup> There, court rules permit waiver of counsel in juvenile delinquency proceedings before consulting an attorney.<sup>168</sup> As a result, as many as 80% of children charged with criminal wrongdoing in some Ohio juvenile courts are not represented by counsel.<sup>169</sup> Most of these children waive their right to legal representation shortly after their arrest.<sup>170</sup> A growing number of cases show that youth not represented by attorneys are more likely to enter guilty pleas even when they may have viable defenses or may be innocent.<sup>171</sup> Many Ohio youth also fail to understand the serious charges they may face: roughly 75% of incarcerated youth need mental health services, and nearly half of those incarcerated at Ohio Department of Youth Services facilities need special educational services.<sup>172</sup> Additionally, many children in the justice system have been abused or neglected, and are 50% more likely to be arrested as juveniles than other children.<sup>173</sup>

In March 2006, the ACLU and its Ohio branch, the Children’s Law Center, and the Ohio Public Defender’s Office filed a peti-

tion calling for the state court to protect children’s right to counsel when they are accused of crime. They advocated changing the court rules to require every child to consult with an attorney prior to waiving the right to counsel.<sup>174</sup> An estimated two-thirds of the 147,867 juveniles who were the subject of delinquency proceedings or unruly complaints resolved in 2004 faced those proceedings without an attorney, and roughly 15% of children committed to Ohio Department of Youth Services, and 20% of those placed at community corrections facilities, were unrepresented by counsel during their delinquency proceedings.<sup>175</sup> Most children waive this right and do so without an appreciation of their rights or understanding the consequences of waiver. Court officials do not take sufficient time to ensure the children are aware of the role defense counsel can play, and the possible repercussions of a finding against them.<sup>176</sup>

Advocates made some inroads in September 2007. The state’s highest court reversed a lower court finding that a juvenile could waive his right to counsel without consulting an attorney, ruling that youths charged with crimes must consult with both their parents or guardians and a lawyer before deciding to forego legal representation.<sup>177</sup>

### **No Counsel for Asylum Seekers**

Although the U.S. has agreed to be bound by treaties protecting refugees by guaranteeing their right to asylum, its mandatory detention

policies, including placing individuals in what is called “Expedited Removal,” subject asylum seekers to prolonged and unwarranted detention despite the fact they present no danger or flight risk.<sup>178</sup> Detention also negatively impacts access to legal assistance in what are highly adversarial removal proceedings.<sup>179</sup> Despite their complexity, adversarial nature, and serious consequences, about 90% of federal detainees go through these proceedings unrepresented by counsel. Even where they are able to retain private counsel, detainees can find it difficult to retain private counsel because detention facilities are often in remote locations, detainee visitation schedules are inflexible, and the facilities’ impose advance notice scheduling requirements. Detention impairs the detainee’s right to present evidence in his or her defense — extensive documentation is required to demonstrate family connections, employment history, commercial connections, and character. Securing originals and copies can be onerous and time-consuming, and all but impossible for detainees.

### **Inadequate Tribunals For Suspected “Enemy Combatants”**

The military commissions authorized by the 2006 Military Commissions Act (MCA) to try detainees at Guantanamo Bay neither guarantee an independent trial court nor prohibit the admission of testimony taken under coercive circumstances. The MCA curtails the right to judicial review of detentions and the right to a remedy for human rights viola-

tions, but only in the case of non-U.S. citizens. The Act is therefore discriminatory on the basis of nationality. Only foreign nationals designated as “alien unlawful enemy combatants” can be tried by military commissions. These trials are likely to provide these individuals a second-class system of justice, one inferior to that enjoyed by U.S. citizens accused of the same or similar crimes, violating the prohibition on the discriminatory implementation of the right to a fair trial.

In short, the military commissions do not afford a fair trial under the U.S. Constitution, U.S. international treaty obligations, customary international law, or the Uniform Code of Military Justice. It is even more troubling that even an acquittal by these commissions — and to date, only three people have been permitted to appear before them — does not result in release. Detainees are simply returned to the general population at Guantanamo where they are held indefinitely as “enemy combatants.”

The military commission proceedings were first used in August 2004 but were halted in November 2004 after a federal district court, in *Hamdan v. Rumsfeld*, held that the use of military commissions to try detainees violated the U.S. Constitution and international law. In July 2005, a federal appellate court unanimously overturned the lower court’s decision and ruled that the President has the power to create military commissions. The U.S. Supreme Court ruled on the matter in

June 2006, invalidating the entire system on the grounds that only Congress could enact such a commission. In December 2006, Congress passed the MCA effectively reinstating a commission system with many of the same flaws. Litigation concerning this system is ongoing and, as of November 2007, only three Guantanamo detainees have been formally charged under the MCA.

### RACIAL & ETHNIC PROFILING

“States parties [to CERD] should take the necessary steps to prevent questioning, arrests and searches which are...based solely on the physical appearance of a person...”<sup>180</sup> and must “[t]ake resolute action to counter any tendency to...profile...[any] ‘non-citizen’ population groups.”<sup>181</sup>

The U.S. Report informs the Committee that U.S. law prohibits racially discriminatory actions by law enforcement agencies.<sup>182</sup> The Report also advises that since January 2001, the Justice Department’s Civil Rights Division has reached 14 settlements with such agencies in cases involving allegations of excessive use of force, discrimination in conducting traffic stops and detention, and other police activities. According to the report, the Justice Department investigates and provides technical assistance to agencies where constitutional violations related to use of force are alleged;<sup>183</sup> and has issued racial profiling guidelines for federal law enforcement officers. The report further asserts that private lit-

igants may sue agencies based on allegations of racially discriminatory police activities; and that federal, state and local agencies are heavily involved in training police officers in diversity issues including defusing racially and ethnically tense situations.<sup>184</sup>

This description is deficient, since the government specifically references only 9 of the 14 settlements in its Report. Of these settlements, 7 have expired, and 2 are expiring in the near future. Moreover, studies have documented the persistence of racial profiling in some of these jurisdictions, such as Cleveland, Ohio (for additional state and local level examples, see below). Moreover, the recent release of a government report highlights continued racial profiling of African-Americans and Hispanics, nationally.<sup>185</sup> Thus, in recent years, the government has in fact failed to adequately enforce the federal anti-discrimination statutes and brought too few “pattern or practice” cases, making urgent the passage of federal anti-profiling and data collection legislation.

The recent government report referenced above found that while Hispanic, black, and white drivers were stopped by the police about as often, Hispanic drivers or their vehicles were searched 8.8% of the time, black drivers 9.5% of the time, and white drivers only 3.6% of the time.<sup>186</sup> Sadly, courts frequently do not take disparate impact data into account: In *Chavez v. Illinois State Police*, the ACLU of Illinois challenged drug interdiction policies adopted by the Illinois

State Police that resulted in the racial profiling of Illinois motorists, with state officers abusing their discretion by discriminating against motorists of color, as documented by significant statistical evidence showing higher numbers of Hispanic and African-American motorists stopped, searched and detained.<sup>187</sup> This evidence was ignored by the trial and appellate courts, which dismissed the case in 2001.<sup>188</sup>

With respect to the Department of Justice's racial profiling guidelines for federal law enforcement officers, while the guidelines prohibit racial profiling they provide no rights or remedies and thus cannot be used to hold the government accountable for its actions. Additionally, they include a broad and largely undefined exception for "national security," a loophole that has been used to circumvent the policy guidelines as a whole. Meanwhile, racial profiling persists, and in the wake of 9/11, larger numbers of individuals and communities of color are being affected, often due to the prevailing anti-immigrant sentiment and hostility that pervades the country.<sup>189</sup>

The U.S. claims that private litigants may sue law enforcement agencies based on allegations of racially discriminatory police activities. While this is true, the burden of proof of intent to discriminate under the Fourteenth Amendment and Title VI is impossibly high, and Fourth Amendment protections against unwarranted search and seizure have been diluted. Thus, it is very hard to prevail in

these cases, and victims are deterred from suing. In this regard, we note the U.S. government's failure to adopt the definition of "racial discrimination" under the CERD treaty to provide broader protections for "any distinction, exclusion, restriction or preference ... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise" of human rights.

With respect to the government's assertions about its outreach programs established in the aftermath of 9/11 for Arab and Muslim communities, again, the programs do exist, but other government programs, including Special Registration<sup>190</sup> and dragnet-style FBI questioning of Muslim, South Asian, and Arab men, undercut the benefits of such outreach efforts. A 2006 study supported by the Department of Justice showed that Arab-Americans feared the intrusion of these and other federal policies and practices even more than individual acts of hate or violence.<sup>191</sup>

"Despite evidence that it is ineffective and often makes us less safe, many law enforcement officials continue to rely on this blunt race-based tactic in hopes of apprehending more offenders."<sup>192</sup> This abuse has worsened since 9/11, with reports of at least 32 million people, many non-citizens, racially profiled since then.<sup>193</sup>

### State-Level Policy Changes Fail to Eliminate Profiling

Across states, despite the strenuous legal and legislative efforts of advocates, it has proven nearly impossible to truly extinguish profiling. In **Massachusetts**, for example, in 2000, the state legislature passed a law requiring local police departments to collect traffic stop data for one year. However, the law was silent about how the data would be analyzed and what should be required in terms of follow-up. A 2004 study found tremendous disparities continued to exist: of 341 local agencies, 249 suffered from one or more type of substantial racial disparity.<sup>194</sup> Those jurisdictions with an appearance of race and gender disparities were then required to collect data for one additional year. But that period has expired, and now there is no permanent requirement of data collection for monitoring purposes. Without accurate data collection in Massachusetts, the extent of racial profiling in traffic stops can only be gleaned through anecdotal evidence.

In **Texas** in 2001, state legislation passed with the goal of requiring all Texas police agencies to collect data for all traffic stops and submit an annual report of their findings to their local governing body. Yet, according to an advocacy group's 2007 report on local agencies' compliance with data collection in 2005, profiling continues unabated:

- “3 out of 4 agencies (72%) reported consent searching blacks more fre-

quently than Anglos in 2005,” an increase from the 2004 statistic.

- “3 out of 5 agencies (56%) reported consent searching Latinos more frequently than Anglos in 2005.”
- The Houston Police Department was over 3 times more likely to consent search blacks than whites and nearly 2 times more likely to search Hispanics.
- The Austin Police Department was over 3 times more likely to consent search blacks than whites and 2.8 times more likely to search Latinos.<sup>195</sup>

### Consent Decrees Eradicating Profiling Are Difficult to Enforce

In Southern **California**, the Los Angeles Police Department (LAPD) has, for over 40 years, harassed, intimidated and committed violence against persons of color in the Los Angeles area. The ACLU's California branch represents the community in an ongoing consent decree between the U.S. and the City of Los Angeles to reform the LAPD by eradicating the practice of racial profiling.<sup>196</sup> In May 2006, the ACLU was able to extend the consent decree for 3 years. Racial profiling data collected pursuant to the decree reveals that black and Latino motorists were more than 3 times as likely than white motorists to be asked to exit their vehicles; black motorists were more than 4 times, and Latino motorists nearly 4 times, as likely than white motorists to be patted down; and black motorists were nearly 6 times as likely and Latino motorists more than 5 times as

likely than white motorists to be asked to submit to a search. Absent judicial oversight and community vigilance, the LAPD has demonstrated itself unwilling to change its practices.

### **Landmark Settlement Banning Consent Searches in California**

In the late 1990s, the California ACLU learned that African-Americans and Latinos were being stopped and searched at two and three times the rate of whites, even though law enforcement was no more likely to find any evidence of criminal activity.<sup>197</sup> The ACLU launched a statewide campaign and in 1999, also filed suit against the **California Highway Patrol (CHP)** and Bureau of Narcotics on the grounds that they systematically targeted, stopped and searched motorists on the basis of race when enforcing traffic laws and operating the drug interdiction program, “Operation Pipeline.”<sup>198</sup> Latinos were approximately three times as likely to be searched by CHP officers than whites in the Central and Coastal Divisions, and African-Americans were approximately twice as likely to be searched in those areas.

In 2002, the CHP issued an order to all CHP commanders mandating a six-month moratorium on consent searches, following a review of data that revealed racially-discriminatory search rates—an extraordinary victory, as it marked the first time a major law enforcement agency voluntarily suspended a key drug interdiction tactic in the face of evi-

dence that it operates in a discriminatory manner. Two years later, the ACLU reached a landmark settlement with the CHP containing significant reforms, including making the CHP the first law enforcement agency in the country to ban consent searches. The settlement also banned drug-related pretext stops; prohibited officers from engaging in racial profiling; required comprehensive data collection for each stop and the creation of a category of citizens’ complaints specifically covering racial profiling; and, it created a new high-level position of Internal Auditor to focus on racial profiling and report directly to the CHP Commissioner to promote accountability and ensure the implementation of the settlement.<sup>199</sup> Together with others, from 1999 to 2002, the California ACLU also lobbied the California Legislature for passage of mandatory racial profiling data collection bills, to no avail.<sup>200</sup>

### **Heightened Profiling in the Wake of Hurricane Katrina**

Since Hurricane Katrina, many **Louisiana** law enforcement officials have adopted practices that disproportionately affect African-American and Latino drivers, homeowners, and businesspeople. For example, police checkpoints have spurred increased complaints because of their effect on predominantly African-American communities, and Latino and other immigrant communities are targets of a recent law criminalizing undocumented drivers.<sup>201</sup>

**Portland Police Bureau Traffic Stops 2006<sup>1</sup>**

Race/Ethnicity	% Population	Total Stops	% Stops	Total Searches (Other Than Inventory)	% Searched of Stopped	# Searched Found Evidence	% Searched Found Evidence	# Searched Nothing Found	% Searched Nothing Found
<b>African-American</b>	6%	9,427	14%	963	10%	260	27%	703	73%
Asian	6%	2,869	4%	92	3%	36	39%	56	61%
<b>Hispanic/Latino</b>	6%	6,253	9%	603	10%	149	25%	454	75%
Native American	1%	172	<1%	13	8%	5	38%	8	62%
<b>White</b>	79%	45,008	66%	2,334	5%	727	31%	1,607	69%
Unknown/other	<1%	4,378	6%	194	4%	52	27%	142	73%
<b>Total</b>		<b>68,107</b>	<b>100%</b>	<b>4,199</b>		<b>1,229</b>		<b>2,970</b>	

<sup>1</sup>This table created by David Fidanque, ACLU of Oregon based on data contained in the Portland Police Bureau Traffic Stops Data Collection 2006 Statistical Report, February 21, 2007, available at: <http://www.portlandonline.com/shared/cfm/image.cfm?id=149745>

### Studies Validate Minorities' Perception of Profiling in Oregon

The Oregon Law Enforcement Contacts Policy and Data Review Committee (LECC) has conducted four annual statewide surveys between 2002 and 2005 to assess the public's views of law enforcement contacts and the prevalence of racially biased policing. Additionally, substantial state police traffic stop data was collected and analyzed by the Committee. The public perception surveys indicate that African-Americans and Latinos are more likely than white drivers to be stopped, to believe that race bias was a factor in the stop, to be searched and to disbelieve the reason police give for the stop.<sup>202</sup>

There is ample data to confirm that the reality is consistent with many of those perceptions. The analysis of Oregon State Police traffic stop data collected from 2001-2005 found that African-Americans were one-and-a-half

times more likely to be searched than Whites and 7% less likely to be found with evidence of a crime. Latinos were twice as likely to be searched than whites, and 9% less likely to be found with evidence of a crime.<sup>203</sup>

In Portland, the state's largest city, the Portland Police Bureau has been collecting traffic stop data since 2001 and the numbers have shown a consistent disproportionate impact on African-Americans and Latinos. In 2006, for example, African-Americans represent six percent of the city's population, but 14% of all traffic stops. Latinos also represent six percent of the population, but nine percent of traffic stops.<sup>204</sup> African-Americans are therefore more than twice as likely to be stopped as whites and Latinos are more than one and a half times as likely to be stopped as whites.

More telling yet, in 2006 10% of African-Americans and Latinos stopped by the police



were subjected to discretionary searches, while only 5% of whites were subjected to such searches. That is to say that African-Americans and Latinos are twice as likely to be searched as whites. And yet evidence of criminal activity was found in a higher percentage of searches of whites (31%), as opposed to African-Americans (27%) or Latinos (25%).<sup>205</sup> Portland and other communities in Oregon are very concerned about the disproportionate impact of police practices and are working to address the underlying causes. They need more assistance from the U.S. federal government in these efforts.

### **Sharp Rise in Profiling in New York**

After much pressure from the **New York** Civil Liberties Union and the New York City Council, the New York Police Department (NYPD) released stop-and-frisk data in 2006, confirming what many in communities of color across New York City have long known: the police are stopping more and more people on New York's streets every year. According to the data, in 2006, the NYPD stopped, questioned and/or frisked over 508,540 people, an increase from just 97,296 in 2002, 86.4% of them black or Latino, and 90% of those stopped were neither arrested nor issued subpoenas – i.e., they were involved in no criminal wrongdoing. The NYPD Stop and Frisk data raises serious concerns over racial profiling, illegal stops, and privacy rights.

### **Government Profiling to Enforce Immigration Laws on the Texas-Mexico Border**

There has been increasing pressure as a result of anti-immigrant sentiment to use local law enforcement to enforce federal immigration laws, particularly in **Texas** border regions. Since most immigrants in Texas, lawful or undocumented, are of Latin American origin, local law enforcement officers who feel pressure to, or are ordered to ask immigration questions, or otherwise try to enforce immigration laws, use Latino appearance as a proxy for immigration status. This racial profiling leads to distrust and tension between the Latino community and local law enforcement.

Between December 2005 and May 2006, the Texas governor's office spearheaded "Operation Linebacker," a law enforcement operation funded through federal grant funds. The operation, which utilized 16 Texas border sheriff's departments, without specialized training or the authority to make arrests for most immigration violations, reported intercepting 4,805 undocumented immigrants.<sup>206</sup> Similar operations between January 17 and January 29, 2007, entitled "Operation Wrangler," involved state and local law enforcement both on the border (coordinated through Joint Operational Intelligence Centers run out of Border Patrol Sector headquarters) and in other regions of the state, and resulted in the referral of 2,773 undocumented immigrants to federal authorities.<sup>207</sup>

The practice of involving local law enforcement in immigration enforcement efforts — without special training or the legal authority to make arrests for immigration offenses — undermines officers' ability to protect the public safety of all residents of their communities. Most undocumented immigrants in Texas live in mixed-status families that include undocumented and legal residents as well as citizens. When local police enforce immigration law, it has the effect of cutting off these entire families from police services. For example, in early 2006, the Border Network for Human Rights documented the El Paso County Sheriff's policy of enforcing immigration laws and stated: "According to families and individuals living in the communities of San Elizario, Agua Dulce, Sparks, and Montana Vista, the Sheriff's Department has been holding immigration roadblocks and conducting immigration raids in their communities. Mothers experience fear when taking their children to school, and other community members are afraid when going to the store or calling the Sheriff's Office in the event of a crime, emergency, or even domestic violence."<sup>208</sup>

For similar reasons, civil rights groups recently sued **New Mexico's** Otero County Sheriff's Department for violations committed during immigration sweeps last September in the southern town of Chaparral. Sheriffs' deputies raided homes without search warrants, interrogated families without evidence of criminal activity,

and targeted households on the basis of race and ethnicity. In one case, deputies ousted a family from their home by banging loudly on the exterior walls in the pre-dawn hours of September 10, 2007. Without a warrant, one sheriff's deputy attempted to enter through an open bedroom window where the mother had been asleep, while another shouted from the front door, "Delivery! Mia's Pizza." The use of local law enforcement to enforce federal immigration laws has been an unmitigated disaster.

### **Racial Profiling & the War on Drugs**

#### *Mass Arrests of African-Americans and South Asians in Texas and Georgia*

For a discussion of drug sweeps in Tulia and Hearne, Texas, including their disproportionate impact on those minority communities, we respectfully refer the Committee to the ACLU 2006 Report "Dimming the Beacon of Freedom: U.S. Violations of the International Covenant on Civil & Political Rights."<sup>209</sup>

South Asian immigrant communities in Georgia are the latest victims of racial profiling in the investigation and prosecution of the War on Drugs. Between December 2003 and May 2005, a Drug Enforcement Administration (DEA) led regional anti-drug task force conducted an initiative called "Operation Meth Merchant" and employed suspected methamphetamine users as "confidential informants" ("CI's") to target local South Asian merchants and shop-workers in

6 counties in northwest Georgia.<sup>210</sup> As a result of the discriminatory practices employed in this law enforcement initiative, 44 of the 49 individuals arrested and charged were immigrants from India, many with the last name “Patel”, and, 23 of 24 stores investigated were South Asian-owned. Evidence shows that the workers and shop-owners were specifically targeted based on race, ethnicity, immigration status and/or English proficiency.<sup>211</sup>

In June 2005, a federal trial court unsealed 24 indictments where the government alleged that all of the retailers sold general household ingredients that could be used for the production of methamphetamine, with reasonable cause to believe that these ingredients would be used by others to make the drug.<sup>212</sup> Given that South Asians constitute less than 2% of the population in the affected area, and only 19.3% of the stores in the relevant area are owned or managed by persons of South Asian descent, this racial group was *over 95 times more likely to be targeted* by law enforcement than similarly situated white merchants. Moreover, law enforcement officers ignored numerous active leads regarding identical sales by non-South Asian merchants and targeted Indian retailers and workers by repeatedly directing CI’s to perform controlled buys almost exclusively at South Asian owned stores. In support of a selective enforcement motion filed by the ACLU, white undercover informants involved in the stings stated that the agent in charge of the operation expressed antipathy towards

“Indians” and directed the informants to target South Asian-owned stores, despite the fact that the same informants had identified multiple white-owned stores that had previously sold the products in question. Through this process, the South Asian immigrant workers’ lack of English proficiency was exploited, as many of the workers were unable to understand the drug-related terminology used by the CI’s while making purchases.

This impermissibly selective investigation violated defendants’ rights to equal protection of the laws. In April 2006, the ACLU moved to dismiss certain of these indictments but in August 2006, the federal trial court judge rejected the argument that the South Asian merchants were intentionally targeted by the police, concluding that the defense lacked evidence establishing discrimination.<sup>213</sup> As immigrant non-citizens, if convicted, even after they serve their criminal convictions, most of these South Asian workers face extended civil detention and eventual deportation back to India. This civil detention will take place in jails far away from their families and children.

The aftermath of “Operation Meth Merchant” garnered local, national, and international attention and condemnation. The UN Human Rights Committee (HRC) questioned the United States delegation, with HRC member Wieruszewski stating, “With respect to racial profiling, the answers offered concentrate only on the federal level. Need to look at enforcement practices at

state level, especially of regional task forces in the war on drugs and war on terror, in infamous Operation Meth Merchant cases. We need to look at the implementation of the State Party at the federal and state level with respect to racial profiling, and the lack of accountability and monitoring of regional task forces.”<sup>214</sup>

The HRC raised concerns about the widespread use of racial profiling by law enforcement and advised the U.S. government to address the lack of accountability or tracking mechanisms in place to monitor the activities of regional task forces set up to wage the “war on drugs” and the “war on terror”, stating that both of these “wars” disproportionately impact people of color. HRC issued a Concluding Observation HRC-24), which stated that “The Committee, while welcoming the mandate given to the Attorney General to review the use by federal enforcement authorities of race as a factor in conducting stops, searches, and other enforcement procedures, and the prohibition of racial profiling made in guidance to federal law enforcement officials, remains concerned about information that such practices still persist in the State party, in particular at the state level.”<sup>215</sup>

These race-based sweeps and unwarranted detentions of innocent citizens violate CERD, and the U.S. Constitution’s protections against discrimination on the basis of race, unreasonable searches and seizures, and the deprivation of liberty without the due process of law.

### *Limitations on Judicial Sentencing Discretion*

Mandatory minimum penalties are predetermined by the U.S. Congress and automatically imposed for certain crimes, the great majority for offenses involving drugs or weapons. In 2006, the bipartisan, independent U.S. Sentencing Commission released a report finding that federal mandatory minimum penalties are applied in a discriminatory fashion and lead to increased arbitrariness in federal sentencing.<sup>216</sup> The American Bar Association’s Kennedy Commission similarly found that American policymakers’ embrace of determinate sentencing practices, including mandatory minimum sentences, elimination or reduction of parole, and increases in base penalties “produced a steady, dramatic, and unprecedented increase in the population of the nation’s prisons and jails” and the resulting reduction of judicial discretion drastically increased racial disparities in the criminal justice system.<sup>217</sup> Although Congress intended to reduce the disparities and arbitrariness of the federal sentencing system, the report concluded that mandatory minimums actually added to these problems.

Restricting or removing judicial discretion in sentencing limits the ability of judges to properly deliver justice in accordance with the circumstances of each case. Given the highly politicized nature of “law and order issues,” politicians will often support mandatory sentencing laws so as to appear “tough on crime,” while failing to implement or sup-

port programs which may be more effective in stopping crime.

Federal and state drug laws and policies over the past 20 years have had a devastating and pronounced effect on African-American and Hispanic women. By 2003, 58% of all women in federal prison were convicted of drug offenses, compared to 48% of men.<sup>218</sup> African-American women's incarceration rates for all crimes, largely driven by drug convictions, increased by 800% since 1986, compared to an increase of 400% for women of all races for the same period.<sup>219</sup> Mandatory sentencing laws prohibit judges from considering the many reasons women are involved or remain silent about a partner or family member's drug activity such as domestic violence and financial dependency. Sentencing policies, such as mandatory minimums often subject women who are low-level participants to the same or harsher sentences as the major dealers in a drug organization.<sup>220</sup>

#### *New York's Punitive Rockefeller Drug Laws*

**New York's** drug sentencing laws are among the most punitive in the country. Enacted in 1973 with strong support from Governor Nelson Rockefeller, the so-called Rockefeller drug laws ("RDLs") mandate extremely harsh prison terms for the sale or possession of a relatively small amounts of drugs. The RDLs have led to the wide-scale incarceration and stigmatization of low-level drug offenders, but have had little impact on the problems of drug abuse and the illegal drug trade. The

RDLs have missed their target with disastrous consequences: unconscionable racial disparities in rates of drug arrests, prosecutions, and imprisonment; the weakening of families and communities; and an enormous waste of limited public resources.

The long mandatory sentences combined with the aggressive law enforcement tactics of the "war on drugs" have led to a spiraling prison population. In 1973, there were 12,500 people in the New York state prison system. Today, there are around 63,000, and 35% of them are non-violent drug offenders.<sup>221</sup> The RDLs have had a highly disproportionate impact on people of color. While African-Americans and Latinos comprise 31% of New York's population, they comprise 93% of those currently incarcerated for drug felonies, even though drug selling and use is spread evenly throughout the population.<sup>222</sup>

The "war on drugs" has also led to an unprecedented increase in the number of women involved in the criminal justice system, and the racial disparities are even more glaring than in the case of men. The Women in Prison Project of the Correctional Association of New York notes that as of January 2007:

- 33% of New York's women inmates were incarcerated for a drug offense.
- Nearly 69% of the state's female inmates are women of color
- 82% of New York's women inmates report having had an alcohol

or substance abuse problem prior to their arrest.

- More than 61% of first felony offenders have never been arrested or convicted of any crime prior to their current offense.
- Almost 74% report being mothers.<sup>223</sup>

There has been a decrease in New York's female prison population in more recent years, but the racial disparities are as persistent as ever.<sup>224</sup>

The cost of maintaining such a huge prison population is staggering. It costs over \$36,000 to maintain a prisoner in a New York State prison for one year.<sup>225</sup> The state's prison operating budget now stands at \$2 billion. The human toll is not so easily measured. The human cost of incarcerating drug offenders — families torn apart, children removed to foster care — is overwhelming, as are the social, economic and political consequences.

In response to a broad-based reform movement, the New York State Legislature adopted minor, incremental reforms to the drug sentencing laws in 2004 and 2005; but these so-called reforms did nothing to address the structural injustice inherent in the drug sentencing laws. New York persists in attempting to imprison a problem whose root causes — for many if not most imprisoned for drug offenses — are addiction, mental illness, unemployment, and poverty. New York's new Governor has expressed support for meaningful reform of the RDLs, but he has referred the issue to a newly created New

York State Commission on Sentencing Reform, charged with conducting a comprehensive review of the state's sentencing laws. The Commission has solicited position papers and commentary on the state's drug laws, but the process has proceeded with little public attention or scrutiny. The Commission is scheduled to issue a formal report in March 2008.

#### *Disparate Penalties for Crack Versus Powder Cocaine Offenses*

In 1986, Congress enacted the Anti-Drug Abuse Act that differentiated between two forms of cocaine — powder and crack, and singled out crack cocaine for dramatically harsher punishment. In 1988, Congress further distinguished crack cocaine from both powder cocaine and every other drug by creating a mandatory felony penalty of five years in prison for simple possession of five grams of crack cocaine. In what has become known as the 100:1 ratio, it takes 100 times more powder cocaine than crack cocaine to trigger the harsh five-and ten-year mandatory minimum sentences. This sentencing scheme has had an enormous racially discriminatory impact. Federal law enforcement's focus on inner city communities has led to blacks being disproportionately impacted by the facially neutral, yet unreasonably harsh crack penalties. In 1995, the U.S. Sentencing Commission transmitted to Congress recommendations that would equalize the penalties between crack and powder cocaine possession and distribution.

Although these recommendations were widely endorsed by a multitude of groups, including the American Bar Association, they were nevertheless rejected by the government. For 21 years now, the 100:1 ratio punished low-level crack cocaine offenders, many with no previous criminal history, more severely than their wholesale drug suppliers who provide the powdered cocaine from which crack is produced. Of all drug defendants, crack defendants are most likely to receive a sentence of imprisonment as well as the longest period of incarceration. The average sentence for a crack cocaine offense in 2003 (123 months) was three and a half years longer than the average sentence for an offense involving the powder form of the drug (81 months). Over 80 % of individuals prosecuted by the U.S. government under the crack cocaine mandatory minimum laws are African-American although only one third of crack cocaine users are African-American. Despite the enormous cost to taxpayers and society, the crack-powder ratio has resulted in no appreciable impact on the cocaine trade.

Finally, in 2007, the U.S. Sentencing Commission lowered the guideline sentences for offenses involving crack cocaine, likely impacting 3,500 federally sentenced defendants each year. On average, the lowered guidelines will reduce defendants' sentences by 15 months, from 121 months to 106 months. The modification would reduce the prison population by 3,800 in 15 years...result[ing] in a savings of over \$87 million.<sup>226</sup>

### **Profiling & the War on Terrorism**

Since the events of September 11, 2001, the U.S. has witnessed an alarming rise in incidents of discrimination against Arab, Muslim and South Asian Americans and against persons perceived to be Arab, Muslim or South Asian. In response to this disturbing trend, President Bush, in his first address to Congress following the attacks, felt compelled to declare that “no one should be singled out for unfair treatment or unkind words because of their background or religious faith.” Attorney General John Ashcroft was equally adamant in proclaiming, just days after the attacks, that “we must not descend to the level of those who perpetrated [Tuesday’s] violence [on September 11] by targeting individuals based on their race, their religion, [or] their national origin.” This Committee has noted the “harsh treatment of Asians...in America...[post 9/11]”<sup>227</sup> and recommended that States Parties “[e]nsure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping.”<sup>228</sup>

#### *Profiling Air Travelers*

We refer the Committee to the ACLU’s ICCPR Shadow Report for a full discussion of the problem of airlines profiling travelers. In August 2007, the ACLU and its New York branch filed an additional airline profiling-

related suit, *Jarrar v. JetBlue Airlines*, in a **New York** federal trial court, on the grounds that TSA inspector Harris and JetBlue violated Iraqi-born architect Jarrar's constitutional and civil rights by legally discriminating against him based on his ethnicity and his t-shirt which read "We Will Not Remain Silent" in Arabic and English script. After the JetBlue agents tore his boarding pass, Mr. Jarrar reluctantly agreed to change his t-shirt in order to get on the flight. As a result of his ethnicity and his t-shirt, the airline not only changed his seat to the back of the plane but required him to board the plane prior to other passengers.

#### *Profiling Travelers at the Border*

In December 2004, American citizens of Arab, Muslim and South Asian origin were detained for as long as six hours at the Niagara Falls border while trying to re-enter the U.S. after having attended a conference on Islam in Toronto.<sup>229</sup> Nearly forty people were detained, fingerprinted and photographed. With the New York Civil Liberties Union and the Council on American Islamic Relations, the ACLU brought suit. The appellate court concluded that the delay of the plaintiffs at the border last year was unfortunate and understandably frustrating but not unconstitutional or in violation of statutes protecting religious freedom because "is well settled that the government's interest in securing the nation against the entry of unwanted persons and things reaches its pinnacle at the border."

Many ACLU state branches are involved in a similar suit, *Rahman v. Chertoff*.<sup>230</sup> The suit was filed in federal trial court in **Illinois** on behalf of nine American Muslim citizens from across the country who recounted episodes of repeated harassment including lengthy stops, questioning, body searches, handcuffing, excessive force, separation from families, and detention by federal agents when they tried to reenter the U.S. from various trips abroad. The plaintiffs were stopped on the grounds that their names were contained in a federal Terrorist Screening Database. None of these plaintiffs has ever been charged with a criminal act or been the subject of any terrorism-related investigation or action. One Michigan family alone was harassed seven different times. A **Washington** State resident, who had previously been stopped on multiple occasions, when driving back to Washington from Canada, had an officer draw his pistol at him and twenty others surround his car with guns drawn.<sup>231</sup> According to a report by the U.S. Inspector General, the database suffers from a variety of flaws including misidentification (i.e. mistaking non-listed people for listed people) and over-classification (i.e. categorizing listed people as dangerous when they in fact pose no threat). The ACLU is challenging this routine misidentification of innocent U.S. citizens resulting from severe deficiencies in the database, and asking the court to order the FBI and Department of Homeland Security to adopt policies that ensure expeditious reentry to the U.S. for cit-



izens who are over-classified or misidentified, and to institute training and supervision to ensure that citizens are not unduly detained and harassed upon entering the U.S.

### *Official Policies Create Climate for Racial, Ethnic & Religious Profiling*

In the post-9/11 era, federal and state government policies have helped create a climate in which all Muslims or people who look Muslim are viewed as potential terrorists. For example, FBI agents appear at Muslims' homes to "interview" them; additionally, the FBI issues directives to its field agents advising them to count mosques in their areas, and to use the number as a benchmark for the number of terrorism investigations that they should pursue. The U.S. reports that it has made efforts to prevent and punish race-based hate crimes.<sup>232</sup> According to the FBI, immediately following the September 11 terrorist attacks, crimes against those perceived to be Muslim or Arab increased by 1600% and incidents directed at individuals on the basis of ethnicity or national origin increased by 130%.<sup>233</sup> In **California**, far from the site of any of the 9/11 attacks, hate crimes targeting people of "other ethnicity/national origin" rose 345.8% in 2001 because of anti-Arab hate crimes.<sup>234</sup> Examples abound and many are included in a 2002 report profiling local victims of anti-Arab, -Muslim, and -South Asian hate crimes.<sup>235</sup>

Some of the increase may be attributable to the government's own actions. The atmos-

phere of hysteria and paranoia created by the government and some of its programs in the aftermath of 9/11 may have contributed to an increase in such crimes. Additionally, the Civil Rights Division's enforcement priorities have changed. Its core mission and traditional focus, the prosecution of official misconduct and hate crimes—crimes that disproportionately victimize racial minorities—have been deemphasized in favor of sex trafficking cases including the forced prostitution of adult women and any prostitution of minors.<sup>236</sup>

State law enforcement also enacts similarly hostile policies, devising new "security measures" for local application. For example, in **Massachusetts**, a program named "behavioral profiling" was piloted at Logan Airport and then instituted in the MBTA (mass transit system),<sup>237</sup> As documented in a May 2004 report, the ACLU of Massachusetts, in the media, on the streets, at airports and bus stations, in schools, businesses and other places of employment, Muslims, Middle Easterners and South Asians have been subjected to official and unofficial religious and national origin profiling, slurs, discrimination and hate crimes.<sup>238</sup> Incidents include one in July 2003 when Saurabh Bhalerao, a Hindu university student of Indian origin, working as a pizza delivery man in New Bedford, was told to "go back to Iraq," as he was beaten, burned with cigarettes, bound with a rope, stuffed into the trunk of a car and then stabbed after he escaped. And in May 2002, police, fire

trucks, and the bomb squad converged on BJ's Wholesale Club in Stoughton after Muslim men were sighted praying at sunset. The same month in Brookline, police and school officials convened a news conference to address an alarmed public after reports that men of Middle Eastern appearance carrying maps were spotted at neighborhood schools. It later turned out that the men had been speaking with school administrators in Brookline and Newton to help decide where to move with their families.

US efforts to combat hate crimes against Arabs, Muslims, and South Asians urgently need improvement.

### Profiling Immigrant Workers

This Committee has made clear that undocumented non-citizens must be protected against discrimination. It has specifically recommended that States Parties “[e]nsure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens.”<sup>239</sup> Also, States Parties should “[t]ake measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects.”<sup>240</sup>

### *Federal Officials Raid Worksites*

Over the last 2 years, Bureau of Immigration and Customs Enforcement (ICE) has been sweeping through factories and communities in an effort to flush out undocumented immigrants, with major effects on workers and employers alike. *The government has begun arresting immigrants through massive raids at workplaces and residences.* In a strategic planning document for “Operation Endgame,” ICE reports that its goal is to deport all removable aliens by the year 2012.<sup>241</sup> *ICE arrests persons without judicial warrants and based on insubstantial evidence of undocumented status, often no more than racial profiling. Last year, ICE deported a record 195,000 people.*<sup>242</sup> *A few recent examples follow.* (For all recent raids, see Appendix I.)

In **Massachusetts**, a state heavily dependent upon foreign-born workers for the growth in its labor force, an ICE raid of the Bianco plant in New Bedford led to the arrest of 361 workers, mostly women, who stitched armored vests and backpacks for the U.S. military. The workers were held and interviewed at the factory for hours, then taken to a converted military base nearly 100 miles away, and within 48 hours, shipped to remote detention centers thousands of miles away. Most of the workers were from Guatemala and El Salvador. Many had small children in daycare or school when the raids took place and who found themselves without parents that evening. Lawyers and state social service agency officials were denied meaningful

access to the parents. The manner in which these raids were carried out also leads to mistakes. Juan Sam-Castro, a Guatemalan worker at Bianco was mistaken for another man of the same name and nationality and wrongfully deported. The ACLU of Massachusetts and others have challenged this raid in *Aguilar v. ICE*,<sup>243</sup> a class-action lawsuit on behalf of all the Bianco workers, alleging that their treatment in detention and their transfer to Texas violated their statutory and constitutional rights to due process. A Massachusetts federal trial court dismissed the case for lack of subject-matter jurisdiction and the ACLU is currently appealing the dismissal in a federal appeals court.<sup>244</sup>

In another raid, in November 2006, immigration officials began a crackdown at Smithfield Foods' slaughterhouse in Tar Heel, **North Carolina**, arresting 21 undocumented immigrants at the plant and rousting others from their trailers in the middle of the night.<sup>245</sup> Since then, more than 1,100 Hispanic workers have left the 5,200-employee hog-butcher plant, leaving it struggling to find, train and keep replacements. So far, Smithfield has largely replaced the Hispanic workers with 'American' workers. But the turnover rate for new workers, many of whom find the work grueling and the smell awful, is twice what it was when Hispanics dominated the work force. Employee turnover has long been a problem at Smithfield and other meat-processing plants, but the problem has grown worse recently: 60% of the new workers quit within 90 days

of being hired, compared with 25% to 30% two years ago, when many new employees were undocumented immigrants.<sup>246</sup>

In August 2006, several hundred immigrant employees at the Crider poultry plant in Stillmore, **Georgia**, were arrested in an ICE raid. Crider was left with less than 25% of its mostly Hispanic 900-member work force. The rest fled Stillmore or went into hiding nearby. Some women and children hid for days in the scrubland and pine woods outside the town without food or shelter while they awaited the departure of immigration agents. In the week after the raids, dozens of Latinos crowded a vacant lot beside a convenience store, across from Stillmore's city hall, to get on buses operated by a Mexican bus line leaving for other cities in the U.S. or for Mexico.<sup>247</sup> Crider began recruiting Southeast Asian workers from Minnesota, hiring men from a nearby homeless mission and providing free transportation.<sup>248</sup>

#### *States and Localities Pass Anti-Immigrant Ordinances*

There is a growing movement in towns, cities, and counties across the U.S. to introduce local anti-immigrant ordinances that attempt to drive out undocumented immigrants and their families, and to punish those who employ or rent to them. These ordinances attempt to legislate locally in the area of immigration law, and violate the long-standing constitutional principle that immigration regulation is the purview of the fed-

eral government.<sup>249</sup> They also inflame anti-immigrant and anti-Latino sentiments, and infringe on fundamental human rights and civil liberties.

The anti-immigrant ordinances target immigrant residents by subjecting them to special legislation and selective enforcement. These actions, which often come in the form of local laws — but are not limited to legislation — attempt to deputize local government officials, and sometimes local residents themselves, to become immigration enforcement agents. The ordinances have the effect of encouraging profiling by private citizens. They target anyone who speaks with an accent or looks “foreign,” and prevent innocent people from finding employment or housing, or receiving government services. The ordinances impose penalties on businesses and non-profits that do business with, employ, or contract with undocumented workers, and penalize landlords who lease or rent property to undocumented immigrants. Some also require that English be the only language spoken at work sites.<sup>250</sup>

In the past two years, more than 30 towns nationwide have enacted laws intended to address problems attributed to illegal immigration.<sup>251</sup> While local anti-immigrant sentiments have been brewing for years in certain communities, the most recent wave of anti-immigrant ordinances on the local level began with a ballot measure in San Bernardino, **California**. Introduced in May 2006, the proposal sought to (1) deny city

money and permits to businesses that employ undocumented immigrants; (2) allow local police to seize the automobiles used by employers to pick up day laborers; (3) ban the ability of undocumented immigrants to rent property; and (4) require that all city business take place in English only.<sup>252</sup> While advocates eventually defeated this ordinance, similar proposals began to spring up throughout the country. The first such ordinance, discussed below, passed in the town of Hazleton, **Pennsylvania** in July 2006.<sup>253</sup> Since then, approximately 90 localities have proposed more than 100 similar ordinances, and at least 35 have passed.<sup>254</sup>

The movement to pass local anti-immigrant ordinances began almost immediately after the peaceful marches of spring 2006 in support of comprehensive immigration reform. These ordinances began cropping up due to frustration with the federal government’s inability to fix a broken immigration system, but also because of false assumptions about the impact of immigrants on society, and, in particular, on the country’s crime rate, school systems, and economy.<sup>255</sup>

These assumptions are unsupported by evidence: the incarceration rate for foreign-born individuals in the U.S. is well below the rate for native-born Americans (0.86% compared with 3.51%),<sup>256</sup> and many economists agree that immigration has a positive impact on wages and the economy.<sup>257</sup> Moreover, documented and undocumented immigrants pay taxes with every purchase they make.

Many undocumented immigrants pay federal income taxes.<sup>258</sup> Many contribute to the social security system without ever benefiting from it, and under federal law, undocumented immigrants are ineligible for most of the public benefits that citizens receive.

In Riverside, **New Jersey**, a town of 8,000 inhabitants, immigrants have come in waves, as with most American towns and cities. German immigrants came first, followed by Portuguese immigrants, then Italians, then Poles, and most recently, Latin Americans. Not long ago, legislation passed penalizing anyone who employed or rented to an undocumented immigrant. Within months, hundreds, if not thousands, of recent Latin American immigrants fled. The local economy suffered. Hair salons, restaurants and corner shops that catered to immigrants saw business plummet; several closed. Meanwhile, the town was hit with lawsuits challenging the law, and paying legal bills strained the town's already tight budget and prevented it paving roads, among other essentials. Suddenly, many people — including some who originally favored the law — started having second thoughts, and in September 2007, the town rescinded the ordinance.<sup>259</sup> Furthermore, hostility towards immigrants fuels the rise of intolerance and racism and has led to an increase of Ku Klux Klan and other white supremacist activity.<sup>260</sup>

These ordinances also suffer from constitutional infirmities. The Supremacy Clause of the U.S. Constitution<sup>261</sup> grants the federal

government authority over the regulation of immigration pursuant to its authority to regulate commerce and to establish a uniform code of naturalization.<sup>262</sup> Accordingly, the Supreme Court has long held that under the U.S. Constitution, the “[p]ower to regulate immigration is unquestionably exclusively a federal power.”<sup>263</sup> Moreover, constitutional protections, such as those contained in the First Amendment, apply to citizens and non-citizens alike.<sup>264</sup>

#### *Significant Legal Victory: Court Blocks Pennsylvania Ordinance*

In a landmark trial decision, a federal court recently declared unconstitutional a local ordinance that sought to punish landlords and employers for doing business with undocumented immigrants. The case, *Lozano v. Hazleton*,<sup>265</sup> concerned legislation pursuant to which businesses that refused to investigate the immigration status of employees and tenants would be fined or denied business permits.<sup>266</sup> The court agreed with plaintiffs that anti-immigrant laws like Hazleton's are unconstitutional because they usurp federal immigration policy, fail to provide procedural protection to people before they are fired or evicted, and violate federal civil rights law.<sup>267</sup>

#### *New York Ordinance Penalizes Employers*

New York's Suffolk County is an affluent and very segregated<sup>268</sup> suburban county with a mostly white population of about 1.5 mil-

lion. Latinos make up approximately 11% of the population.<sup>269</sup> Tensions between white Suffolk County residents and the immigrant Latino population first flared into violence in 2000, when two men posing as contractors kidnapped two day laborers and beat them with a crowbar. In August 2006, Suffolk lawmakers introduced a bill to penalize employers who receive county funding and hire undocumented immigrants though federal legislation to that effect already exists — the Immigration Reform and Control Act of 1986.<sup>270</sup> In September, the legislature passed the bill by a vote of 15-3.<sup>271</sup>

In January 2007, Suffolk County legislators introduced Resolution 1022, an anti-loitering/solicitation bill that attempted to create two new misdemeanor offenses in order to ban day laborers from seeking employment along county roadways.<sup>272</sup> Lawmakers described the proposed legislation as a way for Suffolk County to safeguard its roadways, but the proposed ordinance was driven by a desire to prevent day laborers—and what they represent to disgruntled county residents—from seeking work opportunities in Suffolk County. The law would have had disastrous consequences on the lives of Suffolk County residents. With no means to solicit employment, day laborers would be unable to support their families. In any event, the County failed to produce adequate evidence to support its position that banning day laborers from county roadways would improve public safety. Moreover, Suffolk County lawmakers failed to inform their constituents about the contribu-

tions by immigrants, including undocumented immigrants, of millions of dollars a year into the Suffolk County economy. Resolution 1022 would likely also have been unconstitutional as it unduly infringed on Suffolk County residents' First Amendment rights. In March 2007, Suffolk lawmakers defeated the proposed anti-solicitation ordinance by a vote of 10-6.<sup>273</sup>

*Georgia Ordinances Penalize Landlords and Mandate Speaking English*

Between 1990 and 2000, **Georgia** experienced a dramatic increase in its Mexican immigrant community; existing population rates more than doubled. While Georgia has benefited from the availability of new low-wage workers, some public leaders have sought to politicize immigration fears,<sup>274</sup> and legislators have passed a plethora of laws that harass the estimated 250,000 to 800,000 undocumented immigrants of Latino origin.<sup>275</sup> These anti-immigrant state and local initiatives, policies and ordinances include those:

- Exposing landlords to criminal prosecution for renting to undocumented persons.
- Mandating that English be the main or only language used;<sup>276</sup> preventing State employees from speaking Spanish at work;<sup>277</sup> and requiring that taxi drivers be “English profi-

cient” or else be subject to fines and/or possible deportation.<sup>278</sup>

- Condoning profiling of persons presumed to be immigrants at traffic checkpoints, particularly in areas of high Latino density.<sup>279</sup>
- Restricting voting rights of citizens with Hispanic surnames.<sup>280</sup>

#### *Implementation of the Criminal Alien Assistance Program in Texas*

In response to the anti-immigrant ordinances in the city of Farmers Branch, **Texas**, the mayor of nearby Irving, Texas, in an interview with the Dallas Morning News, explained that unlike Farmers Branch, Irving would be a city for “all of its inhabitants.” A backlash ensued, spearheaded by two members of the Irving City Council. Under pressure from anti-immigrant city council members, the City of Irving implemented the federal “Criminal Alien Assistance” program in September 2006.<sup>281</sup> In April 2007, the Irving police modified the program by incorporating a 24-hour, seven day a week call-in number that enables police to screen all arrestees for immigration status, and refers any suspected deportable immigrant to ICE. This policy has resulted in a massive increase in referrals of immigrants from the Irving Police Department to ICE. A total of 1,638 suspected deportable immigrants have been referred to ICE under the program, over 90% of whom were arrested on misdemeanor charges, including approximately 10% who were arrested solely for driving

without a license or with an expired license.<sup>282</sup>

This policy has led to a massive public outcry from Irving’s Latino population and its surrounding communities. Latino residents report an increase in stops for petty or non-existent traffic offenses, and feel that they are being targeted based on ethnicity. The Mexican Consul has taken the extraordinary step of issuing a travel advisory warning Mexican nationals to avoid traveling through Irving. There are reports of Latinos taking their children out of Irving’s public schools,<sup>283</sup> and since the Consul’s warning, Irving Police Department referrals to ICE have decreased under the program.<sup>284</sup> It is unclear if this is because Latinos are leaving Irving or because the police are feeling pressure and decreasing the aggressiveness of their enforcement.

Community members also claim that the racial profiling disproportionately targets the Southern part of Irving, which includes most of the older Latino residential neighborhoods, while avoiding enforcement in North Irving, where businesses, some of which may depend on substantial immigrant workforces, are located.

#### **Federal Legislation to Eliminate Profiling**

All the forms of profiling discussed above – of minorities, workers and immigrants, often overlapping groups – violate CERD and U.S. law. Congress could bring federal and state

law enforcement agencies into compliance by enacting the End Racial Profiling Act (ERPA), which has been introduced in the U.S. House of Representatives and U.S. Senate every year *since 1997*. ERPA would *require* all law enforcement agencies to: ban racial profiling; create and implement anti-racial profiling policies; and collect and report data on stop and search activities by race and gender. ERPA would also provide for the loss of federal funding for agencies found to have engaged in racial profiling, and would create a private cause of action for racial profiling victims.<sup>285</sup>

### MINORITY OVER-REPRESENTATION IN THE CRIMINAL JUSTICE SYSTEM

Incarceration in the U.S. is skyrocketing at an unprecedented rate. There has been a 500% increase in the U.S. prison population over the last 30 years, with 2.2 million people now behind bars nationwide. The U.S. has 25% of the world's prisoners but only 5% of its population. As prisons and jails struggle with this frenzy of incarceration, minorities are bearing a disproportionate share of the consequences. As of 2001, one in six black men had spent time incarcerated in U.S. prisons and jails. If current rates of incarceration persist, one in three black men can expect to spend some time incarcerated during their lives.

Nationally, at the last decennial census in 2000, the population was 69.1% white, 12.5% Latino, 12.3% black, 3.6% Asian, and .9% American Indian. The 2006 prison population, in contrast, was about 46% white, 41% black, and 19% Latino.<sup>286</sup>

A recent study looked at the issue through a different lens – people living in group quarters. Among them, it found, whites were almost twice as likely to be living in a dormitory than a prison, while Asians were nine times more likely to be in a college dorm than in prison, but blacks and Latinos were about three times as likely to be imprisoned than to be living in a dormitory.<sup>287</sup> Among immigrants living in group quarters, Europeans were more likely to be in nursing homes, Asians in dormitories and Latin Americans in correctional facilities.<sup>288</sup> In its Concluding Observations of 2001, this Committee had recommended that the U.S. take firm action to ensure equal access to justice, and ensure that the disparity in incarceration rates is not a result of the economically, socially, and educationally disadvantaged position of these groups.<sup>289</sup> The U.S. does not acknowledge that different incarceration rates are based on unequal treatment in the courts and does not explain how, if at all, the U.S. will work to address the underlying socio-economic difficulties, which lead to greater incarceration of minorities.<sup>290</sup> The U.S. also states that immigration status is not a factor in unrelated court proceedings but ignores the problems faced by immigrants in receiving effective representation in immigration hearings where representation is not a right, and most, if not all have no legal representation.

According to the U.S. Report, jail and prison populations have increased between 1995 and 2005, and, in 2004, 3.2% of black males, 1.2% of Hispanic males and 0.5% of white

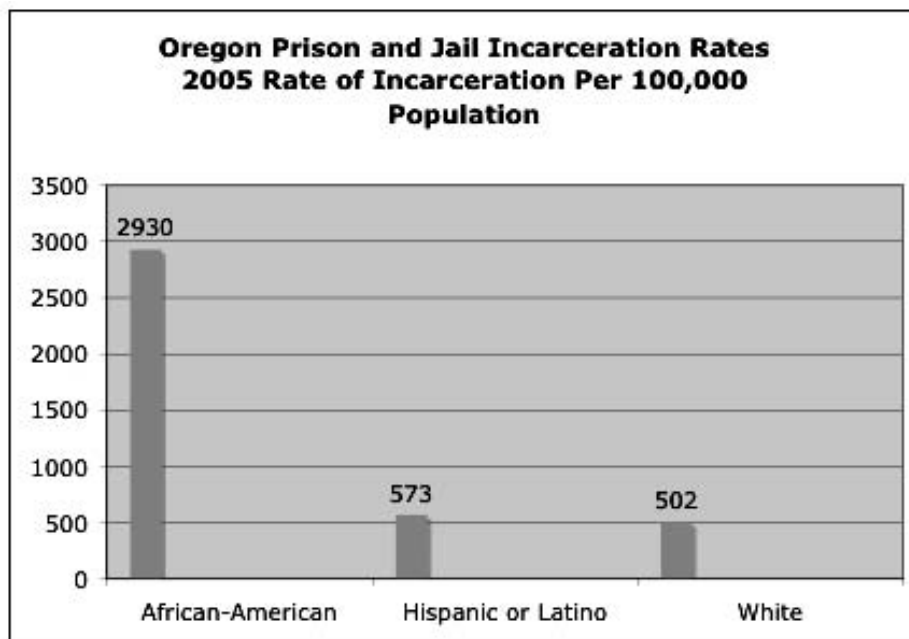


males were incarcerated in state or federal prisons with similar distributions for the female population.<sup>291</sup> Stating that reasons for the disparities in incarceration rates are “complex”, the U.S. notes that some scholars have found them related primarily to differential involvement in crime by various groups.<sup>292</sup> Solid research, including ACLU studies done in **Massachusetts** and **New York**, refutes such findings.<sup>293</sup> This research demonstrates that these disparities are related to government policies and the disparate treatment of minorities at every stage of the criminal justice system, from investigation to

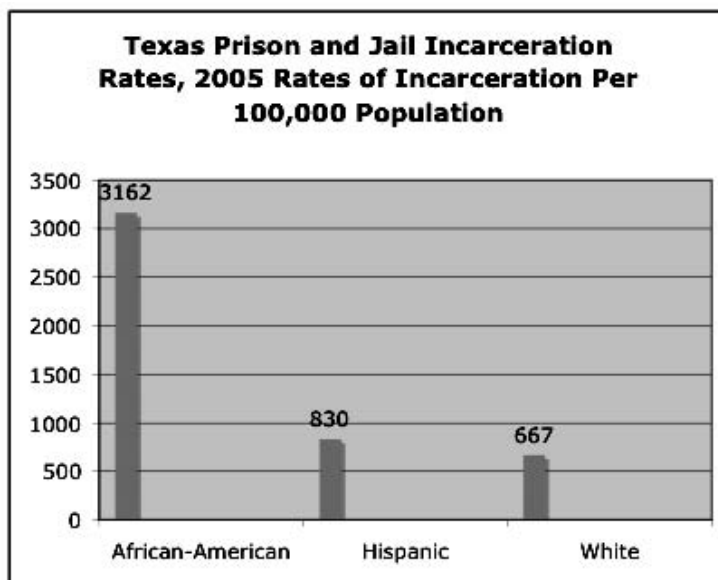
sentencing, with respect to both juveniles and adults. Data collected from state courts by the Justice Department itself found that a higher percentage of black felons than white felons receive prison sentences for nearly all offenses, and also that blacks receive longer maximum sentences for most offenses.<sup>294</sup>

#### **Disparate Rates of Minority Confinement in Oregon**

Minorities are confined at disproportionate rates even where they are few in number, as in **Oregon**. That state’s racial composition is



\*Incarceration rates based on U.S. Bureau of Justice Statistics at midyear 2005.



\*Incarceration rates based on U.S. Bureau of Justice Statistics at midyear 2005.

approximately 91% white, 10% Hispanic, 2% African-American, 4% Asian/Pacific Islander and 1% American Indian.<sup>295</sup>

African-Americans are more than five times more likely to be incarcerated than whites.

### **Disparate Rates of Minority Confinement in Texas**

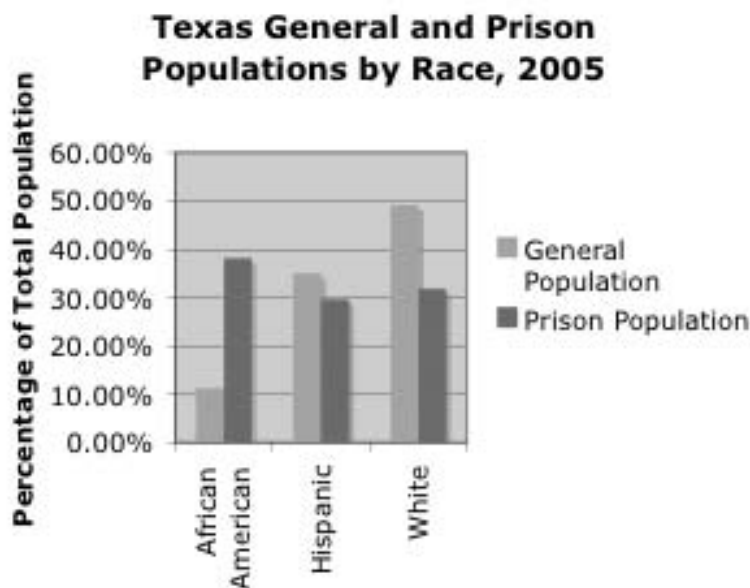
Texas has a particularly sordid history of over-incarceration and discrimination in its criminal justice system. In 2005, Texas had the third highest incarceration rate in the country, with 4,659 Texans behind bars for every 100,000 residents.<sup>296</sup> That year, there were a total of 223,195 inmates in custody in

the state. This statistic is even more alarming when the race of Texas inmates is considered. African-Americans are incarcerated at nearly five times (4.7) the rate of whites.<sup>297</sup> Although Texas incarcerates more of its residents than almost every state in the country, its incarceration rate for whites is by far the lowest (667 per 100,000 residents), as compared to African-Americans (3,162 per 100,000) or Hispanics (830 per 100,000) in the state.<sup>298</sup> Texas incarcerates a startling 3.2% of its African-American population,<sup>299</sup> compared to only 0.67% of whites and 0.83% of Hispanics.

Although African-Americans comprise a little over 11% of Texas's general population, they make up almost 40% of its prison population. Despite the startling numbers, Texas legislators and Texas Department of Criminal Justice officials appear pleased that there is relative racial equity among the Texas prison population. In a House Corrections Committee Meeting in March 2006 legislators informed the audience that they were pleasantly surprised that African-Americans only comprised approximately 40% of the prison population and not a majority, reveal-

ing deeply entrenched assumptions about race and criminality that are not being addressed adequately in the domestic political and legal systems.

The problem of disproportionate minority confinement is exaggerated in the area of drug law enforcement in Texas. As of August 31, 2006, African-Americans convicted of drug possession offenses comprised 46.7% of inmates in Texas prisons (6,759 people) and 40.7% of those in state jails (2,009 people).<sup>300</sup> This is in spite of the U.S.



\*Incarceration rates based on U.S. Bureau of Justice Statistics at \*Percentages based on U.S. Census Bureau, Population Estimates for 2005 and Incarceration Rates by Texas Department of Criminal Justice for 2005 Fiscal Year. 2005.

Cory Maye, an African-American man with no prior criminal record, was convicted of killing a police officer and imprisoned on Mississippi's death row. As chronicled by libertarian journalist Radley Balko, the real story emerges as the consequence of another out-of-control midnight drug raid based on the word of an unreliable confidential informant. In 2001, Maye was occupying half of a duplex-house with his partner and their child. The other half was occupied by a man who was the primary target of the raid. Police had a search warrant for the neighbor which also covered Maye's apartment, though Maye was not identified by name. Balko reports that when a member of the raiding team crashed through the door on Maye's side of the house and rushed into Maye's bedroom, Maye – who thought his home was being invaded by robbers or worse -- grabbed his gun to defend himself and his tiny daughter and pulled the trigger. After a determined crusade by Balko to exonerate Maye, attorneys who took up his case on appeal were able to win him a new sentencing trial. Maye has been removed from death row, but remains incarcerated pending the new hearing.

government's own research indicating that drug use and drug dependence among African-Americans and whites is relatively similar: 9.4% of whites reported a substance abuse/dependence problem in 2005, compared to 8.5% of African-Americans; 9.7% of African-Americans reported current drug use in 2005, compared to 8.1% of whites.<sup>301</sup> If Texas law enforcement were arresting whites and African-Americans for possession equally based upon their use rates, the overrepresentation of African-Americans in Texas prisons and jails for drug possession crimes would disappear.

Even more dramatically, 50.1% of those incarcerated in Texas prisons (4,111 people) and 67.9% in state jails (741 people) for drug delivery offenses are African-American. The disparity in incarceration rates for drug crimes is at its absolute extreme with regard to cocaine-related convictions: 76.9% of the 3,036 inmates serving time as of August 31, 2006, for a cocaine related offense in Texas were African-American.

### **Disparate Rates of Minority Confinement in Mississippi**

Mississippi's rate of incarceration is 39% higher than the national average, with African-Americans making up over 70% of the incarcerated. Furthermore, over 80% of the state's inmates are incarcerated for drug offenses. Under the state's mandatory minimum sentencing laws, these inmates have to serve 85% of their sentences before being

	Mississippi	National Avg.
<b>Incarceration Rate (2005)</b>	660/100,000	400/100,000

released. Many of these individuals are first-time offenders whose crime was the sale of tiny amounts of illegal substances. Some have been sentenced to as many as thirty years in prison for such offenses.<sup>302</sup> Many of these convictions are obtained based on the testimony of confidential informants paid by local law enforcement or those who have provided testimony in exchange for a shorter sentence in their own criminal case.

### **Disparate Rates of Incarceration of Minority Women**

Despite rates of drug use among racial minority women equal to or lower than those of Caucasian women, racial minority women are significantly overrepresented among those imprisoned for drug crimes. This results from racially targeted law enforcement and racially disparate charging and sentencing practices. It also results from the expansion of criminal liability through legal provisions such as accomplice liability. And, the imposition of unduly harsh mandatory minimum sentences fails to take into account the often peripheral involvement of women defendants in drug crimes and other mitigating factors.<sup>303</sup> In fact, the number of women incarcerated in U.S. state facilities for drug-related offenses increased by almost 900%

between 1986 and 1999.<sup>304</sup> As a result of long prison sentences, many children of incarcerated mothers are left in an already overburdened and racially stratified foster care system.

### **Selective Enforcement of the Law Against Native Americans**

Multiple recent reports attest to a substantial disparity in the treatment of non-Indians and American Indians in **South Dakota's** judicial system. One report from the South Dakota Advisory Committee to the U.S. Commission on Civil Rights, an independent, bipartisan agency created by Congress, documents widespread distrust of the justice system by the Native American community, and that community's strong belief that Native Americans experience unequal treatment in both the state and federal systems.<sup>305</sup>

Those anecdotal perceptions are factually substantiated in a subsequent report commissioned by the state's governor. That report, while suggesting that income and employment status may be the determinants, found that Native Americans are treated worse than non-Indians with respect to the length of sentence they receive, bond determinations, and case disposition, and experience disadvan-

tages in the length of prison time they serve and the type of release from prison they receive.<sup>306</sup> In all these areas, indigenous people's treatment does not coincide with the severity or number of charges associated with their cases.<sup>307</sup> Overall, American Indians were disadvantaged in a majority of the 30 relationships tested in the study.<sup>308</sup> The impacts are felt, the authors reported, in job opportunities, family security, criminal justice activity, and self-respect.<sup>309</sup>

In 2000, while American Indians comprised about 8.3% of South Dakota's population, they made up about 22% of the state's inmate population.<sup>310</sup> In 2000, there were 2,563 non-Indian inmates and 562 American Indians. According to the study, American Indians do not commit more crimes per individual or more serious crimes per individual than non-Indians. Yet non-Indians are more likely to be released on bond, while Indians are either disallowed bond or are made to post higher bond to prevent flight; a higher percentage of Indians plea-bargain or are convicted of crimes than non-Indians; and, non-Indians go to trial more often and are more likely to be acquitted or receive suspended sentences than Indians. While 77.8% of non-Indians are acquitted, only 11.1% of Indians are acquitted, and 80.4% of non-Indians receive suspended sentences as compared with a mere 13.9% of Indians.<sup>311</sup> The data also reveal that more Indians serve out their full sentences than non-Indians.<sup>312</sup>

A third report resulted from the State Supreme Court's creation of the Equal Justice Commission which examined racial disparities and steps to remedy them. That report acknowledged the validity of at least some of the perceptions of the Native American community regarding disparate treatment and recommended a long series of changes including attorney selection, jury composition, juvenile justice, stops, arrests and criminal justice.<sup>313</sup> There has been some movement on those recommendations directly within the control of the judiciary, but very little change in areas outside the judiciary.

This disparate judicial treatment also extends to Indian children. By raising concerns about South Dakota's lack of compliance with the Indian Child Welfare Act (ICWA), the ACLU of the Dakotas, Indian legislators and tribal governments succeeded in bringing about the creation of a commission to examine the state's failure to comply. That Commission's work led to a fourth report on the issue of Indian treatment before the law, one that found the state to be widely out of step with ICWA provisions. For example, in an area as sensitive as child custody, in 22% of cases involving foster care placement or termination of parental rights, Indian mothers were given less than the required ten days notice of a hearing.<sup>314</sup>

**Alaska** Natives are also disproportionately represented at all stages of the criminal justice system, and in particular, in the state's prison population. As of the most recent

Alaska Department of Corrections Offender Profile (2003), approximately 35% of the prison population was Alaska Native, compared to 16% of the general population.<sup>315</sup> The overrepresentation of Alaska Natives and also African-Americans at all stages of the criminal justice system may be attributable to selective enforcement of the laws.<sup>316</sup> Examining statistics relating to felonies alone, in 1999, African-Americans were overrepresented at three times their number in the adult population: at 4% of the population, they constituted 11% of those charged with a felony; Alaska Natives were overrepresented at twice their number in the adult population: at 14% of the population, they made up 30% of those charged with felonies. By contrast, whites were underrepresented: they made up 76% of the population and constituted only 50% of those charged with felonies.<sup>317</sup> Alaska Natives also spend more time in jail than other ethnic groups for offenses of all types outside Anchorage, and for drug offenses in Anchorage. In addition, African-Americans living in Anchorage generally receive longer sentences for drug offenses than other ethnic groups.<sup>318</sup>

### Juvenile Life Without Parole

Although the juvenile death penalty was eliminated in the United States in 2005 by the Supreme Court in the case of *Roper v. Simmons*, forty-one states continue to sentence children to life without parole for crimes committed before they are 18 years old.<sup>319</sup> In many states, juveniles can be

transferred to adult courts and sentenced to life without any chance of parole regardless of their age, and without considering the circumstances of the offense. At least 2,381 people in the U.S. are currently incarcerated for life without parole for crimes they committed as children.<sup>320</sup> According to a recent report by the University of San Francisco School of Law's Center for Law and Global Justice, children of color in the U.S. are 10 times more likely to receive sentences of life without parole than white child offenders. In some states, including California, the rate is 20 to 1. California lawmakers will consider a bill that would abolish the practice in January 2008. The California Supreme Court is also considering the case of a 14-year-old boy, the youngest person ever to be sentenced to life without the possibility of parole for a crime involving no physical injury to the victim.<sup>321</sup>

In **Michigan**, according to the ACLU's research, at least 307 individuals are serving life without parole for crimes committed as juveniles.<sup>322</sup> Michigan has the third-highest rate in the nation of sentencing child offenders to life without parole. Almost half (146) are serving the sentence for crimes committed when they were age sixteen or younger. Most were sixteen or seventeen years old at the time of the offense, 43 persons were fifteen and 2 were fourteen. While all the youth serving the sentences were convicted of an offense involving a homicide, not all were principally responsible for the death. Nearly half reported that they were convicted on an

“aiding and abetting” theory and nearly half reported that they were not the principal and had adult co-defendants.<sup>323</sup> Nationwide, an estimated 59 percent received a life-without-parole sentence for their first-ever criminal conviction.<sup>324</sup> Sixteen percent were between thirteen and fifteen years old at the time they committed their crimes, and an estimated 26 percent were convicted of felony murder” (participation in a robbery or burglary during which a co-participant committed murder without the knowledge or intent of the teen).<sup>325</sup>

The unfairness of imposing an adult punishment on children is heightened by racial and gender inequities. The “majority (221) of juvenile lifers in Michigan are minority youth, 211 of whom are African-American.”<sup>326</sup> “Nationwide, the estimated rate at which black youth receive life-without-parole sentences (6.6 per 10,000) is ten times greater than the rate for white youth (0.6 per 10,000).”<sup>327</sup>

Girls in Michigan comprise two percent of those serving life without parole. Unlike boys who are sent to the Michigan Youth Correctional Facility and housed with other prisoners under the age of twenty, girls are sent directly to adult women’s prisons and housed with adults.<sup>328</sup>

In February 2006, the ACLU filed a petition with the Inter-American Commission on Human Rights protesting this policy. That petition is still pending.<sup>329</sup>

### “Three Strikes” Laws

“Three strikes” laws generally require that felons found guilty of a third serious crime be incarcerated for a minimum of 25 years to life. **California’s** law, which went into effect in 1994, may be the most draconian. The California ACLU campaigned against the initiative, and when it passed, filed a legal challenge, all to no avail.<sup>330</sup> In 2004 and 2005, the California ACLU was unsuccessful in attempts to reform this law legislatively.

Although the first two “strikes” are required to be serious or violent felonies, the crime that triggers the life sentence can be any felony. Nearly 75% of second and third strikes within California are for non-violent offenses. Furthermore, the law doubles sentences for a second strike, requires that these extended sentences be served in prison (rather than in jail or on probation), and limits “good time” earned during prison to 20 % of the sentence given (rather than 50%, as under the previous law). Such laws are ultimately ineffective in dealing with crime and may, in fact, serve to perpetuate cycles of crime and violence.

California “now has 8,000 people serving sentences of 25 years to life, nearly half of whom were convicted of a property or drug crime as their third strike.”<sup>331</sup> The law has a disproportionate impact on communities of color. In California, African-Americans are given third-strike life sentences at a rate nearly 13 times the rate of whites, and the



Latino incarceration rate is a staggering 82% more than whites.<sup>332</sup> African-Americans are 6.5% of the population, but they make up 45% of third strikers.<sup>333</sup> Research also found “that California had four times as many people incarcerated under Three Strikes as the other twenty-one Three Strikes states” with available data.<sup>334</sup>

### CONDITIONS OF CONFINEMENT IN PRISONS & JAILS

The U.S. asserts that domestic law prohibits racial discrimination against federal inmates, and that claims are investigated and prosecuted by government agencies.<sup>335</sup> The government adds that the federal Department of Justice can also bring civil lawsuits against state and local governments for a “pattern or practice” of unlawful conditions under the Civil Rights of Institutionalized Persons Act (CRIPA).<sup>336</sup> Since 2001, the Department’s Civil Rights Division (CRD) has used CRIPA and other statutes to prosecute allegations of torture, cruel, inhuman, and degrading treatment or punishment, or other abuse, opening 69 CRIPA investigations, issuing 53 findings letters, filing 22 cases, and obtaining 53 settlement agreements.<sup>337</sup>

The government claims that the CRD has vigorously enforced the civil rights of persons in the nation’s prisons and jails under the CRIPA. However, to make this claim, the government admittedly cites statistics that include many institutions that are neither prisons nor jails. In fact, the CRD rarely

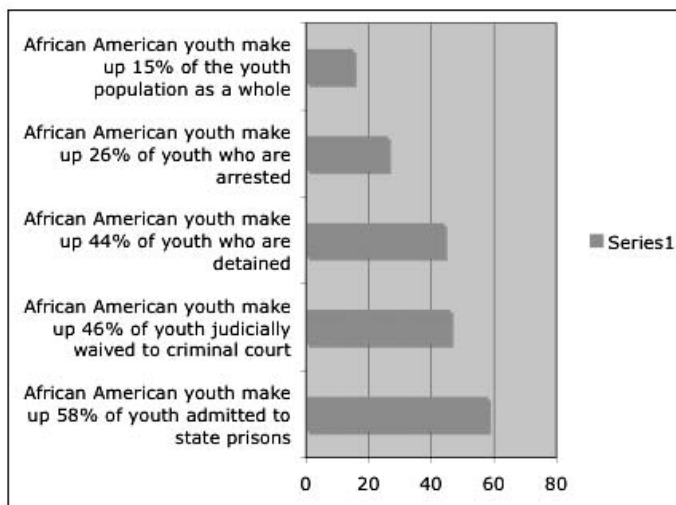
investigates abuse in prisons and jails. Even when it does investigate, the investigations rarely result in litigation, and even more rarely, in enforceable court orders.<sup>338</sup> In the entire 2002-04 period, the CRD took action to enforce existing court orders in just one prison or jail case, and the CRD has not produced an annual report on its activities to the U.S. Congress since 2004.<sup>339</sup>

The egregious mistreatment of prisoners during Hurricane Katrina and the gross neglect of immigrants and their children in immigration detention are just some examples of insufficient corrective action by the government.

### Juvenile Detention Facilities: Warehouses of Problem Children

There is growing recognition that people incarcerated in U.S. jails and prisons often suffer from abusive treatment and neglect. When those abused are children who have been placed in juvenile facilities, ostensibly for their rehabilitation, public concern is justifiably heightened. Yet, juvenile detention centers in states across the country are rife with problems, including minority overrepresentation, inadequate attention to the unique issues of girls in detention, and lack of safety, mental health programming, and rehabilitation services. The U.S. has failed to recognize the internationally accepted norm that the arrest, detention or imprisonment of children should be measures of last resort and applied for the shortest appropriate period of time.

### THE PROPORTION OF AFRICAN AMERICAN YOUTH INCREASES AT EVERY STAGE OF INVOLVEMENT IN THE JUSTICE SYSTEM



Source: Yamagata, Eileen Poe and Michael A. Jones. *And Justice for Some: Differential Treatment of Minority Youth in the Justice System*. Washington, DC: Building Blocks for Youth, April 2000.

The racial disparities are severe: in **California**, for example, African-American youth are incarcerated at a rate 6 times greater than white youth, and Latino youth and Native American youth are incarcerated at rates 2 and 1.4 times greater than white youth, respectively.<sup>340</sup> Young offenders deserve a fair chance to put their lives back on positive tracks. For this to be possible, juvenile detention facilities must be converted from warehouses of problem children to centers of genuine rehabilitation.

#### *Girls in New York Juvenile Prisons*

Media stories and public debate about troubled children tend to focus on the delinquent behaviors of and state responses to boys.

However, an increasing proportion of the children being put behind bars are girls. Nationally, more than 95,000 children are in the custody of juvenile justice agencies. In 2004, over 14,590 children, or about 15% of the children incarcerated in the U.S., were girls. Girls also constitute about 20% of children in pre-adjudication detention facilities. Over half belong to racial and ethnic minority groups. In **New York State**, the number of girls as a fraction of all children taken into custody has grown from 14% in the mid-1990s to almost 19% in 2004. A recent report by the ACLU and Human Rights Watch focuses on the two large, prison-like facilities in which girls in New York State are confined, Tryon and Lansing.<sup>341</sup> The majority of girls in these facilities are fifteen or sixteen years old,

although some are as young as twelve. A disproportionate number of girls confined in New York are African-Americans from families who have lived in poverty for generations, with parents or other close relatives who themselves have been incarcerated. In many cases, these girls fall into juvenile facilities through vast holes in the social safety net, after child welfare institutions and schools have failed them. The marginalization permeating the life experiences of girls of color continues through their time in the juvenile justice system. The increasingly common practice among school administrators of calling the police in response to student misbehavior has a disproportionate impact on African-American students.<sup>342</sup> Across the U.S., 70% of delinquency cases involving white girls are dismissed, while only 30 % of cases involving African-American girls are dismissed.<sup>343</sup> Nationally, 34% of 12 to 17 year olds in the U.S. are girls of color, yet they account for 52% of those incarcerated for juvenile offenses.<sup>344</sup>

In New York, 54% of children in the general population are Caucasian, 20% are Latino, 18% are African-American, and 6% are Asian.<sup>345</sup> In contrast, of the girls admitted to the Lansing and Tryon facilities over the last three years, 54% are non-Hispanic African-American, 19% are Hispanic,<sup>346</sup> 23 % are non-

Hispanic white, 3% are Native American and none is Asian. One is classified as non-Hispanic-Other.<sup>347</sup> The disproportionately high number of African-American girls incarcerated in the highest security juvenile prisons in New York State echoes the overall overrepresentation of black children under Office of Children & Family Services (OCFS) supervision: Since 1995, African-American boys and girls have consistently accounted for close to 60% of children taken into OCFS custody.<sup>348</sup>

This population is especially vulnerable: In New York in 2004, of the children screened by OCFS for special needs when taken into custody, 48% had physical health needs, 52% had mental health needs, and 77% had substance abuse problems. Sixty-nine percent of screened children had multiple special needs. OCFS documents and the statements of



administrators reveal that staff is aware of and concerned about the health needs of incarcerated girls. The report's conclusions about the conditions at Tryon and Lansing are disheartening:

- Incarcerated girls experience abuse and neglect, including sexual abuse and strip searches by staff;
- Girls are subjected to needlessly harsh security measures, with even “non-secure” portions of Tryon consisting of barracks-like units surrounded by razor wire;
- Because the facilities are in remote locations, confined girls are isolated from their families and communities;
- The girls are denied critical mental health, educational, and rehabilitative services, and, crucially, do not get assistance when leaving the facilities or when reintegrating with families, schools and communities.<sup>349</sup>
- These failures persist because there is little or no meaningful oversight of conditions in OCFS facilities; and
- Internal monitoring and oversight of the facility are dysfunctional, and independent outside monitoring is all but nonexistent. As a result, the conditions in the Tryon and Lansing facilities are shrouded in secrecy and girls who suffer abuse have little meaningful redress.<sup>350</sup>

In addition to violating CERD, these conditions violate provisions in the U.S.-ratified

ICCPR and CAT treaties. They also violate similar standards in the CRC and CEDAW, especially relevant to girls. The latter treaties, however, while signed, have not yet been ratified by the U.S.<sup>351</sup>

#### *Disproportionate Minority Confinement in Massachusetts*

In 1988, Congress amended the Juvenile Justice & Delinquency Prevention Act of 1974 to require that states address the disproportionate representation of minority youth in their juvenile justice systems.<sup>352</sup> Yet, **Massachusetts** has not taken any steps to reduce the overrepresentation of youth of color in its pre-trial detention facilities. In 1993, youth of color represented approximately 17% of the Commonwealth's juvenile population, 29% of youth arrested, 59% of youth arraigned, and 57% of juveniles committed to secure facilities.<sup>353</sup> In 2002, youth of color represented 23% of the juvenile population, 25% of youth arrested and 63% of juveniles committed to secure facilities (arraignment statistics were not available).<sup>354</sup> In addition, these facilities are overcrowded and children are not provided with necessary services. In 2003, the ACLU investigated the overrepresentation issues and issued a report making recommendations for improvement, and although the state did acknowledge that youth of color are overrepresented at almost every stage of its juvenile justice system, it has yet to adequately identify the scope of the problem or to determine its causes.

Each year, Massachusetts also misuses pre-adjudication detention, improperly incarcerating children charged with criminal wrongdoing, in violation of state and federal law. State law permits the detention of young people after arrest and before trial, but only if they are unlikely to appear at their next court hearing or will endanger others if released. Yet, according to information gathered from dozens of judges, administrators, prosecutors, defense attorneys, law enforcement officials and juvenile court personnel by the ACLU, Massachusetts frequently detains juveniles who fall into neither category in highly secure facilities, under jail-like conditions.

The use of detention in lieu of foster homes, respite care and therapeutic placements is bad public policy. A substantial body of research demonstrates that pre-trial detention can have profoundly negative consequences on the lives of those detained. Youth who are detained are more likely than those who are not to experience depression, stress-related illnesses and suicidal ideations, to receive harsher dispositions, to drop out of school and to re-offend. In fact, pre-trial detention is one of the most significant predictors of recidivism among juveniles.<sup>355</sup>

The exact number of young people who are wrongfully detained each year is unclear. The Massachusetts Juvenile Court collects very little statistical data and does not maintain detention-related statistics. Although the state's Department of Probation allegedly

collects data, it has consistently refused to supply both its data for review and its employees for comment. According to data compiled by the Massachusetts Department of Youth Services (DYS), however, roughly 6,000 youth are securely detained each year. Between two-thirds and three quarters are charged with misdemeanors or low-level, non-violent offenses. Many were arrested at school for incidents that in years past would have been handled without involving law enforcement. Of those 6,000, only 20% are ultimately committed to DHS after the charges against them are resolved. The remaining 80% are released back into the community, either because they are innocent or because the crimes of which they were convicted are not serious enough to warrant incarceration. By the time of their release, however, they will have spent an average of 18.5 days in custody.<sup>356</sup>

Not surprisingly, the state's misuse of detention disproportionately affects youth without the financial, emotional or educational resources to advocate effectively on their own behalf. Approximately two-thirds of those detained are youth of color. Another two-thirds have special educational needs and yet another two-thirds suffer from some form of mental illness. Most of these children are housed by the Commonwealth in secure facilities under less than optimal conditions. Many facilities are at or above capacity. One-third of the staff turns over every year. Peer-on-peer abuse, the use of restraints, suicidal ideations and gestures are

not uncommon. The quality of the education provided to detained youth has been the subject of a legislative investigation for the last six years.

*Settlement in Illinois Concerning Conditions at Juvenile Detention Center*

Over 6,000 children, some as young as 9 years old, pass through the Cook County Juvenile Temporary Detention Center each year, waiting to be charged or have their cases heard in court. Fifty-four percent of prisoners in Illinois' juvenile institutions are black, 34% are white, and 11% are Latino and Hispanic.<sup>357</sup> In 1999, the **Illinois** ACLU filed *Jimmy Doe v. Cook County* on behalf of the youth detained at the Cook County Juvenile Temporary Detention Center to challenge overcrowded, unsafe and filthy conditions. Residents of the facility were assaulted by other detainees and staff, did not receive appropriate medical or mental health care, and were denied adequate exercise and education. Staff was poorly trained and supervised, and discipline was unfair and arbitrary. The grievance system was inaccessible and ineffective, and staff retaliated against youth who made complaints. In 2002, the ACLU finally reached a settlement with the County in which the County agreed to implement the following standards of care:

- Residents are safe, clean, and adequately housed and fed;
- Medical, dental, mental health and developmental needs are promptly

identified, and youth receive timely access to appropriate services;

- Youth who are being disciplined are afforded due process of law, and are housed and disciplined in the least restrictive manner appropriate under the circumstances; and
- The system provides adequate social and recreational programming, security and a facility conducive to adequate education.

The settlement set mandatory standards of care for the children at the JTDC, but entrusted the planning and implementation of necessary changes to County officials and Detention Center managers. The County, however, did not fulfill its responsibilities to implement meaningful reform, and in 2005, when the situation remained dire, the ACLU returned to court, and was ordered by the judge to try and resolve the problem through negotiation. In May 2006, the court approved a new settlement agreement stipulating that a team of juvenile health and corrections experts familiar with the facility would develop a plan to achieve the original standards. The court-appointed monitors approved the final version of the plan in January 2007. The revised settlement also mandated that a qualified Compliance Administrator work with JTDC managers and oversee the implementation of the Plan. An experienced corrections professional and child welfare advocate was named to the position. Facility management remained resistant. As the implementation period for

the reforms stipulated by the renegotiated settlement drew to a close, reports from the Compliance Administrator and independent assessments revealed that critical problems persisted, including political patronage in staffing, a lack of a comprehensive management system, inadequate mental health services and on-going physical mistreatment and neglect of youth. In response, the ACLU returned to court again in May 2007, this time asking the federal judge to appoint a receiver with complete independent authority to oversee the facility and make needed reforms. In August 2007, after further negotiations, the judge appointed a nationally recognized expert in juvenile justice as the “Transitional Administrator” of the facility, who recently assumed administrative control of the Center and will remain at the facility until the standards set forth by the settlement agreement are met.

#### *Missouri’s Model Juvenile Justice System*

While most juvenile justice systems are turning nonviolent offenders into hardened criminals, Missouri, by contrast, has abandoned traditional detention centers in favor of small community-based centers that stress therapy over punishment, try to keep detained youth near their homes, and include family members in therapy. Case managers handle 15-20 cases, fewer than in many other states, and these managers follow their charges after their release and help them with job placement, therapy referrals, school issues, and substance treatment.<sup>358</sup>

#### **Adult Facilities: Inadequate Medical & Mental Health Care & Deaths in Custody**

In **Alaska**, prisons statewide fail to provide adequate health care, particularly as it relates to the treatment of inmates with mental illnesses.<sup>359</sup> Alaska Natives and African-Americans are grossly overrepresented in the prison population, and whites underrepresented, as stated above.<sup>360</sup> A 2004 report that summarized a one-day snapshot of Alaskan inmates reported that 37% of the prisoners exhibited a mental disorder,<sup>361</sup> and that the “consensus among professionals working with the mentally ill inmate population is that in Alaska, as elsewhere, staffing and resources are inadequate to meet the needs of this population. There are not enough sub-acute care units, and there is little counseling available. . . . [S]creening at intake can be inadequate for identifying the mentally ill, leading to lags in providing treatment and medication.” The Department of Corrections also uses inmate segregation (isolation) “as a tool for managing the prison population, including those who are mentally ill.”<sup>362</sup>

In **Texas**, people of color are disproportionately represented in the prison population, as set forth above, and substandard conditions prevail in jails and prisons. According to the Texas Commission on Jail Standards, one in three state jails failed state inspections this year and a fourth, Harris County, one of the state’s largest jails with more than 9,000 inmates, failed last year. Out of 38 county jails that were inspected, 13 have failed to

meet state standards. In 2006, 73 of the state's 268 jails failed to meet standards. The infractions range from mold to structural problems to inadequate staffing.<sup>363</sup> Investigators from the U.S. Justice Department found, for example, deplorable conditions at the Dallas county jail. Their report highlighted a grim pattern of negligent health care and unprofessional conduct, and found that the jail failed to treat people for communicable diseases and had large concentrations of drain flies and fly larvae swarming in bathrooms. They also found that inmates were not receiving essential life-sustaining medicines, and were receiving deficient medical and mental health care. The report documented at least 11 inmates whose deaths could have been prevented had both the Dallas County Sheriff's Department and the jail's medical provider followed basic standards of jail health and operation. Alice Lynch Fullen, whose brother committed suicide months after being sent to a Dallas jail, said, "It's as if they were POWs in a Third World country. If I got to do an impact statement, I'd have the guards and the health care professionals stay in the same jail that my brother did, and we'll see if they make it."<sup>364</sup>

*Hurricane Katrina Shines Spotlight on Array of Problems in Louisiana Prisons*

The U.S. fails entirely to discuss the treatment of prisoners during Hurricane Katrina, a shocking and unacceptable omission (particularly since the Human Rights Committee specifically requested follow-up information

from the U.S. on Katrina in its Concluding Observations to the U.S. last year).<sup>365</sup> Although **Louisiana's** population is 32 % African-American, 72% of the state's prison population is African-American.<sup>366</sup> Orleans Parish Prison (OPP) is the eighth largest jail in the country and houses recent arrestees, federal inmates, state inmates, immigrant detainees and juveniles.<sup>367</sup> More than 6,000 prisoners were left behind at OPP when New Orleans was evacuated; a decision was made not to evacuate the jail. This decision resulted in many inmates being stranded behind locked cell doors in chest deep water.<sup>368</sup>

The overwhelming majority of those inmates—5,693 people, or 89.3% of the prison population—were black (610 prisoners, or 9.6% of the prison population, were white).<sup>369</sup> Among those left behind were 1,884 *unsentenced* prisoners.<sup>370</sup> As the storm hit the city, first the phones went dead and the prison went into 'lockdown' mode. Soon, the prison lost all power supply, waters began to rise in the buildings, and prison deputies abandoned their posts. The prisoners, some of whom were disabled, remained in lockdown as the floodwaters rose. For days there was no food, water or medicine. Violence broke out between panicked prisoners who then attempted to escape the terrible conditions.<sup>371</sup>

Juvenile detainees were also heavily affected. At the two youth centers in the same New Orleans facility, 95% or more of the juveniles were African-American.<sup>372</sup> Over 100 teenagers in detention during the hurricane



A/P Wide World Photos



Prisoners await rescue on the Broad Street overpass after Hurricane Katrina.

endured horrific conditions. They stood by for hours in filthy floodwater, with nothing to eat and drink for three to five days, and were forced to consume floodwater or toilet water as a result. After their rescue, these juveniles were housed with adult inmates in violation of numerous human rights standards.<sup>373</sup>

During and after Hurricane Katrina, many prisoners from OPP, Jefferson Parish Correctional Center, and other correctional facilities in Louisiana faced systematic and racially motivated assaults by prison guards. At the Jena Correctional Facility, prisoners reported being slapped, punched, beaten, stripped naked, hit with belts, and kicked by correctional officers.<sup>374</sup> The detainees, most

of whom were African-American, were subjected to degrading treatment and racist slurs by the correctional officers, most of whom were white.<sup>375</sup> After documenting this abuse, Human Rights Watch and the NAACP Legal Defense Fund called upon the DOJ's Civil Rights Division to conduct an investigation into the abuse at Jena.<sup>376</sup> The Civil Rights Division refused to conduct an investigation, noting that the facility had been closed shortly after the abuse allegations were publicized. Likewise, the ACLU called upon the Department of Justice to investigate the abuse New Orleans prisoners suffered during and after Hurricane Katrina at prisons and jails throughout the state.<sup>377</sup> No information was released publicly about

whether any such investigation ever took place, or whether any of the guards responsible for the abuse were reprimanded or otherwise disciplined.

Problems persist in the New Orleans jails today. Violence persists at OPP, particularly in holding cells and in the housing tiers in the House of Detention (HOD). Examples are abundant, some noted here.<sup>378</sup> Prisoner-on-prisoner violence is also a constant danger in the poorly managed facility. Again, there is no shortage of examples.<sup>379</sup> Security is so lax that it is not uncommon for hours to pass without any deputy on guard. One man escaped by chiselling a hole through a wall in the hallway outside his cell, a task that could have taken him in excess of one and a half weeks. This area would have been inaccessible to him had the cell door been locked as designed, and the hallway monitored.<sup>380</sup>

Chronic overcrowding in HOD is another problem.<sup>381</sup> Prisoners report abhorrent conditions in the holding cells, some of which hold more than 70 people sharing a single toilet in a standing-room-only cell. Many new arrestees spend two days or more in such cells, sleeping on floors littered with trash, urine, and feces. In the housing tiers, the conditions are no better: cells designed to house 10 people regularly house 15 to 16 individuals; prisoners wait up to 2 weeks to get a bed; it is dangerously hot in the summer and without proper ventilation, prisoners living in severely overcrowded conditions are at greater risk for both drug-resistant “staph”

infections and multidrug-resistant tuberculosis. The Sheriff has not responded to an ACLU request for documents pertaining to any recent audits or inspections of jail conditions or operations, or to requests for information on overcrowding at the jail.<sup>382</sup>

The availability of medical care is another serious problem. In the years leading up to Hurricane Katrina, a number of prisoners at OPP died of apparently treatable medical conditions.<sup>383</sup> Recently, still more individuals died while detained at OPP.<sup>384</sup> In March 2007, a 54-year-old man died just three days after entering the jail. According to the Sheriff’s Office, preliminary autopsy results indicated that chronic heart and lung disease caused his death.<sup>385</sup> On July 3, a 29-year old man named Glenn Thomas was found dead in his cell. Thomas had been brought to OPP on October 23, 2006, on a cocaine possession charge.<sup>386</sup> The circumstances surrounding this death — and OPP’s handling of it — raises serious questions about current conditions inside the jail. Exacerbating this crisis in medical care, one of the two large public hospitals that provided emergency medical services to OPP before Katrina remains closed.<sup>387</sup> Many prisoners report significant problems in the delivery of necessary medical services.<sup>388</sup>

OPP has had a tragic history of failing to meet the serious needs of mentally ill prisoners at the jail.<sup>389</sup> In 2001, a young man named Shawn Duncan died of dehydration after being left in restraints, largely unsuper-

vised for 42 hours.<sup>390</sup> Less than two years later, a suicidal prisoner hanged himself while he was restrained in the same cell where Duncan had died.<sup>391</sup> Just weeks before Hurricane Katrina flooded the city, yet another prisoner in the mental health tier committed suicide by hanging.<sup>392</sup> Today, mental health care at OPP remains in a state of crisis.<sup>393</sup> The critical danger posed by OPP's inability to provide adequate psychiatric services is underscored by the fact that OPP is now the largest provider of psychiatric care in the greater New Orleans area.<sup>394</sup> This startling fact can be attributed both to Louisiana's historically poor mental health care system, and to the crippling effect of Hurricane Katrina on the city's public mental health services. Even before the storm, Louisiana's mental health care system was widely regarded as under funded and under-resourced. The state spends approximately one-third as much on mental health care per person as the national average.<sup>395</sup> Katrina exacerbated those pre-existing problems, and created new ones. Katrina wiped out about 300 public and private psychiatric beds, and another 200 slots for outpatient treatment services.<sup>396</sup> In addition, scores of mental health professionals have left the area, creating a tremendous staffing shortage.<sup>397</sup> Only 48 of the 208 licensed psychiatrists in the Gulf Coast were practicing medicine in the area as of fall 2006.<sup>398</sup> Perhaps the biggest blow to the region's mental health care system is the loss of Charity Hospital, which offered crisis-intervention beds and psychiatric beds to the community.<sup>399</sup> Charity was a

place where the police could bring mentally ill people for emergency care.<sup>400</sup> Without that hospital, police officers spend countless hours each month transporting hundreds of mentally ill people to emergency rooms.<sup>401</sup> In a recent post-disaster tracking survey, Harvard Medical School researchers found high proportions of those affected by Hurricane Katrina have continued to suffer mental illness and suicidality much longer than expected. This finding of lengthened duration combined with an increase in suffering, evidenced more severe adverse emotional effects of the hurricane than of more typical disasters.<sup>402</sup>

With so few psychiatric services available to the public, mentally ill people are being funneled into the criminal justice system. Without community mental health services and a functioning emergency system for acute psychiatric care, mentally ill people will continue to be incarcerated for behavior that is a product of their illness, and will spend increasingly long periods of time in jail, rather than in a proper therapeutic setting.

#### *Inadequate Care & Racially Disparate Commitment to New York Psychiatric Facilities*

The Kings County psychiatric facility serves 7 community districts, all overwhelmingly low-income, black communities. The approximate percentage of black residents per community district is, respectively, as follows: 48%, 82%, 73%, 40%, 81%, 88% and 55%. An extensive investigation recent-

ly conducted by Mental Hygiene Legal Services (MHLS), in conjunction with the **New York** Civil Liberties Union and others, showed that Kings County's psychiatric facilities are overcrowded and often dangerously unsanitary and that patients — including children and the physically disabled — are routinely ignored and abused. Investigators found that patients at Kings County's psychiatric facilities are confined in hospital wards whose floors are often covered with urine, feces and blood. Patients frequently sleep in plastic chairs and on the floor — sometimes for days on end. Patients are given soiled linens, if any, and frequently go without showers and clean clothes. If a patient complains about these conditions or asks for basic necessities, he or she runs the risk of being punished with a forcible injection of psychotropic drugs. Patients who use wheelchairs must choose between using the facility's only accessible bathroom, which has no lock on the door; using a commode, which is rarely emptied; or dragging themselves across a filth-covered floor in an attempt to use a non-accessible toilet in privacy.

The Board of the New York City Health and Hospitals Corporation was made aware of the horrific conditions at KCHC and failed to remedy them.<sup>403</sup>

Another disturbing phenomenon in New York is the apparently significant racial, ethnic and geographic disparities in the implementation of New York State's involuntary outpatient commitment law. In 1999, with

the adoption of "Kendra's Law," the New York State Legislature expanded the circumstances under which the State may compel persons with psychiatric disabilities to undergo treatment against their will or to participate involuntarily in mental health programs, even if those individuals do not meet the criteria for involuntary hospitalization and/or medication. Involuntary outpatient commitment orders under Mental Hygiene Law (MHL) §9.60 ("IOC" orders) typically involve judicial decrees that compel the administration of psychotropic drugs and require participation in other mental health services. These orders subject individuals to highly intrusive invasions of personal liberty and bodily integrity. According to the New York State Office of Mental Health, §9.60 orders absolutely determine what medications a person takes; where he or she receives therapy, spends much of the day (day treatment or rehabilitative programs) and lives (such as a community residence with a curfew and many rules); and whether he or she submits to blood and urine testing. Black people are almost five times as likely as white people to be the recipients of IOC orders. Hispanic people are two and a half times as likely as non-Hispanic white people to be the recipients of IOC orders. People who live in New York City are more than four times as likely to be the recipients of IOC orders as people living in the rest of the state. People with multiple psychiatric hospitalizations, but no histories of hurting others, are the primary recipients of IOC orders. New York City leads the state in using a state

law that disproportionately takes away the freedom of certain people of color who are mentally ill.

The New York State Office of Mental Health has characterized, with no further comment or explanation, the racial and ethnic composition of the recipients of IOC orders as “diverse.” According to the New York State Office of Mental Health 42% of IOC order recipients are black, 34% of IOC order recipients are white, and 21% are Hispanic. But, when compared with a similar population of mental health service recipients, the percentage of IOC order recipients who are men of color is disproportionate to the percentage of men of color whom the State has characterized as suffering from severe and persistent mental illness. Geographically, IOC orders are sought and imposed in a particularly skewed fashion across the state. As of April 1, 2005, New York City, Nassau and Suffolk Counties on Long Island and Erie County represented the locations where the majority of orders have been entered. Yet, the New York State Office of Mental Health has afforded no explanation as to why there is such stark geographic disparity in the application of “Kendra’s Law.”

### **Immigration Detention**

The U.S. detains over 261,000 people on civil immigration charges a year, at an annual cost of \$1.2 billion.<sup>404</sup> Immigration detention is the fastest growing form of incarceration in the nation. These immigrants are

housed in a patchwork of federal centers, private prisons and local jails, about which little is made public. Despite the highly secretive nature of this detention system, some very disturbing information about detainee treatment is beginning to emerge. Although the National Detention Standards adopted in 2000 call for hygienic living conditions, access to legal materials and counsel, and appropriate medical care, detainee mistreatment and deaths are increasing. Immigration and Customs Enforcement Bureau (ICE) and related federal authorities are failing to follow the standards, and are resisting efforts to turn them into legally binding regulations on the grounds that it would reduce the authorities’ flexibility.

The Department of Homeland Security recently released a study in which auditors reported that at 4 of 5 sites studied, they found “instances of noncompliance” “regarding health care” “including timely and initial and responsive medical care”, and also including rodent and bug infestations, limited access to legal services, irregular medical care, undercooked and filthy food and utensils.<sup>405</sup> Even ICE admits 62 deaths in custody between 2004 and 2006, many of them preventable. No government body is charged with accounting for these deaths, and getting any details about them is extremely difficult. The ACLU National Prison Project has documented blatant medical neglect at the facilities and is trying to determine whether medical negligence contributed to 20 of them.

Among those who died were: a man from Sierra Leone who collapsed at a Virginia jail after saying he did not get medicine for a kidney ailment; a woman from Barbados who died in another Virginia jail after telling her sister she received no medicine for a uterine fibroid that caused hemorrhaging; a South Korean woman who died after cell-mates appealed to authorities for help over a period of weeks; a Brazilian whose family implored authorities to give him medication for epileptic seizures; and a pregnant Mexican woman who lost consciousness. More than 70 detainees signed the petition of another detained 23-year old AIDS patient urging she receive immediate medical care; the woman did not receive treatment and died in custody.<sup>406</sup>

The incompetence and indifference of immigration officials in refusing to provide appropriate medical care amounts to punishment that violates the Fifth Amendment to the U.S. Constitution<sup>407</sup> (and, arguably, the Eighth Amendment) as well as CERD, which requires states parties to “[e]nsure the security of non-citizens, in particular with regard to arbitrary detention, as well as ensure that conditions in centres for refugees and asylum-seekers meet international standards.”<sup>408</sup> To ensure American immigrant detention facilities meet basic standards, ICE should promulgate improved detention rules as regulations, giving them the force of law and providing a larger incentive to comply. It should also commission an independent

comprehensive review of living conditions and medical care.

### *Ill-Treatment of Children in Immigration Detention*

In recent years, Congress has repeatedly directed the Department of Homeland Security (DHS) to keep immigrant families together, either by releasing them or by using alternatives to detention. Where detention is necessary, Congress has said immigrant families should be housed in non-penal, home-like environments.<sup>409</sup>

The T. Don Hutto Residential Facility is a converted prison in Taylor, **Texas** that began detaining immigrant families in the summer of 2006. That winter, more than half of the approximately 400 inmates at Hutto were infants and children, who received standard educational, medical, and mental health services, as well as inadequate nutrition and opportunity for physical exercise. In the spring of 2007, the ACLU filed a series of lawsuits against DHS and six officials from U.S. Immigration and Customs Enforcement (ICE) on behalf of 26 of these children who were between the ages of 1 and 17 and whose parents, in almost all cases, were awaiting determinations on their asylum claims. Soon after the litigation commenced, ICE instituted a policy of detaining at Hutto only families placed in expedited removal proceedings (drastically reducing the number of asylum seekers at the facility) and began to issue



Photos courtesy of AP Images.

### Immigrant families detained at the T. Don Hutto Residential Facility.

bonds for asylum seekers who passed their “credible fear” interviews.<sup>410</sup>

After extensive litigation and mediation, the parties ultimately reached a settlement that greatly improves conditions for immigrant children and their families inside Hutto, and secured the release of all 26 children from the facility with their families. These children are now living with family members who are U.S. citizens and/or legal permanent residents while pursuing their asylum claims.<sup>411</sup>

Andrea Restrepo, a 12-year-old child from Colombia, had been held in Hutto in a small cell for nearly a year with her mother and 9-

year-old sister. When released, she said, “I feel much better, I feel tranquil, I can do things now I couldn’t do there ... I am trying to forget everything about Hutto. I feel free. It was a nightmare.”<sup>412</sup>

Conditions for children still detained at Hutto have gradually and significantly improved as a result of the groundbreaking litigation, in areas like education, recreation, medical care, and privacy. Children are no longer required to wear prison uniforms and are allowed much more time outdoors. Educational programming has expanded and guards have been instructed not to discipline children by threatening to separate them

from their parents. Instead of punishing asylum seekers by treating them like criminals, the settlement requires ICE to treat children with care and compassion. ICE's compliance with these reforms, as well as others, will be subject to external oversight to ensure their permanence. Despite the tremendous improvements at Hutto, the facility remains a former medium security prison managed by the Corrections Corporation of America, a for-profit adult corrections company. Factors external to the suit may cause Hutto to close down entirely, but it remains unknown whether it will simply be replaced by another similar facility.

Despite the settlement, immigration reform advocates continue to assert that detaining immigrant children at Hutto or similar facilities is inappropriate, and Congress should compel DHS to find humane alternatives for managing families whose immigration status is in limbo.<sup>413</sup> In November 2007, the Women's Commission for Refugee Women and Children in combination with Lutheran Immigration and Refugee Service, released a report entitled *Locking Up Family Values: The Detention of Immigrant Families*. Based on interviews with families detained at Hutto and the Berks Family Shelter Care Facility in Pennsylvania, the report found families, many with children, detained in harsh conditions, for periods ranging from days to years. The families are held in penal environments, where residents are deprived of the right to live as families, denied adequate medical and mental health care, and subjected to excessively harsh discipline.<sup>414</sup>

### *Inhumane Conditions Lead to Deaths in Custody*

In June 2007, the ACLU filed a class action lawsuit on behalf of immigrant detainees at San Diego Correctional Facility (SDCF), because inadequate medical and mental health care had caused unnecessary suffering and, in several cases, avoidable death.<sup>415</sup> Detainees are routinely subjected to long delays before treatment, denied necessary medication for chronic illnesses, and refused essential referrals prescribed by medical staff, on several occasions resulting in death. In one such case, a Ghanaian man suffering obvious chest pains was denied treatment and was ordered to submit a written sick call request shortly before his death.

### *Indefinite Detention*

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the U.S. Supreme Court ruled that immigrants who have an order pending for their deportation, but whose home countries will not accept them, may not be detained longer than 6 months. Yet, longer detentions are all too common at the Albuquerque Immigration and Customs Enforcement detention facility. Between November 2006 and June 2007, ACLU of New Mexico attorneys obtained the release of many Chinese, Cuban and other immigrants, most of whom had been detained for as many as 5 years on grounds that their continued detention violated, among other rights, their right to due process of law.



## CAPITAL PUNISHMENT

The U.S. is the only Western industrialized country that applies the death penalty. More than half the countries in the world have abolished the death penalty in law or in practice. Seventy-nine countries outlaw the death penalty for any crime; fifteen more allow it only for exceptional crimes, such as those committed during wartime. Another 23 countries are “de facto abolitionist”: they have not executed anyone during the past 10 years or more, or they have made a commitment not to carry out executions. In 2003, there were over 1000 executions in 28 countries around the world. China, Iran, Vietnam and the U.S. were responsible for 84% of these known executions.

Although the local constitutions of several states prohibit capital punishment, as U.S. entities, death sentences may be imposed in local criminal cases prosecuted in federal court under federal statutes that provide for that punishment and applied in a U.S. jurisdiction where capital punishment is allowed. At the federal level, the death penalty was ruled unconstitutional in 1972 and later reinstated in 1976. It has been administered more than 1,000 times during the past 30 years, and it is lawful in 38 states.<sup>416</sup> According to a Gallup Poll conducted in June 2007, about two-thirds of U.S. residents, or 65%, favor the death penalty for someone convicted of first-degree murder, while 31% oppose it.

Defendants’ and victims’ races play crucial and unacceptable roles in deciding who receives the death penalty in America, in violation of CERD.<sup>417</sup> A moratorium on the use of capital punishment is urgently needed to address the blatant prejudice in its application. In its Concluding Observations of 2001, this Committee noted that minorities are disproportionately sentenced to the death penalty, especially in **Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas**, and urged the U.S. to consider moratoria to ensure that disparities in the death penalty are not a result of race bias or the economically, socially, and educationally disadvantaged position of these groups.<sup>418</sup>

In fact, people of color have accounted for a disproportionate 43% of total executions since 1976, and make up 55% of those currently awaiting execution. In its Report, the U.S. states that capital punishment is a source of great debate but still supported by most persons, and in any event the “U.S. Government remains confident that [it] is not administered in a manner inconsistent with...the Convention.”<sup>419</sup> The U.S. notes that since 2000, New York has declared capital punishment unconstitutional under the state constitution, executions in New Jersey and Illinois have been suspended, and criminal defendants in the U.S., especially those in potential capital cases, enjoy numerous procedural guarantees,<sup>420</sup> adding that two Supreme Court decisions have narrowed the categories of defendants against whom the death penalty may be applied,<sup>421</sup> and, both

the number of prisoners under sentence of death and the number of executions have declined.<sup>422</sup>

In fact, procedural protections often fail, with catastrophic results. There is compelling evidence that states have executed at least 8 likely innocent men (6 African-American or Latino).<sup>423</sup> Moreover, 124 people on death row were either: 1) granted full executive pardons based on new evidence of innocence; or 2) had their convictions overturned and were either acquitted at retrial or had all charges dropped.<sup>424</sup> These wrongful convictions were primarily due to a failure of procedural protections and fair processes including but not limited to ineffective assistance of counsel, false confessions attributable to overzealous law enforcement efforts, states' suppression of exculpatory evidence, states' unreliable use of testimony obtained in exchange for money or leniency in the handling of witnesses' own criminal cases, and unreliable eyewitness identifications.

Procedural failures also often result in the erroneous imposition of a death sentence even where guilt is not at issue. In the few instances it considers such cases, the U.S. Supreme Court has repeatedly reversed death sentences in **Texas**, the nation's leader in executions, for violations stemming from flawed sentencing proceedings.<sup>425</sup> Although proponents of the death penalty may point to such reversals as evidence of the system working properly, the fact is that the Supreme Court grants only a miniscule per-

centage of petitions for certiorari. The vast majority of people sentenced to death will not have their cases reviewed by the Court.

Moreover, the trio of cases cited above is only the most recent evidence that the Texas and federal courts, which review Texas capital appeals repeatedly fail to uphold Eighth Amendment protections explicitly, spelled out by the Supreme Court's decisions.

Finally, courts frequently fail to uphold "the right to challenge the makeup of the jury," with a recent example again from Texas where a prosecutor purposefully eliminated nearly all qualified black prospective jurors. An African-American man languished on death row for nineteen years before the U.S. Supreme Court, by reversing erroneous lower court rulings, granted him reprieve.<sup>426</sup> A "right" to challenge the makeup of the jury, and discrimination in its selection, which takes nineteen years of litigation from death row to vindicate is but a shadow of the robust protections which should be available to those facing capital prosecution.

The U.S. Report states that "[o]f the inmates in prison under sentence of death [by the states and federal government], 56% were white and 42% were African-American."<sup>427</sup> But according to the Death Penalty Information Center, nationally, the racial composition of those on death row is 45% white, 42% black, and 11% Hispanic.<sup>428</sup> By labeling Hispanic inmates as "white," and thus over-representing the percentage of white people on death row, the government

creates the impression that the death penalty is utilized in a more racially balanced manner than it truly is.

The U.S. also notes that in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court held that the execution of mentally retarded criminal defendants constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.<sup>429</sup> While *Atkins* did outlaw the execution of mentally retarded criminal defendants, the Court left it to the states to decide which defendants were mentally retarded. *Atkins*, 536 U.S. at 317. “The result is a plethora of procedures and definitions [of mental retardation] that differ from state to state,” and the concomitant arbitrary imposition of the death penalty.<sup>430</sup>

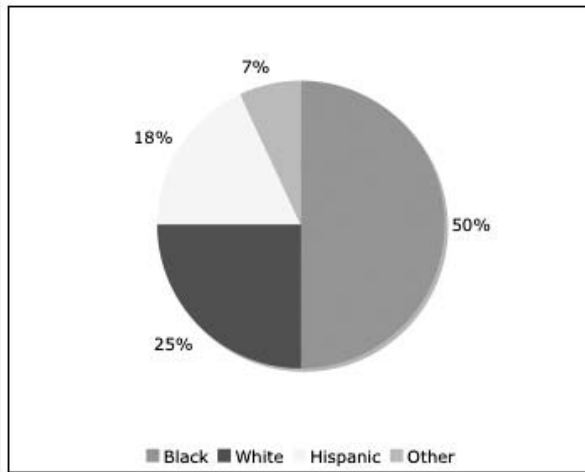
<b><u>Death Penalty Statistics*</u></b>	<b><u>2006</u></b>	<b><u>2005</u></b>
Executions	53	60
Death Sentences	114	128
Death Row Pop. (as of 1/1/07) <sup>^</sup>	3,350	3,415
<b>% of Executions by Region</b>		
South	83%	72%
Midwest	11%	23%
West	6%	3%
Northeast	0%	2%

**Death Penalty Statistics: 1973-2006**

Total Executions	1,058
Texas Executions	379
Virginia Executions	98
Oklahoma Executions	83
Exonerated or released	123

\*Death Penalty Information Center – As of Dec. 31, 2006; <sup>^</sup>NAACP Legal Defense Fund, “Death Row USA” (January 1, 2007). *Statistics provided by [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org)*

### Race Bias in the Application of the Death Penalty



### Race of Defendants Approved for Federal Death Penalty Prosecution

Source: Death Penalty Information Center

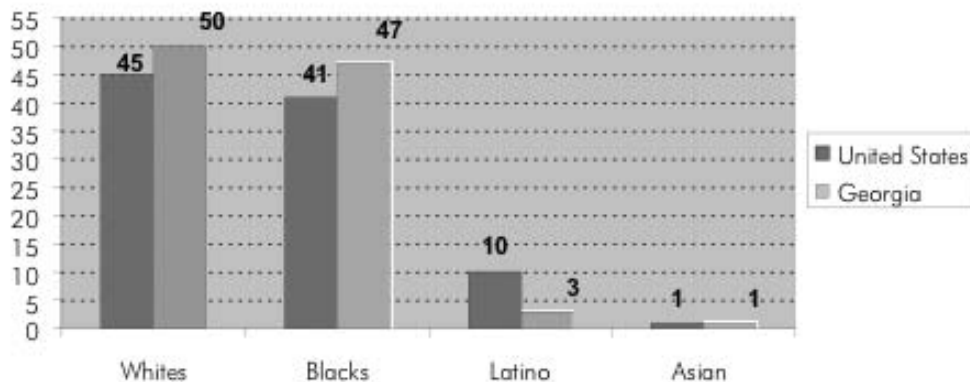
**Texas**, the epicenter of the death penalty in the U.S., has executed over one third of the 1089 inmates executed since the death penalty was reinstated in 1976, which is 300 more than the second most active death penalty state, Virginia. The death row population in Texas demonstrates the same systemic racism that plagues the general prison population. Over 40% of the current death row population is African-American. This statistic does not paint a full picture, however, as racism and the death penalty has as much to do with the race of the victim as the race of

the offender. The Death Penalty Information Center had documented this trend of selectively pursuing the death penalty in cases involve White victims while equally horrendous crimes against minorities receive less severe penalties. Of the inmates executed since 1976 across the country, 78% of their victims were white. With Texas leading the number of executions in the country threefold, it is significantly responsible for this trend.<sup>431</sup>

Among inmates on death row as of August 31, 2006, the victim(s) were white in approximately 50% of the cases; 22.4% of the victims were Hispanic, 14.8% were African-American, and in 5.5% of cases the race of the victim is not known.<sup>432</sup>

Death row conditions in Texas are among the worst in the nation. Male Death Row inmates are incarcerated at the Polunsky Unit in Livingston, Texas, where they are housed in single cells measuring 60 ft. They eat alone, recreate alone and worship alone. Visitation, recreation and commissary rights vary depending on an inmate's classification level. Level I (best behaved) inmates are permitted one two hour general visit per week, allowed out of their cell from seven to 12 hours a week for recreation and have access to the prison commissary. Level II (rule-breakers) inmates are permitted two two-hour general visits per month, allowed out of their cell for four hours a week for recreation and have limited access to the prison commissary. Level III (assault or combative) inmates are permitted one two

Percentage of Death Row Inmates by Race/Ethnic Group, 2007<sup>439</sup>



hour general visit per month, allowed out of their cell three hours a week for recreation and have no access to the prison commissary. Texas is the only death row in the nation that does not offer television. However, some inmates (depending on their classification level) are allowed to have a radio.<sup>433</sup>

As of November 7, 2007, there were 9 women on Texas death row. Four of these women are African-American.<sup>434</sup> One of the African-American women on death row was convicted of killing an African-American child in her care. All of the remaining women on Texas death row were convicted of murder of one or more white victims, except in one case where the race of the victim is not publicly available.<sup>435</sup> Therefore, at least 77% of the women on Texas death row are there for the murder of white victims.

In **Georgia**, where African-Americans represent 29.8%, Latinos 7.18%, whites 66.1%, and Asians 2.7% of Georgia's 9,363,941 citizens,<sup>436</sup> the African-American prison population is an astounding 68%. The state surpasses the national average of African-American (black) death row inmates.<sup>437</sup> Currently, 90% of Georgia's death row cases involve white victims, even though 65% of the victims in Georgia's homicides are African-American. Despite these findings, Georgia has yet to institute any measures to address racial bias in the application of the death penalty. According to the federal General Accounting Office, race is a significant factor in the determination of death sentences in Georgia: a death sentence is four times more likely when the victim is white rather than black, and blacks who kill whites are 11 times more

likely to receive the death penalty than whites who kill blacks.<sup>438</sup>

Similarly, in **California**, the first statewide study of the role of race, ethnicity and geography in death sentencing in the state found that race and ethnicity of victim, place, and community diversity are key factors in determining who is sentenced to death.<sup>440</sup> While 27.6% of murder victims are white, 82% of executions have been for those convicted of killing whites.<sup>441</sup> Moreover, those who kill whites are over three times more likely to be sentenced to death than those who kill African-Americans and four times more likely to be sentenced to death than those who kill Latinos.<sup>442</sup>

**New York's** death penalty statute has remained highly controversial since its enactment and continues to be severely criticized. The law was struck down in June 2004 by the state's highest court, which found that the state's jury instructions were unconstitutional under the state constitution and that the constitutional defect in the existing statute could only be remedied by passage of a new law by the legislature.<sup>443</sup> As a result, there is currently a *de facto* moratorium on the death penalty in New York. The question as to whether the death penalty statute should be revived has been the subject of intense debate since the Court of Appeals decision in *LaValle*. Defendants convicted of murdering white victims are more than twice as likely to face the death penalty as those convicted of murdering black victims. Specifically,

32% of first degree murder cases since 1995 involved a white victim, yet 60% of the cases in which a prosecutor sought the death penalty involved a white victim. In contrast, while 43% of the first-degree murder cases involved a black victim, only 36% of the cases in which a prosecutor sought the death penalty involved a black victim.<sup>444</sup> It has been widely shown that capital punishment does not deter crime. Monroe County prosecutors have sought the penalty 6 times, the most in any county, yet the city of Rochester (located in Monroe County) has the highest murder rate in the state. By contrast, the Manhattan District Attorney's office has never sought the death penalty, and the murder rate has steadily decreased since 1995.

### ***DISCRIMINATION IN THE RIGHT TO SECURITY AGAINST PUBLIC & PRIVATE VIOLENCE***

#### **ROUND-UP AND ARBITRARY DETENTION OF MUSLIM IMMIGRANTS**

The U.S. government has rounded up, arbitrarily detained and interrogated hundreds of men from (or appearing to be from) Arab, South Asian or Muslim countries.<sup>445</sup> Despite the lack of any concrete evidence, these men were said to have been investigated on suspicion of their possible involvement in terrorist activity, although even official sources found that few, if any, had any real links to terrorism and that the process of naming them "of special interest" to the investigation seems to have been based, in many cases, on race and

religion alone. These men were detained often for months at a time, and while detained, subjected to a regime of physical and psychological abuse. After being found innocent of terrorism, many were deported. We refer the Committee to two ACLU reports that document the devastating impact that the deportation of these men has had on their families and the immigrant communities in the U.S. as well as a decision of the UN Working Group on Arbitrary Detention.<sup>446</sup>

### Special Registration Program

The U.S. Department of Justice also instituted a “special registration” program, also known as the National Security Entry-Exit System (NSEERS), which required selected visitors to the U.S. to be fingerprinted, photographed and questioned. The domestic component applied exclusively to male citizens and nationals of twenty-five countries, all but one predominantly Muslim and located in the Middle East, South Asia or North Africa (that one is North Korea). None of the individuals who reported for special registration were charged with terrorism, and many were detained and deported. In December 2003, with problems mounting as a consequence of the government’s failure to provide adequate notice about re-registration requirements, the Department of Homeland Security, which had assumed responsibility for special registration, suspended the program’s 30-day and annual re-registration requirements. However, some of the special registration

requirements remain in effect to this day, including a little known requirement that those who went through special registration must restrict their departures from the U.S. to designated ports and formally register their departures before leaving. A 2006 study conducted for the U.S. Department of Justice found that Arab Americans fear the intrusion of federal policies and practices even more than individual acts of hate or violence.<sup>447</sup>

Egregious mistakes have been made in relation to this racial and ethnic profiling. In **Washington** State in 2003, Abdulameer Yousef Habeeb, an Iraqi refugee who lives in Washington, was picked out of a group of passengers taking a station break during a train ride through Montana. Agents arrested him for failing to register for the Special Registration Program although, as a refugee, he was exempt from this program. Mr. Habeeb was strip searched, placed into deportation proceedings and imprisoned for eight days, before finally being released without an apology. The ACLU sued the government for the wrongful arrest and detention, and after a lower court loss, and while an appeal was pending—four years later, in 2007—the Justice Department agreed to compensate Mr. Habeeb for the unfair treatment he received and offered a long-overdue apology. The district court judge in Montana agreed to vacate his ruling, erasing a dangerous precedent from the books.<sup>448</sup>

## ABUSE OF NON-CITIZENS DURING DETENTION

In 2006, the U.S. government agreed to pay \$300,000 to settle one detention case brought in 2004 by an Egyptian man who was among the dozens of Muslims rounded up in New York after the September 11, 2001 attacks.<sup>449</sup> Mr. El-Maghraby was held for nearly a year in the Administrative Maximum Special Housing Unit of the Metropolitan Detention Center and deported after being cleared of links to terrorism.<sup>450</sup> He had been working in New York at the time of the September 11 attacks, and said he was physically and mentally abused while detained. Although the government did not admit official liability, the settlement is a form of accountability for what happened to Mr. El-Maghraby. The suit charged Attorney-General John Ashcroft and other government and prison officials of conspiring to violate the rights of Muslim immigrant detainees on the basis of race, religion, and national origin.<sup>451</sup>

## FEDERAL BUREAU OF INVESTIGATION INTERROGATES MUSLIMS

After the September 11 events, under the guise of investigations on possible threats to the safety and well being of the country, the U.S. began an interrogation program of predominantly Arab, Muslim and South Asian individuals, directed by the Federal Bureau of Investigations (FBI). The secrecy surrounding the interviews has made it difficult, if not nearly impossible, to obtain an accu-

rate number of the people who have been interviewed. Individuals are singled out because they are Arab, Muslim and/or South Asian men; they sometimes come to the attention of authorities for an otherwise mundane aspect of their daily lives. For example, one individual was interviewed because he complained to an apartment manager about the service he was receiving. Another man was selected for an interview because he and his wife, who wears a hijab, were seen stopped on a highway photographing a sunrise to show his mother-in-law who lives in Morocco.

Usually, identified individuals are approached at their home or place of employment by two FBI agents, or one FBI agent and one ICE agent. The individuals are informed of the government's interest in interviewing them. If an interviewee requests counsel, some agents ask "Why do you need an attorney? Do you have something to hide?" If an interviewee decides to have an attorney present, there have been instances where agents resisted the presence of an attorney and on some occasions cancelled the interview entirely. In their interrogations, agents often ask inappropriate questions, such as: "How many times do you go to Mosque?" "What do you think of President Bush?" "Are you Shiite or Sunni?" "What do you think of the war in Iraq?" These interviews place fear in people with no connection to terrorist activity or to the 9/11 events and have a devastatingly, chilling effect. Some of the interviewees now fear going to Mosque, being active in politics, and one was afraid of tak-



ing pictures in public places. This fear has spread beyond the individuals who were interviewed to their families and friends, as members of the Arab, Muslim and South Asian communities learn of these interrogations of their friends, relatives and neighbors.

### NATURALIZATION DELAYS

The government is illegally delaying processing the naturalization applications of thousands of immigrants by profiling those it perceives are Muslim based on their names, race, national origin, place of birth, ethnicity or religion, and subjecting them to indefinite security checks.<sup>452</sup> Beginning in 2002, the U.S. Citizenship and Immigration Services agency (USCIS) modified its background check procedures for naturalization applicants, drastically expanding the database for a procedure known as an “FBI name check.” By the government’s own admission, the FBI name check database contains the names of innocent people who are involved in government investigations, including witnesses and crime victims, thus leading to large numbers of false positive results. The USCIS’s own ombudsman publicly has agreed “with the assessment of many case workers and supervisors at USCIS field offices and service centers that the FBI name check process has limited value to public safety or national security, especially because in almost every case the applicant is in the United States during the name check process, living or working without restriction.” The ombudsman therefore has criticized the modified FBI

name check procedure, reporting, “the current USCIS name check policy may increase the risk to national security by prolonging the time a potential criminal or terrorist remains in the country.” Nonetheless, USCIS persists in its policies.

As a result, as of May 2007, USCIS reported a staggering 329,160 FBI name check cases pending, with approximately 64 percent (211,341) of those cases pending more than 90 days and approximately 32 percent (106,738) pending more than one year. As of June 2007, there were 31,144 FBI name checks pending more than 33 months. From 2006 to 2007, the number of delayed applications increased by 93,358.

The ACLU of **North Carolina** has received numerous complaints from *legal permanent residents* (all Muslim men) who have experienced delays of up to five years in the processing of their naturalization applications and whose mandatory naturalization interviews have been canceled by the government. The ACLU and its California branch also filed suit in cases in which the interviews took place but no action followed, seeking a remedy for the systemic, years-long delays in the process of obtaining U.S. citizenship. These actions constitute a baseless denial of due process rights as well as a prevention of full enfranchisement and the benefits to which individuals would be entitled.

## ABUSE OF MATERIAL WITNESS LEGISLATION

As the ACLU explained in its 2006 submission to the Committee Against Torture, following the September 11 attacks, the Department of Justice detained at least 70 men living in the U.S. — all but one of whom were Muslim — under a federal law that permits the government, in narrow circumstances, to arrest and briefly detain “material witnesses” who have information about a criminal case and who might otherwise flee to avoid testifying in a criminal proceeding. After September 11, the government in many cases used the material witness statute to secure indefinite detention of persons thought to be possible terrorist suspects but as to whom probable cause was lacking for a criminal arrest. While claiming a need for testimony from these individuals, the government frequently delayed or failed to take their testimony at all. The government’s use of the material witness statute in this manner enabled it to impose extended detention for the purpose of investigating the putative witnesses as suspects.

A 2005 report published jointly by the ACLU and Human Rights Watch documented how witnesses were often arrested at gunpoint in front of families and neighbors and transported to jail in handcuffs, held around-the-clock in solitary confinement, and subjected to the harsh and degrading high-security conditions typically reserved for prisoners accused or convicted of the most dangerous crimes,

including being taken to court in shackles and chains.<sup>453</sup> In at least one case, a material witness was made to testify in shackles. The ACLU is challenging in court the U.S. government’s post-9/11 use of the material witness law in the case of *al-Kidd v. Gonzales*.<sup>454</sup>

## VIOLENCE AGAINST MIGRANTS

In December 2006, the U.S. Department of Homeland Security (DHS) announced more than \$12 million in grant awards to the four Southwest border states in support of ongoing local law enforcement efforts at the border. The funding assists local authorities with operational costs and equipment purchases that contribute to border security.

Increased militarization of the U.S.-Mexico border has led to war-like conditions in many border regions. Since 1996, when President Clinton began to implement a strategy of militarizing the border, more than 4,000 migrants have died while attempting to cross from Mexico into the U.S., with some activists citing figures closer to 10,000.<sup>455</sup> Violence continues to escalate along the border due to the inadequate training of Border Patrol agents, despite the fact that the government has increased the number of agents to 15,000 (and will increase the number to 18,300 next year) and lent significant National Guard support.<sup>456</sup> According to the Director of the Border Network for Human Rights in El Paso, “Their mentality is that we’re all criminals.” A **Texas** resident at a recent rally in El Paso echoed the concerns



Markers for people killed crossing the U.S.-Mexico border.

of the BNHR Director, “We are trying to stop the Border Patrol from shooting immigrants. We don’t want this to happen anymore. We need to stop these abuses.”<sup>457</sup>

The summer of 2007 has been particularly violent along the border, especially in the El Paso, Texas region. On July 4, an El Paso Border Patrol agent shot and wounded a migrant who was illegally crossing into the U.S. through a drainage tunnel, claiming that the immigrant was moving towards him. This shooting was the second in less than a week by the El Paso Border Patrol. Once again, on August 9, another El Paso Border Patrol agent shot and killed a 23 year-old migrant attempting to cross the border.<sup>458</sup> When watchdog groups like the Border Network for Human Rights have requested

information about the Border Patrol’s policies on use of force, the only responses they have received have been justifications based on fear of attack by immigrants.<sup>459</sup>

In addition to gun violence and racial profiling, there have been an increasing number of allegations concerning Border Patrol agents for their mistreatment and abuse of women immigrants. On July 26, 2007, an El Paso Border Patrol agent pled guilty to two civil rights violations in connection with molesting three immigrant women and then releasing them without processing.<sup>460</sup>

There has also been a failure to protect immigrant, low-income, detained and homeless populations during the October 2007 **California** fires that caused half a million



U.S. Military vehicles patrolling the U.S.-Mexico border.

people to evacuate their homes. The emergency response system was successful in alerting vast segments of the population and getting them to safety, among other things. Hundreds of reports have emerged that undocumented immigrants and homeless evacuees were denied emergency services and shelter because they could not provide proper identity documents. (Similar incidents occurred during Hurricane Katrina.) A Filipino volunteer was evicted from the stadium where many were housed for helping evacuees carry donated goods to their vehicles.<sup>461</sup>

### VIOLENCE AGAINST MINORITY WOMEN

The U.S. report is silent as to violence against women, even though racial minority women are especially vulnerable to violence. For example, while African-American women and white women with the same economic characteristics experience similar levels of domestic violence, African-American women experience a higher rate of domestic violence, in part because they are more likely to live in disadvantaged neighborhoods and experience economic distress.<sup>462</sup> Women are heads of household in 79% of households

living in government subsidized-housing, including public housing; 58% of households consist of people of color.<sup>463</sup> Native American women experience the highest rate of violence of any group in the U.S.<sup>464</sup> Police response to reports of domestic violence is frequently inadequate, exposing racial minority women in particular to persistent and grave danger. Additional factors in the government's failure to protect women are the interpretation of the U.S. constitutional guarantee to affirmative protection from violence as a "negative" right rather than a "positive" right, and the government's denial of its obligation to protect women from harm by private parties, as in the 2005 U.S. Supreme Court case *Town of Castle Rock v. Gonzales*.<sup>465</sup>

The U.S. also fails to address violence against minority women in the workplace. This Committee requires states parties to "[t]ake effective measures to prevent and redress the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical assault."<sup>466</sup> Yet these injustices are happening to millions of women in the U.S. today.

#### *Exploitation of Women Workers by Diplomats*

Nearly 93% of domestic workers are women, and the vast majority are also minorities and migrants.<sup>467</sup> Unfortunately, there is a legacy in the U.S. of slavery-related exclusions of

domestic workers and farm workers from labor protections. The landmark Fair Labor Standards Act, enacted in 1938, largely, and consciously, excluded African-American workers from its protections.<sup>468</sup> At a time when 65% of black Americans worked in either agriculture or domestic service, neither category of employment was covered. This was consistent with other labor and welfare legislation enacted at the time.<sup>469</sup> In order to satisfy the staunch Southern segregationists then in control of Congress explicit exclusions had to be included for agricultural and domestic service workers in several major pieces of legislation,<sup>470</sup> since these politicians would not tolerate legislation that put black and white workers on the same economic footing. (Today, farm workers and domestic workers are almost exclusively immigrants of color.) Earlier this year, the U.S. Supreme Court unanimously upheld a regulation excluding "domestic service employees" from the Act's minimum wage and overtime provisions regardless of whether they are employed directly by the recipient of the care or an outside agency.<sup>471</sup> As a result, migrant women workers in the U.S., particularly domestic workers, including those employed by diplomats, may be held in conditions of servitude or forced labor, and are often verbally or sexually abused.<sup>472</sup>

Unlike other employers, diplomats are generally immune from civil, criminal and administrative processes in the U.S. unless the sending countries waive their immunity. Aggravating the problem, U.S. courts have

interpreted the commercial activity exception contained in Article 31(c) of the Vienna Convention on Diplomatic Relations to exclude the hiring and employment of domestic workers.<sup>473</sup>

Reiterating this position, the U.S. government has submitted “Statements of Interest” on behalf of foreign diplomats in lawsuits brought by abused workers, arguing that the U.S. has entered into a number of treaties that establish its obligation to accord diplomatic immunity from prosecution. Pursuant to these treaties, diplomats are entitled to the same privileges and immunities in the U.S. as the U.S. accords to diplomatic envoys, immunities defined by the Vienna Convention, including immunity from the civil jurisdiction of the courts in this country.<sup>474</sup> In *Tabion v. Mufti*, the federal court of appeals relied on what it called the State Department’s “narrow interpretation” of commercial activity, holding that employment of a domestic servant did not constitute commercial activity.<sup>475</sup> As a result, certain diplomats are sheltered from the legal repercussions of exploiting employees including domestic workers. Yet domestic workers, including workers employed by diplomats, too often face a range of civil and human rights violations including forced labor and trafficking rising to the level of slavery.

For example, in *Chere v. Taye*, the ACLU represented Beletaschew Chere, an Ethiopian domestic worker trafficked by UNDP staff Alemtashai Girma and her husband Fesseha

Taye to New Jersey and held in conditions of forced labor.<sup>476</sup> She was forced to work 75-80 hours per week, without payment or time off, verbally and sexually abused, denied needed medical care, prohibited from contacting her family or seeking help, made to sleep on the toddler’s bedroom floor and eat the family’s leftovers.<sup>477</sup> The ACLU filed suit against the employers for violations of several federal and state labor laws, federal statutes, the Thirteenth Amendment of the U.S. Constitution prohibiting involuntary servitude, and international law prohibiting forced labor and trafficking in persons under the Alien Tort Claims Statute and state tort laws. The Alien Tort Claims statute allows non-citizens to sue for damages in U.S. courts for injuries that violate international law. The ACLU settled this case with a favorable outcome for Ms. Chere.

And, in *Vishranthamma v. Al-Awadi*, the ACLU advocated on behalf of Swarna Vishranthamma, a domestic worker from India who was exploited and abused by her employer, the First Secretary to the Kuwaiti mission to the U.N. For 4 years, she was forced to work 7 days a week, 18 hours a day, and paid far below minimum wage and given no overtime compensation. She was also physically and sexually abused, repeatedly threatened, and verbally assaulted. Her employers confiscated her passport, threatened her with arrest should she try to leave, and severely restricted her contact with family and friends. Despite her fears of retaliation, she ultimately escaped from her

employer's home. Ms. Vishranthamma filed a civil action against her employer seeking redress and compensation for the exploitation she endured but after 2 years of litigation, the case was dismissed, after the court concluded her employer was entitled to diplomatic immunity. A subsequent case was filed on her behalf in 2006, which is still pending.

The ACLU has now brought another suit in federal trial court, *Sabbithi, et al. v. Al Saleh, et al.*<sup>478</sup>, this time suing the country of Kuwait and a Kuwaiti diplomat and his wife with trafficking three women from India and forcing them to work as domestic employees and perform childcare against their will under slavery-like conditions, seeking to hold not only the diplomats but the nation of Kuwait accountable for the abuse the women suffered at the hands of its diplomatic employee. In the suit, we represent Kumari Sabbithi, Joaquina Quadros and Tina Fernandes, three Indian women who were employed as domestic workers by Major Waleed Al Saleh and his wife Maysaa Al Omar of McLean, Virginia. In the summer of 2005, the three women were brought to the U.S. under false pretenses, where they were subjected to physical and psychological abuse by the Al Saleh family and forced to work against their will. In the winter of that year, fearing for their lives, each of the women individually fled the household. As a diplomat, Al Saleh was required to sign a contract with each of the women guaranteeing them a fair wage, specific working conditions and safe passage home, but he failed to

uphold these basic contractual obligations and thereby violated the law.<sup>479</sup> Al Saleh filed a motion to dismiss on the ground of diplomatic immunity. The ACLU requested state department intervention and the U.S. requested that Kuwait waive immunity. Kuwait, in turn, sent the diplomat out of the U.S. The ACLU is still proceeding with the lawsuit and working to negotiate a settlement for its clients. The ACLU has also raised the immunity issue in a Petition to the Inter-American Commission on Human Rights.

#### *Sexual Violence Against Indigenous Women*

Sexual violence among indigenous women in the U.S. has also been largely unaddressed by the U.S. government. The U.S. Department of Justice has reported that more than one in three Native American women will be sexually assaulted in their lives.<sup>480</sup> A new Amnesty International report documents that Native American women are more than 2.5 times more likely to be raped or sexually assaulted than women in the U.S. in general.<sup>481</sup>

U.S. federal law ties the hands of tribal authorities to investigate and prosecute these crimes, allowing perpetrators to rape with impunity. The federal Bureau of Justice Statistics reports that nearly 4 in 5 American Indian victims of rape or sexual assault described the offender as white.<sup>482</sup> However, the U.S. Supreme Court decision in *Oliphant v. Suquamish* barred tribal authorities from exercising jurisdiction over non-Indian perpetrators, even when the crimes occur on

tribal land.<sup>483</sup> Thus, for the vast majority of sexual assaults experienced by Indian women, federal authorities have the sole ability to pursue criminal cases – and they frequently fail to do so against the white perpetrators of these crimes. From October 1, 2002 to September 30, 2003, federal prosecutors declined to prosecute 60.3% of the sexual violence cases filed.<sup>484</sup>

The bar on tribal prosecution, combined with the reluctance to pursue these cases on the federal or state levels, has led to a complete failure of the criminal justice system for Indian women who have been sexually assaulted or raped. Nor do adequate social services exist to help them recover from the trauma they have experienced. Law enforcement authorities and the Indian Health Service have not resolved who should pay for transportation of the victim to an equipped medical facility as well as for the sexual assault forensic examination, a crucial piece of evidence in any prosecution; in some cases, the victim herself has been forced to pay for the examination.<sup>485</sup> The consequences of these various obstacles to justice are a sense of helplessness among victims and even reports of “suicide epidemics” among women on reservations.<sup>486</sup> Sexual violence against indigenous women is a serious and systemic human rights violation that has been unaddressed by the U.S., and implicitly encouraged by the lack of federal action and the limitations placed on tribal law enforcement authority.

The specific example of **Alaska** is very disturbing, because Alaska Native women are raped at startling rates. Alaska has one of the highest per capita rates of physical and sexual abuse in the U.S. A U.S. Department of Justice study on violence against women concluded that 34.1 % of Native American and Alaska Native women – or more than one in three – will be raped during their lifetime; the comparable figure for the USA as a whole is less than one in five.<sup>487</sup> Even when a perpetrator was arrested for rape, Alaska’s rate of conviction on any felony charge after a rape arrest was 33% lower than the national average.<sup>488</sup> Although jurisdictional complexities pose a problem to tribes in many states, Alaska’s situation is unique because the state has taken the position that the Alaska Native village does not have inherent criminal law enforcement authority. Tribal councils were threatened with criminal prosecution “should they attempt to enforce their village laws.”<sup>489</sup> This is despite this Committee’s admonition that states “ensure respect for, and [recognize] traditional systems of justice of indigenous peoples...”<sup>490</sup> And, while the state has fought to limit tribal authority in maintaining order on tribal lands, it has at the same time failed to provide state law enforcement services, and police are often slow to respond to reports of sexual violence.<sup>491</sup> In the state’s largest city, Anchorage, while Alaska Natives make up only 8% of the total population they comprise 24% of all victims of violence.<sup>492</sup> Accordingly, Alaska Native women are par-



ticularly vulnerable to violence and lack access to services they desperately need.

## POLICE BRUTALITY

This Committee has admonished states to ensure “the observance of the principle of proportionality and strict necessity in recourse to force” against minorities,<sup>493</sup> and specifically recommended that the U.S. “take immediate and effective measures to ensure the appropriate training of the police force with a view to combating prejudices which may lead to racial discrimination and ultimately to a violation of the right to security of persons.”<sup>494</sup>

The government states that U.S. law prohibits racially discriminatory actions by law enforcement; that the U.S. has stepped up training efforts (which, after 9/11, have focused on discrimination against Arab Americans and Muslims); and that the Department of Homeland Security has established an online “Civil Liberties University.” However, the report otherwise ignores police brutality and the specific part of the Committee’s recommendation concerning stronger penalties and better remedies for such actions.

The police continue to brutalize and take the lives of many racial minorities in the U.S. The government’s own recent statistics attest as much: of the forty-seven states and District of Columbia who reported that 2,002 arrest-related deaths occurred in their jurisdic-

“Carole” (not her real name) was brutally raped in Fairbanks, Alaska, in July 2006. She reported the crime right away, telling the police she had been raped by a non-Native man. The city police officers took her description of the perpetrator and said they would go look for him. Carole waited for them to return. When they didn’t, she went to the emergency room to seek treatment. She had bruises all over her body, and she was so traumatized that she was speaking very quickly, a support worker reported. The medical staff assumed she was drunk. “[They] treated her like a drunk Native woman first and a rape victim second,” the support worker said. The hospital workers gave her some painkillers and money to go to a non-Native shelter. But the shelter turned her away because they too assumed she was drunk.

(Suemedha Sood, U.S. Government Turns Blind Eye to Rape Victims WireTap, October 5, 2007, also at [http://www.alternet.org/story/62527/.](http://www.alternet.org/story/62527/))

tions from 2003 through 2005, homicides by state and local law enforcement officers were the leading cause of such deaths during this period at 55%.<sup>495</sup> Minorities were disproportionately represented among them, with 32% African-American, 20% Hispanic, 44% white, and 4% of other or multiple races.

Recent police murders include that of 92-year old Kathryn Johnson in Atlanta, Sean Bell in New York City, and Ronald Madison, a mentally disabled man shot in the back by New Orleans police in the days following Hurricane Katrina. The International Association of Chiefs of Police's National Use of Force Database reported 175,000 use-of-force incidents from 1994-2000 with only 750 complaints sustained. The racial disparities are clear: in New York City, 76% of overall complaints to the city's Civilian Complaint Review Board were made by African-Americans, with two-thirds of the police brutality complaints made by African-Americans and Latinos. And new technologies contribute to the problem. Since 2001, over 200 taser-related deaths have been reported with 80% of taser use on unarmed individuals. Again, there are stark racial disparities: in San Diego, **California**, African-Americans and Latinos were twice as likely to be tasered than whites.

Tasers are used throughout the nation by law enforcement agencies to subdue suspects by law enforcement agencies. From 1999 to September 2004, at least 148 people in the U.S. and Canada died after encounters with

police who shocked them with Tasers.<sup>496</sup> In September 2005, the ACLU published a report reviewing the use of Tasers by seventy-nine law enforcement agencies in northern and central California and found that, despite the growing number of deaths and the increasing concern from medical experts about taser safety, the use of Tasers remains largely unregulated.<sup>497</sup> The ACLU found that police departments rely on training materials provided by the manufacturer, Taser International, which grossly exaggerate the safety of Tasers.<sup>498</sup>

There has been an historic lack of accountability by the police in misconduct and brutality cases. The FBI, while collecting and reporting data on violence against police, reports no data on *violence by police*. In addition, the Department of Justice has failed, in its additional duty created by its contractual relationship (in its capacity of grantor of specialized funding to state and local police agencies), to monitor, and hold accountable, grantees for failing to uphold representations to obey the law and uphold the constitution. The Department of Justice has failed to use its "pattern or practice" jurisdiction to investigate systemic issues of police abuse and misconduct to the extent it is warranted.

### **Excessive Force in the Wake of Hurricane Katrina**

Although abuse by **Louisiana** police was rampant long before Hurricane Katrina,



Photos courtesy of AP Images.

People searching for safety in the wake of Hurricane Katrina.

police actions during the evacuation were particularly alarming, as New Orleans became heavily militarized. In what were anarchic conditions, with no relief in sight, survivors desperately sought food and other necessities as and where they could. In response, the government sent in nearly 50,000 National Guard soldiers with “shoot to kill” orders ostensibly to “tackle armed gangs that have looted stores across New Orleans.”<sup>499</sup> There were also several thousand U.S. Army soldiers deployed to the area in addition to local police.

In one particular incident, during the storm, hundreds of mostly African-American evacuees followed the instruction of New Orleans authorities and attempted to evacuate the city

by crossing the Crescent City Connection Bridge into the neighboring city of Gretna. When the evacuees arrived at the bridge, Gretna police officers, who reportedly were ordered by the police chief to seal off the passageway, allegedly fired shots in the direction of the crowd and held some evacuees at gunpoint.<sup>500</sup> The Louisiana Attorney General has yet to make public the results of his investigation and has declined to pursue criminal charges against any of the officers involved.<sup>501</sup> In a similar incident at Danziger Bridge, New Orleans Police Department (NOPD) officers gunned down several New Orleans residents, killing two, including a mentally retarded man who was shot in the back.<sup>502</sup> Seven of the officers have been charged with murder and indicted by a grand jury.<sup>503</sup>

After the hurricane, excessive and dysfunctional police practices became commonplace. Renaissance Village, one of the largest Federal Emergency Management Agency (FEMA) trailer parks in Louisiana and home to more than 1500 families, though designed to be a residential neighborhood, was run more like a prison: law enforcement person-



Steven Elloie

### Excessive Police Force Post-Katrina

Steven Elloie is the manager of a family owned and operated bar in Central City, a predominantly African-American New Orleans neighborhood. On June 23, 2006, six to ten New Orleans Police Department (NOPD) officers entered Mr. Elloie's bar and forcefully searched the premises without a warrant or permission. In full view of numerous witnesses, and without provocation, the officers severely beat and twice tasered Mr. Elloie. One or more of the officers also drew firearms on the patrons of the

bar and yelled profanities at them. Although aware of the severity of his physical injuries, the officers took Elloie directly to Orleans Parish Prison (OPP). Jail officials refused to admit him in his condition and requested that he be taken to the hospital for treatment. Before being returned to OPP, Elloie was treated for multiple serious injuries and an elevated heart rate and high blood pressure. The charges of resisting arrest and battery against an officer were ultimately dropped.

Mr. Elloie filed a complaint with the NOPD's Public Integrity Bureau (PIB), and provided a taped statement and additional evidence including a list of witnesses. Nevertheless, Mr. Elloie later learned that the PIB classified his allegations as "not sustained," and refused numerous requests for information about their investigation. This finding raises serious questions about whether any effective oversight of the police exists, and exemplifies the city's continued failure to adequately address complaints against police. Apparently the officers were acting in accordance with a new NOPD policy directing them to be "very aggressive" and "proactive" in Central City. In June 2007, the ACLU of Louisiana filed a lawsuit on Mr. Elloie's behalf against the city of New Orleans.<sup>507</sup>

nel policed the park and required identification just for entry. In February 2006, the Baton Rouge police force began conducting a series of 6:00 a.m. searches of evacuee trailers in a “knock and talk” campaign.<sup>504</sup> The ACLU opposed the disclosure of residents’ information to law enforcement officials in East Baton Rouge Parish on privacy grounds.<sup>505</sup> FEMA ultimately agreed, and refused to turn over evacuees’ information to the Sheriff, who wanted to perform background checks on all evacuees in the parish.<sup>506</sup>

In **Mississippi**, also severely affected by Hurricane Katrina, Gulf Coast families interviewed in the weeks following the hurricane began to complain about police officers using excessive force, including the use of tasers during routine traffic stops, many of which occurred when people violated city-imposed curfews in attempts to retrieve items from their homes or check on relatives. Among the more extreme cases of police brutality, 18-year old Robert James Smith was found hanged in his Pascagoula County jail cell on May 18, 2007, despite having no history of depression or suicide attempts. The police department ruled the death a suicide, but police and jail officials have reported conflicting stories about the incident. The ACLU is trying to determine what, in fact, happened to Mr. Smith.<sup>508</sup>

### **Police Brutality in New York City**

In 1992, the **New York** City Council established an independent oversight agency, administered entirely by civilians, charged with investigating complaints of police misconduct. The City Charter mandates that the Civilian Complaint Review Board (CCRB) undertake “complete, thorough and impartial” investigations of police misconduct complaints brought by civilians, and that these investigations be conducted in a manner in which both the public and the police have confidence. In a 2007 report, the New York Civil Liberties Union concluded that the CCRB is failing to fulfill its mission.<sup>509</sup> The report includes the following findings:

- Complaints filed with the CCRB increased by 66% from 2002 to 2006, with sharp, steady increases from year to year.
- From 1997 to 2006, blacks and Latinos have filed nearly 80% of all police-misconduct complaints received by the CCRB. During this period blacks represented more than 50% of all complainants – more than two times their representation in the general population of New York City.
- Half of all complaints filed with the CCRB include an allegation of excessive force. The ratio of force complaints to total complaints filed has been consistent since the inde-

pendent CCRB came into existence in July 1993.

- The allegations filed most frequently with the CCRB involve serious abuse of authority – improper stop, frisk or search; unauthorized entry or search of premises; threat of arrest; threat of force – police actions that could provoke a confrontation between a police officer and a civilian.
- Of those police officers who face potential disciplinary action for excessive force, relatively few are actually disciplined. From 2000 to 2004, the New York City Police Department closed about three times as many substantiated CCRB force cases without imposing discipline as compared with substantiated non-force cases.
- Of the more egregious cases of misconduct that were referred by the police commissioner to an administrative trial between 2000 and 2004, more than 60% of the police officers charged received no discipline. When discipline was imposed it was strikingly lenient in light of the severity of the misconduct that had been substantiated by the CCRB.

The civilian oversight system is failing to meet the standards set out in the City Charter. The agency investigates fewer than half of all complaints that it reviews, and it

produces a finding on the merits in only three of ten complaints disposed of in any given year. The agency has failed to win the confidence of the city's residents, and the police department is largely dismissive of the CCRB's findings and recommendations.

### **Police Crimes against Puerto Rico's Vulnerable Populations**

Puerto Rico has the highest level of poverty within the U.S. — in excess of 60%. An elite unit of the state police force has been involved in what seems to be very serious crimes against the homeless and Puerto Ricans of African heritage, including women.<sup>510</sup> The crimes include kidnapping, public humiliation (publicly stripping the person naked, shaving their hair and marking them with paint balls as they sleep on public benches), pepper spraying them while they sleep, arson, aggravated assault, acts of torture, and sexual violence against homeless women. At the Guerrero Prison in Aguadilla, over 42 mostly homeless men have died while in detention, some within the first 24 to 56 hours. Most deaths have been of homeless drug users, many of them women. The racially motivated abuse of black families (headed predominantly by women who constitute over 50% of the population and head 38.7% of all homes), has in Loiza, a town that is a locus of such activity, been called “a ticking time bomb.”<sup>511</sup>

Crimes against the homeless, and the racially motivated abuse of black families, appear to be

part of an orchestrated effort by the same police unit to do away with specific communities.

### **Federal Consent Decree Fails to Deter Police Abuse in Michigan & New Mexico**

Police misconduct has been so severe in the City of Detroit that litigation filed by the U.S. Justice Department resulted in a comprehensive 2003 consent decree that governs police practices ranging from arrest procedures to use of force to use of firearms and chemical sprays. Allegations of abusive practices have nevertheless continued. For example, Detroit Police are alleged to have attacked a group of children of color who protested conditions at MacKenzie High School. The children complained of a deteriorating physical plant, a severe shortage of textbooks and the absence of the most basic necessities, such as toilet paper.

Approximately 32 students staged a peaceful walkout. According to media reports, police handcuffed and arrested the children, charging at least one of them with a felony.<sup>512</sup> In yet another incident, in Southwest Detroit, numerous neighborhood residents alleged that two white police officers were routinely detaining and conducting public cavity searches of young black men. The ACLU of Michigan has filed a lawsuit on behalf of one of the victims of this practice.<sup>513</sup>

And in **New Mexico**, in 2001, in response to a suit filed by the New Mexico ACLU, the City of Hobbs approved a Stipulated Class Action Agreement that promised comprehen-

sive improvements in police practices to address a campaign of intimidation by the Hobbs Police Department against African-American and Hispanic residents. The Agreement required improved police procedures in the use of force, detentions, searches, seizures, and arrests and extensive in-service training on cultural diversity, use of force, and integrity and ethics. Although the lawsuit significantly reduced the incidence of police abuse, the agreement has now expired and the Department suffers from ongoing problems.<sup>514</sup>

### **Overuse of Tasers in Florida**

Statewide, tensions between law enforcement and the African-American community continue to run high, caused, in large part, by law enforcement's use of excessive force, misuse of deadly force, and overuse of Tasers, hand-held electronic stun guns that fire two barbed darts up to a distance of 21 feet, penetrate up to two inches of the target's clothing or skin, and deliver a 50,000 volt electro shock. An alarming increase in excessive use of force complaints and a series of fatal shootings by the local Sheriff's Office mobilized civil rights and civil liberties activists in Escambia County, **Florida's** westernmost county. Since 2000, 11 of the 14 jail fatalities were of African-Americans, in a county where African-Americans comprise less than 25% of the county population, and in a recent ten-month period, three African-American men died while in the Escambia County Sheriffs Office's custody.

The complaints of excessive use of force come from inmates in the Escambia County Jail, as well as civilians and/or suspects outside the jail, and examples include the use of Tasers on individuals whose behavior is a manifestation of a known physical or emotional disorder, and inmates denied medications and/or other medical treatment. The number and severity of complaints prompted activists including the ACLU of Florida to lobby the County Commission to push for the creation of an independent civilian oversight panel to investigate citizen complaints and review and make recommendations on the policies of the Escambia Sheriff's department.

Similarly, in response to the police shooting to death a mentally impaired black man in the historically black Dunbar neighborhood in Ft. Myers, Florida, a community that has experienced decades of racially hostile policing practices, including excessive use of force against its residents, leaders in all segments of the community have come together to support an independent review panel.

### ***DISCRIMINATION IN THE APPLICATION OF POLITICAL RIGHTS***

At the height of the civil rights movement of the 1960s, thousands of people risked their lives to change a system of widespread, blatant racism that barred millions of citizens from participating in the most basic civic engagement: the right to vote. Although Congress passed the Voting Rights Act in 1965 to ameliorate this state of affairs, many states continue to impose restrictions on access to the polls, most significantly impacting the rights of minorities.

The U.S. government writes that U.S. law guarantees voting rights through the Voting Rights Act (VRA) and the Help America



A rally for voting rights.



Vote Act of 2000 (HAVA), enacted in response to 2000 election problems, both of which are enforced by the Department of Justice's Civil Rights Division's Voting Section.<sup>515</sup> Since 2000, however, the Section's enforcement record has been dismal. Partisan political factors have played a role in some of its most sensitive decisions, and the prosecution of claims of discrimination against African-Americans — historically its central priority — has largely been eliminated. Enforcement of the primary nationwide antidiscrimination provision of the VRA is at a virtual standstill.

### U.S. FAILS TO ENFORCE FEDERAL AMELIORATIVE STATUTES

The VRA is the primary federal statute banning racial discrimination in the election process. The Department of Justice also enforces HAVA, passed in 2002, to improve the administration of U.S. elections.

In 2006, Congress reauthorized the VRA for an additional 25 years, simultaneously reversing some very bad voting precedent set by the Supreme Court.<sup>516</sup> But, since 2000, enforcement of the primary nationwide antidiscrimination provision of the VRA, Section 2, is at a virtual standstill, with cases brought at the lowest rate since 1982.<sup>517</sup> The Section's focus appears to have been on language minority cases, nearly all concerning Spanish language claims.<sup>518</sup>

Additionally, the U.S. Report fails to mention the Department of Justice's pre-clearance of repressive new laws that require voters to present identification, including picture identification, at the polls on election day, as those in force in **Georgia, Florida** and Arizona, even though the Georgia law was held by a federal court to be a poll tax.<sup>519</sup> In addition, in the weeks preceding the 2004 presidential election, the Department of Justice argued in multiple litigations that only the Department of Justice—and not private citizens—could enforce *any* rights under HAVA.<sup>520</sup> East Asians and South Asians have also been heavily impacted by the voter ID requirements, and have joined in the challenge pending before the U.S. Supreme Court to the ID requirements.

### VOTING RIGHTS DISCRIMINATION AGAINST SOUTH DAKOTA'S NATIVE AMERICANS

Multiple successful ACLU-initiated lawsuits over the last decade have documented and proved a long history of racial discrimination against Native Americans in issues concerning voting and representation in **South Dakota**.<sup>521</sup> In *Bone Shirt v. Nelson*, a South Dakota federal court found “substantial evidence that South Dakota officially prevented Indians from voting and holding office,” by law until the 1940s, and then in effect until 1980 in certain counties. Problems that have deterred Indian voting have included vote dilution, voter registration, access to polling places and redistricting.<sup>522</sup> More recently,

there has also been discrimination against Indians by both the State of South Dakota and political subdivisions within South Dakota.<sup>523</sup> This history of discrimination in voting practices is so replete that South Dakota became one of the major focuses of the Voting Rights Reauthorization fight in Congress last year.<sup>524</sup>

### FELONY AND MISDEMEANOR DISFRANCHISEMENT BARS MILLIONS FROM VOTING

Felony disfranchisement is a policy that bars citizens from the ballot box upon conviction of a felony, usually an offense requiring one year or more of incarceration. (In 6 states misdemeanor offenses can also lead to disfranchisement.) Each state in the U.S. has its own disfranchisement policies, and they range from no disfranchisement for conviction to permanent disfranchisement. A person's right to vote in federal elections is determined by the policy of their state of residence.

Forty-eight states bar incarcerated individuals from casting a ballot; ten states permanently ban certain individuals with a felony conviction from voting and two of those states bar all persons with felony convictions from voting. Thirty states disfranchise individuals on probation, and 35 states disfranchise individuals on parole (both periods of supervision served living in the community).

All told, felony disfranchisement laws deprive over 5.3 million people, one in 40 adults, of the right to vote, disproportionately affecting minorities and their communities. One million four hundred thousand, or one in seven, African-American men, are disfranchised under state disfranchisement laws. In five states that deny the vote to even those individuals who have completed their sentences, one in four African-American men is permanently disfranchised. Given current rates of incarceration, 3 in 10 African-American men can expect to be disfranchised at some point in their lives. Empirical studies in Rhode Island and Atlanta, **Georgia** deeply underscore the harm to minority communities, where most of these prisoners live and come from.<sup>525</sup> Nearly 4 of the 5.3 million disfranchised have long been out of prison and live and work in their communities. Of the 4 million, about 2 million remain under some form of correctional supervision, but 2.1 million of them have fully completed all terms of their sentences.

Additionally, states have unique voting rights *restoration* rules as well. Some automatically restore the vote upon completion of sentence, others require paperwork. Still others, like Kentucky, where the process is entirely discretionary and cumbersome,<sup>526</sup> require applicants for rights restoration to submit a written statement explaining why they want to regain their voting rights and three letters of reference. Several states also require the payment of restitution before returning the vote, and some condition the acquisition of

certain occupational licenses on civil rights restoration (usually the right to vote, serve on a jury, and hold public office).

These laws have proven challenging even to those charged with administering them. Surveys of state and local election officials have found serious deficiencies in officials' knowledge of the policies in nearly every state surveyed. For example, in **Mississippi**, only about one-third of the officials surveyed knew that a federal felony conviction was not a bar to voting and only about one-half of them knew that out-of-state convictions did not disqualify individuals from voting. In a survey done in **New York**, more than half of the local election agencies, including New York City, refused to register individuals with a felony conviction until they provided various documents, documents which are not legally required and often did not exist.<sup>527</sup>

The U.S. states that felony disfranchisement is a matter of "lively debate" and "continuing scrutiny,"<sup>528</sup> adding that most states deny the right to vote to individuals convicted of "certain serious crimes" as allowed by the 14<sup>th</sup> Amendment<sup>529</sup> but that the loss of voting rights "does not stem" from race/ethnicity<sup>530</sup> and thus does not violate CERD.<sup>531</sup> Although felon disfranchisement laws disparately impact African-Americans and Latinos, U.S. courts have frequently rejected claims based on racial discrimination and equal protection.<sup>532</sup> The U.S. also notes that a National Commission on Federal Election Reform, chaired by Presidents Carter and Ford, recommended all states restore voting

rights to citizens after they have served their sentences, and that some states have repealed draconian disfranchisement laws.<sup>533</sup> The Commission's recommendations would only improve the policies of two remaining permanent disfranchisement states, and the state-level advances referred to are few, and only one is far-reaching, but none restore a significant number of the disfranchised to the voting rolls.<sup>534</sup>

This Committee, in its Concluding Observations of 2001, reminded the U.S. that Article 5 makes it the right of everyone to vote on a non-discriminatory basis,<sup>535</sup> underscoring the grossly disparate rate of minority political disfranchisement due to felony conviction. The Human Rights Committee, in its most recent, 2006, recommendation to the U.S. on this issue, suggested the U.S. enfranchising everyone after they have served their prison term.

### **Florida's Trumpeted But Inadequate Reform**

**Florida** is home to nearly one million of the nation's 5.3 million disfranchised, nearly 300,000 of them African-American. In April 2007, Florida's new Governor exercised his discretion to amend the Rules of Executive Clemency that govern restoration of voting (among other) rights. However, the reforms essentially benefit only a few categories of non-violent offenders, and only if the latter have paid any restitution they might owe and have no pending charges. Among the diffi-

culties in implementing the new rules is the state's ability to locate the hundreds of thousands of individuals who may be eligible to benefit from the reforms. These people have been out of the criminal justice system for years, even decades, and have moved from place to place, and are thus difficult to locate. Additionally, research indicates that as many as 40% of people who are found to be ineligible to have their voting rights restored were ineligible in whole or part due to unpaid restitution. As a result, hundreds of thousands of individuals continue to be barred from voting. Thus, the reforms falls far short of a truly automatic, paperwork-free, rights restoration process, which is what the ACLU of Florida and the coalition it leads, have advocated since 2000.

### **Washington and Arizona's Unfair Monetary Requirements Hinder Voting Rights**

In **Washington State**, where 46,500 people are unable to vote due to outstanding restitution or "legal financial" obligations, the loss of voting rights hits racial minorities especially hard, affecting 3.6% of the total voting age population but 10.6% of the Latino population and 17.2% of the African-American population. In 2004, the ACLU of Washington filed suit, *Madison v. State*, in state court, to challenge this requirement.<sup>536</sup> Although a lower court agreed with the ACLU, finding the requirement a "modern form of the poll tax" and as such, unconstitutional, the state's Supreme Court overturned

the lower court's ruling, finding the restriction constitutional.<sup>537</sup> The ACLU has also challenged the restitution requirement in federal court in Arizona. That suit, *Coronado v. Napolitano*, challenges the denial of voting rights to individuals with a felony conviction based on their inability to pay the court fines, fees, and restitution associated with their sentences. The suit also challenges Arizona's disfranchisement of people convicted of certain offenses, which never existed when Congress enacted Section 2 of the 14<sup>th</sup> Amendment.<sup>538</sup>

### **Mississippi's Unconstitutional Expansion of Disfranchisement Policy**

The ACLU of **Mississippi**, in filing the lawsuit *Strickland v. Clark*, challenged the state's expansion of disfranchising crimes in contravention of state and federal laws.<sup>539</sup> Section 241 of the Mississippi State Constitution denies the right to vote to anyone convicted of one of the following ten crimes: murder, rape, forgery, bribery, obtaining money or goods under false pretense, bigamy, embezzlement, perjury, theft and arson.<sup>540</sup> However, the provision states that people convicted of any of those ten crimes may still vote in U.S. Presidential elections.<sup>541</sup> In 2004, the Attorney General issued an advisory opinion expanding the list of disfranchising crimes, without legislative approval, to include eleven additional offenses. The Secretary of State then amended the voter registration form to include twenty-one disqualifying crimes and the form does not allow people to register to

vote only in federal elections. The ACLU is litigating this action.

### ***DISCRIMINATION IN THE PROVISION OF ECONOMIC, SOCIAL, & CULTURAL RIGHTS***

In its Concluding Observations of 2001, the Committee recommended that the U.S. take appropriate, including special, measures to ensure [that rights to housing, education, employment and access to health care] are non-discriminatorily afforded to all.<sup>542</sup> The U.S. now responds that some Article 5 rights are not explicitly recognized as “rights” under U.S. laws, but then appears to contradict itself by stating that “[n]onetheless, the federal and state constitutions and laws fully comply with the requirements of the Convention that the rights and activities covered by article 5 be enjoyed on a non-discriminatory basis.”

The Committee has expressed concern that, despite domestic laws prohibiting racial discrimination in housing, education, and employment, discrimination remains widespread, and suggested adopting affirmative measures to remedy the problems.<sup>543</sup> Acknowledging that “much work remains to be done to overcome challenges that still exist,” the U.S. responds that some Article 5 rights are not explicitly recognized as “rights” under U.S. laws,<sup>544</sup> and that although the Convention requires special measures when circumstances so warrant, “when circumstances warrant” is a matter to

be determined by the U.S., as well as the precise measures, measures that “may or may not” be race-based.<sup>545</sup>

### **THE RIGHT TO HEALTH: INFERIOR SYSTEM AND MEDICAL TREATMENT FOR MINORITIES & WOMEN**

According to the U.S. Report, “[s]trong overall care” is “provided by the U.S. health-care system.”<sup>546</sup> Specific programs,<sup>547</sup> and public health issues are discussed.<sup>548</sup> There are in fact two, racially stratified, health-care systems in the U.S. – a private system of care and an inferior and overburdened public system disproportionately relied on by low-income racial minorities. The programs cited by the U.S. report consist largely of research studies and outreach campaigns rather than concrete investments in public health.<sup>549</sup> In reality, burdensome eligibility restrictions, increasing privatization, and outright denials of care, such as abortion services under Medicaid programs in several states, exacerbate the hardships suffered by those relying on government health programs. As a result, racial minorities suffer relatively poor health care and health outcomes, and have lower levels of health coverage.

For example, while only 8% of non-Hispanic whites report that their health is fair or poor, 13% of Hispanics, 15% of African-Americans, and 17% of Native Americans report their health as fair or poor. Additionally, while only 15% of whites have no usual source of health care, twice as many

Hispanics lack a usual source of health care. Racial disparities are also evident in access to prenatal care. In 2004, only 2% of white women received late or no prenatal care, while 5% of Hispanic women, 6% of African-American women, and 8% of Native American women received little or no prenatal care. (Latinas now have the highest teen birth rate in the U.S. with increased birth rates in a number of states.<sup>550</sup> Less than 4 out of 10 teen mothers who start their families before the age of 18 finish high school, leaving them unprepared for the job market and more likely to raise their children in poverty.<sup>551</sup>) Furthermore, 32% of Native American workers between the ages of 18-64 are uninsured, as are 40% of Hispanic workers, and 23% of African-American workers, while only 14% of white workers go without health coverage.

Additionally, studies have shown that blacks receive inferior medical treatment to that received by whites. While previous studies have found that whites receive better medical care than blacks, a new study reveals the reason for the difference to be implicit racial bias.<sup>552</sup> That study is the first to deal with unconscious racial bias and how it can lead to inferior care for African-American patients. Finding racial bias in patient treatment, the study revealed doctors were more likely to provide better health care to whites than African-Americans because they harbored unconscious and unintentional racist feelings that affected how they diagnosed and treated patients.

For the study, 220 doctors training to become emergency services physicians were asked to diagnose a hypothetical case in which two 50-year-old men, one white and one African-American, complaining of chest pain and each with other symptoms of a heart attack, came to them for treatment. Most of the doctors were more likely to prescribe a potentially life-saving, clot-busting treatment for the white patient than for the African-American patient. Following their evaluation of the two patients, the doctors were then given an “implicit association” test designed to reveal a person’s unconscious views of blacks and whites. A high score on the bias against African-Americans portion of the test showed doctors were less likely to provide clot-busting treatment for a heart attack for black patients. The study also found that black doctors also showed bias against the black patient, though less than the white doctors.

One effect of inferior insurance and treatment may be the established mortality rate gap between black and white women with breast cancer. A Chicago, Illinois Breast Cancer Task Force recently released recommendations after finding black women’s mortality rate was 68% higher than that of white women.<sup>553</sup>

## THE RIGHT TO WORK: DIMINISHED FEDERAL PROTECTION OF WORKER RIGHTS

The U.S. asserts that it has “strong legal protections safeguarding the right to free choice of employment and just and fair conditions of employment,” and notes that Title VII of the Civil Rights Act of 1964 is the federal statute that prohibits discrimination in employment on grounds of race, national origin, sex or religion, and covers public and private sector employees.

Yet, racialized economic injustice and exploitation persist in the U.S. and is exacerbated by government policies. For example, in the *Hoffman* case, the Supreme Court denied equal legal remedies to undocumented workers, and post-*Hoffman* litigation tactics by private employers have further weakened the enforcement of workplace rights for undocumented persons. Also, as explained above, vulnerable groups of workers (including farm and domestic workers), most of whom are racial minorities and/or women, are explicitly excluded from overtime and minimum wage requirements.<sup>554</sup> Likewise, domestic workers are denied many federal labor law protections.<sup>555</sup> Domestic workers employed by foreign diplomats are denied judicial remedies by the legal doctrine of diplomatic immunity, making them vulnerable to exploitation and labor trafficking.<sup>556</sup> Even in “white collar” professions, such as scientific and technological fields, women and racial minorities endure discrimination,

lack of role models, lower salaries, and limited resources.

The U.S. describes certain private sector initiatives to increase the representation of underrepresented minorities and women in traditionally male scientific and technical occupations.<sup>557</sup> This statement implicates but fails to address recent efforts by the government to dismantle public and private programs intended to counteract the effects of past and present racial and gender discrimination.

### Government’s Failure to Enforce Anti-Discrimination Protections for Workers

In recent years, for example, the U.S. Department of Justice has refused to enforce existing consent decrees that the agency itself obtained.<sup>558</sup> In 1996, the Justice Department brought suit against the New York City Board of Education, alleging that the Board had long discriminated against women, African-Americans, Hispanics, and Asians by failing to recruit them as custodians and by giving civil service tests for the job that discriminated against African-Americans and Hispanics. In 1999, the Justice Department and the Board of Education entered into a settlement agreement. At that time, many of the women, African-Americans, Hispanics, and Asians working as custodians were employed only provisionally, meaning they could be fired at any time and they could not compete for various job benefits. The settlement agreement provided that these individuals would all

become permanent civil service employees. It also provided them with retroactive seniority. Finally, it provided that if any of its provisions were challenged, the Justice Department and the Board of Education would defend the agreement. Several white male custodians represented by the Center for Individual Rights challenged the agreement, arguing that it constituted reverse discrimination. In 2002, the Justice Department reneged on its promise to defend many of the women and minority custodians whose interests it had championed during the previous six years of litigation. Thereafter, the ACLU intervened to protect the settlement agreement<sup>559</sup> on behalf of twenty-two female and minority custodians abandoned by the Justice Department. In September 2006, the judge issued a decision stating that the permanent appointments and retroactive seniority awarded to female custodians did not violate the Constitution or Title VII, though the women cannot rely on their retroactive seniority in the event of layoffs in the custodial workforce. Because race-based affirmative action is held to a higher standard than gender-based affirmative action, the court held that men who didn't take one of the discriminatory examinations could keep their jobs but would lose the seniority they received under the agreement. The ACLU continues to litigate the case to seek fuller relief.

### **Government Discriminates Against Undocumented Workers & Fails to Protect Them From Employer Discrimination**

As of March 2006, there are an estimated 11.5-12 million undocumented workers in the U.S.<sup>560</sup> Under federal and state laws and recent court decisions, undocumented workers face both *de jure* and *de facto* discrimination in the U.S. *De jure* discrimination persists in lack of worker protections afforded to domestic workers and agricultural workers, almost all of whom are migrants and racial or ethnic minorities. For example, domestic workers and agricultural workers do not enjoy protection under the Occupational Health and Safety Act, the National Labor Relations Act, and the Fair Labor Standards Act, among others.

*De facto* discrimination exists against undocumented workers through recent judicial decisions beginning with the *Hoffman Plastics* Supreme Court case in 2002. In *Hoffman*, the U.S. Supreme Court held that the National Labor Relations Board (NLRB) lacked the authority to order an award of back pay – compensation for wages an individual would have received had he not been unlawfully terminated before finding new employment – to an undocumented worker who had been the victim of an unfair labor practice by his employer.<sup>561</sup> Since then, employer defendants have invoked *Hoffman* to argue that undocumented workers are not entitled to back pay or other remedies under labor or employment-related statutes, includ-



ing Title VII (employment discrimination), the Americans with Disabilities Act (disability discrimination), the Age Discrimination in Employment Act, the Fair Labor Standards Act (setting forth right to federal minimum wage and overtime), state workers' compensations schemes, and state law counterparts to the federal anti-discrimination and wage and hour laws.

Some courts have exported the *Hoffman* rationale into other contexts, curtailing both undocumented workers' access to courts and entitlement to various rights and remedies. For example, a New Jersey state court in *Crespo v. Evergo* effectively eliminated certain undocumented workers' right to be free from discrimination in the workplace by interpreting *Hoffman* to preclude the ability of undocumented migrants terminated for discriminatory reasons to avail themselves of the protection afforded by New Jersey's anti-discrimination law.<sup>562</sup> Because federal discrimination statutes only apply to private employers with a minimum of 15 employees, the practical effect of such a ruling is that any undocumented migrant who works for an employer with less than 15 employees in the State of New Jersey has no enforceable right to be free from discriminatory termination in the work place. In addition to New Jersey, Kansas, New York, California, Pennsylvania, Michigan, Illinois, Florida and other states have all restricted the rights of undocumented workers in response to *Hoffman*. Undocumented workers have lost protections in the areas of available remedies when

injured or killed on the job, overtime pay, workers' compensation, family and medical leave and other areas.

In addition to excluding undocumented migrants from protection of state anti-discrimination laws, tort remedies or workers' compensation protection in some states, one collateral effect of all the post-*Hoffman* litigation has been to make immigration status a focal point in all employment-related litigation, such that employers vigorously seek documents during litigation concerning employee immigration status. Some courts have justified ordering such information to be turned over on the grounds that it is relevant to the employers' ability to defend against the workers' claims, arguing that immigration status could be used to attack credibility or limit emotional distress damages. Immigrant workers are thus understandably afraid to come forward to enforce their rights, and are forced, when seeking compensation for workplace discrimination, to subject themselves to intrusive inquiries that could have very serious consequences, such as criminal prosecution or deportation. Even documented workers have hesitated to come forward because of family members or loved one's potential risk in an immigration status investigation. Moreover, the National Labor Relations Board, with no authority to award punitive damages or other remedies that seek to punish employers, relied on the back pay remedy to serve this purpose, thus, without an effective remedy, many attorneys are unlikely to represent migrants in such cases.

For example, in *Campbell v. Bolourian*, a legally authorized live-in domestic employee was denied federal or state minimum wage and overtime pay by defendants, and filed suit for back pay after leaving her employer.<sup>563</sup> During discovery, the Bolourians demanded information concerning her immigration status *after* she ceased working for them, arguing that it was relevant because, even though it was undisputed that she was legally authorized to work throughout the term of her employment with them, it shed light on her motives for bringing the suit.<sup>564</sup> The trial judge ordered the discovery, which Campbell appealed.<sup>565</sup> The ACLU of Maryland, along with the Public Justice Center and other organizations, submitted a friend-of-the-court brief for Mrs. Campbell.<sup>566</sup> It was argued, *inter alia*, that relevant federal and state wage laws applied regardless of an employee's immigration status, and that allowing such intrusive discovery demands would intimidate undocumented and other immigrant workers and dissuade them from pursuing legal recourse from abusive and unscrupulous employers. In addition, it was argued that even if immigration status were somehow relevant, Campbell was nonetheless entitled to a protective order against discovery of her current immigration status because the harms – the chilling effect on the enforcement of worker rights – greatly outweighed the employers' need for information.<sup>567</sup>

In *Sierra v. Broadway Plaza Hotel*,<sup>568</sup> the ACLU represented 4 housekeepers from Mexico who worked in a large hotel in

Manhattan where they were subjected to severe sexual harassment by the housekeeping supervisor and not paid for working overtime as required by federal and state law. Although this case ultimately settled, as a result of *Hoffman*, plaintiffs did not seek back pay remedies in order to avoid any inquiry into their immigration status in the course of the litigation.

By making immigration status potentially relevant in employment-related litigation, *Hoffman* has undermined the ability of all migrant workers, documented or not, to enforce their right to be free from discrimination, their right to a fair wage and overtime, their right to be compensated for work-related injuries, and other workplace rights. *Hoffman* has thus effectively undermined the equal protection and access to remedies of undocumented and other migrants under U.S. labor and employment laws. The U.S. is in clear violation of Article 5 of the Convention because the government discriminates against undocumented workers by preventing them from realizing the same protections regarding union organizing that documented workers would be entitled to, moreover, the U.S. government also fails to meet its non-discrimination obligation by failing to protect the rights of undocumented workers.

The ACLU, the National Employment Law Project and the Transnational Legal Clinic at the University of Pennsylvania School of Law filed a petition urging the Inter-American Commission on Human Rights to find the

U.S. in violation of its universal human rights obligations by failing to protect millions of undocumented workers from exploitation and discrimination in the workplace. The petition was submitted to the commission on behalf of the United Mine Workers of America, AFL-CIO, Interfaith Justice Network and six immigrant workers who are representative of the six million undocumented workers in the U.S. labor force. The petition is pending decision as to admissibility.

## THE RIGHT TO EDUCATION

Although there is no fundamental right to education in the U.S.,<sup>569</sup> federal laws protect against discrimination in education on the basis of race, national origin, sex and disability. Title I of the Elementary and Secondary Education Act of 1965, amended in 2001 as the “No Child Left Behind” Act (NCLB), also provides federal funding for high poverty schools and schools with limited English proficient children, children with disabilities, and other children in need of assistance. In addition, it is a basic public expectation that all children have the right to attend public school and be treated with dignity and social equality.

The U.S. reports on its efforts to improve educational disparities in U.S. public schools. The government has made efforts including passage of NCLB but, as detailed below, the Act’s efficacy has been limited by a number of factors and, together with the rapid re-segregation of schools and the spread of the “school-to-prison” pipeline

phenomenon, public schooling, especially for minorities, is in a state of crisis. The U.S. Census Bureau projects that by 2050, about 50% of the U.S. population will be minority. Given this steep demographic shift, the government must address the performance of children of color and nature of the schools they attend.

## The Federal No Child Left Behind Act

First passed in 2001, the No Child Left Behind Act (NCLB) was designed to bring all students up to grade level in reading and math, to close the achievement gaps between students of different races and ethnicities within a decade, and to hold schools accountable for results through annual assessments. Data from 2005 shows that, although achievement gaps between white and minority students continue to exist, the gaps are beginning to narrow, even as student populations are becoming more diverse.

Nonetheless, substantial disparities in educational outcomes persist between racial minority students and white students,<sup>570</sup> and between students of low-socio economic status and economically advantaged students. Nationally, in 2005, 58% of African-American and 54% of Latino fourth grade students scored below the basic reading level for their grade, compared to only 36% of students overall. In 2001, the four-year high school graduation rate in school districts with a majority of students of color was 56.4% compared to 74.1% in majority white

school districts. Similarly, in high-poverty school districts the graduation rate was 57.6% compared to 76% in low-poverty school districts.<sup>571</sup> These disparities are largely the result of a failure to meaningfully address our nation's dropout crisis and a failure to adequately support schools serving at-risk students. Unfortunately, these harms disproportionately fall on our nation's students of color.

#### *Failure to Meaningfully Address Dropout Crisis*

In an increasingly competitive global marketplace, the consequences of dropping out of high school are devastating to individuals, communities and our national economy. At

an absolute minimum, adults need a high school diploma if they are to have any reasonable opportunities to earn a living wage. A community where many parents are dropouts is unlikely to have stable families or social structures. Most businesses need workers with technical skills that require at least a high school diploma. Yet, with little notice, the U.S. is allowing a dangerously high percentage of students to disappear from the educational pipeline before graduating from high school.<sup>572</sup>

The U.S. remains in a dropout crisis today. Nationally, high school graduation rates are low for all students, with only an estimated 68% of those who enter 9th grade graduating with a regular diploma in 12th grade. But, as

### National Graduation Rates by Race and Gender

<b>By Race/Ethnicity</b>	<b>Nation</b>	<b>Female</b>	<b>Male</b>
<i>American Indian/Alaska Native</i>	51.1	51.4	47.0
<i>Asian/Pacific Islander</i>	76.8	80.0	72.6
<i>Hispanic</i>	53.2	58.5	48
<i>Black</i>	50.2	56.2	42.8
<i>White</i>	74.9	77	70.8
<b>All Students</b>	68	72	64.1

Gary Orfield et. al, *Losing Our Future: How Minority Youth Are Being Left Behind by The Graduation Rate Crisis* (2004), at 2.

the table below makes clear, they are substantially lower for most minority groups, and particularly for males. According to the calculations used in this report, in 2001, only 50% of all black students, 51% of Native American students, and 53% of all Hispanic students graduated from high school. Black, Native American, and Hispanic males fare even worse: 43%, 47%, and 48% respectively. (In 2004, a different study reports that the numbers rose slightly to 53% for black males, and 76% for white males.<sup>573</sup>)

Taking a state snapshot, in **Florida's** Palm Beach County School District in 2001 the graduation rate for all students was 46.6%; for white students, it was 57.9%, for black students 32.2%, a 23.4% disparity.<sup>574</sup> The Palm Beach County statistics are symptomatic of statewide failures in public education.

Unfortunately, the No Child Left Behind Act has failed to meaningfully address the dropout crisis in the U.S., nor has it adequately addressed the significant racial disparities in graduation rates. In fact, NLCB has exacerbated the crisis by creating perverse incentives to push at-risk children, who are disproportionately low-income and children of color, out of public schools. Under the No Child Left Behind Act, schools are penalized for failing to meet certain performance standards, called adequately yearly progress (AYP), which are based largely on students' performance on standardized tests in math and English. The Act's heavy reliance on standardized test scores creates

perverse incentives for schools to push out the low-performing children. Congress correctly identified this risk in the current law, and incorporated graduation-rate accountability in part to counteract these incentives. Unfortunately, those accountability measures have not been adequately enforced.

First, although the law requires each State to ensure that all students enrolled in schools achieve 100% proficiency on standardized tests, there is no requirement that States make any significant steps toward improving graduation rates.<sup>575</sup>

Second, the federal Department of Education has been permitting States to define graduation rates in ways that depart from the statutory definition of graduation rates, resulting in inaccurate and exaggerated claims of graduation rates. For example, some states calculate the graduation rates simply by counting the number of official "dropouts" from a given school; such a measure fails to account for the large numbers of students who do not take the time to fill out the paperwork to officially dropout, nor does it account for students who are sent to disciplinary alternative schools (many of which do not even offer a diploma) or corrections facilities, often as a result of AYP pressures.

Third, the Department of Education issued regulations that concluded, contrary to the Act, that graduation rates do not need to be disaggregated by minority sub-group. Thus, a State may now satisfy the graduation-rate

provisions of NCLB, regardless of whether the graduation rate for students of color is significantly less than the graduation rate for white students.

At the same time, as mentioned above, the Act's emphasis on high-stakes testing encourages schools to "game the system" by simply getting rid of low-performing students through suspensions, expulsions, referrals to law enforcement or the juvenile justice system, sending them to alternative schools, or holding them back a grade. In the absence of any meaningful accountability for graduation rates, there is nothing to counteract these incentives. Given the close correlation between test scores, race, and socioeconomic status, the students who are most at-risk — low-income students and children of color — bear the brunt of this push-out phenomenon.

In some cases, schools and districts have simply informed students who perform poorly that they cannot return to their mainstream public schools.<sup>576</sup> More often, administrators utilize disciplinary means mentioned above to get rid of these students. At least one scholar has identified a spike in the number of suspensions in a particular school district on days when standardized tests are given. In another school district, in **South Dakota**, the district failed to meet AYP goals because of the low performance of Native American students. During the following year, because of a decline in Native American students enrolled in that school —

largely as a result of disproportionate suspensions and police referrals — the school was no longer held separately accountable for the performance of that particular subgroup.

Another example of the Act's exacerbation of the dropout crisis and attendant racial disparities stems from the Act's emphasis on high-stakes testing, which has led many States to impose standardized tests as a requirement for graduation. In **Massachusetts**, where the MCAS standardized test became a graduation requirement for the Class of 2003, the already large gap in high school graduation rates became wider. The state now faces a graduation rate crisis, with little more than half of black students graduating from high school "on time" and an "on time" graduation rate for Latinos of 36.1%, the second lowest in the nation.<sup>577</sup> Striking "achievement gaps" remain among racial groups. Each year African and Latino students fail their grades at rates that are approximately three times the rate of white children, and drop out of high school at rates that are between two and three times the rate of white students.<sup>578</sup>

The MCAS has been an especially daunting hurdle for students who do not speak English as their first language, and for special needs students. It has also had a harmful impact on the quality of education in schools where academic curricula have been narrowed as teachers "teach to the test." MCAS serves as a gatekeeper to future opportunities for public school students; that leaves those who fail

the exam by only one point no way to graduate from high school. The assessment, which had been mandated as part of “education reform,” may have instead deepened existing inequalities.

In these ways, the No Child Left Behind Act not only has failed to meaningfully address the dropout crisis, but it also has exacerbated it.

#### *Failure to Ensure Adequate Support for Minority Students Attending At-Risk Schools*

Although the No Child Left Behind Act’s stated goal of narrowing the achievement gap between races remains laudable, the means employed to reach that goal undermine its fundamental purpose. The Act emphasizes the imposition of sanctions on schools and districts that do not meet performance goals, rather than the provision of additional support and resources to those schools. Consequently, the schools and districts serving disproportionately low-income and minority students remain drastically underfunded and without the basic provisions of bare educational minimums.

Government under-funding has caused service shortages that are most acute in minority-attended schools. In 31 of 49 states, school districts with the highest minority enrollment get fewer resources than school districts with the lowest number of minorities enrolled. These 31 states educate six out of ten minority children in America.<sup>579</sup> In high schools where at least 75% of the students are low-

income, there are 3 times as many uncertified or out-of-field teachers teaching both English and science than in schools with wealthier populations.<sup>580</sup>

For example, **Georgia** spends twice as much per prisoner as per public school pupil.<sup>581</sup> As a result, a disproportionate number of black (88%) and Latino (86%) fourth graders could not read at grade level in 2005.<sup>582</sup> Only 79% of Georgia’s 2,071 schools met the performance targets required under NCLB.<sup>583</sup>

In **New York**, the New York City public school system enrolls approximately 1.1 million students in over 1,400 schools. 85% of these students are non-white, and 73.4% are low-income (eligible for the free lunch program). In this predominantly minority and poor district, 43% of fourth graders are reading below the basic level of proficiency for their grade and only 38% of high school students are graduating in four years.<sup>584</sup> Eighty percent of students in large high schools and a majority of students in small schools feel that staff *never, rarely* or *sometimes* notice if they are having trouble learning and 50% of students attending large high schools and 40% of students in small schools said that school teachers and staff *never, rarely* or only *sometimes* believe they (i.e. students) can perform at adequate levels.<sup>585</sup> There is only one guidance counselor for every 450 students; 77% of students in large high schools and 63% of students in small schools feel that they are *never, rarely* or only *some-*

times able to see a guidance counselor when they are in need of services.<sup>586</sup>

In **California**, “there is a dramatically unfair concentration of the worst conditions in schools attended primarily by low income children, African-American and Latino children, and English Language Learners.”<sup>587</sup> More specifically, “[h]uge numbers of schools are failing to hire and keep qualified teachers. Textbooks are so scarce that kids are unable to take them home to do their homework. Classrooms are severely overcrowded, and the buildings themselves are crumbling and infested with rats and cockroaches.”<sup>588</sup> Compared to schools attended by mostly white students, schools with a high concentration of African-American and Latino students are:

- 11 times more likely to have a high percentage of under-qualified teachers;
- 73% more likely to have evidence of cockroaches, rats or mice;
- 74% more likely to lack textbooks for students to use for homework;
- More than 3 times more likely to report that teacher turnover is a serious problem; and
- Twice as likely that teachers rate the working conditions in their school as “only fair” or “poor.”<sup>589</sup>

In *Williams v. State of California*, a suit unrelated to NCLB but concerning state governance of education, the **California** ACLU

and others filed a lawsuit on behalf of California public school students who lacked basic tools for learning in their schools and classrooms, charging the state with violating students’ rights by not providing the bare minimum necessities required for an education and violating state and federal requirements that equal access to public education be provided without regard to race, color, or national origin.<sup>590</sup> (Perhaps unsurprisingly, more black men are likely to go to prison than college in California.<sup>591</sup>) After four years of litigation, in 2004, the *Williams* lawsuit culminated in a successful settlement, resulting in the infusion of nearly one billion dollars to repair California schools and provide textbooks for the more than one million students in the state’s lowest performing schools.<sup>592</sup> ACLU reports fully document the implementation of the settlement.<sup>593</sup>

Across the U.S., children of color are disproportionately left to attend the poorest schools with the fewest resources, and the No Child Left Behind Act has failed to address these devastating resource disparities.

### **Racial Re-Segregation of Public Schools**

Closely related to these resource disparities, public schools in the U.S. are becoming rapidly re-segregated on the basis of race. The U.S. reports that, since the 1954 Supreme Court decision *Brown v. Board of Education*, reversing the policy of *de jure* racial segregation in schools, it has taken action to racially integrate schools with some degree of suc-



cess. However, today, even districts that were once required by federal court order to racially integrate students are becoming more and more likely to educate minority students separately from white students.

The reasons for this trend toward racially re-segregated schools vary, but depend on large part on federal judicial decisions. Federal courts have been dismissing school desegregation cases based on findings of unitary status,<sup>594</sup> and U.S. Supreme Court decisions in the last decade have steadily eroding the progress in educational integration including cases ending desegregation plans in 1991, as well the 1974 decision against city-suburban desegregation.

More recently, the U.S. Supreme Court in 2007 imposed additional roadblocks to school integration in the two companion cases *Parents Involved in Community Schools v. Seattle School District* and *Meredith v. Jefferson County Board of Education*. In those cases, the Court rejected voluntary integration plans in Seattle, **Washington** and Louisville, Kentucky designed to reduce racial segregation in the schools by allowing consideration of a student's race in making school assignments. The ACLU submitted an amicus brief in that case, arguing that race-conscious measures are necessary to ensure racial integration in public schools because they are the least restrictive means available to achieve that goal. The Supreme Court's rejection of this position, although a significant setback, did

not signal the end of voluntary integration plans across the country. The Court recognized that school districts maintain a compelling interest in racially diverse public schools, and wrote that states and localities are entirely free to adopt express race-based *goals* that seek to achieve racial inclusion in "K-12"<sup>595</sup> public education so long as the *means* to achieve those goals are race-neutral. Nonetheless, the rejection of the Seattle and Louisville school plans represents a drastic step backwards in a nation where schools are becoming increasingly segregated by race and ethnicity.<sup>596</sup>

Racial integration in public schools remains necessary today not only because of the need to remedy our nation's history of segregation and discrimination, but also because it is necessary to ensure a racially tolerant future generation and, even more important, to ensure adequate educational resources for minority children. Social science research demonstrates integrated K-12 schooling has direct and significant effects in improving both graduates' racial attitudes and their ability to interact with persons of other races. Perhaps even more compelling, academics warn that the rise in segregation threatens the quality of education received by non-white students, who now make up 43% of the total U.S. student body.<sup>597</sup> Minority students in particular reap a number of benefits — among them improved achievement scores and graduation rates in the short run and enhanced social mobility and income in the long run — from attendance at desegregated schools.<sup>598</sup>

Notwithstanding these benefits, beginning in the late 1980s, the trend toward desegregation began reversing. As a result, the nation's public school enrollment has undergone a striking transformation. From 1991 to 2003, the number of black students attending majority non-white schools rose sharply across all regions. By 2003, the nation's 27 largest schools school districts were "overwhelmingly" segregated.<sup>599</sup> Nationwide today, almost half of black and Latino children attend schools where less than 10% of the students are white. Meanwhile, the average white student attends a school that is 80% white and far more affluent.<sup>600</sup> Since the 1990s, the percentage of students of every race in multiracial groups has increased — segregation is no longer black and white but increasingly multiracial.<sup>601</sup> Despite this increase in diversity, white students remain the most isolated group.

Re-segregation has been most notable in the South and in the border states of **California**, **Arizona**, **New Mexico** and **Texas** for African-American students and in the West for Latinos. In the South, the percentage of black students attending majority non-white schools increased from 61% to 71% from 1991 to 2003. Latinos, the fastest growing minority in U.S., now constitute the largest minority and are increasingly segregated in regions where they are concentrated. (Latino students often face triple segregation — by race, class and language.)

The facts are striking. Nationwide over one third of African-American and Latino students attend schools where 90% or more of the student body is non-white.<sup>602</sup> Over one in six African-American students attends a school that is 99% non-white, as does more than one in ten Latino students.<sup>603</sup> Almost 2.4 million students, or over 5% of all public schools, attends a school with less than 1% white students.<sup>604</sup>

These schools are far more likely than non-segregated institutions to be low-income and to struggle with retaining highly qualified teachers. Historically, schools with high concentrations of minority students have lacked the resources necessary to provide equal educational opportunity, demonstrated through inferior access to qualified and experienced teachers, higher turnover rates among staff, larger class size, fewer advanced placement courses, poorer infrastructure, and fewer basic educational supplies. In most of these schools, graduation rates are less than 50%, and even among the students who do graduate, there are few who are prepared for college.<sup>605</sup> Even school districts across the country that succeeded in achieving some degree of racial integration through the 1970's are now rapidly re-segregating.<sup>606</sup> Four case studies demonstrating the causes and effects of racial re-segregation across the nation follow.

### *White Parents Challenge Integrated School District in Massachusetts*

In **Massachusetts** in 2003-2004, more than two-thirds of all black students attended schools in which minorities were the majority, and more than a quarter of all black students attended schools that were 90%-100% minority. The percentage of white students who attended schools that could be defined as multiracial had declined 12% since 1980. According to a 2002 report issued on behalf of the Massachusetts Education Reform Review Commission, 90%-95% of the white students are from the three highest district income categories, while the lowest-income district category includes 70% of students of color, who make up less than a quarter of the state's public school population.

Despite these statewide trends, public schools in Lynn, Massachusetts, made significant strides toward racial integration, due to a carefully-tailored race-conscious transfer plan and several other innovations, including better facilities, programs and staff training. Schools showed steady improvement in terms of attendance, levels of violence and racial harmony. However, white parents whose children had been denied transfers to the school of their choice brought a civil action against the school district. The appeals court upheld the school's plan,<sup>607</sup> but now the 2007 Supreme Court voluntary-integration ruling striking down the race-conscious student assignment plans in Seattle

and Louisville has emboldened the plaintiffs to try again, and put at risk the 20 race-conscious plans adopted by various Massachusetts school districts.

### *Challenges to California School Districts' Use of Race and Diversity*

In California, the vast majority of black students attend majority-minority schools.<sup>608</sup> Yet, five lawsuits have been filed challenging efforts to desegregate schools, each arguing that desegregation efforts violate California's controversial Proposition 209, which in 1996 outlawed government from discriminating or granting preferences on the basis of race.<sup>609</sup>

### *School Districts Drawn to Limit Minority Attendance in Mississippi*

**Mississippi's** schools remain highly segregated, due in large part to the "white flight" phenomenon, wherein white students flee to private academies when they perceive their schools to be "too black." In a perverse effort to counteract this trend, however, school districts are reconfigured to limit the opportunity of black students to attend certain schools when black student enrollment exceeds 30%. In Jones County, for example, attendance zones are drawn so as to ensure that the black student population does not exceed 10% in each school. The U.S. Department of Justice is currently investigating allegations of racial discrimination in Webster County based on a complaint two

families filed with the Department of Justice's Civil Rights Division.<sup>610</sup>

*Rezoning of School District Detrimental to Minority Children in Alabama*

During court-ordered desegregation, schools in the racially mixed city of Tuscaloosa, **Alabama**, a city of 83,000, roughly reflected the school system's racial makeup, and there were no all-black schools. But in recent years, the board has carved the district into three zones, each with a new high school. One cluster of schools has a high school that is 73% black; another has 5 schools with 2,330 students, of whom only 19 are white and its high school is 99% black. In contrast, a cluster of schools that draw white students from an affluent area, as well as some blacks bused into the area, now includes two majority-white elementary schools. Its high school is 56% black. Some black parents are challenging the rezoning as a violation of the federal No Child Left Behind law, which gives students schools deemed failing the right to move to better ones.

After white parents in Tuscaloosa, complained about school overcrowding, school authorities decided to rezone the school district's plan, with the result that all but a handful of the hundreds of students required to move in 2007 were black — and many were sent to virtually all-black, low-performing schools.<sup>611</sup> When the racially polarized, eight-member Board of Education approved

the rezoning plan in May, however, its two black members voted against it.

The schools superintendent and board president say that the rezoning, which redrew boundaries of school attendance zones, was a color-blind effort to reorganize the 10,000-student district around community schools and relieve overcrowding, and that optimizing use of the city's 19 school buildings saved taxpayers millions. They also acknowledged another goal: that of drawing more whites back into Tuscaloosa's schools by making them attractive to parents of 1,500 children attending private academies founded after court-ordered desegregation began.

Each of these four case studies — from different regions of the country — demonstrates how students of color across the U.S. are more and more likely to be educated in separate schools from white students, and that the schools for minority students have far fewer resources and far poorer educational outcomes. The U.S. today continues to operate a dual school system on the basis of race.

### **School-to-Prison Pipeline**

The ACLU is particularly disappointed by the U.S. Report's failure to acknowledge the "school-to-prison pipeline" responsible for funneling vast numbers of minority children into the juvenile and criminal justice systems rather than graduating them from high school. This pipeline manifests itself through systemic policies that prioritize the

incarceration, rather than the education, of children, especially children of color. At-risk youth, including children with learning disabilities, histories of poverty, abuse or neglect, and children of color increasingly find themselves pushed out of public schools through a lack of adequate educational resources, unfair suspensions and expulsions, the criminalization of minor school misconduct, by being funneled into “alternative schools” that do not provide adequate educational services, and by racial discrimination in and by schools. Each of these factors has a disproportionate impact on children of color. As mentioned above, a part of this “push-out” phenomenon is driven by the high-stakes testing regime of the No Child Left Behind Act, which creates perverse incentives for school officials to rid their enrollment of at-risk children who are likely to score poorly on standardized tests to avoid the sanctions associated with being labeled a “failing school.”

#### *Inappropriate School Discipline Pushes At-Risk Students Out of Schools*

Under the banner of “zero-tolerance,” schools today mandate excessively harsh discipline for minor misconduct, regardless of the circumstances. Initially, “zero tolerance” policies gained favor pursuant to the federal Gun Free School Zones Act of 1994, followed by the Columbine shootings in 1999, and sought to eliminate firearms in public schools. However, states, school districts, and public schools across the nation have

begun implementing “zero tolerance” to suspend and expel students for even the most minor of school offenses. Children are being excluded from schools for talking back to their teachers, not having their shirts tucked in, or being late to class. For example, in Michigan, “zero tolerance”<sup>612</sup> contemplates not only drug and alcohol-related conduct, but also “disobedience,”<sup>613</sup> which frequently serves as the basis for the disciplining of black students. The annual number of students receiving out-of-school suspensions nearly doubled from 1.7 million in 1974 to 3.1 million in 2000.<sup>614</sup>

Nationally, minority students are suspended at rates of two to three times that of other students. They are also more likely to be subject to office referrals, corporal punishment, and expulsion.<sup>615</sup> Nationally, African-American students comprise approximately 17% of the student population, but account for 36% of school suspensions and 31% of expulsions.<sup>616</sup> In the New Jersey, for instance, black students are nearly 60 times more likely to be expelled than their white counterparts. In Iowa, blacks make up just 5% of the statewide public school enrollment, but account for 22% of suspensions.<sup>617</sup> In **Georgia** in 2004, black students had a suspension rate of 13.5%, as compared to 5.8% for Latino students and 5.2% for white students. In Michigan, black youth account for approximately 20% of the student population as a whole but 39% of expelled students.<sup>618</sup> In Lee County, Florida, 1 out of every 3 black high school students receives

an In-School Suspension (ISS) during the course of the school year and 1 out of every 4 receives an Out-of-School Suspension (OSS).<sup>619</sup> Minority students with disabilities are particularly vulnerable. African-American students with disabilities are three times more likely to receive short-term suspensions than their white counterparts, and are more than four times as likely to end up in correctional facilities.<sup>620</sup>

These disciplinary policies result in a larger number of students of color ending up in the juvenile and criminal justice systems. When students are excluded from the school, they are more likely to end up on the street with little to no adult supervision. According to the American Bar Association, the “single largest predictor” for later arrest among adolescent girls, for example, is having been suspended, expelled, or held back during the middle school years.<sup>621</sup>

In Texas, 30.9% of students were not in school before they entered juvenile prison, and more than 81% of Texas prison inmates are dropouts.<sup>622</sup> Unsurprising given the disparities in school discipline, African-Americans are significantly overrepresented in the prison population in Texas. While blacks make up approximately 11.7% of the state population, they comprise 37.5% of the population in custody of the Texas Department of Criminal Justice.<sup>623</sup>

There are also significant questions about whether schools are providing constitutional

due process measures, described first by the Supreme Court in *Goss v. Lopez*, 419 U.S. 565 (1975), in granting students the opportunity to challenge suspensions and expulsions.<sup>624</sup> Michigan’s school law, for example, makes no reference to procedural requirements for suspension hearings.<sup>625</sup> It is common for school officials to not only make the rules for the manner in which challenges will be considered, but to also serve as the sole decision makers on the question of whether punishment should be imposed. Sometimes, the school district may be represented by legal counsel, while low-income families rarely have the resources to retain attorneys to represent their interests. In the end, there is often a stark imbalance with respect to resources and capacity for effective advocacy.

In addition to suspensions and expulsions, students, especially students of color, also remain vulnerable to state-sanctioned beatings by teachers. More than 20 U.S. states continue to permit corporal punishment, with 275,000 students subjected to such beating each year. Texas leads the states in the number of students who are beaten, but Mississippi leads the nation in rates of beatings, at nearly 10% of all students receiving corporal punishment.<sup>626</sup> Nationally, black students are hit at a rate that is more than twice their makeup in the population. Blacks comprise 17% of students, but receive 39% of paddlings. Mississippi regulates only the size of the paddle (the same size for students

aged 5-18) and provides partial immunity for teachers or principals who beat students.<sup>627</sup>

### *Criminalization of School Discipline*

Increasingly, schools rely on law enforcement and the court system to address trivial school-related offenses among even the youngest students. For example, one juvenile court judge in Massachusetts reported to the ACLU that he deals with more school discipline in his courtroom than he did in his former job, as a public school principal. Growing numbers of districts employ full-time police officers to patrol middle school and high school hallways, often with little or no training on how to work within the educational environment. Many of these officers approach youth as they would approach adult perpetrators on the street, rather than children in their classrooms.

Consequently, children are far more likely to be arrested at school than a generation ago, for *non-violent* behavior: e.g., in one **Texas** school district, 17% of school arrests were for “disruptive behavior”, and 26% were for “disorderly conduct”.<sup>628</sup> Zero-tolerance policies result in automatic arrests for incidents such as giving over-the-counter pain reliever to a classmate, getting into a fight with a classmate in self-defense, or even, as we have now seen twice in **Florida**, having a temper tantrum. In one case, a 6 year-old black girl was handcuffed and arrested, as a felon. Again, these police practices disproportionately harm youth of color. A 2006

report<sup>629</sup> found that there were close to 27,000 school-related referrals to the Florida Department of Juvenile Justice in the 2004-05 school year. Over three-quarters of the referrals were for misdemeanor offenses such as disorderly conduct, trespassing, or assault and/or battery, often no more than a school-yard fight. Black students received 46% of out-of-school suspensions and police referrals, although they comprised only 22.8% of the student population.

Defenders of the status quo cannot attribute the explosion of school-based arrests to an increase in school violence. On the contrary, empirical evidence shows that between 1992 and 2002, school violence actually dropped by about half.<sup>630</sup> According to the Justice Policy Institute and U.S. Department of Education, crimes committed in public schools have decreased by as much as 30% since 1990 and less than 1% of all violent incidents involving adolescents occur on school grounds. Yet, students around the nation report that their schools are beginning to feel more and more like “mini-prison.”

In Michigan, Detroit police conducted unlawful, random searches of public school students, including at least one incident of strip searches of students, until the ACLU of Michigan filed a lawsuit that resulted in a settlement stopping the practice.<sup>631</sup> In Mississippi and elsewhere, schools permit teachers to handcuff students for misbehaving.



Photos courtesy of George M. Gutierrez/ New York Times Redux.

New York City students protest the police practices at their school.

Deploying police and police tactics in public school hallways has also gained force in Los Angeles Unified School District (LAUSD), which serves over 741,000 students in approximately 720 schools; the vast majority of these students (91%) are non-white (91%) and low-income (74.8%). The District permits random searches of students, issues “tickets” or removes students from classrooms and places them in detention rooms for being late to school, and issues tickets and suspensions for “loitering” in hallways.<sup>632</sup> These tickets incur significant financial expense, as four late slips result in a \$250 truancy ticket from the police, imposing a financial burden for low-income families. LAUSD also commonly deploys metal detectors in schools, which have little to no impact on safety. In a survey of students

conducted in 1996, over 50% of high school students said they had metal detectors in their schools, 38.5% adding that metal detectors did not make them feel safer, and 63.6% reporting that metal detectors do not serve as a deterrent to keep weapons off campus.<sup>633</sup>

In November 2003, the **South Carolina** police raided Stratford High School, recorded by both the school’s surveillance cameras and a police camera. The tapes show students as young as 14 forced to the ground in handcuffs as officers in SWAT team uniforms and bulletproof vests aim guns at their heads and lead a drug dog to tear through their book bags. The raid was authorized based on the principal’s suspicion that a single student was selling marijuana, even though the suspected student was absent at the time of the



raid. No drugs or weapons were found during the raid and no charges were filed. While African-Americans represented less than a quarter of the high school's students, more than two-thirds of those caught up in the sweep were African-American. The ACLU represented 20 of the nearly 150 students caught up in the raid and since settled the case. The settlement includes a consent decree that sets a new standard for students' rights to be free from unreasonable search and seizure.

Public schools in New York City likewise exemplify the way policing in schools has negatively impacted children of color. A 2007 report by the New York and National ACLUs documents the excesses of the New York City school policing program,<sup>634</sup> and concludes that while students and teachers are entitled to a safe learning environment that is conducive to education, the environment created by the massive deployment of inadequately trained police personnel in schools is often hostile and dysfunctional.

At the start of the 2005-2006 school year, the New York Police Department (NYPD), responsible for school safety since 1998, employed a total of 4,625 School Safety Agents (SSAs) and at least 200 armed police officers assigned exclusively to schools. These numbers make the NYPD's School Safety Division alone the tenth largest police force in the country – larger than the police forces of Washington, D.C., Detroit, Boston, or Las Vegas.

Seventy-one percent of students in large high schools and 58% of students in small schools reported feeling that armed police officers *rarely or never* make them feel safer.<sup>635</sup> In schools throughout New York City, police officers are involved much more often in non-criminal incidents than in criminal incidents. In the 2003-2004 school year, police reported being involved on average in 3 violent crimes per 1,000 students in high schools, such as felony assault. By comparison police were involved on average in 47 non-criminal incidents per 1,000 students, 44 of which are categorized as “disruptive to the school environment,” such as “disorderly conduct, harassment,” and possession of “dangerous instruments,” often consistent with normal adolescent behavior and properly administrable by school staff, not police.<sup>636</sup>

Because these school-assigned police personnel are not directly subject to the supervisory authority of school administrators, and because they often have not been adequately trained to work in educational settings, SSAs and police officers often grant themselves authority well beyond the narrow mission of securing the safety of students and teachers. They enforce school rules relating to dress and appearance, make up their own rules regarding food or other objects unrelated to school safety, and, on occasion, subject educators who question the NYPD's treatment of students to retaliatory arrests.

The result is that many New York City schools feel more like juvenile detention facilities than learning environments. Every day, over 93,000 city children cannot get to class without passing through a gauntlet of metal detectors, bag-searches, and pat-downs administered by police personnel who are inadequately trained and supervised and often belligerent, aggressive and disrespectful. Moreover, any middle school or high school without permanent metal detectors might on any day be unexpectedly forced to subject its students to mandatory scans and searches that consume up to three hours of class time.

All students are not equally likely to bear the brunt of over-policing in New York City schools. The burden falls primarily on the schools with permanent metal detectors, which are attended by the city's most vulnerable children: children living in poverty, and children of color. During the 2004-2005 school year, poor students constituted 59% of children attending high schools with permanent metal detectors but only 51% of high school students citywide.<sup>637</sup> 82% of children attending high schools with permanent metal detectors were black and Latino, eleven percentage points higher than in schools citywide.<sup>638</sup>

These schools with permanent metal detectors serving the most at-risk students also have higher rates of police involvement in non-criminal violations such as "disorderly conduct." In these schools, the vast majority of incidents — 77% — in which the NYPD

is involved are classified as non-criminal.<sup>639</sup> Police get involved in more than twice as many non-criminal incidents at schools with permanent metal detectors than at typical, similarly-sized schools.<sup>640</sup> Students in these schools are thus subject to increased criminalization for non-criminal incidents as compared to their peers citywide.

Children attending high schools with permanent metal detectors also receive grossly under-funded educations.<sup>641</sup> Librarians and books are also in short supply at schools with permanent metal detectors.<sup>642</sup> And, while the New York City school system as a whole is overcrowded, high school buildings with permanent metal detectors are among the largest and most overcrowded in the city.<sup>643</sup> High schools with permanent metal detectors also suspend children at far higher rates than similarly situated schools,<sup>644</sup> issuing, overall, 48% more suspensions than similar schools.<sup>645</sup> Most high schools with permanent metal detectors also have high drop-out rates.<sup>646</sup> Even based on the city's inflated reports of graduation rates,<sup>647</sup> available data show that the vast majority of high schools with permanent metal detectors — 70% — qualify as drop-out factories.<sup>648</sup>

Thus, as schools across the nation increasingly rely on law enforcement and the criminal justice system to enforce disciplinary rules, more and more children of color are ending up arrested and in detention facilities.

Disproportionate Impact on Students of Color  
General Student Population vs. DAEP Population (%)  
2004-05

	African-American		Hispanic		White	
	State	DAEP	State	DAEP	State	DAEP
1	13.5	39.5	48.3	32.1	34.9	26.7
2	13.6	42.5	47.3	34.8	35.5	21.7
3	13.6	39.3	46.5	36.0	36.4	23.6
4	14.0	36.7	45.7	38.0	37.0	24.2
5	14.2	32.8	44.8	40.7	37.7	25.8
6	14.6	28.3	44.0	49.9	38.1	21.0
7	14.5	24.3	43.3	53.0	39.0	21.8
8	14.5	21.3	42.4	52.8	40.0	24.9
9	15.0	21.2	43.6	52.4	38.4	25.5
10	14.5	22.8	39.6	45.8	42.4	30.1
11	14.0	22.5	37.4	39.4	44.7	36.5
12	13.8	20.8	36.1	34.6	46.3	42.7

Chart reprinted from the Texas Education Agency, 2006 Comprehensive Annual Report on Texas Public Schools, available at [www.tea.state.tx.us](http://www.tea.state.tx.us)

*Involuntary Transfers to “Alternative Schools”*

In addition to simply suspending and expelling children or referring to them to the juvenile justice system, schools across the US are expelling at-risk children from the track toward high school graduation by funneling them into “alternative schools” that often fail to provide adequate educational services.

The Texas Safe Schools Act<sup>649</sup> mandates students be removed from mainstream schools to disciplinary alternative education programs (“DAEP”) or juvenile justice alternative education programs (“JJAEP”) for criminal violations. The Act also gives schools the authority to remove a student to one of these alternative schools for any violation of the local school code of conduct.

Approximately 80% of these involuntary transfers to alternative schools are discretionary, i.e., for non-violent, non-criminal

behavior.<sup>650</sup> These alternative schools are not subject to any effective state oversight. The 2007-2008 school year will be the first year the state education agency is required to develop standards for DAEPS (but it is not required to monitor or enforce them).<sup>651</sup> Not surprisingly, DAEPs have five times the drop-out rate of regular schools.<sup>652</sup>

Students with disabilities and students of color are overrepresented in these alternative schools. For example, while students receiving special education account for approximately 12% of the statewide student population, they account for about 24% of the DAEP population.<sup>653</sup>

On a positive note, in Austin, **Texas**, after administrators realized that black youths accounted for 14% of the school district's population but 37% of those sent to alternative schools, they implemented a program to encourage positive behavior rather than punish negative behavior. At Pickle Elementary, which consists largely of Hispanic and African-American students, the results were remarkable—disciplinary referrals decreased from 520 in 2001-2002 to a mere 20 in 2006-2007.<sup>654</sup>

In **Georgia**, by contrast, Atlanta Public Schools (APS) contracted with the private, for-profit company Community Education Partners (CEP) to operate and manage Atlanta's alternative school. Although the Atlanta public schools are largely attended by poor, black students, children at CEP are

almost entirely segregated by race and class. One hundred percent of CEP students are black and 82% are poor (defined as eligible for free or reduced price meals).<sup>655</sup>

During the 2004-05 school year, when there were approximately 625 students enrolled at CEP at any given time, there were more than 1,200 suspensions at CEP.<sup>656</sup> Of the 498 children who left CEP in 2005-06, 75% did not return to a "regular" APS program; 40% of those children were either expelled from CEP or "removed" for lack of attendance.<sup>657</sup> Not a single child at CEP made it to their 12<sup>th</sup> or final year in 2006, and only one child sat for the 11<sup>th</sup> grade Georgia High School Graduation Tests. Although 120 9<sup>th</sup> graders started CEP in 2006, that number dwindled to 30 students in the 10<sup>th</sup> grade, and only 11 in the 11<sup>th</sup> grade.<sup>658</sup> Attendance rates at CEP are extremely low. Forty-two percent of students were absent more than 15 days during the 2005-2006 school year, compared to just 8.4% of students in the Atlanta school system overall.<sup>659</sup>

In 2005-2006, 96% of CEP 6<sup>th</sup> graders did not pass exams in math and science and 73% of those same students did not meet expectations in reading. Ninety-nine percent of CEP 7<sup>th</sup> graders did pass exams in science and 78% did not meet standards in reading. One hundred percent of the 9<sup>th</sup> grade males attending CEP failed the end-of-course literature and composition exams.<sup>660</sup> CEP provides no Special Education program or teachers qualified to work with differently-

abled youth for its special education students. The Fulton County Educational Advocate reports that 40% of the special needs children she advocates for are CEP students.<sup>661</sup> An overwhelming majority of CEP teachers lack the experience and training necessary to properly educate their students. Fifty-five percent have been teaching for less than one year. Not a single teacher has more than 10 years of experience. More than 70% have only a bachelor's degree.<sup>662</sup> The lack of qualified teachers at CEP cannot be attributed to the difficulty of attracting teachers to alternative schools in the Atlanta area. While CEP teachers average just 1.1 years of experience, teachers at South Fulton Crossroads, an alternative school in Fulton County, average 8.1 years of experience, and teachers at DeKalb Alternative School average 10.56 years of experience.<sup>663</sup>

Lee County, **Florida**—where Alternative Learning Centers (ALCs) serve as warehouses for poor students—likewise exemplifies the ways that alternative schools harm minority youth. Although 44% of Lee County's students qualify as economically disadvantaged, economically disadvantaged students comprise 76% of those at ALC Central Middle and 66% of those at ALC Central High.<sup>664</sup> Black students are being disproportionately funneled into the ALC system. *Although black students make up just 14% of Lee County's student population, 31% of referrals to the ALC system are for black students. 20% are for black males,*

### Students Assigned to CEP for Non-Disciplinary Reasons

D.L., a 14-year-old African-American boy, was sent to CEP school in 2004 after his family lost their housing and had to move between several school zones. Although his mother tried to re-enroll him in his original middle school, APS would not let her do so solely due to the fact that the family was homeless. Before being sent to CEP, D.L. earned above average grades, enjoyed school, and had no behavioral problems. He is now in his second year at CEP, after receiving all failing grades last year and being held back in the sixth grade. For fear of being physically assaulted, D.L. does not want to attend school. Consequently, he has been reported to juvenile court for truancy. (2005-2006 CEP Data, Atlanta Legal Aid Case History).

who comprise just 7% of the county student population.<sup>665</sup>

The disparity in referrals is also acute among girls. Although white students are 55% of the district's population and black students just 14%, the number of referrals to the ALC system for black females is equal to that for white females. This means that *a black girl in Lee County is nearly four times as likely to be referred to an ALC as a white girl.*<sup>666</sup>

At the ALCs, discriminatory discipline continues. White students, comprising 55% of the county's enrollment and 42% of referrals to the ALC system, receive just 35% of the suspensions and timeouts meted out by the ALCs. ALCs punish black girls with suspensions and timeouts twice as often as white girls, although they are sent to ALCs in equivalent numbers. While 45% of white girls involved in an incident of "disruption" are given a timeout but no suspension, just 25% of black girls involved in such an incident escape suspension. ALCs refer three times as many black girls as white girls to law enforcement.<sup>667</sup>

### *Racial Discrimination in Schools*

Another reason minority children increasingly find themselves pushed out of schools stems from racial discrimination within schools, and even by school officials. Schools tolerate racial harassment and bullying, resulting in students dropping out, and they may discriminate on the basis of race in

disciplining students of color more harshly than their white counterparts. Examples of the ACLU's efforts to combat such discrimination are as follows.

In **Washington State**, the ACLU received complaints from parents and students in the Colville Confederated Tribes in the Grand Coulee Dam School District regarding unfair application of discipline. Students wearing "Native Pride" gear were being sent home from school for purported gang affiliation. Additionally, a police officer routinely interrogated children without notifying parents and pressured their children to "confess." The ACLU found that Native Americans were in fact disciplined out of proportion to their numbers and referred to juvenile court for truancy far more often than white students (without adequate communication between the district and the student's family). After writing to the school district requesting policy changes to ensure parents are notified when a police officer interrogates a child at school or removes a child from campus, the district's board eventually adopted the new procedures.

In **South Dakota**, in March 2006, the ACLU assisted ten Native American families with children in the Winner school system in filing a lawsuit against the Winner School District claiming that the schools discriminated against Native American students in disciplining them, were hostile toward Native American families, and took statements from students involved in disciplinary matters that were later used to prosecute them in juvenile

and criminal courts. The school district denied any wrongdoing, but agreed to enter into settlement discussions so as to avoid litigation.

Under the settlement agreement reached by the parties in June 2007, the district will enact policies and practices to ensure that the rights of Native American students are not violated and to enrich the educational experience of all students. Key terms of the settlement include the following:

- School officials will not require students to write statements that can be used to prosecute them in juvenile or criminal court.
- The district will hire a full-time Native American ombudsperson to serve as a liaison between Native American families and school officials, especially on disciplinary issues.
- The district will hire an educational expert to monitor the district's efforts and work with school officials and Native American families to set benchmarks on improving Native American graduation rates, reducing levels of suspension and school-based arrests, and improving the overall climate for Native American students, among other goals
- A committee including Native American parents will review disciplinary incidents every quarter for racial disparities.

- The Interwest Equity Assistance Center, funded by the U.S. Department of Education, will provide trainings for Winner students on conflict resolution and trainings for teachers on unconscious racial bias and educational equity.

- The schools will include Native American themes in the mainstream curriculum, in-school activities, and after-school activities. Additionally, the district will offer Native American Culture, History and Language class every year in the high school, taught by a Native American instructor.

In Bishop, **California**, a small eastern town, there are approximately 5,000 people including about 1,600 members of the Bishop Paiute Tribe. In 2005, after reports of pervasive discrimination, harassment and excessive force against Native American students in the Bishop Unified Elementary School District, the California ACLU and California Indian Legal Services began an investigation into local practices. After learning of a long history of discrimination by both the District and the Bishop Police Department, staff filed Public Records Act requests with the District and the police department related to racial discrimination and harassment, including racial disparities in student discipline cases, and student interactions with law enforcement. We learned, for example, that for school years 2000-2006, while Native American students

were about 17% of the student population, they were almost 67% of those suspended for being “disrespectful/argumentative.” In September 2007, the ACLU reached a groundbreaking settlement that will remain in effect until 2012.<sup>668</sup>

In 2001, an African-American student in a Modesto, **California** high school was involved in a fight with another student because the other student called him a “nigger.” The African-American student was suspended and forced to transfer to another school, while the white student received a less severe punishment. The student and his father filed a complaint with the U.S. Department of Education, Office of Civil Rights against the school district, noting that African-American students were 2.5 times more likely than white students to be expelled.<sup>669</sup> The ACLU recently negotiated school conduct code reforms, and is pursuing other policy changes through local advocacy. In another California school district (Los Angeles) in 2007, the ACLU helped pass a novel board resolution mandating nondiscriminatory school discipline practices and policies that promote collaboration over discipline.<sup>670</sup>

The **Mississippi** ACLU likewise has documented racial discrimination in discipline through an extensive human rights documentation initiative to interview children and families. Generally, Caucasian students receive substantially better treatment than African-American students for the same offenses. For certain minor offenses,

Caucasian students are rarely disciplined while African-American students may even be suspended from school.<sup>671</sup>

According to the African-American families interviewed, when making decisions regarding discipline, administrators often fail to follow school policy. For instance, policies usually require several steps be taken before suspending students, including verbal warnings, parent/teacher conferences and after-school detention. Yet, students the ACLU interviewed stated that school administrators routinely skip such preliminary steps and impose the maximum punishment. As one example, a student in Webster County was suspended for three days for reporting a bullying incident to her teacher. Because she asked the teacher multiple times after receiving no response from the teacher, she was disciplined for being ‘disruptive’.

The ACLU of Louisiana has assisted in organizing community mobilization efforts in the town of Jena, **Louisiana**, a small town of 3,000 that is 12% black and 85% white. At Jena High School, students of different races rarely sat together during their free time. The day after a black student sat under the “white tree” — after receiving the principal’s permission to do so, nooses were hung from the tree. The students responsible for the nooses were recommended for expulsion, but the school board and Superintendent overruled the recommendation and reduced the punishment to a three-day suspension.



Events that followed included the police and District Attorney's repression of a peaceful school protest led by black students outraged at the minimal punishment. The same day, the District Attorney, flanked by police officers, told students at a school-wide assembly that if students didn't stop making such a fuss about the noose incident, he could "take away their lives with the stroke of a pen." A few months later, an unsolved arson burnt down parts of the building that frame the tree, further igniting racial tension between the students. Thereafter, a white adult held up two black students at gunpoint at a convenience store, yet the black youth—who wrestled the gun away from the perpetrator—were charged by local authorities with aggravated battery and theft of property of over \$500 for taking away the gun. In contrast, the very next day a white student charged with breaking a bottle over a black student's head at an off-campus party was sentenced only to probation.

The following week, there was a fight at the school between black and white children, in which one student suffered minor injuries. Six black students were expelled as a result, and the District Attorney, who also serves as the legal counsel for the school board in expulsion hearings, filed charges against all 6 black students for conspiracy to commit second-degree murder and attempted second-degree murder where the "dangerous weapon" required to sustain a felony charge was a tennis shoe. One of the black students, Mychall Bell, on trial in an adult court, faced

85 years or more in prison. After much national public outcry and the intervention of high-profile personalities, the charge was reduced to aggravated battery, and his possible punishment to 22 years, but he remained in adult court and was quickly convicted by an all-white jury and a public defender who provided no witnesses on his behalf. The appeals court then ruled that because Bell was 16 at the time of the schoolyard beating, he should not have been tried as an adult and has remanded him to juvenile court.

The deterioration of race relations led to a protest march of over tens of thousands in Jena on September 20. Nooses have now been hung 45 times, including outside university professors' offices and black student campus organizations.<sup>672</sup>

## ARTICLE 6 ENSURE EFFECTIVE PROTECTION & REMEDIES FOR RACE DISCRIMINATION

Under Article 6, states parties must ensure effective protection and remedies through competent public institutions for any acts of racial discrimination, and the right to seek sufficient reparation for any damage from such discrimination.<sup>673</sup> This Committee has stated that in addition to punishing perpetrators for acts of discrimination, courts must consider the propriety of awarding the victim financial damages.<sup>674</sup> States parties must also ensure that non-citizens have equal access to effective

remedies, “including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies.”<sup>675</sup>

According to the U.S. Report, U.S. law has several remedies for redressing individual discrimination. They include private lawsuits, administrative procedures, and federal and state-initiated civil and criminal prosecution of offenders, as well as policy guidance and oversight by certain federal Departments and offices. Additionally, federal and state laws, the U.S. reports, are constantly under review and potential revision, and new laws are often enacted to deal with new issues.<sup>676</sup>

However, the significant erosion in both the government’s enforcement of rights (described in Article 2, above) and private rights of action is well documented. Actions of the federal legislative and judicial branches of the U.S have seriously imperiled both the equal application of rights and availability of effective (or, in some cases, any) remedies. U.S. Supreme Court cases over the last decade have sharply limited the ability of individuals to sue for civil rights violations. The Court has ruled that claims of racial or national origin discrimination must be accompanied by proof of intentional discrimination; showing disparate impact, however egregious, is insufficient. Concerning undocumented migrant worker’s rights, courts have severely circumscribed available remedies including back pay, state tort remedies and workers’ compensation, and have also made immigration status relevant in such litigation.

Rights available to women have been similarly curtailed, with the Court striking down a civil remedy under the Violence Against Women Act and refusing to apply the federal civil rights remedy to local officials who ignore a prior mandatory judicial protective order. And the Court has limited the rights of immigrants, prisoners and detainees in the “war on terror,” to use the writ of habeas corpus in U.S. courts to challenge the constitutionality of their ongoing detention, significantly circumscribing the availability of a most potentially significant remedy.<sup>677</sup>

### KEY GUARDIAN OF CIVIL RIGHTS FAILS TO ENFORCE PROHIBITIONS AGAINST DISCRIMINATION

Since 2001, the role of the Civil Rights Division of the Department of Justice has changed to the detriment of those who need it. As detailed in Article 2 above, the Division and its work have become highly politicized with partisan political concerns driving decision-making and hiring.<sup>678</sup> Thus, the historical tools of the Justice Department for impartial civil rights enforcement have significantly weakened, leaving many people vulnerable to unequal opportunity and rising racial and religious intolerance. As of 2001, the Civil Rights Division has abandoned much of the traditional civil rights enforcement work that it had pursued since its creation in 1957.

From January 2001, the Voting Section of the Justice Department’s Civil Rights Division

has brought no Section 2 cases on behalf of African-Americans in the Deep South and no Section 2 cases on behalf of Native Americans anywhere in the U.S. Instead the Voting Section has repeatedly exercised its authority to encourage states to limit, rather than expand, the voting franchise, often to the detriment of poor and minority voters, and in a manner that appears to favor certain political interests over others. For example, in 2005, the Voting Section approved a strict Georgia voter photo identification (ID) law that would disenfranchise thousands of African-Americans who do not possess government-issued photo identification. The Voting Section permitted this law to go into effect, despite no evidence of impersonation fraud at the polls and despite well-documented evidence showing that the law would disproportionately disenfranchise African-Americans. The ACLU has challenged ID laws in Georgia and Indiana, the latter to be heard by the U.S. Supreme Court in early 2008. As noted earlier, these ID laws have adversely impacted East Asians, South Asians, and other language minority populations as well.

The number of discrimination cases brought by the Justice Department's Employment Litigation Section under Title VII of the Civil Rights Act of 1964 – one of the most important federal employment discrimination laws – has plummeted since January 2001. The decline is most noticeable in areas that historically have provided the highest percentage of charges. Cases alleging a pattern or

practice of job discrimination against African-Americans have dropped precipitously, and the Employment Litigation Section has yet to file a single Title VII case alleging job discrimination against a Latino individual. The Employment Litigation Section has also filed far fewer disparate impact cases since January 2001. This demise in civil rights enforcement is deeply troubling, and has created the widespread perception that partisan motives, rather than actual discrimination trends, have replaced vigorous enforcement of the law.

Under the Bush administration, the Justice Department's Housing and Civil Enforcement Section announced it would no longer pursue disparate impact housing cases, even though facially neutral housing policies can negatively affect racial minorities. This announcement stands in sharp contrast to the data indicating that housing discrimination continues to be a major barrier to neighborhood integration. Moreover, despite the recent focus on sub-prime lending abuses including the steering of minority applicants to sub-prime loans, the Housing and Civil Enforcement Section has filed few fair lending cases since January 2001.

Additionally, both the Department of Justice and the federal courts have scaled back private enforcement of civil rights. In key areas of discrimination such as racial profiling, where federal and state efforts have over decades proved fruitless, the U.S. provides no private cause of action for victims at all.<sup>679</sup>

Pressing civil rights issues in education, voting, immigration and housing, among others, must once again be impartially addressed and violations vigorously enforced.

### PRIVATE ENFORCEMENT OF CIVIL RIGHTS CLAIMS ALSO SCALED BACK

Court decisions have severely curtailed some of the tools with which discrimination may be tackled. For example, in 2001, the Supreme Court held that individuals have no right of action for violation of disparate impact regulations prohibiting federally funded entities from discriminating based on race, color or national origin.<sup>680</sup> And in 2000, the Court held that the U.S. Constitution's Eleventh Amendment immunity for states prohibits state employees from suing for age and disability discrimination.<sup>681</sup> In *Gonzaga v. Doe*, the Supreme Court limited the ability of individuals to use the federal civil rights law known as Section 1983 when states or entities violate certain statutes.

The most damaging of these cases in the assault on private enforcement of civil rights laws is the Supreme Court's 2001 ruling in *Alexander v. Sandoval*, that the disparate impact regulations of Title VI of the 1964 Civil Rights Act, which covers a broad range of federally funded programs, are not privately enforceable.<sup>682</sup> Private individuals can no longer sue for discrimination under civil rights statutes unless they can prove the discrimination was intentional. This burden of

proof exceeds the requirements of CERD and of international law. By obliging victims of discrimination to prove the discriminatory intent, as opposed to discriminatory effect, of a policy or practice, the U.S. imposes an impermissible burden on racial minorities and others who seek to assert their non-discrimination rights.<sup>683</sup> *Sandoval* has weakened civil rights laws that affect many areas of American life, but the impact of this case is strongest against those who are discriminated against based on national origin and the language that they speak.<sup>684</sup>

The Department of Justice's Voting Rights Division has also undercut private rights of action by depriving the federal Help America Vote Act (HAVA), also discussed in Article 5 above, of any force it may have had when it was most needed: in the weeks preceding the 2004 presidential election, the Department of Justice argued in multiple litigations that private citizens could not enforce *any* rights under HAVA and that only the Department itself would be able to do so.<sup>685</sup>

This Committee has stated that "discrimination" prohibited by CERD includes conduct that has a discriminatory purpose or effect. It is vital to restore these legal remedies in order to continue to combat the ongoing racial discrimination and to comply with the Convention.

## ROLLBACK OF CIVIL RIGHTS REMEDIES FOR MINORITY WOMEN

The rollback in civil rights protections has specific ramifications for racial minority women, who are especially vulnerable to violence. For example, while African-American women and white women with the same economic characteristics experience similar levels of domestic violence, African-American women experience a higher rate of domestic violence in part because they are more likely to live in disadvantaged neighborhoods and experience economic distress.<sup>686</sup> Native American women experience the highest rate of violence of any group in the U.S.<sup>687</sup>

Two Supreme Court cases in particular, *United States v. Morrison* and *Castle Rock v. Gonzales*, erode federal civil remedies for female victims of domestic violence.<sup>688</sup> In *Morrison*, the Court held that Congress did not have the power to create a private cause of action, wiping out the Violence Against Women's Act's civil rights remedy. In *Gonzales*, the Court refused to apply the federal civil rights remedy to local officials who ignore a prior mandatory judicial protective order, denying any governmental obligation to protect women from harm by private parties.<sup>689</sup> As a result of these cases, there is now no federal judicial remedy to compensate women for violence by private actors, and no federal remedy to compensate for the failure of state actors to protect women from and/or prevent domestic violence.<sup>690</sup>

## INSUFFICIENT REMEDIES FOR DISCRIMINATION

The U.S. writes that the Equal Protection Clause of the U.S. Constitution guarantees the right of equal access to tribunals and that it has already addressed the issue in Article 5. The U.S. overlooks the issue raised by Article 6(a). The issue is not access to tribunals, but rather, assuming equal access (which we show in Article 5, above, may not be assumed), is whether proper remuneration or injunctive relief is available. It is not.

In particular, the recovery of attorneys' fees, long recognized as a crucial tool for enforcing civil rights law, has been seriously eroded in the last decade by the U.S. Supreme Court. In the American legal system, you pay as you go. A plaintiff in a civil lawsuit bears his own costs, win or lose. There are exceptions, however, that force the loser to pay the winner's legal fees. Over one hundred federal statutes provide for a kind of fee shifting: federal remedial statutes, like the civil rights laws, that provide for attorneys' fees for "prevailing parties" to be paid by their opponents. These attorneys' fees provisions were expressly designed by Congress to encourage private citizens to participate in enforcing the law. But in the Supreme Court's 2001 *Buckhannon* case,<sup>691</sup> the definition of who was a prevailing party, was changed, and now the term "prevailing party" means a party that won a judgment, or entered into a consent decree, or somehow got a court to find, or a defendant to admit,

that the defendant had committed a legal wrong. As a result, lawyers who now bring cases under federal remedial statutes have less incentive to do so.<sup>692</sup>

Relatedly, because of the *Hoffman* case discussed above, attorneys may also be reluctant to pursue employment discrimination suits on behalf of immigrant workers. *Hoffman* had a chilling effect on workers challenging employment abuses because it made their immigration status a focal point in employment-related litigation. Moreover, the National Labor Relations Board has no authority to award punitive damages or other remedies to punish employers, and used to rely on the backpay remedy to serve this purpose, which *Hoffman* renders unavailable. Thus, without an effective financial remedy, many attorneys are unlikely to represent exploited undocumented workers.

The U.S. also fails to discuss the impact of the Prison Litigation Reform Act (PLRA), which imposes significant barriers to prisoners seeking judicial relief for abuses inflicted during incarceration. Examples of harmful provisions of the PLRA include one requiring a showing of physical injury for any federal civil action,<sup>693</sup> thereby denying judicial recourse to inmates suffering racial discrimination and many forms of sexual abuse, among other violations.

## ARTICLE 7 MEASURES IN TEACHING, EDUCATION & CULTURE TO COMBAT DISCRIMINATION & PROMOTE TOLERANCE

Article 7 requires states parties to adopt immediate and effective measures especially in teaching, education, culture and information to combat prejudices which lead to race discrimination, and to promote understanding, tolerance, and friendship among nations and racial or ethnic groups as well as to propagate the UN Charter's principles, the Universal Declaration on Human Rights, the UN Declaration on the Elimination of all forms of Racial Discrimination and CERD. The Committee emphasizes that these obligations are binding on all States parties and must be fulfilled by them, including states that declare that racial discrimination is not practiced in their jurisdictions.<sup>694</sup> Thus, Article 7 requires States to combat prejudice leading to discrimination and instill tolerance and understanding, particularly in the fields of teaching, culture, and information.

The U.S. states that it satisfies Article 7 through several federal statutes prohibiting discrimination in education, and that the Departments of Education and Justice play key roles in implementing these laws including by resolving discrimination complaints.<sup>695</sup> The U.S. also cites funding for programs to eliminate prejudice and intolerance.<sup>696</sup> The No FEAR law, enacted in 2002, requires all federal managers and law enforcement offi-

**\*U.S. HATE CRIMES STATISTICS**

Population-Adjusted Reporting Rates (PARR) by Subgroup (Reports per 100,000)<sup>705</sup>

Arab-American (pre-Sept. 11)	3.77
Muslim (pre-Sept. 11)	0.68
Arab-American & Muslim Combined (pre-Sept. 11)	4.45
Arab-American (post-Sept. 11)	67.86
Muslim (post-Sept. 11)	12.03
Arab-American & Muslim Combined (post-Sept. 11)	79.89
Gay	20.71
Jewish	18.04
Black	8.87
Asian-Pacific Islander	2.90
Hispanic	1.48
White	0.43

cers to receive diversity training including training on handling hate crimes.<sup>697</sup>

### RACIAL PROFILING OF MINORITIES CONTINUES UNABATED

Whatever efforts the government has made in these areas, a few facts remain clear. No jurisdiction in the U.S. has addressed racial profiling in an effective and comprehensive way.<sup>698</sup> And although the President denounced racial profiling in 2001, he has failed to support any federal legislative efforts to eliminate racial profiling, including the currently pending End Racial Profiling Act.<sup>699</sup> As detailed in Article 2, the 2003 DOJ-issued “Guidance Regarding the use of Race by Federal Law Enforcement Agencies” is inadequate and has been ineffective, not to mention that it is merely advisory, and not legally binding.<sup>700</sup>

### RELIGIOUS AND ETHNIC DISCRIMINATION CONTINUES TO RISE

The U.S. reports that it has made efforts to prevent and punish race-based hate crimes.<sup>701</sup> As above, immediately following the September 11 terrorist attacks, crimes against those perceived to be South Asian, Muslim or Arab increased by 1600% and incidents directed at individuals on the basis of ethnicity or national origin increased by 130%.<sup>702</sup> The post-September 11 level of hate crime reporting by Arab-Americans is extraordinarily high; the midpoint of the range would be 67.86 reports per 100,000 Arab-

Americans.<sup>703</sup> Hate crimes against Arabs, Muslims, and South Asians continue to increase at an alarming rate. The backlash of 9/11 also included several murders, and attacks against Hindus and Sikhs perceived to be Muslim.<sup>704</sup> To capture the full effect of post-September 11 hate crimes, we examine anti-Arab and anti-Muslim figures, both separately and combined, in comparison to other marginalized groups.

It is even more staggering to remember that these crimes took place in only about three months; assuming this level kept up, it would be reasonable to multiply the PARR by four to achieve some better annualized estimate. U.S. efforts to combat hate crimes against Arabs, Muslims, and South Asians are, to say the least, in urgent need of improvement.

It is also true additionally that an overwhelming number of hate crimes go unreported to authorities. Many victims of hate crimes are reluctant to contact law enforcement due to a mistrust of government that has resulted from post-911 policies and programs, a lack of knowledge about the criminal justice system, fear of retaliation, linguistic and cultural barriers, immigration status, apathy towards recourse and prior negative experience with government agencies. The greater the number of barriers to understanding and trusting law enforcement and or government agencies, the more likely that hate crimes are underreported.<sup>706</sup> Thus, some of this increase may be attributable to the government's own actions.

Detainees also suffer religious discrimination. About 90 of the 330 detainees at Guantanamo Bay Navy Base, for instance, returned their copies of the Koran to their commanders when attending recreational or attorney meetings because they feared guards would defile the texts. Some Guantanamo detainees were also forced to have their beards cut as a form of disciplinary action (a practice the U.S. military claims it has ceased), often in the presence of female officers; at least one such incident has been videotaped.<sup>707</sup>

#### HUMAN RIGHTS INFORMATION IS NOT READILY AVAILABLE

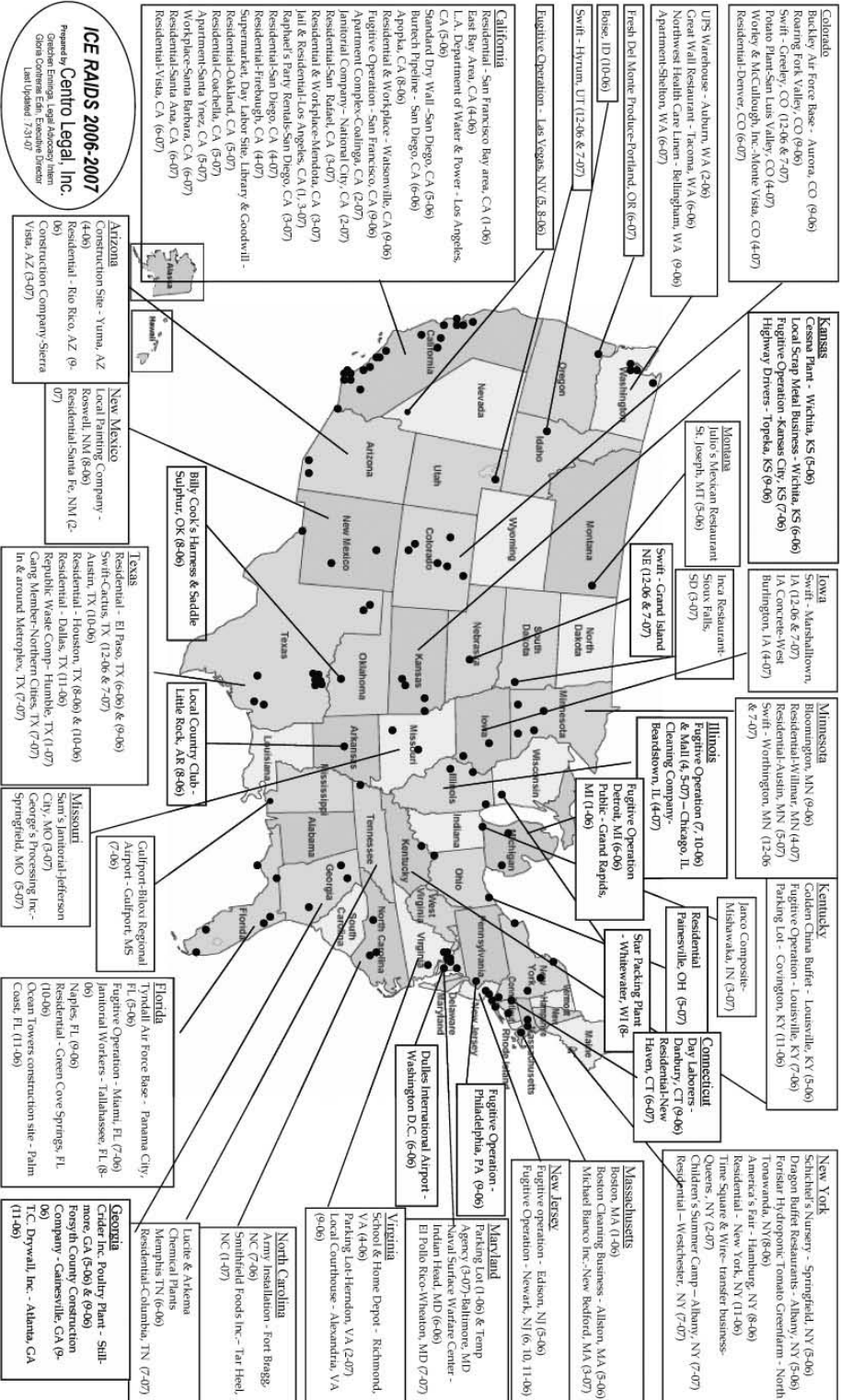
The U.S. claims that its citizens have access to information concerning their human rights because such information is “readily available” through the Internet.<sup>708</sup> The U.S. also claims that many schools have human rights components in their curricula and that human rights may be pursued at institutions of higher education.<sup>709</sup> People in the U.S. may be well informed about their domestic civil and political rights, including equal protection, due process, and non-discrimination, but they are not aware of any international human rights-based, often more expansive and embracing protections.

Certainly, little effort is made to affirmatively educate the public on any broad scale about their universal human rights, including those guaranteed by the CERD treaty. Simply prohibiting discrimination in education, instruct-



ing federal employees in anti-discrimination, and relying upon a small number of educational institutions to provide a basic level of human rights education does not meet the requirements of international human rights law. Given how pervasive societal discrimination continues to be in the U.S., the government must take its human rights obligations seriously and begin to provide broad basic human rights education.

# APPENDIX I



## END NOTES

- <sup>1</sup> UNICEF, *THE STATE OF THE WORLD'S CHILDREN: EXCLUDED AND INVISIBLE* 41 (2005).
- <sup>2</sup> Custody Data (1997 – Present), Office of Juvenile Justice and Delinquency Prevention, [http://www.unicef.org/sowc06/pdfs/sowc06\\_fullreport.pdf](http://www.unicef.org/sowc06/pdfs/sowc06_fullreport.pdf) (last visited Nov. 21, 2007).
- <sup>3</sup> HOWARD N. SNYDER AND MELISSA SICKMUND, NATIONAL CENTER FOR JUVENILE JUSTICE, *JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT* 236 (MARCH 2006), <http://ojjdp.ncjrs.org/ojstatbb/nr2006/downloads/chapter7.pdf>.
- <sup>4</sup> CERD, Gen. Rec. No. 24, ¶ 1, 55 Sess., U.N. Doc. A/54/18 (Aug. 27, 1999) *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/9ce4cbfde77a452a8025684a0055a2d0?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9ce4cbfde77a452a8025684a0055a2d0?OpenDocument).
- <sup>5</sup> CERD, Concluding Observations of the CERD: United States of America, ¶ 393, 59<sup>th</sup> Sess., U.N. Doc. A/56/18 (Aug. 14, 2001) *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/A.56.18.paras.380-407.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.56.18.paras.380-407.En?OpenDocument).
- <sup>6</sup> CERD, Gen. Rec. No. 14, ¶ 2, 42<sup>nd</sup> Sess., U.N. Doc. A/48/18 (Mar. 22, 1993) *available at* <http://www.unhchr.ch/tbs/doc.nsf/099b725fe87555ec8025670c004fc803/d7bd5d2bf71258aac12563ee004b639e?OpenDocument#%2F>.
- <sup>7</sup> CERD, Gen. Rec. No. 30, ¶ 3, 64<sup>th</sup> Sess., U.N. Doc. CERD/C/64/Misc.11/rev.3 (Oct. 1, 2004) *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e3980a673769e229c1256f8d0057cd3d?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e3980a673769e229c1256f8d0057cd3d?OpenDocument).
- <sup>8</sup> CERD, U.S. Report, ¶ 318, U.N. Doc. CERD/C/USA/6 (May 1, 2007) *available at* [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).
- <sup>9</sup> *See* Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); *see also* Washington v. Davis, 426 U.S. 229 (1976).
- <sup>10</sup> CERD, Fourth, Fifth, and Sixth Periodic Reports of the United States of America [hereinafter U.S. Report], ¶ 6, U.N. Doc. CERD/C/USA/6 (May 1, 2007) *available at* [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc). (Referring to CERD, Second and Third Periodic Reports of the United States of America, ¶¶ 145-173, CERD/C/351/Add.1 (September 2000)).
- <sup>11</sup> Committee against Torture, Second Periodic Reports of the United States of America, ¶ 155, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005) *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/G05/425/90/PDF/G0542590.pdf?OpenElement>; *see also*, Human Rights Committee, Second and Third Periodic Reports of the United States of America, ¶ 467, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005) *available at* [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/01e6a2b492ba27e5c12570fc003f558b/\\$FILE/G0545268.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/01e6a2b492ba27e5c12570fc003f558b/$FILE/G0545268.pdf).
- <sup>12</sup> CERD, Gen. Rec. No. 13, ¶ 2, 42<sup>nd</sup> Sess., U.N. Doc. A/48/18 (March 21, 1993) *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/51868b27038065a2c12563ee004b2eaf?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/51868b27038065a2c12563ee004b2eaf?OpenDocument).
- <sup>13</sup> JOSEPH D. RICH, *THE ATTACK OF PROFESSIONALISM IN THE CIVIL RIGHTS DIVISION, IN THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION* 13-17 (William L. Taylor, Dianne M. Piché, Crystal Rosario, & Joseph D. Rich eds., 2007).
- <sup>14</sup> Neil A. Lewis, *Justice Dept. Reshapes Its Civil Rights Mission*, N.Y. TIMES, June 14, 2007, *at* <http://www.nytimes.com/2007/06/14/washington/14discrim.html?ex=1339560000&en=1e2768988bb8b6a8&ei=5124&partner=digg&expod=digg>.

<sup>15</sup> *With New Faces, New Types of Cases*, B. GLOBE, July 23, 2006, at [http://www.boston.com/news/nation/washington/articles/2006/07/23/with\\_new\\_faces\\_new\\_types\\_of\\_cases](http://www.boston.com/news/nation/washington/articles/2006/07/23/with_new_faces_new_types_of_cases).

<sup>16</sup> CERD, Gen. Rec. No. 31, ¶ 32, 67th Sess., U.N. Doc. A/60/18 (2005), available at [http://ohchr.org/english/bodies/cerd/docs/GC31Rev\\_En.pdf](http://ohchr.org/english/bodies/cerd/docs/GC31Rev_En.pdf).

<sup>17</sup> See *U.S. v. City of Virginia Beach*, Civ. Action No. J:06CV189, available at [www.usdoj.gov/crt/emp/documents/vabeachcomp.pdf](http://www.usdoj.gov/crt/emp/documents/vabeachcomp.pdf); see also *U.S. v. Delaware*, Civ. Action No. 01-020-KAJ, available at [www.usdoj.gov/crt/emp/documents/delawarecd.htm](http://www.usdoj.gov/crt/emp/documents/delawarecd.htm).

<sup>18</sup> Most of the settlements did require training for persons involved in management and hiring. Additionally, in *Bob Ward New Homes*, the EEOC reserved the right to ask for reports concerning compliance, but only if they asked (*EEOC v. Bob Ward New Homes*, No. JFM-05CV2728 D. Md. June 27, 2006). In *University of Guam*, the University had to provide the U.S. with copies of any complaints received, (*United States of America v. University of Guam*, available at [www.usdoj.gov/crt/emp/documents/guamcd.htm](http://www.usdoj.gov/crt/emp/documents/guamcd.htm)).

<sup>19</sup> CERD, U.S. Report, ¶¶ 221-225, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).

<sup>20</sup> CERD, Concluding Observations of the CERD: United States of America, ¶ 398, 59<sup>th</sup> Sess., U.N. Doc. A/56/18 (Aug. 14, 2001) available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/A.56.18.para.380-407.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/A.56.18.para.380-407.En?Opendocument).

<sup>21</sup> See Jacqueline Palank, *Democrats Will Try to Counter Ruling on Discrimination Suits*, N.Y. TIMES, July 13, 2007, available at <http://www.nytimes.com/2007/07/13/washington/13ledbetter.html>; see also Jacqueline Palank *Bill Would Extend Lawsuit Window*, N.Y. TIMES, Aug. 1, 2007, at <http://www.nytimes.com/2007/08/01/washington/01brfs-wage.html?partner=rssnyt&emc=rss>.

<sup>22</sup> CERD, U.S. Report, ¶¶ 246, 254, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).

<sup>23</sup> *Id.* at ¶ 249.

<sup>24</sup> *Women Most Likely to Receive Subprime Home Loans*, CONSUMERAFFAIRS.COM, Dec. 11, 2006, at [www.consumer-affairs.com/news04/2006/12/subprime\\_women.html](http://www.consumer-affairs.com/news04/2006/12/subprime_women.html).

<sup>25</sup> DEBBIE GRUENSTEIN BOCIAN, ET AL., UNFAIR LENDING: THE EFFECT OF RACE AND ETHNICITY ON THE PRICE OF SUBPRIME MORTGAGES 3-4 (2006), available at [http://www.responsiblelending.org/pdfs/rr011-Unfair\\_Lending-0506.pdf](http://www.responsiblelending.org/pdfs/rr011-Unfair_Lending-0506.pdf).

<sup>26</sup> Manny Hernandez, *Study Finds Disparities in Subprime Mortgages by Race*, N.Y. TIMES, Oct. 15, 2007, at [www.nytimes.com/2007/10/15/nyregion/15subprime.html](http://www.nytimes.com/2007/10/15/nyregion/15subprime.html).

<sup>27</sup> PAYING MORE FOR THE AMERICAN DREAM: A MULTI-STATE ANALYSIS OF HIGHER COST HOME PURCHASE LENDING, NEIGHBORHOOD ECONOMIC DEVELOPMENT ADVOCACY PROJECT 4 (2007), available at [http://www.nedap.org/press-room/documents/2007\\_Report-2005\\_HMDA.pdf](http://www.nedap.org/press-room/documents/2007_Report-2005_HMDA.pdf).

<sup>28</sup> HUD-provided state data reveals these race and gender disparities: in Illinois, for example, 64% of the recipients of HUD subsidized housing and assistance are racial and ethnic minorities. In Alabama, 54% of the subsidized housing population consists of female-headed households (the average household is 2.4 people), and the average income consists of \$9, 862, well below the \$13,690 national poverty guideline for a household of two. See <https://pic.hud.gov/pic/RCRPublic/rcrmain.asp> (click link state, select Illinois and tab of Race/ Ethnicity to derive to Illinois information and click link state, select Alabama, select tab TTP for statistics on females and select tab household for income and household size) (Last visited September 28, 2007).

<sup>29</sup> HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING NN. 92, 107, 185, 261-262 (2004), available at <http://hrw.org/reports/2004/usa1104/usa1104.pdf> (finding that

3,504,483 will automatically become ineligible for public housing as a result of their criminal records and the limitations created by public housing authorities against individuals who have criminal records or are drug users. Since minorities comprise 63.4% of the prison population, they are the most likely to be affected by the public housing guidelines and restrictions.).

<sup>30</sup> CERD, U.S. Report, ¶ 67, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc)

<sup>31</sup> CERD, U.S. Report, ¶ 68, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).

<sup>32</sup> See *United States v. Silva*, 2007 WL 2890998 (D. Or. 2007); see also *United States v. Sterling*, 225 Fed.Appx. 748 (C.A.10 (Okla.) 2007).

<sup>33</sup> CERD, U.S. Report, ¶ 255, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).

<sup>34</sup> Press Release, Greater New Orleans Fair Housing Action Center, Fair Housing Center Files Suit Against St. Bernard Parish; Announces News Conference Regarding Lawsuit (Oct. 3, 2006), available at <http://www.gnofairhousing.org/pdfs/100306%20%20press%20release%20lawsuit%20-%20St%20Bernard.pdf>.

<sup>35</sup> *Id.*

<sup>36</sup> Bob Warren, *St. Bernard Agrees to Delay Its Rent Rule; Ordinance Prompted Discrimination Suit*, TIMES-PICAYUNE, Nov. 13, 2006.

<sup>37</sup> See Meghan Gordon, *Trailers Must Hit the Road By April; Jefferson Council to Permit Appeals*, TIMES-PICAYUNE, Dec. 8, 2006; see also Debra Lemoine, *Tangipahoa Plans to Continue Ban on Trailers*, BATON ROUGE ADVOCATE, July 9, 2006, available at

<http://pqasb.pqarchiver.com/theadvocate/access/1073981831.html?dids=1073981831:1073981831&FMT=ABS&FMT S=ABS:FT&date=Jul+9%2C+2006&author=Debra+Lemoine&pub=Advocate&edition=&startpage=3&desc=tangipahoa+plans+to+continue+ban+on+trailers>.

<sup>38</sup> GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER, FOR RENT, UNLESS YOU'RE BLACK: AN AUDIT REPORT AND STUDY ON RACE DISCRIMINATION IN THE GREATER NEW ORLEANS METROPOLITAN RENTAL HOUSING MARKET (2007), available at <http://www.gnofairhousing.org/pdfs/GNOFHAC%202007%20Rental%20Audit.pdf>.

<sup>39</sup> *Thousands of New Orleans Public Housing Units to be Destroyed as 200,000+ Low-Income Residents Remain Displaced*, DEMOCRACY NOW, June 20, 2006, at <http://www.democracynow.org/article.pl?sid=06/06/20/142210>.

<sup>40</sup> MARK A. BERNSTEIN, ET. AL., REBUILDING HOUSING ALONG THE MISSISSIPPI COAST: IDEAS FOR ENSURING AN ADEQUATE SUPPLY OF AFFORDABLE HOUSING, OCCASIONAL PAPER XI-XIV (2006), available at [http://www.rand.org/pubs/occasional\\_papers/2006/RAND\\_OP162.pdf](http://www.rand.org/pubs/occasional_papers/2006/RAND_OP162.pdf).

<sup>41</sup> U.S. Census Bureau, State & County QuickFacts, available at <http://quickfacts.census.gov/qfd/states/28000.html>.

<sup>42</sup> Letter from ACLU of Mississippi, et. al., to Governor Barbour, State of Mississippi (May 9, 2007) (on file with the authors). On file with the authors.

<sup>43</sup> CERD, U.S. Report, ¶ 69, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).

<sup>44</sup> In fact, the government challenged the ability of schools to implement *voluntary* desegregation programs in two related and recently decided Supreme Court cases: *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738 (2007) and *Meredith v. Jefferson County Board of Education*, 127 S.Ct. 2738 (2007). For a more in depth discussion, see *infra* Section 5.

- <sup>45</sup> See NATIONAL WOMEN'S LAW CENTER, TITLE IX AND EQUAL OPPORTUNITY IN VOCATIONAL AND TECHNICAL EDUCATION: A PROMISE STILL OWED TO THE NATION'S YOUNG WOMEN 7-9 (2001), available at [www.nwlc.org/pdf/TitleIXCareerEducationReport.pdf](http://www.nwlc.org/pdf/TitleIXCareerEducationReport.pdf); see also THE NATIONAL WOMEN'S LAW CENTER INVISIBLE AGAIN: THE IMPACT OF CHANGES IN FEDERAL FUNDING ON VOCATIONAL PROGRAMS FOR WOMEN AND GIRLS 5-6, 10 (2001), available at <http://www.nwlc.org/pdf/InvisibleAgain.pdf> (service providers who work with female vocational students report significant decrease in student services, program funding and support from state and local agencies; in the Perkins Vocational and Technical Education Act of 1998, Congress eliminated funding for and significantly reduced the number of provisions that would encourage gender equity or provide services for displaced homemakers and single parent students; over half of programs surveyed have had their funding cut while 71% of the programs reported their ability to provide services had decreased.).
- <sup>46</sup> ACLU, New Title IX Regulations Pose a Serious Threat to Civil Rights of Students, <http://www.aclu.org/women-srights/edu/27207res20061026.html> (last visited Nov. 18, 2007) (U.S. Department of Education released regulations in 2006 inviting public schools across the country to institute sex segregated classes and programs arguably turning back progress that has developed since the passage of Title IX in 1972.).
- <sup>47</sup> See generally Verna Williams, *Reform or Retrenchment? Single Sex Education and the Construction of Race and Gender*, 2004 Wis. L. Rev. 15 (2004).
- <sup>48</sup> CERD, U.S. Report, ¶ 71, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).
- <sup>49</sup> Press Release, U.S. Department of Justice, Fact Sheet: Civil Rights Division Efforts to Combat Modern-Day Slavery (Jan. 31, 2007) (available at [http://www.usdoj.gov/opa/pr/2007/January/07\\_crt\\_061.html](http://www.usdoj.gov/opa/pr/2007/January/07_crt_061.html)).
- <sup>50</sup> *Id.*
- <sup>51</sup> U.S. Department of Health and Human Services, Fact Sheet: Human Trafficking, [http://www.acf.hhs.gov/trafficking/about/fact\\_human.html](http://www.acf.hhs.gov/trafficking/about/fact_human.html) (last visited Nov. 18, 2007).
- <sup>52</sup> *Inmate Shoots 4 Prisoners in U.S. Virgin Islands Correctional Facility*, AP ALERT, Feb. 28, 2007.
- <sup>53</sup> See *Lawrence Carty v. Charles W. Turnbull*, No. 3:94-cv-00078-SSB, (D. V.I. filed June 20, 1994).
- <sup>54</sup> CERD, U.S. Report, ¶¶ 72-76, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).
- <sup>55</sup> SHUBHANKAR DAM, LESSONS FROM NATIONAL HUMAN RIGHTS INSTITUTIONS AROUND THE WORLD FOR STATE AND LOCAL HUMAN RIGHTS COMMISSIONS IN THE UNITED STATES, IN EXECUTIVE SESSION PAPERS, HUMAN RIGHTS COMMISSIONS AND CRIMINAL JUSTICE 1, 11-12 (Marea L. Breeman ed. 2007), available at [www.hrcj.org/hrcj/pdfs/nhri.pdf](http://www.hrcj.org/hrcj/pdfs/nhri.pdf).
- <sup>56</sup> CERD, U.S. Report, ¶¶ 81-82, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).
- <sup>57</sup> *Id.* at ¶¶ 83, 85, 88-90.
- <sup>58</sup> CERD *Id.* at ¶ 91.
- <sup>59</sup> *Id.*
- <sup>60</sup> See Executive Summary on 2006 Missouri Vehicle Stops, <http://ago.mo.gov/racialprofiling/2006/racialprofiling2006.htm> (last visited Nov. 18, 2007) (Finding that there has been an increase in the likelihood that African-Americans will be stopped by the cops in 2006 than there was in 2004. The likelihood has increased from 38% to 57%.); see also ACLU, THE PERSISTENCE OF RACIAL PROFILING IN RHODE ISLAND CALL FOR ACTION 3 (2007) available at [http://www.riaclu.org/documents/RacialProfilingReport0107\\_001.pdf](http://www.riaclu.org/documents/RacialProfilingReport0107_001.pdf) (Finding that the likelihood that police are 2

times as likely to stop non-whites to whites in Rhode Island has not decreased after the passages of End of Racial Profiling Act of 2004; rather, it has created a sense of fear among minority communities towards the police.)

<sup>61</sup> CERD, U.S. Report, ¶ 93, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).

<sup>62</sup> *Id.* at ¶¶ 94-97.

<sup>63</sup> *House Bill Would Give Black Colleges an Additional \$125-Million*, CHRONICLE OF HIGHER EDUCATION, July 19, 2007, at <http://chronicle.com/news/article/2707/house-bill-would-give-black-colleges-an-additional-125-million>.

<sup>64</sup> See Cati Vanden Breul, *Bush Expected to Cut TRIO Funding*, THE MINN. DAILY, Feb. 1, 2005, at <http://www.mndaily.com/articles/2005/02/01/63018>; see also Linda Friedman, *Who Will Fell Budget's Impact*, THE CHRISTIAN SCIENCE MONITOR, Feb. 8, 2006, at <http://www.csmonitor.com/2006/0208/p01s03-usec.htm>.

<sup>65</sup> CERD, U.S. Report, ¶¶ 111-113, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).

<sup>66</sup> *Id.* at ¶ 86.

<sup>67</sup> AMNESTY INTERNATIONAL, THREAT & HUMILIATION: RACIAL PROFILING, DOMESTIC SECURITY, & HUMAN RIGHTS IN THE UNITED STATES VII, 31 (2004), available at [http://www.amnestyusa.org/racial\\_profiling/report/rp\\_report.pdf](http://www.amnestyusa.org/racial_profiling/report/rp_report.pdf).

<sup>68</sup> THE CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, AMERICANS ON HOLD: PROFILING, CITIZENSHIP, AND THE "WAR ON TERROR" 3, 10-11 (2007), available at <http://www.chrgj.org/docs/AOH/AmericansonHoldReport.pdf>.

<sup>69</sup> See ACLU, SANCTIONED BIAS: RACIAL PROFILING SINCE 9/11 1-3, 8-11, 12-13, 17 (2004) available at <http://www.aclu.org/FilesPDFs/racial%20profiling%20report.pdf> (*Department of Justice guidance regarding the Use of Race By Federal Law Enforcement Agencies* has national security exception that allows for blatant, discriminatory targeting of innocent Arabs, South Asians, and Muslims because it allows for racial and ethnic profiling in its domestic counterterrorism efforts); (finds that according to the Office of Inspector General Report, ethnic profiling was used to detain Middle Eastern, South Asian and Arab individuals who have had no connection with terrorism for having 'suspicious items' such as pictures of famous buildings with them during traffic stops.); (according to officer, racial profiling "utilized when you have no intelligence and you are casting a wide net and having to use a process of elimination out of that wide net.").

<sup>70</sup> CERD, Gen. Rec. No. 30, ¶ 12, 64<sup>th</sup> Sess., U.N. Doc. CERD/C/64/Misc.11/rev.3 (Oct. 1, 2004) available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/e3980a673769e229c1256f8d0057cd3d?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/e3980a673769e229c1256f8d0057cd3d?Opendocument).

<sup>71</sup> CERD, Gen. Rec. No. 31, ¶ 4(b), 67<sup>th</sup> Sess., U.N. Doc. A/60/18 (2005), available at [http://ohchr.org/english/bodies/cerd/docs/GC31Rev\\_En.pdf](http://ohchr.org/english/bodies/cerd/docs/GC31Rev_En.pdf).

<sup>72</sup> Incentive Grant Program to Prohibit Racial Profiling, 71 Fed. Reg. 5727-5729 (Feb. 2, 2006), available at [http://www.nhtsa.dot.gov/nhtsa/whatsup/tea21/GrantMan/HTML/Sec\\_1906\\_RacialProfile.html](http://www.nhtsa.dot.gov/nhtsa/whatsup/tea21/GrantMan/HTML/Sec_1906_RacialProfile.html) ("To meet the requirement of subsection Section" (c)(1); a State law shall prohibit, "in the enforcement of State laws regulating the use of Federal-aid highways," a State or local law enforcement officer from using the "race or ethnicity of the driver or passengers" to any degree in making routine or spontaneous law enforcement decisions, such as ordinary traffic stops on Federal-aid highways." (a)(1)).

<sup>73</sup> See End Racial Profiling Act of 2005, S. 2138, 109<sup>th</sup> Cong. 1<sup>st</sup> session (2005), available at <http://www.govtrack.us/congress/billtext.xpol?bill=s109-2138>

<sup>74</sup> Tasers are most often used in police encounters (although also used extensively in prisons and jails), and frequently against non-aggressive, unarmed people for failure to comply with an official command. The deaths of 148 persons, from 1999 to September 2005, were attributed to Taser weapons. See ACLU OF NORTHERN CALIFORNIA, STUN GUN FALLACY: HOW THE LACK OF TASER REGULATIONS ENDANGERS LIVES 1 (2005), available at [http://www.aclunc.org/issues/criminal\\_justice/police\\_practices/asset\\_upload\\_file593\\_5242.pdf](http://www.aclunc.org/issues/criminal_justice/police_practices/asset_upload_file593_5242.pdf); see also ACLU,

ENDURING ABUSE: TORTURE AND CRUEL TREATMENT BY THE UNITED STATES AT HOME AND ABROAD 58-6 (2006), *available at* [http://www.aclu.org/safefree/torture/torture\\_report.pdf](http://www.aclu.org/safefree/torture/torture_report.pdf).

<sup>75</sup> George W. Bush, President, United States of America, Address of the President to the Joint Session of Congress (Feb. 27, 2001), *available at* [www.whitehouse.gov/news/releases/2001/02/20010228.html](http://www.whitehouse.gov/news/releases/2001/02/20010228.html).

<sup>76</sup> CERD, Gen. Rec. No. 31, ¶ 20, 67th Sess., U.N. Doc. A/60/18 (2005), *available at* [http://ohchr.org/english/bodies/cerd/docs/GC31Rev\\_En.pdf](http://ohchr.org/english/bodies/cerd/docs/GC31Rev_En.pdf).

<sup>77</sup> *See* Bay County Democratic Party v. Land, 347 F.Supp.2d 404 (E.D. Mich. 2004) and Michigan State Conference of NAACP Branches v. Land, 347 F.Supp.2d 404 (E.D. Mich. 2004) (Memorandum By The United States As Amicus Curiae In Support of Defendants' Motion to Dismiss And Brief in Support Thereof); *see also* Florida Democratic Party v. Glenda Hood, 342 F.Supp.2d 1073 (N.D. Fla. 2004) (Memorandum By The United States As Amicus Curiae In Support of Defendants' Motion to Dismiss And Brief in Support Thereof); *see also* The Sandusky County Democratic Party v. J. Kenneth Blackwell, 387 F.3d 565 (6<sup>th</sup> Cir. 2004) (Memorandum By The United States As Amicus Curiae Supporting Appellant and Urging Reversal).

<sup>78</sup> CERD, U.S. Report, ¶¶ 130-31, U.N. Doc. CERD/C/USA/6 (May 1, 2007) *available at* [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).

<sup>79</sup> *Id.* at ¶ 128.

<sup>80</sup> CERD, Concluding Observations of the CERD: United States of America, ¶ 399, 59<sup>th</sup> Sess., U.N. Doc. A/56/18 (Aug. 14, 2001) *available at* [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/A.56.18.paras.380-407.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/A.56.18.paras.380-407.En?Opendocument) (Emphasis added) (Emphasis added).

<sup>81</sup> CERD, U.S. Report, ¶ 334, U.N. Doc. CERD/C/USA/6 (May 1, 2007) *available at* [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).

<sup>82</sup> *Id.* at ¶¶ 132-33.

<sup>83</sup> *Id.* at ¶ 128.

<sup>84</sup> WILLIAM C. KIDDER, DOES AFFIRMATIVE ACTION REALLY HURT BLACKS & LATINOS IN U.S. LAW SCHOOLS? 1 (2005), *available at* [http://www.trpi.org/PDFs/affirm\\_action.pdf](http://www.trpi.org/PDFs/affirm_action.pdf).

<sup>85</sup> THE DISCRIMINATION RESEARCH CENTER & EQUAL RIGHTS ADVOCATES, PROPOSITION 209 AND THE DECLINE OF WOMEN IN THE CONSTRUCTION TRADES (2004), *available at* [http://www.impactfund.org/publications/public\\_contractors\\_report.pdf](http://www.impactfund.org/publications/public_contractors_report.pdf) (The passage of Proposition 209 in 1996 led to a decline in the number of women in construction trades—a 33% decline after the industry's employment of women had earlier risen 26% between 1990 and 1996.) "Proposition 209 and the Decline of Women in the Construction Trades," Discrimination Research Center & Equal Rights Advocates, June 2

004, *available at* [http://drcenter.org/studies/prop209\\_tradeswomen\\_04.pdf](http://drcenter.org/studies/prop209_tradeswomen_04.pdf), p 40. The research further demonstrates that women of color "suffer the double jeopardy of racial and gender discrimination." Morris, Monique W., "Women of Color Hurt by Proposition 209," Bay Area Business Woman, October 2006, <http://www.babwnews.com/article.php?id=701>

<sup>86</sup> William C. Kidder, *The Struggle for Access from Sweatt to Grutter: a History of African American, Latino, And American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 31 (2003) ( Subsection 6 explains the fall of affirmative action in public schools as the result of the prohibition of affirmative action and the implementation of the percentage plans in various states. The numbers and percentages derived directly from the paper, the charts and tables 4, 5, and 7 were used in the paper to reveal the drop in admissions for African-Americans in the higher education programs).

<sup>87</sup> *Id.*



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93 *See* Parents Involved in Community Schools v. Seattle School District No. 1, 127 S.Ct. 2738 (2007) and Meredith v. Jefferson County Board of Education, 127 S.Ct. 2738 (2007); *see also* Linda Greenhouse, *Justices Reject Diversity Plans in Two Districts*, N.Y. TIMES, June 28, 2007, at <http://www.nytimes.com/2007/06/28/us/28cnd-scotus.html?ex=1189310400&en=e2f85b36886d6a35&ei=5070>.

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- 126 *Id.*
- 127 CAROLINE WOLF HARLOW, DEFENSE COUNSEL IN CRIMINAL CASES (2000) available at <http://ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf> (This would suggest that when indigent defendants are “convicted” they are put behind bars at higher rates (i.e. “incarcerated”) and when non-indigent defendants are “convicted” they get their punishment lowered to fines, community service, etc. The data also indicates that in those cases non-indigent defendants are found guilty AND incarcerated, they tend to serve longer sentences than indigent defendants. This could well be because non-indigent defendants tend to commit serious, often financial crimes which affect many victims.).
- 128 This is shown both by actual cases (*Tulia and Hearne*), discussed in the art. 26 section of the ACLU report on U.S. government compliance vis-à-vis their ICCPR obligations (see ACLU, DIMMING THE BEACON OF FREEDOM: U.S. VIOLATIONS OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (2006), available at <http://www.aclu.org/pdfs/iccprreport20060620.pdf>), and also documented by studies; see also ACLU, DISPROPORTIONATE MINORITY CONFINEMENT IN MASSACHUSETTS, FAILURES IN ASSESSING AND ADDRESSING THE

OVERREPRESENTATION OF MINORITIES IN THE JUVENILE JUSTICE SYSTEM 1 (2003), *available at* [http://www.aclu.org/FilesPDFs/dmc\\_report.pdf](http://www.aclu.org/FilesPDFs/dmc_report.pdf) (With respect to juveniles, studies have shown that racial disparities in confinement are the result of disparate treatment at every stage of the justice system, from decisions about whether to prosecute to sentencing decisions.); *see also* KATHARINE BECKETT, RACE AND DRUG LAW ENFORCEMENT IN SEATTLE 45-66 (2004) *available at* <http://www.soc.washington.edu/users/kbeckett/Enforcement.pdf> (In the adult context, while there has been little study, one study was done and that reveals that while the majority of those who deliver serious drugs are black, the majority arrested and charged are black. This was the result of focusing on open-air drug markets in black neighborhoods while failing to focus on white outdoor markets.).

<sup>129</sup> THE TASK FORCE ON IMPROVING PUBLIC DEFENSE SERVICES IN MICHIGAN, MODEL PLAN FOR PUBLIC DEFENSE SERVICES IN MICHIGAN 4 (2002) *available at* <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/mi-modelplan.pdf>.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 5

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* Facts that set this problem in its larger context *see* AMERICAN BAR ASSOCIATION PRESIDENTIAL TASK FORCE ON ACCESS TO JUSTICE IN CIVIL CASES (2006) (on file with ACLU). (The 2006 budget has earmarked \$1.88 billion for the Department of Corrections, around 20 % of the state fund. Currently, the state is spending \$313 million less on colleges than corrections. Michigan has the largest prison system in the country, with 42 correctional centers and 10 correctional camps. In the last 25 years, Michigan's prison population grew at 38 times the rate of its total population. Michigan is number 6 nationally in prison population; it is number 4 in its prison budget; and number 3 in the %age of state spending earmarked for corrections. While total state staffing has declined by 30% over the last 15 years, the DOC staffing has risen by 25%. The DOC now employs over 18,000 employees – about one third of the state workforce. While the incidence of violent crimes in Michigan has dropped steadily over the past few years, the prison population has continued to rise. About one of every five tax dollars goes to prison funding. The average cost to keep a prisoner in prison is \$30,000. State spending on public education rounds out to \$6,700 per student. The per day cost of operating Michigan's prisons is \$4 million. From 1985 to 2000, Michigan increased spending on higher education by 27%, but corrections spending grew by 227%. Corrections spending grew at 8 times the rate of higher education spending. In 2000, there were more African- American men in Michigan's prison system (24,300) than there were in Michigan's colleges (21,454). Between 1980 and 2000, African-American men were added to Michigan's prisons at 13 times the rate they were added to Michigan's colleges.).

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<sup>136</sup> *Id.*

<sup>137</sup> Jeffrey Best et al. v. Grant County, No. 04-2-00189-0 (Super. Ct. Wash. filed Dec. 21, 2004) (*see* Complaint ¶ 3).

<sup>138</sup> SOUTHERN CENTER FOR HUMAN RIGHTS, A REPORT ON PRE- AND POST-KATRINA INDIGENT DEFENSE IN NEW ORLEANS 4 (2006), *available at* <http://www.schr.org/indigentdefense/Press%20Releases/SCHR%20REPORT%20ON%20PRE-%20AND%20POST-KATRINA%20INDIGENT%20DEFENSE%20IN%20NEW%20ORLEANS.FINAL.pdf>.

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- 229 *Tabbaa v. Chertoff*, 2005 (E.D.N.Y. filed Apr. 20, 2005) (Complaint ¶ 2), *available at* [http://www.nyclu.org/pdfs/tabbaa\\_v\\_chertoff\\_complaint.pdf](http://www.nyclu.org/pdfs/tabbaa_v_chertoff_complaint.pdf).
- 230 *Rahman v. Chertoff*, 2007 WL 2892972 (N.D. Ill.).
- 231 The Michigan residents were Dr. Elie Khoury, a 68-year old citizen, and his wife Farideh; and the Washington State resident was Shimrote Ishaque, a Pakistani-American.
- 232 CERD, U.S. Report, ¶¶ 186-198, U.N. Doc. CERD/C/USA/6 (May 1, 2007) *available at* [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).
- 233 *Id.* at ¶ 181.



- 234 CALIFORNIA DEPARTMENT OF JUSTICE, HATE CRIME IN CALIFORNIA, II (2001), available at <http://ag.ca.gov/cjcs/publications/hatecrimes/hc01/preface.pdf>.
- 235 ACLU OF NORTHERN CALIFORNIA, ET AL., CAUGHT IN THE BACKLASH: STORIES FROM NORTHERN CALIFORNIA (2002), available at [http://www.aclunc.org/issues/government\\_surveillance/asset\\_upload\\_file532\\_4380.pdf](http://www.aclunc.org/issues/government_surveillance/asset_upload_file532_4380.pdf).
- 236 Seth Rosenthal, The Criminal Section, in THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION 18, 19 (William L. Taylor et al. eds., Citizens' Commission on Civil Rights & The Center for American Progress) (2007), available at [http://www.american-progress.org/issues/2007/03/pdf/civil\\_rights\\_report.pdf](http://www.american-progress.org/issues/2007/03/pdf/civil_rights_report.pdf).
- 237 The ACLU of Massachusetts discovered the program when the African-American national coordinator of the ACLU's Campaign Against Racial Profiling was targeted and questioned for "acting suspiciously" when he was talking on a pay phone in Logan Airport. This incident is now under litigation.
- 238 MASS IMPACT: The Domestic War Against Terrorism in Massachusetts: Are We On the Right Track?, available at [http://www.aclu-mass.org/pdf/mass\\_impact.pdf](http://www.aclu-mass.org/pdf/mass_impact.pdf).
- 239 CERD, Gen. Rec. No. 30, ¶ 7, 64<sup>th</sup> Sess., U.N. Doc. CERD/C/64/Misc.11/rev.3 (Oct. 1, 2004) available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e3980a673769e229c1256f8d0057cd3d?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e3980a673769e229c1256f8d0057cd3d?Opendocument).
- 240 *Id.* at ¶ 33.
- 241 U.S. DEP'T OF HOMELAND SECURITY, ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003-2012 1-2 (2003), available at <http://www.aclum.org/endgame.pdf>.
- 242 Julia Preston, *No Need For a Warrant, You're An Immigrant*, N.Y. TIMES, Oct. 14, 2007, available at [http://www.nytimes.com/2007/10/14/weekinreview/14preston.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/10/14/weekinreview/14preston.html?_r=1&oref=slogin).
- 243 *Aguilar v. ICE*, No. 07-CV-10471 (D. Mass. filed Mar. 8, 2007) (formerly *Sandoval v. ICE*, No. 07-CV-10471 (D. Mass. filed Mar. 8, 2007)).
- 244 The subject-matter jurisdiction of a court determines the kinds of claims or disputes over which it has jurisdiction, or the power to render a decision.
- 245 Steven Greenhouse, *Crackdown Opens Slaughterhouse's Work Force*, N.Y. TIMES, Oct. 12, 2007 at [http://www.nytimes.com/2007/10/12/us/12smithfield.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/10/12/us/12smithfield.html?_r=1&oref=slogin).
- 246 *Id.*
- 247 Evan Perez & Corey Dade, *An Immigration Raid in Georgia Aids Blacks for a Time*, PITT. POST-GAZETTE, Jan. 17, 2007, available at <http://www.post-gazette.com/pg/07017/754517-28.stm> (originally printed in the Wall Street Journal).
- 248 Steven Greenhouse, *Crackdown Opens Slaughterhouse's Work Force*, N.Y. TIMES, Oct. 12, 2007 at [http://www.nytimes.com/2007/10/12/us/12smithfield.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/10/12/us/12smithfield.html?_r=1&oref=slogin); see also ACLU of Washington, *Somali Merchants Finally Receive Compensation for Government Raid*, July 22, 2004, <http://www.aclu-wa.org/detail.cfm?id=197> (In Washington State, in late 2001, federal agents raided a building housing the Barakat Wire Transfer Company's offices. Ultimately, no charges were filed. Agents also however seized the inventory of two other businesses that happened to be in the same building, a grocery and a gift shop, releasing it three weeks later, much damaged or altogether destroyed. After two years of efforts on their behalf, the ACLU of Washington was able to get them some monetary compensation since this was an invalid exercise of federal authority).
- 249 For example, the Massachusetts State Police are questioning people about their immigration status, an activity within the federal government's purview, during the course of motor vehicle stops, in an effort to determine lawful presence. Reports of these incidents and the increasing number of people being deported after being stopped for minor traffic violations have terrified immigrant communities.

250 The Alaska ACLU recently challenged and prevailed in such a case. In *Alaskans for a Common Language v. Alakayak*, No. 6185 (Alaska, Nov. 2, 2007), the state Supreme Court ruled unconstitutional a provision of the Official English Initiative that would have required “all public agencies in all government functions and actions” to use only English. In reaching its decision, the Court recognized “the core values” protected by the First Amendment and the Alaska Constitution, and stated: “If all government communications must be in English, some voices will be silenced, some ideas will remain unspoken, and some ideas will remain unchallenged. Such a requirement harms ‘society as a whole, which is deprived of an uninhibited marketplace of ideas.’”

251 Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, at <http://www.nytimes.com/2007/09/26/nyregion/26riverside.html?hp>.

252 City of San Bernardino Illegal Immigration Relief Act Ordinance (2006), available at <http://www.campaignsite-builder.com/templates/displayfiles/tmpl68.asp?SiteID=843&PageID=12139&Trial=false>.

253 For the legislative and legal history of the Hazleton ordinance, log onto <http://www.aclu.org/immigrants/discrim/27452res20061115.html#legisdocs>.

254 For a list of ordinances introduced, passed and defeated, log onto <http://www.fairimmigration.org/learn/immigration-reform-and-immigrants/local-level/>.

255 For example, section 2(C) of the Illegal Immigration Relief Act Ordinance introduced in Hazleton, PA states: “Illegal immigration leads to higher crime rates, at schools, subjects our hospitals to fiscal hardship and legal residents to substandard quality of care, contributes to other burdens on public services, increasing their costs and diminishing their availability to legal residents, and diminishes our overall quality of life.” Ordinance 2006-18: Illegal immigration Relief Act Ordinance, available at [http://www.aclu.org/pdfs/immigrants/hazleton\\_secondordinance.pdf](http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf). The City of Hazleton offered no evidence to support these sweeping claims.

256 RUBÉN G. RUMBAUT ET AL., MIGRATION POLICY INSTITUTE, DEBUNKING THE MYTH OF IMMIGRANT CRIMINALITY: IMPRISONMENT AMONG FIRST AND SECOND GENERATION YOUNG MEN (2006), available at <http://www.migrationinformation.org/Feature/display.cfm?id=403>.

257 ALEXANDER TABARROK, DAVID J. THEROUX, ET AL., OPEN LETTER ON IMMIGRATION (2006), available at <http://www.independent.org/newsroom/article.asp?id=1727>.

258 In New Haven, Connecticut, for example, City Hall sponsors workshops to help undocumented immigrants file federal income tax returns.

259 Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, at <http://www.nytimes.com/2007/09/26/nyregion/26riverside.html?hp>.

260 Press Release, Anti-Defamation League, Ku Klux Klan Rebounds with New Focus on Immigration, ADL Reports (Feb. 6, 2007), available at [http://www.adl.org/PresRele/Extremism\\_72/4973\\_72.htm](http://www.adl.org/PresRele/Extremism_72/4973_72.htm).

261 U.S. CONST. art. VI, § 2.

262 See *Nishimura Ekiu v. U.S.*, 142 U.S. 651 (1892).

263 *DeCanas v. Bica*, 424 U.S. 351, 354-355 (1976), (*Passenger Cases*, 7 How 283, 12, L. Ed. 702 (1849); *Henderson v. Mayor of New York*, 92 U.S. 259 (1876); *Chy Lung v. Freeman*, 92 U.S. 275 (1876); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

264 For example, courts have long recognized that individuals have a right to solicit employment in public spaces. Yet for the past year, municipalities have attempted to prohibit immigrant day laborers from congregating along roadways for the purpose of finding employment.

265 496 F. Supp. 2d 477 (M.D. Pa. 2007).

266 *Id.*

267 *Id.*

268 *Id.*

269 U.S. Census Bureau, Suffolk County, New York, *available at* <http://quickfacts.census.gov/qfd/states/36/36103.html>.

270 Pub. L. No. 99-603, 100 Stat. 3359. The Act imposed three major requirements on employers and employees: (1) employees must state under penalty of perjury that they are authorized to work in the United States; (2) employers must verify this information by attesting that they had examined documents evidencing the lawful immigration status of their employees; and (3) employers must retain the attestation forms for specified periods, making it available upon request to designated federal government officials.

271 Udi Ofer, New York Civil Liberties Union, Testimony: Proliferation of Local Anti-Immigrant Ordinances in the United States (May 12, 2007), *available at* <http://nyclu.live.echoditto.com/node/1006>.

272 Udi Ofer, New York Civil Liberties Union, Testimony: Regarding Suffolk County Introductory Resolution 1022, a Local Law to Prohibit the Obstruction of County Roadways (Mar. 6, 2007), *available at* <http://nyclu.live.echoditto.com/node/986>.

273 Ofer, *supra* note 278.

274 MICHAEL K. BESS, TRANSNATIONAL TRENDS, REGIONAL REFLECTIONS: THE EMERGENCE OF MEXICAN IMMIGRANT COMMUNITIES IN THE STATE OF GEORGIA (2007), *available at* [http://www.galeo.org/pdfs/mbess\\_immigration.pdf](http://www.galeo.org/pdfs/mbess_immigration.pdf).

275 United States Census Bureau 2006, <http://quickfacts.census.gov/qfd/states/13000.html>.

276 The cities of Doraville, Smyrna and Norcross all passed laws making it illegal to have a sign not primarily in English. The Norcross ordinance was challenged, and later dropped when the church carrying the sign closed. Gerald Weber, American Civil Liberties Union of Georgia, Testimony to UN Special Rapporteur on Human Rights of Migrants (May 10, 2007) (on file with ACLU). In the 2007 Georgia General Assembly legislative session, two English-only bills were introduced. House Bill 21 sought to prohibit State and local governments and agencies from printing any official documents or forms in languages other than English. The bill failed due to requirements that any local, municipal or state agency receiving funds for federal programs must provide documents in all necessary languages. House Resolution 413 sought to make English the official language of Georgia. HR 413 was declared unnecessary because English is already the official language in Georgia.

277 In Gainesville, employees of the State Department of Human Resources would have been disciplined for speaking Spanish in the workplace. The threat of a lawsuit resolved this discriminatory practice.

278 Gwinnett County is currently being investigated for requiring taxi drivers to be "English Proficient" or be fined up to \$500. It is common practice in this county for law enforcement officials to initiate deportation proceeding for Mexican immigrants who do not possess green cards during traffic stops. Gerald Weber, American Civil Liberties Union of Georgia, Testimony to UN Special Rapporteur on Human Rights of Migrants, May 10, 2007 (on file with ACLU).

279 In early 2007, in the small town of La Grange, Latino immigrants were arrested at roadblocks for not having driver's licenses. Immigrants were arrested, their vehicles impounded, and given fines exceeding \$700. Ironically, Georgia law currently prohibits Latino immigrants from obtaining drivers licenses. *See* Anton Flores, *Alterna Helps Local Immigrants Drive in Peace*, *Alterna Newsletter* (Spring 2007) (on file with ACLU).

280 In Atkinson County, complaints were filed alleging that dozens of citizens might not be eligible to vote based entirely on Spanish surnames. Gerald Weber, American Civil Liberties Union of Georgia, Testimony to UN Special Rapporteur on Human Rights of Migrants (on file with ACLU).

- 281 According to the U.S. Immigration and Customs Enforcement website, CAP's mission is to "identify [] criminal aliens who are incarcerated within federal state and local facilities thereby ensuring that they are not released into the community by securing a final order of removal prior to the termination of their sentence." <http://www.ice.gov/partners/dro/cap.htm> (last visited Nov. 13, 2007).
- 282 Sergio Chapa, *Irving Illegal Immigrants Charges are Mostly Misdemeanors*, THE DALLAS MORNING NEWS, Oct. 11, 2007, at <http://www.dallasnews.com/sharedcontent/dws/news/city/irving/stories/101107dnmetirvimmig.31ec7c4.html> (originally printed in *Al Dia*).
- 283 Brandon Forby, *Program Puts Irving Hispanics on Edge*, THE DALLAS MORNING NEWS, t. 7, 2007.
- 284 This is based upon Mexican Consular interviews with Mexican nationals in immigration detention reported to the ACLU of Texas.
- 285 See End Racial Profiling Act of 2004, S.2132, 108th Cong. (2004), available at <http://www.govtrack.us/congress/bill.xpd?bill=s108-2132>.
- 286 Sam Roberts, *College Dwellers Outnumber the Imprisoned*, N.Y. TIMES, Sept. 27, 2007, at <http://www.nytimes.com/2007/09/27/us/27census.html?ex=1348545600&en=a5e8e04a6cfac154&ei=5088&partner=rssnyt&emc=rss>.
- 287 *Id.*
- 288 *Id.*
- 289 CERD, Concluding Observations of the CERD: United States of America, ¶ 395, 59<sup>th</sup> Sess., U.N. Doc. A/56/18 (Aug. 14, 2001) available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/A.56.18.paras.380-407.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.56.18.paras.380-407.En?Opendocument).
- 290 CERD, U.S. Report, ¶ 165, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).
- 291 *Id.* at 162.
- 292 *Id.* at 165.
- 293 This is shown both by actual cases (*Tulia, Hearne, & Operation Meth Merchant*), discussed above and also documented by studies. With respect to juveniles, studies have shown that racial disparities in confinement are the result of disparate treatment at every stage of the justice system, from decisions about whether to prosecute to sentencing decisions. ROBIN DAHLBERG, ACLU, DISPROPORTIONATE MINORITY CONFINEMENT IN MASSACHUSETTS, FAILURES IN ASSESSING AND ADDRESSING THE OVERREPRESENTATION OF MINORITIES IN THE MASSACHUSETTS JUVENILE JUSTICE SYSTEM (2003), available at [http://www.aclu.org/FilesPDFs/dmc\\_report.pdf](http://www.aclu.org/FilesPDFs/dmc_report.pdf); (2006) available at <http://hrw.org/reports/2006/us0906/us0906webwcover.pdf>; see also KATHARINE BECKETT, RACE AND DRUG LAW ENFORCEMENT IN SEATTLE 45-66 (2004) available at <http://www.soc.washington.edu/users/kbeckett/Enforcement.pdf> (In the adult context, one study reveals that while the majority of those who deliver serious drugs in Seattle are white, the majority arrested and charged are black. This was the result of focusing on open air drug markets in black neighborhoods while failing to focus on white outdoor markets.).
- 294 Jonathan D. Glater, *Race Gap: Crime vs. Punishment*, N.Y. TIMES, Oct. 7, 2007 at <http://www.nytimes.com/2007/10/07/weekinreview/07glater.html?partner=rssnyt&emc=rss>.
- 295 U.S. Census Bureau, Oregon (2005 estimates), <http://quickfacts.census.gov/qfd/states/41000.html>.
- 296 See <http://www.sentencingproject.org/StatsByState.aspx> (Click on "Texas").
- 297 MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RATE AND ETHNICITY (2007), at 11, available at [http://www.sentencingproject.org/Admin/Documents/publications/rd\\_stateratesofincbyraceandethnicity.pdf](http://www.sentencingproject.org/Admin/Documents/publications/rd_stateratesofincbyraceandethnicity.pdf)

- 298 *Id.*
- 299 Human Rights Watch, Human Rights Watch Backgrounder: Incarcerated America (2003) at 2.
- 300 Texas Department of Criminal Justice, Prison and State Jail Offenders as of August 31, 2006, Total On Hand Offenders by Offender Type and Race, prepared on August 17, 2007. (On file with ACLU.)
- 301 U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, Office of Applied Studies, Results from the 2005 National Survey on Drug Use and Health: National Findings (2005), available at <http://oas.samhsa.gov/nsduh/2k5nsduh/2k5Results.htm#2.7> (last visited August 21, 2007).
- 302 One judge in Columbus, Mississippi, has done so.
- 303 AMERICAN CIVIL LIBERTIES UNION, ET AL., CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES (2006), available at [http://www.aclu.org/images/asset\\_upload\\_file393\\_23513.pdf](http://www.aclu.org/images/asset_upload_file393_23513.pdf).
- 304 *Id.*
- 305 SOUTH DAKOTA ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON HUMAN RIGHTS, NATIVE AMERICANS IN SOUTH DAKOTA: AN EROSION OF CONFIDENCE IN THE JUSTICE SYSTEM (2001), available at <http://www.usccr.gov/pubs/sac/sd0300/main.htm>.
- 306 Richard Bronstein & Steve Feimer, *South Dakota Criminal Justice: A Study of Racial Disparities*, 48 S. D. L. REV. 171 (2002-03).
- 307 *Id.* at 177.
- 308 *Id.* at 189.
- 309 *Id.*
- 310 *Id.* at 183.
- 311 *Id.* at 179. American Indians are also more likely to be transferred to alternative courts, e.g., the federal or tribal court systems. The tribe retains jurisdiction over many minor offenses and cases concerning such offenses may be transferred to tribal court, but the Indian Major Crimes Act gives federal courts jurisdiction over most felonies as well as some offenses that might be misdemeanors in state courts. Federal courts are required to abide by stringent sentencing guidelines while state courts are more flexible and allow for the possibility of parole.
- 312 *Id.* at 188.
- 313 SOUTH DAKOTA EQUAL JUSTICE COMMISSION, FINAL REPORT AND RECOMMENDATIONS (2006), available at <http://www.sjudicial.com/downloads/SDEJCFinalReport2006jan.pdf>.
- 314 NATIONAL CENTER FOR STATE COURTS & NORTH AMERICAN INDIAN LEGAL SERVICES INC., AN ANALYSIS OF COMPLIANCE WITH THE INDIAN CHILD WELFARE ACT IN SOUTH DAKOTA 46 (December 2004), available at [http://www.ncsconline.org/WC/Publications/KIS\\_ChiAbuSDICWAEExSummary.pdf](http://www.ncsconline.org/WC/Publications/KIS_ChiAbuSDICWAEExSummary.pdf).
- 315 ALASKA DEPARTMENT OF CORRECTIONS, DIVISION OF ADMINISTRATIVE SERVICES, 2006 OFFENDER PROFILE (2006) available at <http://www.correct.state.ak.us/corrections/admin/docs/profile2006.pdf>.
- 316 TERESA WHITE CARNS, ET AL., ALASKA JUDICIAL COUNCIL, ALASKA FELONY PROCESS: 1999 (2004), available at <http://www.ajc.state.ak.us/reports/Fel99FullReport.pdf>.
- 317 *Id.* at 55-56.
- 318 *Id.* at 292.
- 319 ACLU OF MICHIGAN, SECOND CHANCES: JUVENILES SERVING LIFE WITHOUT PAROLE IN MICHIGAN PRISONS 3 (2004) available at <http://www.aclumich.org/pubs/juvenilelifers.pdf>. See also <http://www.usfca.edu/law/news/stories/juvenilelwp.html>

- 320 HUMAN RIGHTS WATCH & AMNESTY INTERNATIONAL, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS 1* (2005), available at <http://hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf>.
- 321 <http://www.usfca.edu/law/news/stories/juvenilelwop.html>
- 322 ACLU OF MICHIGAN, *SECOND CHANCES: JUVENILES SERVING LIFE WITHOUT PAROLE IN MICHIGAN PRISONS 4* (2004) available at <http://www.aclumich.org/pubs/juvenilelifers.pdf>.
- 323 *Id.*
- 324 HUMAN RIGHTS WATCH & AMNESTY INTERNATIONAL, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS 1* (2005), available at <http://hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf>.
- 325 *Id.*
- 326 ACLU OF MICHIGAN, *SECOND CHANCES: JUVENILES SERVING LIFE WITHOUT PAROLE IN MICHIGAN PRISONS 6* (2004) available at <http://www.aclumich.org/pubs/juvenilelifers.pdf>.
- 327 HUMAN RIGHTS WATCH & AMNESTY INTERNATIONAL, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS 2* (2005), available at <http://hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf>.
- 328 ACLU OF MICHIGAN, *SECOND CHANCES: JUVENILES SERVING LIFE WITHOUT PAROLE IN MICHIGAN PRISONS 7* (2004) available at <http://www.aclumich.org/pubs/juvenilelifers.pdf>.
- 329 <http://www.aclu.org/crimjustice/sentencing/242321g120060222.html>
- 330 See *Bill Lockyer v. Leandro Andrade*, 538 U.S. 63 (2003) (The three California affiliates of the ACLU participated at the U.S. Supreme Court level in this case to challenge California's "3 Strikes" law. The Ninth federal Circuit court granted a writ of habeas corpus and overturned the defendant's sentence in 2001 holding that it was so grossly disproportionate to the crime that it was cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution. But in 2003, the U.S. Supreme Court disagreed and reversed, holding that the sentence was not a violation of the Eighth Amendment such that the defendant was not entitled to habeas relief.)
- 331 MARC MAUER, *THE HIDDEN PROBLEM OF TIME SERVED IN PRISON*, SOCIAL RESEARCH, VOL. 74 No. 2 701, 702 (2007) available at [http://www.sentencingproject.org/Admin/Documents/publications/inc\\_hiddenproblemtimeserved.pdf](http://www.sentencingproject.org/Admin/Documents/publications/inc_hiddenproblemtimeserved.pdf).
- 332 JUSTICE POLICY INSTITUTE, *RACIAL DIVIDE: AN EXAMINATION OF THE IMPACT OF CALIFORNIA'S THREE STRIKES LAW ON AFRICAN-AMERICAN AND LATINOS 5* (2004) available at [http://www.justicepolicy.org/images/upload/04-10\\_TAC\\_CARacialDivide\\_AC-RD.pdf](http://www.justicepolicy.org/images/upload/04-10_TAC_CARacialDivide_AC-RD.pdf).
- 333 *Id.* at 2.
- 334 *Id.* at 1.
- 335 CERD, U.S. Report, ¶ 171, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).
- 336 *Id.* ¶ 173.
- 337 *Id.* ¶ 175.
- 338 See <http://www.usdoj.gov/crt/split/findsettle.htm#Settlements>.
- 339 See <http://www.usdoj.gov/crt/split/findsettle.htm#congreg>.
- 340 Eileen Poe-Yamagata et al., National Council on Crime and Delinquency, *And Justice for Some: Differential Treatment of Youth of Color in the Juvenile Justice System* 24 (2d ed. 2007), available at [http://www.nccd-crc.org/nccd/pubs/2007jan\\_justice\\_for\\_some.pdf](http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf).

- 341 HUMAN RIGHTS WATCH & ACLU, CUSTODY AND CONTROL: CONDITIONS OF CONFINEMENT IN NEW YORK'S JUVENILE PRISONS FOR GIRLS (2006) *available at* <http://hrw.org/reports/2006/us0906/us0906webwcover.pdf>.
- 342 MEDA CHESNEY-LIND AND KATHERINE IRWIN, STILL 'THE BEST PLACE TO CONQUER GIRLS,' IN WOMEN, LAW AND SOCIAL CONTROL (Jocelyn M. Pollock and Alida V. Merlo, eds., 2005).
- 343 AMERICAN BAR ASSOCIATION & NATIONAL BAR ASSOCIATION, JUSTICE BY GENDER 20-21 (2001), *available at* <http://www.njdc.info/pdf/justicebygenderweb.pdf>.
- 344 GIRLS INCORPORATED, GIRLS AND JUVENILE JUSTICE (2002), *available at* <http://www.girlsinc.org/ic/content/GirlsandJuvenileJustice.pdf>.
- 345 Annie E. Casey Foundation, Kids Count Database, *available at* [http://www.kidscount.org/sld/db\\_07pdf/mt\\_wy.pdf](http://www.kidscount.org/sld/db_07pdf/mt_wy.pdf) (last visited Nov. 20, 2007).
- 346 This figure includes girls categorized as Hispanic African-American, Hispanic-White, and Hispanic-Other.
- 347 These figures are calculated from "Table 1: Characteristics of Admissions to Selected OCFS Facilities, 2003-2005," obtained through the New York Freedom of Information Law and on file with HRW/ACLU.
- 348 NN. 43 (2006) *available at* <http://hrw.org/reports/2006/us0906/us0906webwcover.pdf>.
- 349 *See generally Id.*
- 350 We have also uncovered, in Puerto Rico, grossly inadequate health care for incarcerated women and girls.
- 351 Additionally, there is a body of international legal instruments setting out more specific standards protecting the rights of incarcerated children including the Standard Minimum Rules for the Treatment of Prisoners; the Beijing Rules; the U.N. Rules for the Protection of Juveniles Deprived of their Liberty and the Riyadh Guidelines.
- 352 Juvenile Justice and Delinquency Prevention Act of 1974 (Pub. L. 93-415, 42 U.S.C. § 5601 *et seq.*), as amended (1992), § 223(a)(23).
- 353 ROBIN DAHLBERG, ACLU, DISPROPORTIONATE MINORITY CONFINEMENT IN MASSACHUSETTS, FAILURES IN ASSESSING AND ADDRESSING THE OVERREPRESENTATION OF MINORITIES IN THE MASSACHUSETTS JUVENILE JUSTICE SYSTEM (2003), *available at* [http://www.aclu.org/FilesPDFs/dmc\\_report.pdf](http://www.aclu.org/FilesPDFs/dmc_report.pdf).
- 354 *Id.*
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account indicates that approximately six deputies beat the woman, perhaps with a stick. She was removed from the facility the following day. Interview with J.J., May 31, 2007; Interview with S.T., May 31, 2007.).

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382 ACLU of Louisiana, Public Records Act Request, July 24, 2007 (on file with ACLU).

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391 *Id.* at 17.

392 *Id.*

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Diego Correctional Facility. The first was filed in January 2007 in response to the dangerous and inhumane overcrowding that long existed at the facility.

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422 CERD, U.S. Report, ¶ 169, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc). Since 2000, three federal offenders have been executed: Timothy McVeigh, Juan Paul Garza and Louis Jones.

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- 468 Fair Labor Standards Act, 1938 ch. 676, Sec. 13(a)(6) (agriculture workers exempted). See Palmer, *Outside the Law: Agricultural and Domestic Workers Under the Fair Labor Standards Act*, 7 J. POLICY HIST. 416, 417 (1995).
- 469 See A. BADGER, THE NEW DEAL 252-53 (1989); J. QUADAGNO, THE TRANSFORMATION OF OLD AGE SECURITY 115-16 (1988); H. SITKOFF, A NEW DEAL FOR BLACKS 52 (1978).
- 470 P. Palmer, DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES, 1920-1945 12 (1989); Smith, *Regulating Paid Household Work: Class, Gender & Race, & Agendas of Reform*, 48 AM. U.L. REV. 851, 880-918 (1999); D. KATZMAN, SEVEN DAYS A WEEK: WOMEN AND DOMESTIC SERVICE IN INDUSTRIALIZING AMERICA 256-77 (1981).
- 471 The ACLU submitted a friend of the court brief supporting the appellate court's view that the exception was only meant to apply in the former situation. See *Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339 (2007).
- 472 This problem has long been recognized by the U.N. In 1996, an expert group brought together by the Secretary General to study violence against women migrant workers, recognized that "[v]iolence against women migrant workers is a serious, complex and sensitive issue. The plight of women migrant workers who become victims of physical, mental and sexual harassment and abuse at the hands of their employers, their intermediaries, or the police – a situation exacerbated by economic exploitation – is one that calls for concerted action at the international, national and regional levels." The Secretary-General, *Report on Violence Against Women Migrant Workers* ¶ 1, delivered to the Economic and Social Council and the General Assembly, U.N. Doc. E/1996/71 (June 20, 1996), available at <http://www.un.org/documents/ecosoc/docs/1996/e1996-71.htm>.
- 473 Vienna Convention on Diplomatic Relations, done Apr. 18, 1961, *United States accession*, April 29, 1970, 23 U.S.T. 3227, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/9\\_1\\_1961.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf).
- 474 See, e.g., *Begum v. Saleh*, where the complaint sought damages for defendants' allegedly holding plaintiff in involuntary servitude prohibited by the Thirteenth Amendment, failure to pay minimum wage under federal and state laws, assault and battery, false imprisonment, conversion, and trespass to chattels.
- 475 *Tabion v. Mufti*, 73 F.3d 535, 537-540 (4th Cir. 1996).
- 476 *Chere v. Teye*, No. 2:04-cv-06264-FSH-PS (D.N.J. filed Dec. 21, 2004) (Complaint ¶¶ 2, 5), available at <http://www.aclu.org/FilesPDFs/wrp%20chere%20complaint%20final%20filed.pdf>. The case is currently in the discovery phase.
- 477 *Id.* at ¶¶ 19, 21, 29, 35, 38 43-49, 57-58.
- 478 07-CV- 00115-EGS (DDC 2007).
- 479 In June 2006 a similar lawsuit charging abuse of a domestic worker was filed against the state of Kuwait and a Kuwaiti diplomat in the Southern District of New York, *Swarna v. Al-Awadi*. The case is pending and awaiting a response from those charged.
- 480 STEVEN W. PERRY, U.S. DEPT. OF JUSTICE, AMERICAN INDIANS AND CRIME (2004), available at <http://www.ojp.gov/bjs/pub/pdf/aic02.pdf>.
- 481 AMNESTY INTERNATIONAL, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007), available at <http://www.amnestyusa.org/women/maze/report.pdf>.
- 482 STEVEN W. PERRY, U.S. DEPT. OF JUSTICE, AMERICAN INDIANS AND CRIME 9 (2004), available at <http://www.ojp.gov/bjs/pub/pdf/aic02.pdf>.
- 483 *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
- 484 AMNESTY INTERNATIONAL, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 66 (2007), available at <http://www.amnestyusa.org/women/maze/report.pdf>.
- 485 *Id.* at 68.

- 486 Carson Walker, *Violence against Women Prompts Many Rosebud Reservation Suicides*, ASSOCIATED PRESS, Sept. 19, 2007.
- 487 PATRICIA TJADEN & NANCY THOENNES, US DEPARTMENT OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN (2000).
- 488 See TERESA WHITE CARNS, ET AL., ALASKA JUDICIAL COUNCIL, *ALASKA FELONY PROCESS: 1999* 127 (2004), available at <http://www.ajc.state.ak.us/reports/Fel99FullReport.pdf>.
- 489 Alexandra Arriaga, Testimony: Oversight Hearing on the Prevalence of and Solutions to Stopping Violence Against Women in Indian Country delivered to the Senate Indian Affairs Committee, Sept. 27, 2007, at 5.
- 490 CERD, Gen. Rec. No. 31, ¶ 5(e), 67<sup>th</sup> Sess., U.N. Doc. A/60/18 (2005), available at [http://ohchr.org/english/bodies/cerd/docs/GC31Rev\\_En.pdf](http://ohchr.org/english/bodies/cerd/docs/GC31Rev_En.pdf).
- 491 *Id.*
- 492 Letter from Tammy Young, Director, Alaska Native Women's Coalition, to Byron L. Dorgan, Chairman, Senate Committee on Indian Affairs (Sept. 25, 2007) (on file with the Alaska Native Women's Coalition).
- 493 CERD, Gen. Rec. No. 31, ¶ 22, 67<sup>th</sup> Sess., U.N. Doc. A/60/18 (2005), available at [http://ohchr.org/english/bodies/cerd/docs/GC31Rev\\_En.pdf](http://ohchr.org/english/bodies/cerd/docs/GC31Rev_En.pdf).
- 494 CERD, Concluding Observations of the CERD: United States of America, ¶ 394, 59<sup>th</sup> Sess., U.N. Doc. A/56/18 (Aug. 14, 2001) available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/A.56.18.para.380-407.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/A.56.18.para.380-407.En?Opendocument).
- 495 CHRISTOPHER J. MUMOLA, U.S. DEPT. OF JUSTICE, ARREST-RELATED DEATHS IN THE UNITED STATES, 2003-2005 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ardus05.pdf>. These data are the first national measure of all types of arrest-related deaths under a new program mandated by the federal Death in Custody Reporting Act (Public Law 106-297) which directed all states to report deaths during arrests as a condition of eligibility for receiving federal correctional grants. Three states, Georgia, Maryland and Montana, failed to submit data. Federal agencies are not required to report such deaths.
- 496 ACLU OF NORTHERN CALIFORNIA, STUN GUN FALLACY: HOW THE LACK OF TASER REGULATIONS ENDANGERS LIVES, 1 (2005), available at [http://www.aclunc.org/issues/criminal\\_justice/police\\_practices/asset\\_upload\\_file593\\_5242.pdf](http://www.aclunc.org/issues/criminal_justice/police_practices/asset_upload_file593_5242.pdf).
- 497 *Id.*
- 498 *Id.*
- 499 *Should read: Shoot to kill, troops told*, THE SYDNEY MORNING HERALD, Sept. 2, 2005, available at <http://www.smh.com.au/news/world/shoot-to-kill-troops-told/2005/09/02/1125302714538.html>; *Troops told 'shoot to kill' in New Orleans*, ABC NEWS, Sept. 2, 2005, available at <http://www.abc.net.au/news/newsitems/200509/s1451906.htm>.
- 500 Press Release, ACLU of Louisiana, *Blocking of MS River Bridge By Gretna PD Raises Serious Constitutional Issues; ACLU Applauds AG Foti's Investigation and Urges Him to Wrap Up, Release Report*, Jan. 20, 2006, available at <http://www.laaclu.org/News/2006/gretnabridgeJan20.htm>.
- 501 Press Release, ACLU of Louisiana, *Open Letter Issued to Attorney General Foti on Long Overdue "Gretna Bridge Incident" Investigation*, July 18, 2006, available at <http://www.laaclu.org/News/2006/FotiOpenLetterJul1806.htm>. The Attorney General has since turned the investigation over to Orleans Parish District Attorney Eddie Jordan. The ACLU requested the District Attorney's file on the Gretna Bridge incident, but the DA refused to turn it over, claiming privilege for any material that may ultimately lead to a criminal prosecution.
- 502 John Burnett, *What Happened on New Orleans' Danziger Bridge?*, NATIONAL PUBLIC RADIO, Sept. 13, 2006, available at <http://www.npr.org/templates/story/story.php?storyId=6063982>.

- 503 John Burnett, *Case Falters against Cops in Katrina Shootings*, NATIONAL PUBLIC RADIO, Apr. 10, 2007, available at <http://www.npr.org/templates/story/story.php?storyId=9486975>.
- 504 Ellen Tandy & Brett Troxler, *EBRSO Executes 2nd "Knock and Talk,"* BATON ROUGE ADVOCATE, Feb. 15, 2006.
- 505 Press Release, ACLU of Louisiana, *Open Letter on Call to Protect Privacy of Hurricane Evacuees*, Oct. 20, 2005, available at <http://www.laclu.org/News/2005/Oct2005OpenLtrPrivacy.htm>.
- 506 Mark F. Bonner, *Sheriff's Office Wants ID of Park Residents*, BATON ROUGE ADVOCATE, Oct. 20, 2005.
- 507 *Elloie v. City of New Orleans*, No. 07-3231 (E.D. La. 2007).
- 508 Amber Craig, *Looking for Answers: Robert James Smith's Family Question How the Teenager Died in Pascagoula's Jail*, MISS. PRESS, May 30, 2007.
- 509 NYCLU, MISSION FAILURE: CIVILIAN REVIEW OF POLICING IN NEW YORK CITY, 1994-2006 (2007) available at [http://www.nyclu.org/files/ccrb\\_failing\\_report\\_090507.pdf](http://www.nyclu.org/files/ccrb_failing_report_090507.pdf).
- 510 Jose Alvarado Vega, *Proven Cases of Police Brutality not Hard to Find*, THE SAN JUAN STAR, July 16, 2007.
- 511 Editorial, *A Ticking Time Bomb in Loiza*, VIEWPOINT, July 18, 2007.
- 512 Bankole Thompson, *ACLU to take up case of Mackenzie Students*, THE MICHIGAN CITIZEN, Oct. 16, 2007.
- 513 *Ware v. City of Detroit*, 461 Mich. 859 (1999).
- 514 The ACLU of New Mexico is also involved with pending lawsuits alleging profiling of the To'hajiilee Native Americans by New Mexico State Police. See *To'hajiilee basketball team unlawfully searched*, ASSOCIATED PRESS, THE ALBUQUERQUE TRIBUNE, July 19, 2007, available at <http://www.abqtrib.com/news/2007/jul/19/suit-hajiilee-basketball-team-unlawfully-searched/>.
- 515 CERD, U.S. Report, ¶¶ 200-03, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).
- 516 *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997) and *Georgia v. Ashcroft*, 539 U.S. 461 (2003).
- 517 CITIZENS COMMISSION ON CIVIL RIGHTS & THE CENTER FOR AMERICAN PROGRESS, THE VOTING SECTION, THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION 40-42 (William L. Taylor et. al. eds., 2007), available at [http://www.cccr.org/downloads/civil\\_rights1.pdf](http://www.cccr.org/downloads/civil_rights1.pdf).
- 518 *Id.* at 42.
- 519 The US Supreme Court is currently reviewing a case concerning Indiana's requirement of identification, filed by the ACLU.
- 520 Memorandum By The United States As Amicus Curiae In Support of Defendants' Motion to Dismiss And Brief in Support Thereof, *Bay County Democratic Party v. Land*, (No. 04-10257-BC), and Michigan State Conference of NAACP Branches v. Land, (No. 04-10267-BC) (E.D. Mich.); Memorandum By The United States As Amicus Curiae In Support of Defendants' Motion to Dismiss And Brief in Support Thereof, *Florida Democratic Party v. Glenda Hood* (No. 04:04cv395 RH) (N.D. Fla); Memorandum By The United States As Amicus Curiae Supporting Appellant and Urging Reversal, *The Sandusky County Democratic Party v. J. Kenneth Blackwell* (04-4265 and 04-4266) (6<sup>th</sup> Cir.).
- 521 See *Buckanaga*, 804 F.2d at 474 (noting evidence of South Dakota's history of discrimination against Indians in matters related to voting); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1019-23 (D.S.D. 2004), aff'd, 461 F.3d 1011 (8 Cir. 2006) (detailing the lengthy history of official discrimination by the State of South Dakota against Indians in the areas of voting and representation).
- 522 *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, (D.S.D. 2004).
- 523 *Id.* at 1023-26.



524 See generally LAUGHLIN McDONALD & DANIEL LEVITAS, ACLU VOTING RIGHTS PROJECT, VOTE: THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT (2006), available at <http://www.aclu.org/pdfs/votingrightsreport20060307.pdf>.

525 RYAN S. KING AND MARC MAUER, THE SENTENCING PROJECT, THE VANISHING BLACK ELECTORATE: FELONY DISENFRANCHISEMENT IN ATLANTA, GEORGIA 2 (2004), available at [http://www.sentencingproject.org/Admin/Documents/publications/fd\\_vanishingblackelectorate.pdf](http://www.sentencingproject.org/Admin/Documents/publications/fd_vanishingblackelectorate.pdf) (In 2004, The Sentencing Project conducted a study focused on Atlanta, GA., and found that black males in Atlanta are 11 times more likely than non-black males to be disfranchised. Overall, half the registration gap between black males and non-black males in Georgia is a function of disfranchisement; in Atlanta, over two-thirds of the gap is accounted for by this practice); MARSHALL CLEMENT & NINA KEOUGH, RHODE ISLAND FAMILY LIFE CENTER, POLITICAL PUNISHMENT: THE CONSEQUENCES OF FELON DISENFRANCHISEMENT FOR RHODE ISLAND COMMUNITIES 1 (2004), available at <http://www.ri-familylifecenter.org/reports/PoliticalPunishment.pdf> (This study found that Rhode Island's felony disenfranchisement law disproportionately impacts people of color: Blacks are 10 times more likely than whites to be disfranchised, and Latinos four times more likely. The study also found that felony disenfranchisement dilutes the political power of urban communities and communities of color, meaning that neighbors of disfranchised residents are essentially subjected to some of the same punishments as felons themselves.).

526 See MARC MAUER & TUSHAR KINSAL, THE SENTENCING PROJECT, BARRED FOR LIFE: VOTING RIGHTS RESTORATION IN PERMANENT DISFRANCHISEMENT STATES (2005), available at <http://www.sentencingproject.org/pdfs/barredforlife.pdf>.

527 DEMOS & BRENNAN CENTER FOR JUSTICE, BOARDS OF ELECTIONS CONTINUE ILLEGALLY TO DISFRANCHISE VOTERS WITH FELONY CONVICTIONS (2006), available at [http://www.brennancenter.org/dynamic/subpages/download\\_file\\_34665.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_34665.pdf) (more than one-third of New York's 63 local election boards, including those in three New York City boroughs, continue to unlawfully disfranchise eligible voters with felony convictions).

528 CERD, U.S. Report, ¶¶ 209-10, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).

529 The U.S. Supreme Court has held that "the exclusion of felons from the vote has an affirmative sanction in Section 2 of the Fourteenth Amendment." *Richardson v. Ramirez*, 418 U.S. 24, 94 S.Ct. 2655, § 2671 (1974).

530 CERD, U.S. Report, ¶ 208, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).

531 *Id.*

532 See e.g. *Johnson v. Governor of State of Florida*, 405 F.3d 1214 (11th Cir. 2005); *Baker v. Pataki*, 85 F.3d 919 (2nd Cir. 1996); *NAACP v. Harvey*, 381 N.J. Super. 155, 885 A.2d 445 (N.J. Super. Ct. App. Div. 2005).

533 CERD, U.S. Report, ¶¶ 209-10, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).

534 THE NATIONAL COMMISSION ON FEDERAL ELECTION REFORM, TO ENSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS (2001), available at [http://www.tcf.org/Publications/ElectionReform/99\\_full\\_report.pdf](http://www.tcf.org/Publications/ElectionReform/99_full_report.pdf).

535 CERD, Concluding Observations of the CERD: United States of America, ¶ 394, 59<sup>th</sup> Sess., U.N. Doc. A/56/18 (Aug. 14, 2001) available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/A.56.18.paras.380-407.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/A.56.18.paras.380-407.En?Opendocument).

536 No. 04-2-33414-4SEA (Wash. Super. Ct. Apr. 21, 2006).

537 *Madison v. Washington*, No. 78598-8, 2007 WL 2128346, at \*7-9 (Wash. S. Ct. July 26, 2007). The ACLU of Washington is also trying to reform this policy through the state legislature. The measure would additionally restore the right to vote for people earlier than it currently is returned, upon full completion of sentence, by returning it upon release from prison.

538 No. CV07-01089 PHX SMM (D. Ariz. June 1, 2007).

539 No. G2006-1753 S/2 (Miss. Ch. Ct. Oct. 6, 2006).

540 Miss. Const. art. XII, § 241.

541 *Id.*

542 CERD, Concluding Observations of the CERD: United States of America, ¶ 398, 59<sup>th</sup> Sess., U.N. Doc. A/56/18 (Aug. 14, 2001) available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/A.56.18.para.380-407.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/A.56.18.para.380-407.En?Opendocument).

543 *Id.*

544 CERD, U.S. Report, ¶ 331, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).

545 *Id.* at ¶ 334.

546 *Id.* at ¶ 258.

547 *Id.* at ¶¶106-7 (“The Minority Health and Health Disparities Research and Education Act”); see also *Id.* at ¶108 (activities of the Department of Health and Human Services); see also *Id.* at ¶109 (“Maternal and Child Health Block Grants.”); see also *Id.* at ¶110 (“Ryan White CARE Act.”), see also *Id.* at ¶¶258-63 (for additional programs).

548 *Id.* at ¶¶ 256-63.

549 One example: In 1999, Congress requested a branch of the NAS to analyze racial disparities in health care. The report showed that minorities are less likely to receive needed care, and provided several systemic explanations for these disparities. The report was released in 1999 – we see no information about these efforts – what has been done with the recommendations?

550 The National Campaign to Prevent Teen Pregnancy, *The Real Costs of Teen Pregnancy* (2006), available at [http://www.teenpregnancy.org/resources/reading/pdf/Real\\_Costs\\_9-06.pdf](http://www.teenpregnancy.org/resources/reading/pdf/Real_Costs_9-06.pdf).

551 *Id.*

552 Alexander R. Green et. al., *Implicit Bias among Physicians and its Prediction of Thrombolysis Decisions for Black and White Patients*, J. GENERAL INTERNAL MEDICINE, VOL. 22, NO. 9, 1231-1238 (2007), available at <http://www.springerlink.com/content/dh6mg272g8654318/?p=729fab7449124f3e9884978e51876ded&pi=1>.

553 See Press Release, The Henry J. Kaiser Family Foundation, Chicago Task Force Releases Recommendations to Address Breast Cancer Minority Disparity between Black, White Women, Oct. 19, 2007, available at [http://www.kaisernet.org/daily\\_reports/rep\\_index.cfm?DR\\_ID=48316](http://www.kaisernet.org/daily_reports/rep_index.cfm?DR_ID=48316).

554 The excluded occupations are (1) home care workers, including child care workers and health aids, the vast majority of whom are racial minority women, and (2) agricultural workers, who are largely immigrant and non-Caucasian. See, e.g., *Long Island Care at Home v. Coke*, 462 F.3d 48 (2<sup>nd</sup> Cir., 2007). The U.S. Supreme Court certiorari granted by *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 853, 166 L. Ed. 2d 681, 2007 U.S. LEXIS 16 (U.S., Jan. 5, 2007).

555 National Labor Relations Act, 29 U.S.C. § 152(3) (stating “the term ‘employee’ shall include any employee [...] but shall not include any individual employed [...] in the domestic service of any family or person at his home”); Fair Labor Standards Act, 29 U.S.C. § 213(b)(21) (exempting from maximum hour limitations and overtime compensation requirements all “live-in” domestic workers); Occupational Safety and Health Act, 29 C.F.R. § 1975.6 (1972) (stating “as a matter of policy, individuals who, in their own residences, privately employ persons for the purpose of performing for the benefit of such individuals what are commonly regarded as ordinary domestic household tasks, such as house cleaning, cooking, and caring for children, shall not be subject to the requirements of the Act with respect to such employment”).

- 556 Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95, *available at* [http://untreaty.un.org/ilc/texts/instruments/english/conventions/9\\_1\\_1961.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf).
- 557 CERD, U.S. Report, ¶ 237, U.N. Doc. CERD/C/USA/6 (May 1, 2007) *available at* [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).
- 558 See, e.g., *U.S. v. New York City Bd. of Educ.*, 448 F. Supp. 2d 397, 414-6 (E.D.N.Y., Sept. 11, 2006).
- 559 *U.S. v. New York City Board of Education* (E.D.N.Y.) (filed October 2002).
- 560 <http://pewhispanic.org/reports/report.php?ReportID=61>.
- 561 *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). The ACLU filed a friend – of – the – court brief supporting the respondent, NLRB, in 2001, arguing that back pay awards were proper under the circumstances. Brief of Amici Curiae of American Civil Liberties Union Foundation and Make the Road by Walking, Inc. in Support of Respondent, *Hoffman Plastic Compounds, Inc. v. NLRB*, *available at* [http://www.aclu.org/images/asset\\_upload\\_file821\\_21993.pdf](http://www.aclu.org/images/asset_upload_file821_21993.pdf).
- 562 *Crespo v. Evergo*, 366 N.J.Super. 391 (N.J.Super.A.D., 2004).
- 563 *Campbell v. Bolourian*, No. 250979 – V (Cir. Ct. Montg. Cty. May 6, 2005).
- 564 Press Release, Public Justice Center, Court of Appeals Will Hear Case of Discovery Abuse Against Lawful Immigrant Domestic Worker (Jan. 13, 2006), *available at* <http://www.publicjustice.org/news/index.cfm?newsid=93>.
- 565 *Campbell v. Bolourian*, No. 869 (Md. Ct. Spec. App. Sept. 2005).
- 566 Brief of Amici Curiae of Public Justice Center, et al., *Campbell v. Bolourian*, No. 869 (Md. Ct. Spec. App. Sept. 2005).
- 567 *Id.*; Press Release, Public Justice Center, Court of Appeals Will Hear Case of Discovery Abuse Against Lawful Immigrant Domestic Worker (Jan. 13, 2006). The Court of Appeals of Maryland (the state’s highest court) decided to consider the case itself, but the parties reached a settlement agreement before oral argument. Press Release, Public Justice Center, PJC Brief Leads to Settlement for Immigrant (May 8, 2006), *available at* <http://www.publicjustice.org/news/index.cfm?newsid=111>.
- 568 [9] *Sierra v. Broadway Plaza Hotel* Equal Employment Opportunity Commission charges *available at*, <http://www.aclu.org/FilesPDFs/wrp%20complaint%20to%20eeoc.pdf>.
- 569 *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Plyler v. Doe*, 457 U.S. 202 (1982).
- 570 For example, in Washington State, pursuant to the NCLB, educational policy-makers increasingly have relied on high-stakes testing both to evaluate the performance of individual schools and to determine whether individual students can graduate, with drastic differences in Washington Assessment of Student Learning (WASL) test scores between students of different racial and ethnic groups. American Civil Liberties Union of Washington, “Racial Disparity in Education: Questions WSIPP and Policy-makers Should Consider” (2006), *available at* [http://www.aclu-wa.org/library\\_files/WSIPP%20report%20-%20combined.pdf](http://www.aclu-wa.org/library_files/WSIPP%20report%20-%20combined.pdf). According to the 2005 WASL results, 47% of white 10th-grade students passed all three sections of the test. But only 21.7% of Native Americans, 18.1% of African-Americans and 20.1% of Latinos passed all three sections – less than half the passage rate for white students.
- 571 NATIONAL ECONOMIC AND SOCIAL RIGHTS INITIATIVE, DEPRIVED OF DIGNITY: DEGRADING TREATMENT AND ABUSIVE DISCIPLINE IN NEW YORK CITY AND LOS ANGELES PUBLIC SCHOOLS 1 (2007), *available at* <http://nesri.org/Deprived%20of%20Dignity%2007.pdf>.
- 572 GARY ORFIELD, ET AL., LOSING OUR FUTURE, HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS (2004), *available at* [http://www.urban.org/UploadedPDF/410936\\_LosingOurFuture.pdf](http://www.urban.org/UploadedPDF/410936_LosingOurFuture.pdf).

- 573 Editorial Projects in Education, *Diplomas Count 2007: Ready for What? Preparing Students for College, Careers, and Life After High School*, Education Week 26(40) (2007), PowerPoint presentation available at [http://www.edweek.org/media/ew/dc/2007/DC07\\_PressConf\\_presentation.pdf](http://www.edweek.org/media/ew/dc/2007/DC07_PressConf_presentation.pdf).
- 574 CHRISTOPHER SWANSON, URBAN INSTITUTE EDUCATION POLICY CENTER, WHO GRADUATES? WHO DOESN'T? (2004), available at [http://www.urbaninstitute.org/UploadedPDF/410934\\_WhoGraduates.pdf](http://www.urbaninstitute.org/UploadedPDF/410934_WhoGraduates.pdf). (The numbers are based on 2001 high school enrollment and diploma receipt figures reported to the Common Core of Data, a database of educational statistics maintained by the National Center for Education Statistics at the US Dept. of Education.)
- 575 Under the current law, each State is permitted to establish its own goal for graduation rates, as well as its benchmarks toward achieving that goal.
- 576 The ACLU received a copy of a letter sent by a Florida school district informing parents that their children may not return to the mainstream public school not for disciplinary reasons, but for academic ones.
- 577 GARY ORFIELD, ET AL., LOSING OUR FUTURE, HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS (2004), available at [http://www.urban.org/UploadedPDF/410936\\_LosingOurFuture.pdf](http://www.urban.org/UploadedPDF/410936_LosingOurFuture.pdf).
- 578 The latest available statistics are compiled by the Massachusetts Department of Education in its report, "Dropouts in Massachusetts Public Schools: 2003-04," available at <http://www.doe.mass.edu/infoservices/reports/dropout/0304/report.pdf> Even the "good news" – the gradually increasing rate at which African-Americans and Latinos are passing the MCAS exam – can be read in a different way. Researchers have pointed to a connection between positive trends in MCAS pass rates and a rising 'minority' dropout rate. Some critics of MCAS as a high stakes exit exam argue that the Department of Education has inflated MCAS pass rates for classes of 2005 and 2006 by looking at the overall pass rate on an exam which can be taken multiple times, instead of at "on time" pass rates, which continue to show very wide disparities among different groups: in the class of 2005, 82% of white students passed the MCAS to graduate on time; 61.6% of African-American students passed the MCAS to graduate on time, as did only 51% of Latino students..
- 579 KEVIN CAREY, THE EDUCATION TRUST, THE FUNDING GAP, 2004: MAN STATES STILL SHORT-CHANGE LOW-INCOME AND MINORITY STUDENTS 2 (Fall 2004), available at <http://www2.edtrust.org/NR/rdonlyres/30B3C1B3-3DA6-4809-AFB9-2DAACF11CF88/0/funding2004.pdf>.
- 580 John WIRT, ET AL., THE CONDITION OF EDUCATION 2004, NATIONAL CENTER FOR EDUCATION STATISTICS (2004), available at <http://nces.ed.gov/pubs2004/2004077.pdf>.
- 581 Children's Defense Fund, "Cradle-to-Prison Pipeline Georgia" (2007), available at <http://www.childrensdefense.org/site/DocServer/cpp07-Georgia.pdf?docID=4370>.
- 582 *Id.*
- 583 Governor's Office of Student Achievement and the Georgia Department of Education, 2006 Adequate Yearly Progress (AYP) Overview Report, available at <http://public.doe.k12.ga.us/ayp2006/overview.asp?SchoolID=000-0000-b-1-2-3-4-5-0-0-8-0-10>.
- 584 NATIONAL ECONOMIC AND SOCIAL RIGHTS INITIATIVE, DEPRIVED OF DIGNITY: DEGRADING TREATMENT AND ABUSIVE DISCIPLINE IN NEW YORK CITY AND LOS ANGELES PUBLIC SCHOOLS 9 (2007), available at <http://www.nesri.org/Deprived%20of%20Dignity%2007.pdf>.
- 585 *Id.*, at 16.
- 586 *Id.*, at 28.
- 587 LOUIS HARRIS, REPORT ON THE STATUS OF PUBLIC SCHOOL EDUCATION IN CALIFORNIA 2004 WITH SPECIAL EMPHASIS ON THE STATUS OF EQUALITY IN PUBLIC SCHOOL EDUCATION: A SURVEY OF A CROSS-SECTION OF CLASSROOM TEACHERS

IN CALIFORNIA PUBLIC SCHOOLS 3 (2004), available at <http://www.hewlett.org/NR/rdonlyres/7C8362B1-4D4D-4977-B10B-B5AB01A6E906/0/Harrisexecutivesummary.pdf>.

588 Press Release, Peter Harris Research Group, New Survey of California Teachers Reveals Serious Problems in Classrooms, Starkly Unequal Conditions for African-American, Latino Students, and Broad Teacher Support for Transferring More Control, Accountability from Districts to Schools Fifty Years After Brown vs. Board of Education, Students of Color Still Denied Equal Opportunity to Quality Education in California (May 6, 2004), available at <http://www.hewlett.org/NR/rdonlyres/F08c609d-45a2-498f-98f6-c6580f00bf4b/0/harrispollrelease.doc>.

589 *Id.*

590 For information about the suit, see [www.decentschools.org](http://www.decentschools.org).

591 J.T. Rothwell, *Race & America's Punitive Excesses*, Princeton University Blog (Oct. 23, 2007), available at [http://blogs.princeton.edu/14points/2007/10/race\\_and\\_americas\\_punitive\\_excesses.html](http://blogs.princeton.edu/14points/2007/10/race_and_americas_punitive_excesses.html).

592 See [www.decentschools.org/settlement.php](http://www.decentschools.org/settlement.php).

593 BROOKS M. ALLEN, THE WILLIAMS V. CALIFORNIA SETTLEMENT: THE FIRST YEAR OF IMPLEMENTATION (2005), available at <http://www.decentschools.org/settlement/WilliamsReportWeb2005.pdf>; ACLU OF SOUTHERN CALIFORNIA & PUBLIC ADVOCATES, INC., WILLIAMS V. CALIFORNIA: THE STATEWIDE IMPACT OF TWO YEARS OF IMPLEMENTATION (2007), available at <http://www.decentschools.org/settlement/WilliamsReportWeb2007.pdf>.

594 GARY ORFIELD & CHUNGMEI LEE, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 37-40 (2006), available at [http://www.civilrightsproject.ucla.edu/research/deseg/Racial\\_Transformation.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf).

595 K-12 is the North American designation for primary and secondary education; the expression is a shortening of Kindergarten (5 or 6-year-old) through 12th grade (generally 17 or 18-year-old), the first and last grades of free education in the United States and English Canada.

596 The Supreme Court struck down these two voluntary integration plans. *Seattle's Plan*: Under this plan, high school students ranked their preference for Seattle's ten high schools. Where a school was oversubscribed, the district employed a series of tiebreakers. First, students with siblings attending the school would be granted preference. Second, if the percentages of white and non-white students in the school deviated by more than ten percentage points from the percentages of white and non-white students in the district as a whole, then preference would be granted to students whose race would bring the school closer in line with the district's racial composition. Third, students who lived closest to the school would be granted preference. *Louisville's Plan*: The district grouped schools according to geographical "clusters," and students ranked their preference for schools within their cluster. The district would then assign students to schools on the basis of availability and on the basis of the racial guidelines, which required that the percentage of minority students in each school be within fifteen percentage points — between fifteen and fifty percent — of the racial composition of the district as a whole. Once assigned, students could apply to transfer to another school, but transfers could be denied based on lack of space or based on the racial guidelines.

597 GARY ORFIELD & CHUNGMEI LEE, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 6 (2007), available at [http://www.civilrightsproject.ucla.edu/research/deseg/reversals\\_reseg\\_need.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf).

598 See *id.* at 10-13.

599 GARY ORFIELD & CHUNGMEI LEE, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES (2007), available at [http://www.civilrightsproject.ucla.edu/research/deseg/reversals\\_reseg\\_need.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf).

600 Juan Williams, *A Little Rock Reminder*, WASH. POST, Sept. 25, 2007, at A19, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/24/AR2007092401322.html>.

601 Attendance in multiracial schools varies by region: more than half of black and Asian students attend these schools in the West and about two fifths of Latino students attend these schools in the Border region. States where the largest shares of students attend multiracial schools include the three largest states-California, Texas, and Florida-and one state in which the Latino population seems to be exploding-Nevada. While South and Border regions are resegregating, black students in the South and Border states still have among the highest levels of exposure to white students. More than three quarters of intensely segregated schools are also high poverty schools. Nationally, Asians are more likely than students of other races to attend multiracial schools. Conversely, white students are the least likely to attend these schools.

602 GARY ORFIELD & CHUNGMEI LEE, *HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES* (2007), available at

[http://www.civilrightsproject.ucla.edu/research/deseg/reversals\\_reseg\\_need.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf)

603 *Id.*

604 *Id.*

605 *Id.*

606 *Id.*

607 *Comfort v. Lynn School Committee*, No. 03-2415 (1<sup>st</sup> Cir. June 16, 2005).

608 HARRIS, LOUIS, *REPORT ON THE STATUS OF PUBLIC SCHOOL EDUCATION IN CALIFORNIA, WITH SPECIAL EMPHASIS ON THE STATUS OF EQUALITY IN PUBLIC SCHOOL EDUCATION: A SURVEY OF A CROSS-SECTION OF CLASSROOM TEACHERS IN CALIFORNIA PUBLIC SCHOOLS 3* (2006), available at <http://www.hewlett.org/NR/rdonlyres/7C8362B1-4D4D-4977-B10B-B5AB01A6E906/0/Harrisexecutivesummary.pdf>.

609 The suits are the following: *Neighborhood Schools for Our Kids v. San Juan Capistrano Unified School District* (settled in November 2006 in Orange County Superior Court), challenging school district attendance boundary drawing that involved mere data collection but no further use of race; the court and settlement agreement upheld the collection practice. *American Civil Rights Foundation v. Los Angeles Unified School District* (pending in Los Angeles Superior Court), challenging the use of race in selecting students to enroll in magnet schools and a district busing program. We argue that the district is required by court order to use race to desegregate its schools and would in any event be required so to do because of the continuing racial segregation in the district. *American Civil Rights Foundation v. Los Angeles Unified School District* (pending in Los Angeles Superior Court), challenging the use of race in assigning teachers to particular schools as part of the Teacher Integration Program. We argue that this program is court-ordered and, independently, essential to district desegregation that cannot be achieved without use of the program. *American Civil Rights Foundation v. Berkeley Unified School District* (pending in Alameda Superior Court), challenging student assignment to elementary school through census boundary information that does not use individual students' race data. We argue that the program successfully provides integrated educational offerings without involving any impermissible use of race. *Avila v. Berkeley Unified School District* (successfully resolved in court), challenging a voluntary integration program on the theory that it violated Proposition 209; the court sided with the ACLU and Berkeley Unified School District, relying in part on a California statute embracing the definition of "racial discrimination" found in CERD.

610 Reports from education advocacy groups like Southern Echo, available at <http://www.southernecho.org/>.

611 Sam Dillon, *Alabama Plan Brings Out Cry of Resegregation*, N.Y. TIMES, Sept. 17, 2007, at <http://www.nytimes.com/2007/09/17/education/17schools.html?ex=1348372800&en=9f2423c4ad6f0a3b&ei=5088>.

612 The Federal Gun Free Schools Act requires every state that receives Elementary and Secondary Education Act funds to enact a statute that provides for one year expulsions of students who possess firearms. 20 USC Sec. 7151. This legislation came to be popularly known as a "Zero Tolerance" law. Michigan legislators went beyond the

“firearms” “one year” requirements of the federal legislation by amending the Michigan School Code to require permanent expulsion for possession of a “dangerous weapon,” “arson,” and “criminal sexual conduct.” MCLA Sec. 380.1311(2) ; MCLA Sec. 380.1311a(1) and (2).

613 Ruth Zweifler & Julia De Beers, *The Children Left Behind: How Zero Tolerance Impacts Our Most Vulnerable Youth*, 8 MICH. J. RACE & L. 1, 200 (2002), available at [http://www.studentadvocacycenter.org/legalresources/publications/Race\\_and\\_Law\\_Article.pdf](http://www.studentadvocacycenter.org/legalresources/publications/Race_and_Law_Article.pdf).

614 THE ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 15 (2005), available at <http://www.advancementproject.org/reports/FINALEOLrep.pdf>.

615 RUSS SKIBA, ZERO TOLERANCE: THE ASSUMPTIONS AND THE FACTS 4 (2004) available at [http://ceep.indiana.edu/projects/PDF/PB\\_V2N1\\_Zero\\_Tolerance.pdf](http://ceep.indiana.edu/projects/PDF/PB_V2N1_Zero_Tolerance.pdf).

616 NATIONAL ECONOMIC AND SOCIAL RIGHTS INITIATIVE, DEPRIVED OF DIGNITY: DEGRADING TREATMENT AND ABUSIVE DISCIPLINE IN NEW YORK CITY AND LOS ANGELES PUBLIC SCHOOLS 6 (2007), available at <http://nesri.org/Deprived%20of%20Dignity%2007.pdf>.

617 Howard Witt, *School Discipline Tougher on African Americans*, CHI. TRIB., Sept. 25, 2007, at <http://www.chicagotribune.com/services/newspaper/printedition/tuesday/chi-070924discipline,0,5751354.story>.

618 THE STUDENT ADVOCACY CENTER OF MICHIGAN, NOWHERE TO GO: THE DEVASTATING JOURNEY OF YOUTH EXPELLED FROM MICHIGAN SCHOOLS 7 (2005), available at <http://www.studentadvocacycenter.org/legalresources/publications/nowheretogo.pdf>

619 Florida Department of Education, SESIR Incident Summaries, Lee County, at 6, <http://www.criminologycenter.fsu.edu/p/pdf/safeDrugFree0506/0MasterRptLee.pdf> (last visited Nov. 20, 2007)

620 JOHANNA WALD & DAN LOSEN, DEFINING AND REDIRECTING A SCHOOL-TO-PRISON PIPELINE , available at [http://www.woodsfunf.org/community/Folder\\_1036081004377/File\\_1084877618748](http://www.woodsfunf.org/community/Folder_1036081004377/File_1084877618748)

621 *Id.*, at 4, (citing American Bar Association & National bar Association, *Justice by Gender*, 2001).

622 LISA S. WALLISCH & LISA KERBER, SUBSTANCE USE AND DELINQUENCY AMONG YOUTHS ENTERING TEXAS YOUTH COMMISSION FACILITIES: 2000-2001 (2001), available at [http://www.dshs.state.tx.us/sa/research/youth\\_delinquency00-01.pdf](http://www.dshs.state.tx.us/sa/research/youth_delinquency00-01.pdf) ; LAURA ZVONEK, FINANCIAL COSTS OF NOT GRADUATING COME HIGH (2006), available at <http://www.window.state.tx.us/comptrol/fnotes/fn0612/failure.html>.

623 U.S. Census Bureau, Texas QuickFacts, available at <http://quickfacts.census.gov/qfd/states/48000.html> (last visited August 7, 2007) ; Texas Department of Criminal Justice, Statistical Report Fiscal Year 2006 8 available at [http://www.tdcj.state.tx.us/publications/executive/FY\\_2006\\_Statistical\\_Report.pdf](http://www.tdcj.state.tx.us/publications/executive/FY_2006_Statistical_Report.pdf) (last visited August 7, 2007). (Whites make up approximately 49.2% of the Texas population, but 31.9% of the prison population. Hispanics account for 35.1% of the Texas population and 30% of the prison population.)

624 Ruth Zweifler & Julia De Beers, *The Children Left Behind: How Zero Tolerance Impacts Our Most Vulnerable Youth*, 8 MICH. J. RACE & L. 1, 211-12 (2002) available at [http://www.studentadvocacycenter.org/legalresources/publications/Race\\_and\\_Law\\_Article.pdf](http://www.studentadvocacycenter.org/legalresources/publications/Race_and_Law_Article.pdf).

625 However, the 1985 Attorney General’s opinion provides that a student should be given the “opportunity to present to the Board...his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf.”

626 The Center for Effective Discipline, U.S.: Corporal Punishment and Paddling Statistics by State and Race, <http://www.stophitting.com/disatschool/statesBanning.php> (last visited November 19, 2007).

627 See Miss. Code § 37-11-57 providing that teachers and principals shall not be liable for any action carried out in conformity with relevant law, rules or regulations regarding disciplinary matters except in the case of excessive force

or cruel and unusual punishment. If the teacher or principal are found *by a court* to have acted in bad faith or with malicious purpose or in a manner exhibiting a wanton and willful disregard of human rights or safety, then they may be civilly or criminally liable. The state Tort Claims Act at § 11-46-9 also provides that government employees and entities immunity, from civil liability, for any claim arising out of the administration of corporal punishment or the taking of any action to maintain control and discipline of students unless the teacher or principal acted in bad faith or with malicious purpose or in a manner exhibiting a wanton disregard of human rights or safety.

<sup>628</sup> THE ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 15 (2005), *available at* <http://www.advancementproject.org//reports/FINALEOLrep.pdf>.

<sup>629</sup> FLORIDA STATE CONFERENCE NAACP, ADVANCEMENT PROJECT & THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, ARRESTING DEVELOPMENT: ADDRESSING THE SCHOOL DISCIPLINE CRISIS IN FLORIDA (2006), *available at* [http://www.naacpldf.org/content/pdf/pipeline/arresting\\_development\\_full\\_report.pdf](http://www.naacpldf.org/content/pdf/pipeline/arresting_development_full_report.pdf).

<sup>630</sup> *Id.* at 11.

<sup>631</sup> Chastity Pratt, *Random Searches Halted: Detroit Public Schools to Stop Weapons Sweeps*, DETROIT FREE PRESS, June 15, 2006.

<sup>632</sup> NATIONAL ECONOMIC AND SOCIAL RIGHTS INITIATIVE, DEPRIVED OF DIGNITY: DEGRADING TREATMENT AND ABUSIVE DISCIPLINE IN NEW YORK CITY AND LOS ANGELES PUBLIC SCHOOLS 42 (2007), *available at* <http://nesri.org/Deprived%20of%20Dignity%2007.pdf>.

<sup>633</sup> *Id.* at 37.

<sup>634</sup> The report was based on 1,000 student surveys, an analysis of publicly available data, and interviews of students, parents, teachers, school administrators, school safety agents, and officials from the Department of Education the United Federation of Teachers, and the New York City Police Department (NYPD). ACLU and NYCLU, *Criminalizing the Classroom: The Over-Policing of New York City Public Schools* (2007)

<sup>635</sup> NATIONAL ECONOMIC AND SOCIAL RIGHTS INITIATIVE, DEPRIVED OF DIGNITY: DEGRADING TREATMENT AND ABUSIVE DISCIPLINE IN NEW YORK CITY AND LOS ANGELES PUBLIC SCHOOLS 35 (2007), *available at* <http://nesri.org/Deprived%20of%20Dignity%2007.pdf>.

<sup>636</sup> *Id.* at 38.

<sup>637</sup> ACLU/NYCLU analysis of 2004-2005 Annual School Reports. Available online at <http://schools.nyc.gov/daa/SchoolReports/default.asp>. This and subsequent analysis of metal detector schools in this section includes only 80 schools, as data are drawn from the 2004-2005 Reports, and 8 of the 88 schools identified as metal detector schools are too new to be included in that data.

<sup>638</sup> Analysis of enrollment data from New York City DOE Register, provided by ATS. Data current as of October 15, 2006. Available online at <http://schools.nyc.gov/OurSchools/>.

<sup>639</sup> ACLU/NYCLU analysis of 2004-2005 Annual School Reports. For each school, the DOE's Annual School Report records the number of criminal and non-criminal incidents in which NYPD personnel are involved. "Non-criminal" incidents include charges such as disorderly conduct, for which a child may not be arrested on the spot, but may be subject to formal charges in criminal or juvenile court.

<sup>640</sup> *Id.* For this measure, the Annual School Reports compare each school to the average school of similar size.

<sup>641</sup> Even in comparison with children attending the average under-funded New York City high school, children at high schools with permanent metal detectors receive substantially less funding for direct services, which "include all services provided by the school to support teaching and learning, including classroom instruction, parent involvement, school safety, and building maintenance." In the 2003-2004 school year, the city spent an average of \$ 9,601.87 on the education of a child at a high school with permanent metal detectors, compared with a citywide average of \$11,282.



For students at the largest high schools with permanent metal detectors, the funding shortfall was even starker. A child at a high school with more than 3,000 students and daily metal detector scans received \$8,066 of funding.

642 Available data shows that only 53% of schools with permanent metal detectors have librarians, while 73% of high schools citywide have librarians. At DeWitt, the largest high school with permanent metal detectors in the city, there are 4,511 students and not one school librarian.

643 Eight schools with permanent metal detectors serve more than 3,000 children, and two serve more than 4,400 children. The number of students enrolled citywide is 6% higher than the number that the city has the physical capacity to educate. However, overcrowding is an even more serious problem at high schools with permanent metal detectors, where there are 18% more children than seats.

644 In order to meaningfully compare suspension rates in high schools, the Department of Education places each school in a category of “similar schools.” It defines these schools as those in which entering 9th and 10th graders are “generally alike” in terms of the proportion of English language learners, students overage for grade, average daily attendance, and standardized test scores. NEW YORK CITY DEPARTMENT OF EDUCATION, PARENT GUIDE AND GLOSSARY TO THE 2004-2005 ANNUAL SCHOOL REPORT FOR HIGH SCHOOLS 16, available at [http://schools.nyc.gov/daa/SchoolReports/05asr/Guides/PG\\_H\\_English.pdf](http://schools.nyc.gov/daa/SchoolReports/05asr/Guides/PG_H_English.pdf)

645 ACLU/NYCLU analysis of 2004-2005 Annual School Reports. Available online at <http://schools.nyc.gov/daa/SchoolReports/default.asp>.

646 Daniel J. Losen, *Behind the Dropout Rate*, *Gotham Gazette*, Mar. 20, 2006, at <http://www.gothamgazette.com/article/fea/20060320/202/1792/>.

647 A variety of factors obscure the graduation rates of high school students in New York City. See generally *Id.*

648 Thirty-one of the 89 schools qualify as drop out factories; 13 schools do not. There is no information for 35 metal detector schools, which are not old enough to have 2005 cohort rates. Nine metal detector schools are too new to have Annual School Reports at all.

649 The Act is codified in the Texas Education Code, Chapter 37 (“Chapter 37”) TEX. EDUC. CODE §37.001 et. seq.

650 MARK LEVIN, *POLICY PERSPECTIVE*, SCHOOLING A NEW CLASS OF CRIMINALS? BETTER DISCIPLINARY ALTERNATIVES FOR TEXAS STUDENTS 10 (2006), available at <http://www.texaspolicy.com/pdf/2006-03-PP-DAEP-ml.pdf>.

651 H H.B. 426, 80th Leg., Reg. Sess. (Tex. 2007).

652 Texas Education Agency, <http://www.tea.state.tx.us/research/> (the drop-out rate in the 2004-2005 school year for mainstream schools was 0.9%, for DAEPs it was 5.3%).

653 TEXAS EDUCATION AGENCY, 2006 COMPREHENSIVE ANNUAL REPORT ON TEXAS PUBLIC SCHOOLS 52 (2006), link available at [www.tea.state.tx.us](http://www.tea.state.tx.us).

654 Howard Witt, *School Discipline Tougher on African Americans*, CHI. TRIB., Sept. 25, 2007, at <http://www.chicagotribune.com/services/newspaper/printedition/tuesday/chi-070924discipline,0,5751354.story>.

655 THE GEORGIA GOVERNOR’S OFFICE OF STUDENT ACHIEVEMENT, APS-CEP 2005-2006 ANNUAL REPORT CARD 32, available at <http://public.doe.k12.ga.us/Reports/2006/761/0403/Reportcard/PDF/osa-k12-761-403.pdf>.

656 See ACLU The Atlanta Community Schools: A Separate and Unequal Education (2006), at 1 (on file with ACLU).

657 *Id.* Information also available on the Georgia Department of Education website, available at <http://public.doe.k12.ga.us/ayp2007/overview.asp?SchoolID=000-0000-b-1-2-3-4-5-0-0-8-0-10>

- 658 Governor's Office of Student Achievement and the Georgia Department of Education, APS-CEP 2006 Adequate Yearly Progress Overview Report, <http://public.doe.k12.ga.us/ayp2006/search.asp> ; The Governor's Office of Student Achievement, APS-CEP School Annual Report Card, 2005-2006, <http://reportcard2006.gaosa.org/k12/default.aspx>.
- 659 *Id.*
- 660 THE GEORGIA GOVERNOR'S OFFICE OF STUDENT ACHIEVEMENT, APS-CEP 2005-2006 ANNUAL REPORT CARD, *available at* <http://public.doe.k12.ga.us/Reports/2006/761/0403/Reportcard/PDF/osa-k12-761-403.pdf>.
- 661 *Id.*; Interview with Kimberly Mills
- 662 *Id.*
- 663 DeKalb Alternative School and South Fulton Crossroads 2005-2006 Annual Report Cards, 2005-2006 Georgia School Annual Report Cards *available at* <http://reportcard2006.gaosa.org/k12/default.aspx>.
- 664 ACLU analysis of 2004-2006 Enrollment Data provided by School District of Lee County (on file with ACLU).
- 665 *Id.*
- 666 *Id.*
- 667 *Id.*
- 668 Press Release, ACLU of Northern California, ACLU Seeks Information about Alleged Racial Harassment of Native American Children in Small Rural Town (April 12, 2006), *available at* [http://www.aclunc.org/news/press\\_releases/aclu\\_seeks\\_information\\_about\\_alleged\\_racial\\_harassment\\_of\\_native\\_american\\_children\\_in\\_small\\_rural\\_town.shtml](http://www.aclunc.org/news/press_releases/aclu_seeks_information_about_alleged_racial_harassment_of_native_american_children_in_small_rural_town.shtml).
- 669 Jodie Morse, *Learning While Black*, TIME MAGAZINE, June 5, 2002, at <http://www.time.com/time/magazine/article/0,9171,238611,00.html>.
- 670 Angie Green & Joel Rubin, *L.A. Board of Education Adopts Discipline Policy Aimed at Reducing Suspensions*, L.A. TIMES, February 28, 2007, at B4, *available at* <http://www.calstate.edu/pa/clips2007/february/28feb/board.shtml>.
- 671 One African-American student in Jones County was expelled and arrested for hitting a Caucasian student who had repeatedly called the African-American students in the class 'nigger' and 'black bitch'. The teacher did nothing. He was jailed for several days, charged with felony assault. The judge refused to release him saying that he was a flight risk and a danger to society. The charges were eventually dropped and he spent the remainder of the year in an alternative school.
- 672 *See* <http://www.diversityinc.com/public/2588.cfm> for details of all the noose incidents to date.
- 673 CERD, Gen. Rec. No. 31, ¶ 6, 67<sup>th</sup> Sess., U.N. Doc. A/60/18 (2005), *available at* [http://ohchr.org/english/bodies/cerd/docs/GC31Rev\\_En.pdf](http://ohchr.org/english/bodies/cerd/docs/GC31Rev_En.pdf).
- 674 CERD, Gen. Rec. No. 26, ¶ 2, 56<sup>th</sup> Sess., U.N. Doc. A/55/18 (2000), *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/c11647a2f7823d62802568bd0055ac51?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/c11647a2f7823d62802568bd0055ac51?Opendocument).
- 675 CERD, Gen. Rec. No. 30, ¶ 25, 64<sup>th</sup> Sess., U.N. Doc. CERD/C/64/Misc.11/rev.3 (Oct. 1, 2004) *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e3980a673769e229c1256f8d0057cd3d?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e3980a673769e229c1256f8d0057cd3d?Opendocument).
- 676 CERD, U.S. Report, ¶ 286, U.N. Doc. CERD/C/USA/6 (May 1, 2007) *available at* [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).
- 677 Even before the government's "war on terror", this Committee expressed concern about the lower standards of due process afforded excludable aliens than other aliens. Using the "war on terror" as justification, the protections for undocumented workers have weakened significantly further.

678 JOSEPH D. RICH, THE ATTACK OF PROFESSIONALISM IN THE CIVIL RIGHTS DIVISION, IN THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION 13-17 (William L. Taylor, Dianne M. Piché, Crystal Rosario, & Joseph D. Rich eds., 2007), available at [www.cccr.org/downloads/civil\\_rights1.pdf](http://www.cccr.org/downloads/civil_rights1.pdf).

679 See End Racial Profiling Act of 2005, S. 2138, 109<sup>th</sup> Cong. 1<sup>st</sup> session (2005), available at <http://www.gov-track.us/congress/billtext.xpol?bill=s109-2138>.

680 Alexander v. Sandoval, 532 U.S. 275 (2001).

681 Bd. of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).

682 Alexander v. Sandoval, 532 U.S. 275 (2001).

683 See, e.g., Village of Arlington Heights et al. v. Metropolitan Housing Development Corp. et al., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

684 Americans who aren't given interpreters in hospitals and can't be understood by their doctors, or can't understand the questions being asked of them, have no recourse. Americans who are fired from their jobs for not speaking English—unrelated to their ability to perform their job—might not have any recourse. Even people who are denied interpreters in court will be unable to compel a state to provide them with an interpreter. The federal courts have slammed their doors shut on people for whom these issues can be very, very serious.

685 Memorandum By The United States As Amicus Curiae In Support of Defendants' Motion to Dismiss And Brief in Support Thereof, Bay County Democratic Party v. Land, (No. 04-10257-BC), and Michigan State Conference of NAACP Branches v. Land, (No. 04-10267-BC) (E.D. Mich.); Memorandum By The United States As Amicus Curiae In Support of Defendants' Motion to Dismiss And Brief in Support Thereof, Florida Democratic Party v. Glenda Hood (No. 04:04cv395 RH) (N.D. Fla); Memorandum By The United States As Amicus Curiae Supporting Appellant and Urging Reversal, The Sandusky County Democratic Party v. J. Kenneth Blackwell (04-4265 and 04-4266) (6<sup>th</sup> Cir.).

686 MICHAEL L. BENSON & GREER LITTON FOX, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, WHEN VIOLENCE HITS HOME: HOW ECONOMICS AND NEIGHBORHOOD PLAY A ROLE 2 (2004), available at <http://www.ncjrs.gov/pdffiles1/nij/205004.pdf>

687 American Indian Health Council, Domestic Violence in American Indian Women, <http://aihc1998.tripod.com/violence.html> (last visited November 19, 2007).

688 United States v. Morrison, 529 U.S. 598 (2000); Town of Castle Rock v. Gonzalez, 125 S. Ct. 2796 (2005). Some states, however, do better under state laws. In *Moore v. Green*, Docket No. 100029 (2006), a case filed by the estate of Ronyale White, whose ex-husband killed her after the Chicago Police Department failed to enforce a protective order against him, the state's highest court held that under the Illinois Domestic Violence Act, which imposes civil liability on police who wantonly and willfully fail to enforce protective orders, law enforcement officers who fail to meet their obligations to protect can be held responsible.

689 *Id.*

690 In this case, the Court's decision also distorts state legislatures' intent in requiring enforcement of protective orders and ignores the dynamics of police non – responsiveness to domestic violence that led to these laws. It displays blindness to the realities of domestic violence and the legal structures created to respond to it. In an effort to seek redress for this systemic failure of the police and other governmental actors to respond to domestic violence victims, and to raise awareness of this problem, the ACLU filed a petition with the Inter-American Commission on Human Rights in December 2005. In a Report transmitted to the parties in October 2007, the Commission found the petition admissible under its Rules of Procedure, and will now proceed to a hearing on the merits.

691 Buckhannon Board and Care Home, Inc. v. W. Va. Dep't of Health and Human Resources, 532 U.S. (2001).

692 This is because, among other things, the case places considerable power in defendants' hands. Assume a plaintiff is pursuing only or mainly equitable remedies — trying to get a defendant to stop or start doing something going forward. In that event, the defendant can frequently moot the lawsuit by voluntarily doing what the plaintiff wants, and thereby deprive the lawyers who brought the suit of any payment at all. See William J. Hunter, *Buckhannon Board & Home Care Inc. v. West Virginia Department of Health & Human Resources: A Catalyst for Controversy? The Supreme Court's Decision Limiting Attorney's Fees in Civil Rights Cases*, 56 ARK. L. REV. 185 (2003) (considered the limited success of plaintiffs in civil rights actions in 2001 in conjunction with the Buckhannon opinion, and concluded that many attorneys are not likely to take civil rights actions for fear that attorney's fees will not be recovered since many plaintiffs will not likely prevail under such claims.) More recently, the Supreme Court addressed the circumstances, if any, in which statutory attorney's fees may be awarded to a plaintiff who secures a preliminary injunction. *Sole v. Wyner*, 127 S. Ct 2188 (June 4, 2007). In *Sole*, the Justice Department argued that fees can never be awarded for a preliminary injunction that does not lead to a final decision on the merits in a plaintiff's favor. The Court's decision reversed the attorneys' fee award on the facts, but essentially left the law unchanged, holding that plaintiffs are not entitled to attorneys' fees based on a preliminary injunction that is "reversed, dissolved, or otherwise undone by the final decision on the merits in the same case," expressing no view on whether success at the preliminary injunction stage "may sometimes warrant" a fee award if there is no final decision on the merits.

693 Specifically, the PLRA amended the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997a et seq., to include a provision stating that "no federal civil action may be brought by prisoners confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. §1997e(E).

694 CERD, Gen. Rec. No. 5, 15<sup>th</sup> Sess., U.N. Doc. A/32/18 (1977), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/66c0a515999a813dc12563ee003dee3e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/66c0a515999a813dc12563ee003dee3e?Opendocument).

695 CERD, U.S. Report, ¶¶ 291-92, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).

696 *Id.*

697 *Id.* at ¶295.

698 AMNESTY INTERNATIONAL, THREAT AND HUMILIATION: RACIAL PROFILING, NATIONAL SECURITY, AND HUMAN RIGHTS IN THE UNITED STATES XII & 28-29 (2004), available at [http://www.amnestyusa.org/racial\\_profiling/report/rp\\_report.pdf](http://www.amnestyusa.org/racial_profiling/report/rp_report.pdf).

699 *Id.* at 30-31.

700 *Id.*

701 CERD, U.S. Report, ¶¶ 180-198, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).

702 *Id.* at ¶ 181.

703 William Rubenstein, *The Real Story of U.S. Hate Crime Statistics: An Empirical Analysis*, 78 TUL. L. REV. 1213, 1235-38 (2004), available at <http://www.law.ucla.edu/williamsinstitute/publications/HateCrimes.pdf>.

704 COUNCIL ON AMERICAN-INDIAN RELATIONS, THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES 2002: STEREOTYPES AND CIVIL LIBERTIES (2002), available at <http://www.cair.com/civil-rights/civilrightsreports/2002report.aspx>.

705 William Rubenstein, *The Real Story of U.S. Hate Crime Statistics: An Empirical Analysis*, 78 TUL. L. REV. 1213, 1235-38 (2004), available at <http://www.law.ucla.edu/williamsinstitute/publications/HateCrimes.pdf>.

<sup>706</sup> Muslim Public Affairs Council, *Hate Crime Prevention: Statistics, What You Need to Know*, <http://www.mpac.org/hate-crime-prevention/statistics/> (last visited November 19, 2007).

<sup>707</sup> Carol Rosenberg, *Terror Suspects' Beards are Safe Now*, MIAMI HERALD, Nov. 5, 2007, at <http://www.miami-herald.com/news/world/story/295969.html>.

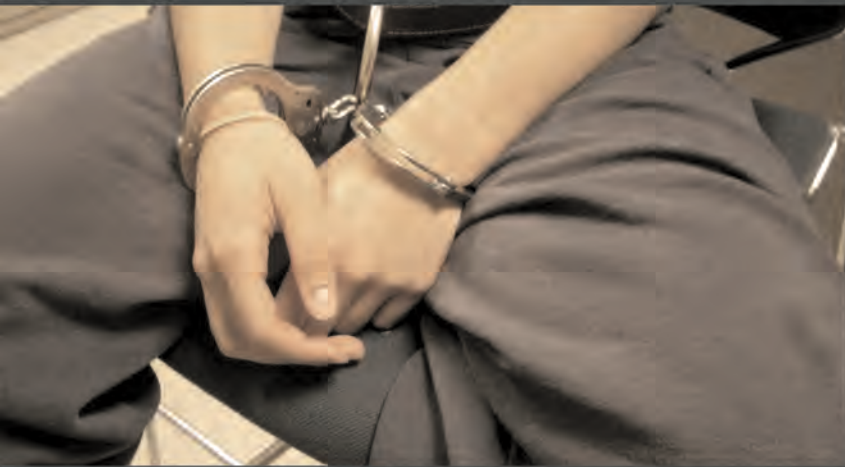
<sup>708</sup> CERD, U.S. Report, ¶¶ 48-51, U.N. Doc. CERD/C/USA/6 (May 1, 2007) available at [http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd\\_c\\_usa6.doc](http://www.ohchr.org/english/bodies/cerd/docs/AdvanceVersion/cerd_c_usa6.doc).

<sup>709</sup> *Id.* at ¶¶ 293.



Despite the United States' obligation to comply with the human rights standards and protections embodied in the International Convention on the Elimination of all Forms of Racial Discrimination, individual and institutional racial and ethnic discrimination continues to pervade American society.

Policies and practices at the federal, state, and local levels place a disproportionate burden on those most vulnerable in society — racial and ethnic minorities, immigrants and non-citizens, low-wage workers, women, children, and the accused. Affirmative action is under attack, and courts have sharply curtailed rights of, and remedies for, discrimination. As a result, discrimination permeates education, employment, the treatment of migrants and immigrants, law enforcement, access to justice for juveniles and adults, court proceedings, detention and incarceration, the death penalty, and the many collateral consequences of incarceration including the loss of political rights.



*Race & Ethnicity in America* closely examines the operation of these policies and practices in both their design and effect. It further details the ACLU and other organizations' use of litigation, legislative advocacy, and public education, to expose the grave and persistent disparities in society — acutely revealed in the context of national emergencies such as Hurricane Katrina and 9/11— and their impact on minority communities in the U.S.

Over a century ago, W.E.B. DuBois wrote that “the problem of the 20th century is the problem of the color line.” The report concludes that this line persists into the 21st century.