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**United States' Compliance with the  
International Convention on the Elimination of All Forms of Racial Discrimination**

**American Civil Liberties Union  
Shadow Report to the 7<sup>th</sup>-9<sup>th</sup> Periodic Reports of the United States**

**85<sup>th</sup> Session of the Committee on the Elimination of Racial Discrimination, Geneva  
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## Introduction

On August 13 and 14, 2014, the UN Committee on the Elimination of Racial Discrimination (“CERD Committee”) will examine the U.S. periodic report on compliance with the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”), a key global human rights treaty which the United States ratified in 1994. At the review in Geneva, Switzerland, a high level U.S. government delegation will officially present the June 2013 U.S. government report and answer questions on progress made and challenges remaining towards implementation of the treaty. Following this examination, the Committee will issue a report on its findings, identifying major areas of concern and incorporating recommendations on how the U.S. government should better implement the treaty.

Since the time that the United States underwent its last review by the Committee in 2008, the U.S. record has shown improvement in certain areas, most notably in the enforcement of civil rights by the Civil Rights Division of the U.S. Department of Justice, the Department of Labor, and the Equal Employment Opportunity Commission. In addition to litigation and enforcement, the Obama Administration has also taken notable executive actions in furtherance of racial justice issues, as the ACLU has described in other settings. However, in many areas, as the ACLU report demonstrates, there remains great need for improvement. While the U.S. report acknowledges that racial discrimination still persists in the U.S., it fails to provide a full picture of the state of discrimination and inequality. In addition, it glosses over how certain federal policies such as the Department of Justice Guidance on the Use of Race, which allows continued racial profiling, as well as state and local involvement in immigration enforcement, have exacerbated racial and ethnic discrimination.

Moreover, the U.S. government’s report doesn't address the pressing need for a national plan of action to end all forms of racial discrimination, which many other countries have already created and which is urgently required to bring the United States into full compliance with its ICERD obligations. The CERD Committee has called on the United States to implement a “[national strategy or plan of action](#),” which makes its omission from the U.S. government report even more glaring.

This ACLU submission and the reports of other civil society organizations aim to address these shortcomings by providing the CERD Committee with a more complete picture of U.S. implementation of the ICERD at the federal, state and local levels. The ACLU report highlights pervasive and institutionalized discrimination in the United States and addresses several issues including:

- Racial Profiling
- Racial Disparities in Sentencing

- Racial Discrimination in the United States Capital Punishment System
- The Right to Vote
- Discriminatory Treatment of Guestworkers and Undocumented Workers
- Predatory Lending and the Foreclosure Crisis
- Lack of Due Process in American Indian Child Custody Proceedings in South Dakota

In a Presidential Proclamation commemorating Human Rights Day and Human Rights Week in December 2013, President Obama called on all nations to “[break down prejudice, amplify the courageous voices that sound the call for change, and reaffirm our unwavering support for the principles enshrined in the Universal Declaration of Human Rights.](#)”

The upcoming ICERD review process presents the Obama Administration with an opportunity to put these words into action by fulfilling the United States’ commitments under the ICERD. The ACLU looks forward to engaging with the Committee and the U.S. government next month and is hopeful that the concerns and recommendations raised in this submission will be meaningfully addressed by the U.S. government during its appearance before the Committee.

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9 July, 2014

## Racial Profiling

### I. Issue Summary

Racial profiling in law enforcement is a persistent problem in the United States. Although top U.S. officials have condemned racial profiling, noting that it “can leave a lasting scar on communities and individuals” and is “bad policing,” federal policy fails to protect against it.<sup>1</sup> In particular, despite repeated calls by civil society, the U.S. Department of Justice has failed to issue a revision to its 2003 Guidance on the Use of Race by Federal Law Enforcement.<sup>2</sup> Although the U.S. government states that the purpose of the Guidance is to ban racial profiling, the current Guidance has the perverse effect of tacitly authorizing the profiling of almost every minority community in the United States.

The Guidance exempts from its ban on racial profiling practices that are related to “protecting the integrity of the Nation’s borders” and “investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security).” Furthermore, the Guidance does not ban profiling based on religion, national origin, or sexual orientation.

A stronger, fundamentally revised Guidance is necessary because racial and ethnic profiling persists at the federal, state, and local levels, as the ACLU has described in previous reports to the Committee.<sup>3</sup> Examples of profiling include:

- **Federal Bureau of Investigation (FBI) racial mapping:** Local FBI offices have collected demographic data to map where people with particular racial or ethnic makeup live, basing this data collection on crude stereotypes about the types of crimes different racial and ethnic groups supposedly commit. This profiling is largely possible due to an exemption in the Guidance for investigating or preventing threats to “national security.”
- **Transportation Security Administration (TSA) profiling:** The TSA has conducted passenger screening based on techniques that constitute racial and ethnic profiling. The Screening Passengers by Observation program, which began in 2007, deploys behavior detection officers to U.S. airports to look for preselected facial expressions, body language, and certain appearances deemed suspicious. Behavioral detection officers recently came to the ACLU to report that colleagues at Boston’s Logan Airport were racially profiling airline passengers in an effort to boost arrests for drug and immigration violations. TSA officers were also previously caught profiling at airports in Newark, New Jersey and Honolulu, Hawaii.<sup>4</sup>

- **Border enforcement:** In the past decade, the federal government has made unprecedented financial investments in border enforcement without creating corresponding oversight mechanisms, leading to an increase in serious human and civil rights violations, including the racial profiling and harassment of Native Americans, Latinos, and other people of color.<sup>5</sup> The ACLU has documented numerous cases of profiling at ports of entry, the use of internal checkpoints, and the spread of Border Patrol roving patrols. The federal government asserts near limitless authority to conduct suspicionless investigative stops and searches within a “reasonable distance” from the border; outdated federal regulations define this distance as 100 air miles from any external U.S. boundary.<sup>6</sup> This area includes roughly two-thirds of the U.S. population, several entire states, and nine of the country’s ten largest metropolitan areas.<sup>7</sup> Federal agents also overuse and exceed their statutory authority to enter private property without a warrant within 25 miles of any border (except dwellings).<sup>8</sup>
  
- **Immigration Enforcement:** “Secure Communities” and “Section 287(g) Agreements” are programs that have led to extensive racial profiling by local police.
  - Section 287(g) of federal immigration law allows state and local law enforcement agencies to enter into an agreement with the federal Immigration and Customs Enforcement to enforce immigration law within their jurisdictions. In effect, it turns state and local law enforcement officers into immigration agents, many of whom are not adequately trained, and some of whom improperly rely on race or ethnicity as a proxy for status as an undocumented immigrant. The predictable result is that any person who looks or sounds “foreign” is more likely<sup>9</sup> to be stopped by police and more likely to be arrested (rather than warned, cited, or simply let go) when stopped.<sup>10</sup>
  
  - Secure Communities is a program under which everyone arrested and booked into a local jail has their fingerprints checked against Immigration and Customs Enforcement’s immigration database. Under this program, some police engage in unjustified stops and arrests for low-level offenses in order to put people through the screening process, actions for which the federal government has failed to develop sufficient oversight mechanisms.<sup>11</sup> Secure Communities has been shown to foster racial profiling, undermine community policing, and harm public safety.<sup>12</sup>
  
  - When an individual is identified through these programs, DHS can issue an immigration detainer (or “hold”) requesting that state or local police hold the individual for up to 48 hours (not including weekends) after the person is eligible to be released from state custody, so that the government can decide whether to

take him or her into federal custody. The number of detainers has soared in recent years, with more than 270,000 issued in 2012 alone. This compares to about 80,000 in 2008, prior to the rollout of Secure Communities.<sup>13</sup> Determinations to issue detainers are made with limited verification of information and no supervisory approval at DHS headquarters. Indeed, deputized state and local police under the 287(g) program issue detainers on their own. Detainers request detention without a constitutionally required judicial determination of probable cause. As a result, state and local authorities may improperly detain people who are misidentified or profiled through these programs—including U.S. citizens—or people who are not immigration enforcement priorities and may be eligible for immigration relief. In addition, in some cases, jurisdictions have held individuals for longer than 48 hours, including a case in New Orleans, Louisiana, in which local police held an immigrant on a detainer in excess of 160 days.<sup>14</sup> In response to the negative impacts on local communities, jurisdictions in several states have passed laws or policies that limit compliance with U.S. Immigration and Customs Enforcement detainers in some fashion.

As can be seen, the result of these broad exemptions and omissions is that the Guidance sanctions profiling against almost every minority community in the United States. Allowing profiling in “border integrity” investigations disproportionately impacts Latino communities and communities living and working within the 100-mile zone; profiling in national security investigations has led to the inappropriate targeting of Muslims, Sikhs, and people of Arab, Middle Eastern, and South Asian descent. In fact, U.S. Border Patrol recently settled a lawsuit brought by the ACLU of Washington and allied organizations, which challenged Border Patrol’s practice of routinely stopping vehicles on Washington’s Olympic Peninsula and interrogating occupants about their immigration status based solely on the occupants’ racial and ethnic appearance.<sup>15</sup> Moreover, given the diversity of the American Muslim population, the failure to ban religious profiling specifically threatens African-Americans as well, who comprise from one-quarter to one-third of American Muslims.<sup>16</sup>

Moreover, while the U.S. government reported to the Committee that the Guidance is “binding on all federal law enforcement officers,” the Guidance’s ban on profiling is not enforceable.<sup>17</sup> The Guidance states that it is “intended only to improve the internal management of the executive branch” and blocks accountability by stating that it “does not create any right of review in an administrative, judicial or any other proceeding.”<sup>18</sup>

## II. Human Stories

**Ernest Grimes** is a resident of Neah Bay, Washington, a correctional officer at Clallam Bay Corrections Center, and a part-time police officer. In 2011 near Clallam Bay, a Border Patrol agent stopped the vehicle in which Mr. Grimes was traveling, approached with his hand on his weapon, and yelled at Mr. Grimes to roll down his window. Without offering a reason for the stop, the agent interrogated Mr. Grimes about his immigration status. Mr. Grimes, who is African-American, was wearing his correctional officer uniform at the time.<sup>19</sup>



**Hamid Hassan Raza** is an American citizen living with his wife and child in Brooklyn, New York. He serves as imam at Masjid Al-Ansar, a Brooklyn mosque, where he leads prayer services, conducts religious education classes, and provides counseling to members of the community. The New York City Police Department has subjected Imam Raza to suspicionless surveillance since at least 2008, and, as a result, he has had to take a range of measures to protect himself. For example, he records his sermons out of fear that an officer or informant will

misquote him, or take a statement out of context. He also steers clear of certain religious topics or current events in his sermons and conversations, so as to avoid statements that the NYPD or its informants might perceive as controversial. Imam Raza's knowledge and fear of suspicionless police scrutiny have diverted his time and attention from ministry and counseling while chilling his ability to speak on topics of religious and community importance. The NYPD's unlawful surveillance prevents Imam Raza from fulfilling his duty as a religious minister, educator, and scholar in the Masjid Al-Ansar community.<sup>20</sup>

## III. CERD Committee Position

In its 2008 Concluding Observations, the Committee urged the United States to “strengthen efforts to combat racial profiling at the federal and state levels.”<sup>21</sup> It expressed concern about racial profiling based on national security grounds and profiling aimed at Arabs, Muslims, and South Asians, noting General Recommendation 30's emphasis that “measures taken in the fight against terrorism must not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin.”<sup>22</sup>

## IV. U.S. Government Response

In its recent submissions to the CERD Committee and other UN treaty bodies, the U.S. has repeatedly condemned racial profiling as ineffective and inconsistent with its “commitment to fairness in our justice system.”<sup>23</sup> In its June 2013 report to ICERD, it specifically noted the Justice Department's review of the 2003 Guidance.<sup>24</sup> Indeed, more than four years ago, at a November 2009 U.S. Senate hearing, Attorney General Eric Holder announced that he had initiated an internal review of the 2003 Guidance. Unfortunately, the Attorney General has still not announced the results of its review, let alone issued a revision.



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

In its 2014 Concluding Observations on the United States, the UN Human Rights Committee urged the U.S. to review the 2003 Guidance and to expand the “protection against profiling on the basis of religion, religious appearance, and national origin.”<sup>25</sup> It generally called on the U.S. to “step up measures to effectively combat and eliminate” various forms of racial profiling, noting specifically the targeting of ethnic minorities and surveillance of Muslims—in the absence of any wrongdoing—by the FBI and New York Police Department.<sup>26</sup>

Through the 2010 Universal Periodic Review process, several member states of the Human Rights Council recommended that the United States address racial profiling in the immigration and national security contexts, in particular.<sup>27</sup> The U.S. government supported some of these recommendations in part, noting that the U.S. has comprehensive federal and state legislation and strategies to combat racial discrimination.<sup>28</sup> During the review’s interactive dialogue, the U.S. delegation addressed the issue more specifically: it recognized the problems of racial and ethnic profiling in the context of immigration enforcement and pledged to significantly strengthen protections and trainings against it;<sup>29</sup> it also pledged to take “concrete measures to make border and aviation security measures more effective and targeted to eliminate profiling based on race, religion or ethnicity.”<sup>30</sup>

In 2010, following a site visit to the United States, Inter-American Commission on Human Rights experts issued a report finding that Immigration and Customs Enforcement failed to develop oversight and accountability systems necessary to ensure that local partners did not resort to racial profiling.<sup>31</sup> It specifically cited the Secure Communities program and 287(g) agreements as “open[ing] up the possibility of racial profiling.”<sup>32</sup>

In 2009, the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related issues called for the collection and publication of data on “police stops and searches as well as instances of police abuse,” coupled with the establishment of intra-agency police oversight bodies that have sufficient authority to “investigate complaints of human rights violations in general and racism in particular.”<sup>33</sup>

## **VI. Recommended Questions**

1. What steps has the U.S. taken to make good on its commitments, expressed most recently during the Universal Periodic Review process, to significantly strengthen protections against racial and ethnic profiling in the context of immigration and border enforcement? How can these efforts be reconciled with the U.S. government’s broad claims of authority to conduct warrantless searches in the 100-mile zone of U.S. borders?

2. Will the U.S. commit to: making the Department of Justice's Guidance Regarding the Use of Race enforceable and revising it to: (a) prohibit profiling based on religion or national origin; (b) explicitly extend its application to border enforcement, immigration enforcement, and national security operations; and (c) apply the Guidance to state and local law enforcement agencies that work in partnership with the federal government or receive federal funds?
3. In the U.S. government's view, how can the failure to prohibit profiling in the context of national security, immigration, and border enforcement be consonant with the object and purpose of the Convention—that is, to eliminate racial discrimination in all its forms?

## **VII. Suggested Recommendations**

1. Revise the Department of Justice's Guidance Regarding the Use of Race to: (1) prohibit profiling based on religion or national origin; (2) end exceptions for border integrity and national security; (3) apply the Guidance to state and local law enforcement who work in partnership with the federal government or receive federal funding; (4) explicitly state that the ban on racial profiling applies to data collection, intelligence activities, assessments and predicated investigations; and (5) make the Guidance enforceable. Revise the Department of Homeland Security's April 2013 memorandum to component heads regarding its commitment to non-discriminatory law enforcement and screening activities, which incorporates the Justice Department's Guidance by reference, accordingly.
2. Declassify and release the full current version of the FBI Domestic Intelligence and Operations Guide (DIOG) and require the FBI to amend it to incorporate prohibitions on the use of race and ethnicity in law enforcement investigations and the amendments to the Justice Department Guidance requested above.
3. End the 287(g) program, including all jail partnerships and task force agreements. End the Secure Communities program. Collect and make public data regarding the race, national origin, and religion of individuals stopped, apprehended, or detained pursuant to the 287(g) and Secure Communities programs. Halt the government's use of immigration detainers in their current form; do not issue detainers except upon a judicial finding of probable cause; and restrict detainers to individuals convicted of a serious crime.

4. Extend the settlement in the case of *Jose Sanchez et al. v. U.S. Border Patrol et al.* nationwide, applying its Fourth Amendment training and data collection provisions to all checkpoints and roving patrols.<sup>34</sup>
5. Support the passage of the End Racial Profiling Act (ERPA).

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1 See Eric Holder, Att’y Gen., Speech at the American-Arab Anti-Discrimination Committee's 30th Anniversary National Convention, <http://www.justice.gov/ag/speeches/2010/ag-speech-100604.html> (June 5, 2010).

2 Civ. Rights Div., Dep’t of Justice, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* (June 2003), available at [http://www.justice.gov/crt/about/spl/documents/guidance\\_on\\_race.pdf](http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf).

3 ACLU & Rights Working Group, *The Persistence of Racial and Ethnic Profiling in the United States: A Follow-Up Report to the U.N. Committee on the Elimination of Racial Discrimination* (2009).

4 Carol Rose, *Racial Profiling at Logan Airport Undermines Security and Freedom*, ACLU Blog of Rights (Aug. 12, 2012, 6:10 PM), <https://www.aclu.org/blog/national-security-racial-justice/racial-profiling-logan-airport-undermines-security-and-freedom>.

5 See, e.g., Univ. of Ariz., Center for Latin Am. Studies, *In the Shadow of the Wall: Family Separation, Immigration Enforcement and Security* (2013), available at <http://bit.ly/1n0QRRt>; Human Rights Watch, *Turning Migrants into Criminals: The Harmful Impact of U.S. Border Prosecutions* (2013), available at <http://bit.ly/1pBRUZL>; No More Deaths, *A Culture of Cruelty: Abuse and Impunity in Short-Term U.S. Border Patrol Custody* (2011), available at <http://bit.ly/1o42IjI>; No More Deaths, *Crossing the Line: Human Rights Abuses of Migrants in Short-Term Custody on the Arizona/Sonora Border* (2008), available at <http://bit.ly/1o42N6S>.

6 See 8 C.F.R. § 287.1(b).

7 States that lie entirely or almost entirely within this area include Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. Nine of the ten largest metropolitan areas, as determined by the 2010 U.S. Census, also fall within this zone: New York City, Los Angeles, Chicago, Houston, Philadelphia, Phoenix, San Antonio, San Diego, and San Jose. See <http://1.usa.gov/1qF0Wsx>; see also <http://bit.ly/1fZZQ0h>.

8 See 8 C.F.R. § 287.1(b); see also, e.g., Todd Miller, *War on the Border*, NY Times, Aug. 18, 2013, available at <http://nyti.ms/1bjgk7R>.

9 In Tennessee, a study of arrest data found that the arrest rates in Davidson County for Latino defendants driving without a license more than doubled after the implementation of the 287(g) program in that county. See Tenn. Immigrant and Refugee Rights Coal., *Arrests for No Drivers License by Ethnicity and Race: A Comparison of May-July 2006 to May-July 2007* 1 (July 31, 2007), available at [http://www.tnimmigrant.org/storage/misc/Arrests\\_for\\_NDL\\_by\\_Race\\_and\\_Ethnicity%206-2008.pdf](http://www.tnimmigrant.org/storage/misc/Arrests_for_NDL_by_Race_and_Ethnicity%206-2008.pdf); Tenn. Immigrant and Refugee Rights Coal., *Citations/Warrants for No Drivers License by Ethnicity and Race: Comparing the Year Prior to 287(g) and the Year Following 287(g)* 1 (May 7, 2008), available at [http://www.tnimmigrant.org/storage/misc/No\\_Drivers\\_License\\_1\\_year\\_overview%206-2008.pdf](http://www.tnimmigrant.org/storage/misc/No_Drivers_License_1_year_overview%206-2008.pdf). In Alabama, 58 percent of motorists stopped by a 287(g) police officer were Latino, although Latinos make up less than two percent of the population. See David C. Volk, *Police Join Feds to Tackle Immigration*, Stateline.org, Nov. 27, 2007, available at <http://www.pewstates.org/projects/stateline/headlines/police-join-feds-to-tackle-immigration-85899386665>.

10 See ACLU, *Joint Hearing on The Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws Before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law & the Subcommittee on the Constitution, Civil Rights, and Civil Liberties U.S.H.R.*, 111th Cong. (2009) [hereinafter ACLU Written Statement], available at <http://www.aclu.org/immigrants/gen/39242leg20090401.html>.

11 Letter from ACLU to Charles K. Edwards, Acting Inspector Gen. on Secure Cmities. 7 (Jun. 20, 2011), available at [http://www.aclu.org/files/assets/letter\\_to\\_dhs\\_oig\\_re\\_scomm\\_audit.pdf](http://www.aclu.org/files/assets/letter_to_dhs_oig_re_scomm_audit.pdf).

12 Nik Theodore, Dep’t of Urban Planning & Policy, Univ. of Ill. at Chi., *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* (2013); Aarti Kohli, Peter L. Markowitz, & Lisa Chavez, Univ. of Cal., Berkeley Sch. of Law, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process* (2011).

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13 National Immigrant Justice Center Data, *available at* <https://immigrantjustice.org/ICEdetainerdata#UzrTZvRDsIK>; TRAC Immigration, Number of Immigration Detainers Drops by 19% (January 2013), *available at* <http://trac.syr.edu/immigration/reports/325/>.

14 See Pl. Compl., *Cacho & Ocampo v. Gusman* (filed Feb. 2, 2011), *available at* <http://nowcrj.guestworkeralliance.org/wp-content/uploads/2011/02/Complaint-Cacho-V.-Gusman.pdf>.

15 Press Release, ACLU, *Settlement Reins in Border Patrol Stops on the Olympic Peninsula* (Sept. 24, 2013), *available at* <https://aclu-wa.org/news/settlement-reins-border-patrol-stops-olympic-peninsula>.

16 U.S. Embassy of the United States in Iraq, *Muslims in America – A Statistical Portrait* (last accessed June 23, 2014), <http://iraq.usembassy.gov/resources/information/current/american/statistical.html>.

17 U.S. Dep’t of State, *U.S. Response to Specific Recommendations Identified by the Committee on the Elimination of Racial Discrimination* 4 (Jan. 13, 2009) [hereinafter U.S. Response], *available at* [http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.USA.CO\\_Followup.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.USA.CO_Followup.pdf); U.S. Dep’t of State, *Committee on the Elimination of Racial Discrimination (CERD) Report* at ¶ 86, 111, 112 (Apr. 23, 2007), U.N. Doc. CERD/C/USA/6, *available at* [http://www.state.gov/g/drl/rls/cerd\\_report/83404.htm](http://www.state.gov/g/drl/rls/cerd_report/83404.htm).

18 Civil Rights Div., U.S. Dep’t of Justice, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* n.2 (2003), *available at* [http://www.usdoj.gov/crt/split/documents/guidance\\_on\\_race.php](http://www.usdoj.gov/crt/split/documents/guidance_on_race.php).

19 Anthony Romero, *Written Statement Submitted to the Senate Committee on the Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights Hearing on “Ending Racial Profiling in America,”* (Apr. 17, 2012), *available at* [https://www.aclu.org/files/assets/senate\\_hearing\\_ending\\_racial\\_profiling\\_in\\_america\\_written\\_statement\\_romero.pdf](https://www.aclu.org/files/assets/senate_hearing_ending_racial_profiling_in_america_written_statement_romero.pdf).

20 ACLU, *Raza v. City of New York – Legal Challenge to NYPD Muslim Surveillance Program* (last accessed June 27, 2014), <https://www.aclu.org/national-security/raza-v-city-new-york-legal-challenge-nypd-muslim-surveillance-program>.

21 Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, United States of America* ¶ 14 (2008), U.N. Doc. CERD/C/USA/CO/6.

22 Comm. on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination against Non-Citizens* (2004), U.N. Doc. CERD/C/64/Misc.11/rev.3.

23 *Committee on the Elimination of Racial Discrimination (CERD) Report* at ¶ 80; *see also* U.S. Dep’t of State, *United States Response to Specific Recommendations Identified by the Committee on Elimination of Racial Discrimination* (January 13, 2009), *available at* <http://2001-2009.state.gov/documents/organization/113905.pdf> ; U.S. Dep’t of State, *Second Periodic Report of the United States to the Committee on Torture* ¶ 247 (Oct. 21, 2005) (“The United States is continuing and intensifying its efforts to end racial profiling”).

24 *Committee on the Elimination of Racial Discrimination (CERD) Report* at ¶28.

25 U.N. Human Rights Comm., *Concluding Observations on the Fourth Periodic Report of the United States of America* ¶7 (Apr. 23, 2014), U.N. Doc. CCPR/C/USA/CO/4, *available at* <http://www.refworld.org/docid/5374afcd4.html>.

26 *Id.*

27 U.N. Human Rights Comm., *Report of the Working Group on the Universal Periodic Review* ¶24 (Malaysia), 92.64 (Egypt), 92.68 (Democratic People’s Republic of Korea), 92.79 (Guatemala), 92.101 (Bolivia, Mexico), 92.102 (Sudan), 92.108 (Mexico), 92.219 (Qatar) (Jan. 4, 2011), UN Doc. No. A/HRC/16/11, *available at* <http://www.state.gov/documents/organization/158198.pdf>

28 U.S. Dep’t of State, *Response to UN Human Rights Council Working Group Report* ¶¶ 5-6 (Mar. 10, 2011), *available at* <http://www.state.gov/j/drl/upr/157986.htm>.

29 U.N. Human Rights Comm., *Report of the Working Group on the Universal Periodic Review* ¶74 (United States of America) (Jan. 4, 2011), U.N. Doc. No. A/HRC/16/11.

30 *Id.* at ¶85.

31 Inter-Am. Comm’n on Human Rights, *Report on Immigration in the United States: Detention and Due Process* ¶18 (Dec. 30, 2010), OEA/Ser.L/V/II Doc. 78/10, *available at* <http://cidh.org/pdf%20files/ReportOnImmigrationInTheUnited%20States-DetentionAndDueProcess.pdf>.

32 *Id.* at ¶190.

33 U.N. Human Rights Council, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance* ¶102 (Apr. 28, 2009), U.N. Doc. A/HRC/11/36/Add.3, *available at* <http://www.refworld.org/docid/4a093b1e2.html>.

34 *Sanchez et al. v. United States Office of Border Patrol et al.*, No. 3:10-cv-05378 (W.D. Wash. filed Apr. 26, 2012).

## Racial Disparities in Sentencing

### I. Issue Summary

There are significant racial disparities in sentencing decisions in the United States.<sup>1</sup> Sentences imposed on Black males in the federal system are nearly 20 percent longer than those imposed on White males convicted of similar crimes.<sup>2</sup> Black and Latino offenders sentenced in state and federal courts face significantly greater odds of incarceration than similarly situated White offenders and receive longer sentences than their White counterparts in some jurisdictions.<sup>3</sup> Black male federal defendants receive longer sentences than Whites arrested for the same offenses and with comparable criminal histories.<sup>4</sup> Research has also shown that race plays a significant role in the determination of which homicide cases result in death sentences.<sup>5</sup>

The racial disparities increase with the severity of the sentence imposed. The level of disproportionate representation of Blacks among prisoners who are serving life sentences without the possibility of parole (LWOP) is higher than that among parole-eligible prisoners serving life sentences. The disparity is even higher for juvenile offenders sentenced to LWOP, and higher still among prisoners sentenced to LWOP for nonviolent offenses. Although Blacks constitute only about 13 percent of the U.S. population, as of 2009, Blacks constitute 28.3 percent of all lifers, 56.4 percent of those serving LWOP, and 56.1 percent of those who received LWOP for offenses committed as a juvenile.<sup>6</sup> As of 2012, the ACLU's research shows that 65.4 percent of prisoners serving LWOP for nonviolent offenses are Black.<sup>7</sup>

The racial disparities are even worse in some states. In 13 states and the federal system, the percentage of Blacks serving life sentences is over 60 percent.<sup>8</sup> In Georgia and Louisiana, the proportion of Blacks serving LWOP sentences is as high as 73.9 and 73.3 percent, respectively.<sup>9</sup> In the federal system, 71.3 percent of the 1,230 LWOP prisoners are Black.<sup>10</sup>

These racial disparities result from disparate treatment of Blacks at every stage of the criminal justice system, including stops and searches, arrests, prosecutions and plea negotiations, trials, and sentencing.<sup>11</sup> Race matters at all phases and aspects of the criminal process, including the quality of representation, the charging phase, and the availability of plea agreements, each of which impact whether juvenile and adult defendants face a potential LWOP sentence. In addition, racial disparities in sentencing can result from theoretically "race neutral" sentencing policies that have significant disparate racial effects, particularly in the cases of habitual offender laws and many drug policies, including mandatory minimums, school zone drug enhancements, and federal policies adopted by Congress in 1986 and 1996 that at the time established a 100-to-1 sentencing disparity between crack and powder cocaine offenses.<sup>12</sup>

Racial disparities in sentencing also result in part from prosecutors' decisions at the initial charging stage, suggesting that racial bias affects the exercise of prosecutorial discretion

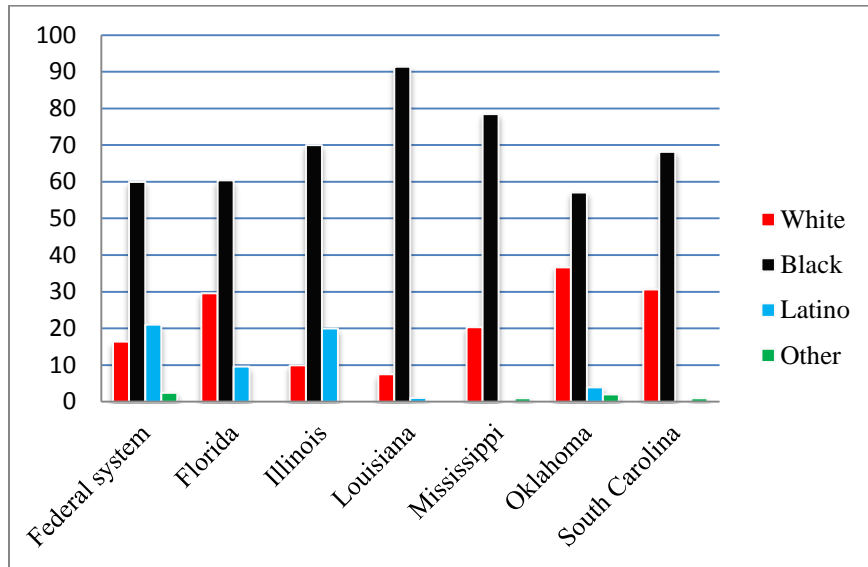
with respect to certain crimes. One study found that Black defendants face significantly more severe charges than Whites, even after controlling for characteristics of the offense, criminal history, defense counsel type, age and education of the offender, and crime rates and economic characteristics of the jurisdiction.<sup>13</sup>

Available data also suggests that there are racial disparities in prosecutors' exercise of discretion in seeking sentencing enhancements under three-strikes and other habitual offender laws.<sup>14</sup> For instance, a 1995 legal challenge revealed the racially biased role of prosecutorial discretion in the application of Georgia's two-strikes law, under which 98.4 percent of prisoners serving life sentences were Black.<sup>15</sup> Georgia prosecutors, who have discretion to decide whether to charge offenders under the state's two-strikes sentencing scheme, which imposes life imprisonment for a second drug offense, invoked the law against only 1 percent of White defendants facing a second drug conviction and 16 percent of Black defendants.<sup>16</sup> In California, studies similarly show that Blacks are sentenced under the state's three-strikes law at far higher rates than their White counterparts.<sup>17</sup> Scholars have also noted that federal § 851 sentencing enhancements, which at a minimum double a federal drug defendant's mandatory minimum sentence and may raise the maximum sentence from 40 years to life without parole if the defendant has two prior qualifying drug convictions in state or federal courts, are applied by federal prosecutors in an arbitrary and racially discriminatory manner and exacerbate racial disparities in the criminal justice system.<sup>18</sup> While the Department of Justice does not develop or publicize data on racial disparities in its prosecutors' application of this sentencing enhancement to eligible defendants, the U.S. Sentencing Commission (the Commission) reported in 2011 that "[b]lack offenders qualified for the [§ 851] enhancement at higher rates than any other racial group."<sup>19</sup>

### ***Racial Disparities in Life-without-Parole Sentencing for Nonviolent Offenses***

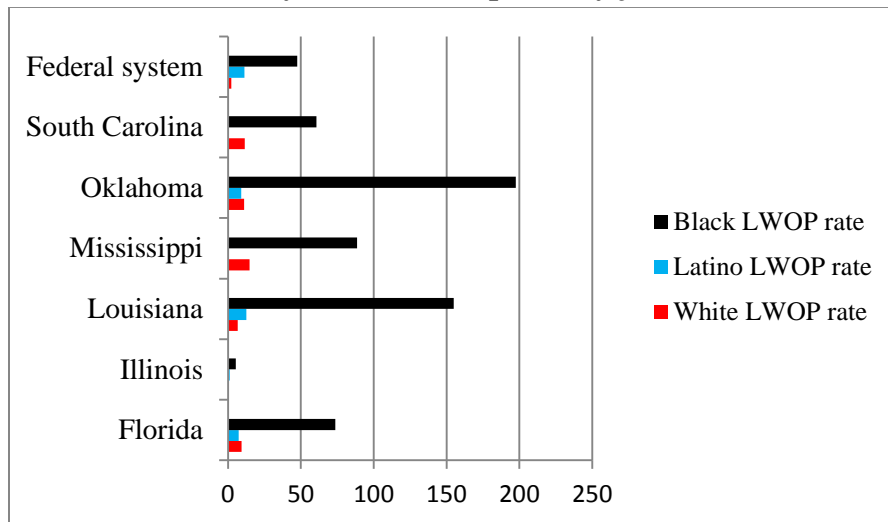
In general, studies have found that greater racial disparities exist in sentencing for nonviolent crimes, especially property crimes and drug offenses.<sup>20</sup> In particular, there are staggering racial disparities in life-without-parole sentencing for nonviolent offenses. Based on data provided to the ACLU by the Commission and state Departments of Corrections, the ACLU estimates that nationwide, 65.4 percent of prisoners serving LWOP for nonviolent offenses are Black, 17.8 percent are White, and 15.7 percent are Latino. According to data collected and analyzed by the ACLU, Black prisoners comprise 91.4 percent of the nonviolent LWOP prison population in Louisiana (the state with the largest number of prisoners serving LWOP for a nonviolent offense), 78.5 percent in Mississippi, 70 percent in Illinois, 68.2 percent in South Carolina, 60.4 percent in Florida, 57.1 percent in Oklahoma, and 60 percent in the federal system.

**Figure 1: Race of prisoners serving LWOP for nonviolent offenses, by jurisdiction<sup>21</sup>**



Blacks constitute a far greater percentage of the nonviolent LWOP population than of the census population as a whole. In the federal system, Blacks are 20 times more likely to be sentenced to LWOP for a nonviolent crime than Whites. In Louisiana, the ACLU found that Blacks were 23 times more likely than Whites to be sentenced to LWOP for a nonviolent crime. The racial disparities range from 33-to-1 in Illinois to 18-to-1 in Oklahoma, 8-to-1 in Florida, and 6-to-1 in Mississippi. Blacks are sentenced to life without parole for nonviolent offenses at rates that suggest unequal treatment and that cannot be explained by White and Black defendants' differential involvement in crime alone.<sup>22</sup>

**Figure 2: Rate of prisoners serving LWOP for nonviolent offenses per 1,000,000 residents, classified by race and compared by jurisdiction**



### ***Racial Disparities in Juvenile Life without Parole Sentencing***

There are stark racial disparities in the imposition of life without parole sentences for juvenile offenders in the United States. Nationally, about 77 percent of juvenile offenders serving LWOP are Black and Latino, while Black youth are serving these sentences at a rate ten times higher than White youth.<sup>23</sup> In California (the state with the highest number of prisoners serving LWOP for crimes committed as children), Black youth are serving the sentence at a rate that is 18 times higher than the rate for White youth, and Latino youth are sentenced to life without parole five times more than White youth.<sup>24</sup> In Michigan (the state with the second-highest number of such prisoners), while youth of color comprise only 29 percent of Michigan's children, they are 73 percent of the state's child offenders serving life without parole.<sup>25</sup> As of 2009, in 14 of the 37 states with people serving LWOP for crimes committed as juveniles, the proportion of African-Americans serving that sentence exceeded 65 percent.<sup>26</sup>

Recent research also shows that that the races of victims and offenders may be a factor in determining which juvenile offenders are sentenced to life without parole, as Black youth with a White victim are far more likely to be sentenced to life without parole than White youth with a Black victim. The percentage of Black juvenile offenders serving LWOP for the homicide of a White victim (43.4 percent) is nearly twice the rate at which Black juveniles are arrested for suspected homicide of a White person (23.2 percent).<sup>27</sup> In contrast, White juvenile offenders with Black victims are only about half as likely (3.6 percent) to be sentenced to LWOP for the homicide crime as their proportion of arrests for suspected homicide of a Black victim (6.4 percent).<sup>28</sup> These outcomes are the result of racial biases that affect who is arrested, who is detained, and who receives the harshest punishments.

### ***Racial Disparities in Crack and Powder Cocaine Sentencing***

Racial disparities are particularly pronounced in cocaine sentencing. As part of the Anti-Drug Abuse Act of 1986, Congress ignored empirical evidence and created a 100-to-1 disparity between the amounts of crack and powder cocaine required to trigger certain mandatory minimum sentences, even though they are simply two forms of the same drug, and the only difference between them is that crack includes the addition of baking soda and heat. As a result of Congress's perceived differences in the harmfulness and dangerousness between crack and powder cocaine, sentences for offenses involving crack cocaine were made much longer than those for offenses involving the same amount of powder cocaine. Thus, for example, someone convicted of an offense involving just five grams of crack cocaine was subject to the same five-year mandatory minimum federal prison sentence as someone convicted of an offense involving 500 grams of powder cocaine. The 100-to-1 ratio resulted in vast unwarranted racial disparities in the average length of sentences for comparable offenses because the majority of people arrested for crack offenses are Black. By 2004, under the 100-to-1 disparity, Blacks served virtually as much time in prison for a nonviolent drug offense (58.7 months) as Whites did for a



violent offense (61.7 months).<sup>29</sup> In 2010, 85 percent of the 30,000 people sentenced for crack cocaine offenses under the 100-to-1 regime were African-American.<sup>30</sup>

In the past five years, the United States Sentencing Commission has made two adjustments to the federal Sentencing Guidelines that reduced, though did not eliminate, the unfounded sentencing disparity between crack and powder cocaine offenses in the Guidelines. First, in 2007, the Sentencing Commission amended the Sentencing Guidelines by lowering the sentencing ranges for most crack cocaine offenses and applied the new guidelines retroactively. Then, in 2010, in long overdue recognition of the unfairness of the sentencing disparity, Congress passed the Fair Sentencing Act (FSA), which reduced the disparity between the amounts of crack and powder cocaine required to trigger certain mandatory minimum sentences from 100-to-1 to 18-to-1. In 2011, the Sentencing Commission amended the Sentencing Guidelines consistent with the FSA and then voted to apply the new guidelines retroactively to individuals sentenced before the FSA was enacted.<sup>31</sup> While the FSA was a step toward increased fairness, the 18-to-1 ratio continues to perpetuate the outdated and discredited assumptions about crack cocaine that gave rise to the unwarranted 100-to-1 disparity in the first place.

Unfortunately, despite Congress's and the Commission's determinations that the previous crack cocaine penalties under which thousands of defendants were sentenced were unfair, over 16,700 prisoners still serving sentences under the 100-to-1 regime—the vast majority of whom are Black—have been unable to benefit from these sentencing adjustments. Of these, over 8,800 are still serving extreme sentences for crack cocaine-related offenses because the FSA is not retroactive and about 7,900 are categorically ineligible for reduction of their sentences, many of which are LWOP.<sup>32</sup> In some cases, prisoners are ineligible because the sentences were controlled by statutory mandatory minimums determined by Congress prior to the passage of the FSA, and the FSA lowered the quantity of drugs that triggered the mandatory minimum but did not change the mandatory minimum sentences. In such cases, people cannot benefit from the retroactive Sentencing Guideline amendments because they remain subject to statutory mandatory minimums. For others, neither the FSA nor the Commission's adjustments resulted in a reduction of their sentencing ranges because the amounts of drugs for which they were held responsible or the enhancements applied to their sentences render review or reduction of their sentences impossible.<sup>33</sup>

### ***Persistent Racial Disparities in the Criminal Justice System***

Racial disparities in sentencing are consistent with a larger pattern of racial disparities that plague the U.S. criminal justice system from arrest through incarceration. There are stark racial disparities in police stops, frisks, and searches. For example, of the 4.4 million pedestrian stops made by the New York City Police Department from January 2004 through June 2012, 83 percent of the people stopped were Black or Latino and only ten percent were White.<sup>34</sup> Blacks and Latinos are arrested at disproportionate rates and are disproportionately represented in the

nationwide prison and jail population. For example, Blacks comprise 13 percent of the general population but represent 28 percent of total arrests and 38 percent of persons convicted of a felony in a state court and in state prison.<sup>35</sup> These racial disparities are particularly pronounced in arrests and incarceration for drug offenses. Despite similar rates of drug use, Blacks are incarcerated on drug charges at a rate ten times greater than Whites.<sup>36</sup> Blacks represent 12 percent of drug users, but 38 percent of those arrested for drug offenses, and 59 percent of those in state prison for drug offenses.<sup>37</sup> Although Blacks and Whites use marijuana at comparable rates, Blacks are 3.73 times more likely to be arrested for marijuana possession.<sup>38</sup> In some counties, Blacks are 10, 15, even 30 times more likely to be arrested.<sup>39</sup>

Similarly, the racial disparities in juvenile LWOP sentencing are symptomatic of racial disparities throughout the juvenile justice system. For U.S. children, the racial disparities grow with each step into the criminal justice system from arrest, to referral, to secure confinement. Black youth account for 16 percent of all youth, 28 percent of all juvenile arrests, 35 percent of the youth waived to adult criminal court, and 58 percent of youth admitted to state adult prison.<sup>40</sup> Black youth are twice as likely to be arrested as White youth. Among juveniles who are arrested, Black children are more likely to be referred to a juvenile court and more likely to be processed rather than diverted.<sup>41</sup> Among those juveniles adjudicated delinquent (i.e. found guilty), Black children are more likely to be sent to secure confinement and are more likely to be transferred to adult facilities.<sup>42</sup> Among youth who had never been incarcerated in a juvenile prison, Blacks are more than six times as likely as Whites to be sentenced to prison for identical crimes.<sup>43</sup> Black children are also more likely to be prosecuted as adults and incarcerated with adults: Black youth comprise 35 percent of youth judicially waived to adult criminal courts and 58 percent of youth sent to state adult prisons.<sup>44</sup>

## **II. Human Stories**

In some of the cases of prisoners serving LWOP for nonviolent offenses documented by the ACLU, there is anecdotal evidence of possible disparate treatment by law enforcement and justice authorities, such as apparently baseless traffic and pedestrian stops and searches that may be the results of racial profiling, targeted drug enforcement in predominantly Black communities, and prosecutors' successful use of peremptory strikes to systematically exclude Black potential jurors resulting in all-White juries in cases with Black defendants.

**Fate Vincent Winslow** is serving life without parole in the state of Louisiana for serving as a go-between in the sale of two small bags of marijuana, worth ten dollars in total, to an undercover police officer.<sup>45</sup> The undercover officer had approached Mr. Winslow and asked to buy two small bags of marijuana, promising to pay him a five-dollar commission. Mr. Winslow, who is Black and was homeless at the time, says he accepted the offer in order to earn some money to get something to eat.<sup>46</sup> Mr. Winslow bought two five-dollar bags of marijuana from a White seller in a hand-to-hand transaction witnessed by the undercover officer, then sold the marijuana to the officer. Mr. Winslow was arrested immediately, and the arresting officers found only the five-dollar bill on him. Police did not arrest the White seller, even though the officers found the marked bill used to make the controlled drug buy in his pocket and had witnessed him supplying the marijuana to Mr. Winslow.<sup>47</sup>

At trial, the ten White jurors found Mr. Winslow guilty of marijuana distribution, while the two Black jurors found him not guilty.<sup>48</sup> He was sentenced to mandatory life without parole under Louisiana's four-strikes law based on prior convictions for unarmed burglaries committed 14 and 24 years earlier (the first burglary he committed as a juvenile, and the second burglary conviction was for opening an unlocked car door and rummaging inside without taking anything)<sup>49</sup> and a nearly decade-old conviction for possession of cocaine when he was 37 (an undercover officer tried to sell him cocaine, which he says he did not purchase).

Mr. Winslow cannot afford an attorney and has prepared his unsuccessful post-conviction appeals, written in pencil, himself. He spends time in the law library daily, "try[ing] to learn how to get out" and prays "every day all day...just living day by day waiting to die in prison."<sup>50</sup>



**Sharanda Purlette Jones**, a mother with no prior criminal record, was sentenced to mandatory life without parole for conspiracy to distribute crack cocaine based almost entirely on the testimony of co-conspirators who received reduced sentences for their testimony and are now out of prison. Ms. Jones was arrested as part of a drug task force operation in Terrell, a majority-White town of approximately 13,500 people in Texas. All 105 people arrested as part of the conspiracy in the small town were Black. A couple living in the town had been arrested on drug charges and became confidential informants. While acting as government informants after their arrests, they asked Ms. Jones during a taped telephone call if she knew where they could buy drugs and Jones agreed to ask a friend where the couple might be able to buy drugs. Other than that taped phone call, there was no physical evidence, including no drugs or video surveillance, presented at trial to connect her to drug-dealing with her co-conspirators.

Ms. Jones has exhausted all of her appeals and has a petition for presidential clemency pending. If she had been convicted of the same amount of powder cocaine instead of crack cocaine, her mandatory minimum sentence would have been 30 years.<sup>51</sup> However, she is not eligible for a sentence reduction based on sentencing reforms that have reduced the disparity in federal sentencing between crack and powder cocaine.<sup>52</sup> Ms. Jones says of her sentence, "I will expire in the federal system. It is really a slow death."<sup>53</sup>

Ms. Jones has been incarcerated for more than 14 years and carefully apports her allotted 300 monthly minutes for non-legal calls to speak ten minutes each day with her 22-year-old daughter, Clenesha, who was only nine when her mother was imprisoned. "Being without my mother for over 14 years of my life has been extremely difficult," Clenesha says. "But the thought that she is set to spend the rest of her life in prison as a first-time nonviolent offender is absolutely devastating.... All I pray for every day is the blessing of being able to spend my life with my mother outside of prison walls."<sup>54</sup>

### **III. CERD Committee Position**

In its May 2008 Concluding Observations following its review of the United States, the CERD Committee reiterated its concern regarding the persistent racial disparities in the criminal justice system, including the disproportionate number of racial minorities in the prison population and the disproportionate representation of African-Americans at every stage of the criminal justice system, due to the harsher treatment African-Americans receive at various stages of criminal proceedings.<sup>55</sup> The Committee recommended that the United States take all necessary steps to guarantee the right of everyone to equal treatment before tribunals and all other bodies administering justice.<sup>56</sup> The Committee also noted with concern the disproportionate imposition of LWOP sentences against child offenders belonging to racial, ethnic, and national minorities.<sup>57</sup> The Committee recommended that the United States discontinue the use of LWOP sentences against children under the age of 18 and review the cases of those already serving such sentences.<sup>58</sup>

### **IV. U.S. Government Response**

In its report submitted to the Committee in June 2013, the U.S. government highlighted the passage of the Fair Sentencing Act of 2010, noting that the law reduced sentencing disparities between powder cocaine and crack cocaine offenses, but failing to note the over 16,700 prisoners still serving sentences under the 100-to-1 regime that resulted in the disproportionate imposition of significantly harsher sentences on Black defendants.<sup>59</sup>

The report also indicated that the Department of Justice intends to conduct further statistical analysis on sentencing disparities in the criminal justice system, and “is working on other ways to implement increased system-wide monitoring steps,” without addressing any plans for concrete reforms to reduce stark racial disparities in sentencing.<sup>60</sup>

With respect to juvenile LWOP sentencing, the U.S. government reported on two Supreme Court cases (*Graham v. Florida* and *Miller v. Alabama*) limiting the applicability of juvenile LWOP sentences. Significantly, the rulings leave open the possibility of judges imposing the sentence in homicide cases. In addition, some courts have ruled that *Miller v. Alabama* does not apply retroactively<sup>61</sup> and courts continue to impose the sentence.<sup>62</sup> Today at least 2,500 prisoners—the great majority of whom are Black and Latino—are still serving LWOP for crimes committed as children. LWOP sentences may still be imposed for homicide offenses, even in cases where the child played a minimal role such as a “lookout” or accomplice.

Most recently, in its response to the petitioners’ post-hearing Final Observations in the *Henry Hill et al. v. United States of America* case brought by the ACLU and other groups before the Inter-American Commission on Human Rights, the U.S. government took the extraordinary and erroneous position that neither the American Declaration on the Rights and Duties of Man

nor international law prohibits the United States from imposing LWOP sentences on juveniles.<sup>63</sup> The U.S. government also wrongly asserted that international law on the racial impact of the sentence requires a showing of intentional discrimination, and that the petitioners' use of statistics showing discriminatory impact in the imposition of juvenile LWOP sentences was inadequate to establish racial discrimination under international law.<sup>64</sup>

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

In its 2014 Concluding Observations on the United States, the UN Human Rights Committee urged the U.S. to “step up its efforts to robustly address racial disparities in the criminal justice system, including by amending regulations and policies leading to racially disparate impact at the federal, state and local levels.”<sup>65</sup> In particular, it urged the U.S. government to “ensure the retroactive application of the Fair Sentencing Act” and “reform mandatory minimum sentencing statutes.”<sup>66</sup> Moreover, the Committee urged the U.S. government to prohibit “all juvenile life without parole sentences irrespective of the crime committed” as well as mandatory and non-homicide related sentences of life without parole.<sup>67</sup>

Moreover, through the 2010 Universal Periodic Review process, the U.S. government committed to taking “appropriate legislative and practical measures to prevent racial bias in the criminal justice system.”<sup>68</sup>

## **VI. Recommended Questions**

1. Particularly in light of its commitment during the UPR process to take measures to “prevent racial bias in the criminal justice system,” what steps is the United States taking to ensure that sentences are not imposed disproportionately based on race?
2. What measures are being undertaken to address the disproportionate, harsh, and outdated sentences being served by the thousands of people convicted of crack offenses who were sentenced before the passage of the Fair Sentencing Act of 2010 or who are ineligible for sentence reductions under that law?
3. What measures are being undertaken to eliminate or limit the imposition of life without parole sentences for nonviolent crimes and life without parole sentences on juvenile offenders, and to ensure that prisoners currently serving such sentences are afforded a meaningful opportunity for release?
4. What studies have the United States initiated to examine racial disparities in sentencing, including racial disparities in prosecutors' exercise of discretion in seeking sentencing enhancements under three-strikes, § 851 federal drug

enhancements, and other habitual offender laws and disparate racial effects of drug policies such as mandatory minimum sentences and school zone drug enhancements?

## VII. Suggested Recommendations

1. Amend the federal sentencing guidelines to prevent any discriminatory impact on minorities including by further reducing the disparity in penalties for crack and powder cocaine offenses. Crack and powder cocaine are two forms of the same drug, and Congress should eliminate any disparity in the amount of either necessary to prompt mandatory minimum sentences.
2. Abolish the sentence of life without parole for offenses committed by children under 18 years of age. Enable child offenders currently serving life without parole to have their cases reviewed by a court for reassessment and resentencing, to restore parole eligibility and for a possible reduction of sentence.
3. Abolish the sentence of life without parole for nonviolent offenses. Congress and state legislatures should eliminate all existing laws that either mandate or allow for a sentence of LWOP for a nonviolent offense. Such laws should be repealed for nonviolent offenses, regardless of whether LWOP operates as a function of a three-strikes law, habitual offender law, or other sentencing enhancement. Make elimination of nonviolent LWOP sentences retroactive and require resentencing for all people currently serving LWOP for nonviolent offenses.
4. Congress should enact comprehensive federal sentencing reform legislation such as the Smarter Sentencing Act of 2013 or the Justice Safety Valve Act of 2013, which would reduce some mandatory minimum sentences for drug offenses and would retroactively apply the Fair Sentencing Act—which reduced the crack/powder cocaine sentencing disparity—to those currently serving sentences for these offenses.

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1 See, e.g., Sonja B. Starr & M. Marit Rehani, *Racial Disparity in Federal Criminal Charging and its Sentencing Consequences*, U of Michigan Law & Econ, Empirical Legal Studies Center Paper No. 12-002 (2012); Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 Prison J. (2011); The Sentencing Project, *Racial Disparity in Sentencing: A Review of the Literature* (2005), available at

[http://www.sentencingproject.org/doc/publications/rd\\_sentencing\\_review.pdf](http://www.sentencingproject.org/doc/publications/rd_sentencing_review.pdf).

2 U.S. Sentencing Comm'n, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing* (Jan. 30, 2013), available at <http://www.ussc.gov/news/congressional-testimony-and-reports/booker-reports/report-continuing-impact-united-states-v-booker-federal-sentencing>.

3 Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 Crim. Justice 427 (2000), available at <http://www.justicestudies.com/pubs/livelink3-1.pdf>.

4 Sonja B. Starr & M. Marit Rehani, *Racial Disparity in Federal Criminal Charging and its Sentencing Consequences*, U of Mich. Law & Econ., Empirical Legal Studies Center Paper No. 12-002 (2012).

5 See, e.g., D.C. Baldus & C. Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DePaul L.R. 1411 (2004).

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6 Ashley Nellis and Ryan S. King, *The Sentencing Project, No Exit: The Expanding Use of Life Sentences in America* 11-14, 17, 20-23 (2009), available at [http://www.sentencingproject.org/doc/publications/publications/inc\\_NoExitSept2009.pdf](http://www.sentencingproject.org/doc/publications/publications/inc_NoExitSept2009.pdf).

7 ACLU, *A Living Death: Life Without Parole for Nonviolent Offenses* (2013), available at [www.aclu.org/livingdeath](http://www.aclu.org/livingdeath).

8 Ashley Nellis and Ryan S. King, *The Sentencing Project, No Exit: The Expanding Use of Life Sentences in America* 11-13, table 3 (2009). The states with over 60 percent African-American lifers are Alabama, Delaware, Georgia, Illinois, Louisiana, Maryland, Michigan, Mississippi, New Jersey, North Carolina, Pennsylvania, South Carolina, and Virginia.

9 *Id.* at 13-15.

10 *Id.*

11 See, e.g., Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 Prison J. (2011); Joshua Rovner, *The Sentencing Project, Disproportionate Minority Contact in the Juvenile Justice System* (2014), available at [http://sentencingproject.org/doc/publications/jj\\_Disproportionate%20Minority%20Contact.pdf](http://sentencingproject.org/doc/publications/jj_Disproportionate%20Minority%20Contact.pdf).

12 M. Crow & K. Johnson, *Race, Ethnicity, and Habitual-Offender Sentencing*, 19 Crim. Just. Pol’y Rev. 63 (2008).

13 Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Charging and its Sentencing Consequences*, U of Mich. Law & Econ., Empirical Legal Studies Center Paper No. 12-002 (2012).

14 See, e.g., Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 114 (2010); Justice Policy Institute, *Racial Divide: An Examination of the Impact of California’s Three Strikes Law on African-Americans and Latinos* (2004), available at <http://www.prisonpolicy.org/scans/jpi/Racial%20Divide.pdf>; Florangela Davila, *State ‘Three-Strikes’ Law Hits Blacks Disproportionately*, Seattle Times (Feb. 18, 2002), available at <http://community.seattletimes.nwsourc.com/archive/?date=20020218&slug=sentencing18m>.

15 Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 114 (2010).

16 *Id.*

17 See, e.g., Justice Policy Institute, *Racial Divide: An Examination of the Impact of California’s Three Strikes Law on African-Americans and Latinos* (2004), available at <http://www.prisonpolicy.org/scans/jpi/Racial%20Divide.pdf>; Center on Juvenile and Criminal Justice, “*Three Strikes*”: *The New Apartheid* (1996), available at [http://www.cjcj.org/uploads/cjcj/documents/three\\_strikes\\_the\\_new\\_apartheid.pdf](http://www.cjcj.org/uploads/cjcj/documents/three_strikes_the_new_apartheid.pdf).

18 See, e.g., Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. Davis L. Rev. 1135, 1139, 1169 (2010); Lynn Adelman, *What the Sentencing Commission Ought to be Doing: Reducing Mass Incarceration*, 18 Mich. J. Race & L. 295 (2013). For example, under the § 851 drug sentencing enhancements, if a federal drug conviction involves a particular quantity of drugs (such as 50 grams of methamphetamine, 280 grams of crack cocaine, or five kilograms of powder cocaine) and the defendant has two prior qualifying drug convictions in state or federal courts, no matter how old those convictions are, he or she *must* be sentenced to mandatory LWOP. These enhancements are solely within the unreviewed discretion of the Department of Justice prosecutors. See 21 U.S.C. § 851 (2012).

19 United States Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 256, 257, 261 (2011). The Department of Justice and U.S. Sentencing Commission also do not publish prosecutorial policies on § 851 enhancements by individual districts and nationally, with the relevant statistical data about eligibility and application by the Department of Justice. See *United States v. Young*, No. CR-12-4107-MWB (N.D. Iowa 2013).

20 The Sentencing Project, *Racial Disparity in Sentencing: a Review of the Literature* (2005), available at [http://www.sentencingproject.org/doc/publications/rd\\_sentencing\\_review.pdf](http://www.sentencingproject.org/doc/publications/rd_sentencing_review.pdf).

21 Federal data based on data provided by the U.S. Sentencing Commission documenting the race of 2,948 prisoners admitted to federal prison between 1999 and 2011 and sentenced to LWOP for nonviolent offenses. This federal data does not represent the race of federal prisoners currently serving LWOP for nonviolent offenses, which the Bureau of Prisons refused to provide in response to a FOIA request filed by the ACLU. State data provided by state Departments of Corrections, except that of Louisiana, which is based on ACLU documentation of the cases of 187 Louisiana prisoners serving LWOP for nonviolent offenses, or 43.6% of the total 429 prisoners serving the sentence for nonviolent crimes. The Louisiana Department of Corrections did not provide offense-specific race data in response to a FOIA request filed by the ACLU.

22 See, e.g., Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Charging and its Sentencing Consequences*, U of Michigan Law & Econ, Empirical Legal Studies Center Paper No. 12-002 (2012); Robert L. Carter, *Fourth Annual W. Haywood Burns Memorial Lecture, The Committee on Minorities and the Law*, 3 N.Y.

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City L. Rev. 267 (2000), *citing* Marc Mauer, *The Sentencing Project, Race to Incarcerate* (1999), *available at* [http://www.cunylawreview.org/wp-content/uploads/2013/11/Summer-00-v3-no-2\\_Ch-12-Carter.pdf](http://www.cunylawreview.org/wp-content/uploads/2013/11/Summer-00-v3-no-2_Ch-12-Carter.pdf). Studies show that Blacks and whites use drugs at comparable rates. *See, e.g.*, U.S. Dep’t of Health and Human Services, *Results from the 2012 National Survey on Drug Use and Health: Summary of National Findings* 24 (2012), *available at* <http://www.samhsa.gov/data/NSDUH/2012SummNatFindDetTables/NationalFindings/NSDUHresults2012.htm>; Human Rights Watch, *Targeting Blacks: Drug Law Enforcement and Race in the United States* 42 (2008), *available at* [http://www.hrw.org/sites/default/files/reports/us0508\\_1.pdf](http://www.hrw.org/sites/default/files/reports/us0508_1.pdf). *See also* The Sentencing Project, *Racial Disparity in Sentencing: a Review of the Literature* (2005).

23 The Sentencing Project, *Juvenile Life Without Parole* (2011), *available at* [http://sentencingproject.org/doc/publications/JLWOP\\_Facts\\_Aug\\_2011.pdf](http://sentencingproject.org/doc/publications/JLWOP_Facts_Aug_2011.pdf); Human Rights Watch & Amnesty International, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* (2005), *available at* <http://www.hrw.org/reports/2005/10/11/rest-their-lives>.

24 Human Rights Watch, *When I Die They’ll Send Me Home: Youth Sentenced to Life without Parole in California* (2008), *available at* <http://www.hrw.org/reports/2008/10/17/when-i-die-they-ll-send-me-home>.

25 *Michigan v. Raymond Curtis Carp*; *Michigan v. Wolfgang Eliason*; and *Michigan v. Cortez Roland Davis*, Amicus Curiae Brief of the NAACP Legal Defense and Educational Fund, Inc. in Support of Defendant-Appellants, S.C. Michigan No. 146478 (Feb. 20, 2014).

26 Ashley Nellis and Ryan S. King, *The Sentencing Project, No Exit: The Expanding Use of Life Sentences in America* 20-21, table 8 (2009), *available at* [http://www.sentencingproject.org/doc/publications/publications/inc\\_NoExitSept2009.pdf](http://www.sentencingproject.org/doc/publications/publications/inc_NoExitSept2009.pdf). These states are Alabama, Arkansas, Delaware, Illinois, Louisiana, Maryland, Minnesota, Missouri, North Carolina, Pennsylvania, Rhode Island, South Carolina, Texas, and Virginia.

27 Ashley Nellis, *The Sentencing Project, The Lives of Juvenile Lifers: Findings from a National Survey* 3, 14-16 (2012), *available at* [http://sentencingproject.org/doc/publications/jj\\_The\\_Lives\\_of\\_Juvenile\\_Lifers.pdf](http://sentencingproject.org/doc/publications/jj_The_Lives_of_Juvenile_Lifers.pdf).

28 *Id.* For example, a 1990 statistical evaluation of police intake decisions in five Michigan counties revealed that, even when controlling for other statistically significant factors such as drug charges, weapons possession, or prior convictions, “race continued to exert an independent and significant influence on detention ... [while] youth of color were more likely to be charged with more serious offenses, they were also more likely to be detained independent of offense seriousness.” Madeline Wordes et al., *Locking Up Youth: The Impact of Race on Detention Decisions*, 31 J. Res. in Crime & Delinq. 149, 156 (1994).

29 U.S. Dep’t of Justice, Bureau of Justice Statistics, *Compendium of Federal Justice Statistics* 112 (Table 7.16) (2003), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs03.pdf>.

30 *See* U.S. Sentencing Comm’n, Office of Research & Data, *Analysis of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 If the Amendment Were Applied Retroactively* 19 (May 20, 2011), *available at* [http://www.ussc.gov/sites/default/files/pdf/research/retroactivity-analyses/fair-sentencing-act/20110128\\_Crack\\_Retroactivity\\_Analysis.pdf](http://www.ussc.gov/sites/default/files/pdf/research/retroactivity-analyses/fair-sentencing-act/20110128_Crack_Retroactivity_Analysis.pdf); R.D. Hartley and J.M. Miller, *Crack-ing the Media Myth: Reconsidering Sentencing Severity for Cocaine Offenders by Drug Type*, 35 Crim. Just. Rev. 67 (2010).

31 Congress gave the Commission authority to make its amendments retroactive in 28 U.S.C. § 994(u).

32 Al Jazeera Am., *Waiting on a Fix* (Mar. 24, 2014), *available at* <http://projects.aljazeera.com/2014/crack-cocaine/>.

33 For example, the 2011 retroactive guideline adjustment only benefited those crack cocaine offenders who were convicted of less than 8.4 kilograms, just as an earlier retroactive guideline adjustment reducing the sentencing ranges for crack cocaine by two levels that took effect in 2008 only benefited those crack cocaine offenders who were convicted of less than 4.5 kilograms.

34 *Floyd et al. v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046209, at \*4, 6-7 (S.D.N.Y. Aug. 12, 2013).

35 Ashley Nellis and Ryan S. King, *The Sentencing Project, No Exit: The Expanding Use of Life Sentences in America* 14 (2009). Latinos represent 15 percent of the general population, but comprise 22.3 percent of those in prison.

36 ACLU, *Drug Sentencing and Penalties*, <https://www.aclu.org/criminal-law-reform/drug-sentencing-and-penalties>; U.S. Dep’t of Health & Human Servs., Substance Abuse & Mental Health Servs. Admin., *Results From The 2012 National Survey on Drug Use And Health* (Sept. 2013), *available at* <http://www.samhsa.gov/data/NSDUH/2012SummNatFindDetTables/NationalFindings/NSDUHresults2012.htm>.

37 NAACP, *Criminal Justice Fact Sheet*, <http://www.naacp.org/pages/criminal-justice-fact-sheet>.



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38 ACLU, *The War on Marijuana in Black And White* 8-9 (2013), available at <https://www.aclu.org/files/assets/1114413-mj-report-rfs-rel1.pdf>.

39 *Id.* at 9.

40 Nat'l Council on Crime and Delinq., *And Justice for Some: Differential Treatment of Youth of Color in the Justice System* (2007), available at [http://www.nccdglobal.org/sites/default/files/publication\\_pdf/justice-for-some.pdf](http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf).

41 Joshua Rovner, The Sentencing Project, *Disproportionate Minority Contact in the Juvenile Justice System* 2 (2014), available at [http://sentencingproject.org/doc/publications/jj\\_Disproportionate%20Minority%20Contact.pdf](http://sentencingproject.org/doc/publications/jj_Disproportionate%20Minority%20Contact.pdf).

42 *Id.*

43 Eileen Poe-Yamagata and Michael A. Jones, Building Blocks for Youth, *And Justice for Some: Differential Treatment of Youth of Color in the Justice System* (2000), available at <http://cclp.org/documents/BBY/jfs.pdf>.

44 Ashley Nellis and Ryan S. King, The Sentencing Project, *No Exit: The Expanding Use of Life Sentences in America* 20 (2009); Nat'l Council on Crime and Delinq., *And Justice for Some: Differential Treatment of Youth of Color in the Justice System* 3 (2007), available at [http://www.nccdglobal.org/sites/default/files/publication\\_pdf/justice-for-some.pdf](http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf). See also Human Rights Watch, *Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute*, 29-32 (2014), available at [http://www.hrw.org/sites/default/files/reports/us0414\\_ForUpload%202.pdf](http://www.hrw.org/sites/default/files/reports/us0414_ForUpload%202.pdf).

45 *State v. Winslow* 55 So.3d 910 (La. App. 2 Cir. Dec. 15, 2010); 55 So.3d 910, writ denied 11-0192 (La. June 11, 2014).

46 Letter to the ACLU from Fate Vincent Winslow, Louisiana State Penitentiary, Angola, Louisiana (May 16, 2013).

47 *State v. Winslow*, 55 So.3d 910.

48 The state of Louisiana does not require a unanimous jury to convict and instead allows convictions by 10 out of 12 jurors.

49 *State v. Winslow*, No. 29888-Ka (La. App. 2 Cir. Oct. 17, 1997).

50 Letter to the ACLU from Fate Vincent Winslow, Louisiana State Penitentiary, Angola, Louisiana, May 16, 2013.

51 ACLU telephone interview with Brittany Byrd, attorney for Sharanda Jones, Dallas, Texas (Mar. 5, 2013); e-mail communication to the ACLU from Brittany Byrd (Mar. 12, 2013).

52 *Id.*

53 E-mail communication from Sharanda Jones, Federal Medical Center Carswell, Fort Worth, Texas (Apr. 2, 2013).

54 Letter from Clenesha Garland (Mar. 13, 2013).

55 Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America* ¶¶ 20, 27, U.N. Doc. CERD/C/USA/CO/6 (May 2008), available at <http://2001-2009.state.gov/documents/organization/107361.pdf>.

56 *Id.* at ¶ 20.

57 *Id.* at ¶ 21.

58 *Id.*

59 United States Department of State, *Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination* ¶ 66 (June 12, 2013), available at <http://www.state.gov/documents/organization/210817.pdf>.

60 *Id.* at ¶ 66.

61 *Id.* at ¶ 71. The highest courts in only six of the 28 states that required mandatory LWOP sentences for juveniles convicted of homicide offenses have ruled that *Miller v. Alabama* must be applied retroactively, and three states (Pennsylvania, Louisiana, and Minnesota) have refused to hold *Miller* retroactive. In June 2014, the Supreme Court refused to review a Pennsylvania court decision holding that *Miller* does not apply retroactively, and in May 2014 the Supreme Court denied *certiorari* review of a Louisiana court decision similarly refusing to retroactively apply *Miller*. Since the *Miller* decision, a majority of the 28 states have not passed legislation to comply with the ruling. Of the 13 states that have passed compliance legislation, many require lengthy minimum time served before parole review (25 to 40 years) and only four allow for resentencing of prisoners currently serving mandatory LWOP sentences for a crime committed as a juvenile. Even in those states where courts have ruled *Miller* applies retroactively, prisoners continue to await resentencing; for instance in Iowa 25 prisoners serving mandatory LWOP sentences for crimes committed as children are still waiting for resentencing. See *Commonwealth v. Cunningham*,

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81 A.3d 1 (Pa. 2013), *cert. denied*, 82 U.S.L.W. 3555 (2014); *Louisiana v. Tate*, No. 2012-OK-2763, 2013 WL 5912118 (La. Nov. 5, 2013), *cert. denied*, No. 13-8915 (May 27, 2014); *see also* Marsha Levick, Juvenile Law Center, *Between Hope and Despair, Waiting for Meaningful Implementation of Miller v. Alabama*, Huffington Post, June 24, 2014; The Sentencing Project, *Slow to Act: State Responses to 2012 Supreme Court Mandate on Life Without Parole* (2014), available at [http://sentencingproject.org/doc/publications/jj\\_State\\_Responses\\_to\\_Miller.pdf](http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf); Grant Rodgers, *25 Young Killers Await New Prison Sentences in Iowa*, Des Moines Reg. (June 25, 2014).

62 For example, despite *Miller*, since the ruling five youth in Michigan have been sentenced to life without possibility of parole. *See, e.g.*, Gary Ridley, *Flint teen gets life in prison without parole in first-of-its-kind juvenile sentencing hearing*, Mlive, Aug. 20, 2013, available at [http://www.mlive.com/news/flint/index.ssf/2013/08/flint\\_teen\\_gets\\_life\\_in\\_prison.html](http://www.mlive.com/news/flint/index.ssf/2013/08/flint_teen_gets_life_in_prison.html).

63 Response of the Government of the United States of America to the Inter-American Commission on Human Rights Concerning the March 25, 2014 Hearing Before the Commission, *Henry Hill, et al. v. United States*, No. 12.866 (May 6, 2014) available at [https://www.aclu.org/sites/default/files/assets/usg\\_response.pdf](https://www.aclu.org/sites/default/files/assets/usg_response.pdf).

64 *Id.*

65 UN Human Rights Comm., *Concluding Observations on the Fourth Periodic Report of the United States of America* ¶ 6, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014), available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FUSA%2FCO%2F4\\_](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FUSA%2FCO%2F4_)

66 *Id.* at ¶ 6.

67 *Id.* at ¶ 23.

68 United States Dep't of State, *U.S. Response to UN Human Rights Council Working Group Report* ¶ 5, 6 (March 10, 2011), available at <http://www.state.gov/j/drl/upr/157986.htm>.

## Racial Discrimination in the United States Capital Punishment System

### I. Issue Summary

Racial bias continues to taint the capital punishment system in the United States, from jury selection through decisions about who faces execution. The death penalty is disproportionately imposed on people of color.<sup>1</sup> As of January 1, 2014, 42 percent of defendants under sentence of death in the United States were Black, and 43 percent were White,<sup>2</sup> although Blacks make up only 13 percent of the overall population. Further, numerous studies from across the country conclusively demonstrate that the murder of Whites results in capital prosecution in far higher percentages than murders of people of color.<sup>3</sup> The disparities based on the race of the victim are often heightened in cases with Black defendants. Despite the U.S. Supreme Court's longtime prohibition on discrimination in jury selection in *Batson v. Kentucky*,<sup>4</sup> people of color continue to be excluded from capital juries at alarming rates.<sup>5</sup> A recent study of capital trials in North Carolina, for example, showed that prosecutors used peremptory strikes to remove qualified Black jurors at more than twice the rate that they excluded all other jurors.<sup>6</sup> Of the 159 prisoners on North Carolina's death row, 31 were sentenced by all-White juries and another 38 had only one person of color on their sentencing juries. Appellate courts in Tennessee and North Carolina have never reversed a case under *Batson*, even in a case in which the prosecutor admitted he had struck two women from the jury because they were "[B]lack women."

In 1987, the United States Supreme Court ruled in *McCleskey v. Kemp*<sup>7</sup> that a defendant cannot rely upon statistical evidence of systemic racial bias to prove his death sentence unconstitutional, no matter how strong that evidence may be. This broadly criticized decision,<sup>8</sup> comparable to other shameful cases in the country's history, such as *Dred Scott v. Sanford* (holding that people of African ancestry were not entitled to the protections of the Constitution) and *Plessy v. Ferguson* (upholding racial segregation of public facilities), continues to prevent successful challenges to the racially biased practices in the country's death penalty system.

In 2009, in response to the landmark *McCleskey* decision, North Carolina passed the Racial Justice Act (RJA). This legislation required courts to enter a life sentence for any death row defendant who proves that race was a factor in the imposition of his sentence and allowed defendants to show evidence of racial bias with statistical evidence. In a historic ruling based on the RJA, in April 2012, a judge found intentional and systemic racial discrimination in the case of Marcus Robinson, a Black death row prisoner, and commuted his death sentence to life without parole.<sup>9</sup> Three more death sentences were set aside under the RJA in December 2012.<sup>10</sup> Then, in June 2013, the North Carolina legislature repealed the RJA.<sup>11</sup> The State has appealed the four cases of the prisoners who won relief under the Act to the North Carolina Supreme Court, where they are pending now.<sup>12</sup>

While most executions take place on the state level, the federal government can also subject people to the death penalty. In fact, a study of the federal death penalty released in 2000 found that 89 percent of defendants prosecuted capitally were people of color.<sup>13</sup> Fifty-seven percent of the prisoners on the federal death row are either Black or Latino.<sup>14</sup> The federal government has not made satisfactory progress in its efforts to rid the country of racial discrimination in the capital punishment system.

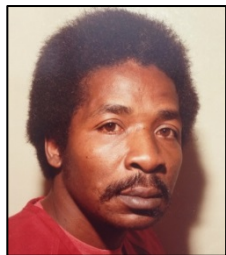
## II. Human Stories



**Duane Buck** was sentenced to die in Texas based on testimony of a psychologist who told the jury that Mr. Buck was more likely to be dangerous in the future because he is Black.<sup>15</sup> The same psychologist gave similar testimony in a total of seven Texas cases. In 2000, then-Attorney General John Cornyn called for the retrial of all seven men who had been sentenced to death based on the same psychologist's testimony that their race or ethnic background made them more dangerous, including Mr. Buck. Courts granted new sentencing trials to six of those inmates, but upheld Mr. Buck's unconstitutional death sentence on technical procedural grounds. Mr. Buck remains on Texas' death row.



**Kenneth Rouse**, a Black man, was tried by an all-White jury in North Carolina after the prosecutor struck every eligible Black juror from the pool. One of the jurors who served on his case—and convicted him and sentenced him to die—admitted later that he decided the case based on his prejudices. Mr. Rouse remains on North Carolina's death row.



**Glenn Ford**, a Black man, was recently exonerated after spending 30 years on Louisiana's death row.<sup>16</sup> He, too, was tried by an all-White jury in a parish that is 40 percent Black. At his trial, the court reporter typed the responses of White jurors as "yes, sir" and the responses of Black jurors as "yes, suh." A Confederate flag flew outside the courthouse where he was tried (and was only removed in recent years).



**Earl McGahee**, a Black man, was tried by an all-White jury in Selma, Alabama. When the judge asked the prosecutor to explain why he had struck all 24 eligible jurors from the jury pool, he said that he felt that many of them were of “low intelligence.”<sup>17</sup>

### **III. CERD Committee Position**

The CERD Committee has expressed concern “about the persistent and significant racial disparities with regard to the imposition of the death penalty, particularly those associated with the race of the victim, as evidenced by a number of studies . . . .”<sup>18</sup> The Committee has recommended that the United States “undertake further studies to identify the underlying factors of the substantial racial disparities in the imposition of the death penalty, with a view to elaborating effective strategies aimed at rooting out discriminatory practices” and that it “adopt all necessary measures, including a moratorium, to ensure that death penalty is not imposed as a result of racial bias on the part of prosecutors, judges, juries and lawyers.”

### **IV. U.S. Government Response**

In paragraphs 69 and 70 in its Periodic Report to the CERD Committee<sup>19</sup> and in paragraphs 101 to 103 of its Common Core Document,<sup>20</sup> the United States emphasized the heightened procedural protections available to capital defendants and the declining application of the death penalty in the United States. The United States’ response mentioned a “vigorous public debate” on the death penalty in the United States, but failed to acknowledge the systemic racial bias in the country’s death penalty system, as it did during the Universal Periodic Review process. Rather than address the ways in which the United States could address the racial bias in the death penalty, it emphasized the limitations on the federal government in addressing concerns with the death penalty.

During the 2010 Universal Periodic Review process and recent review by the UN Human Rights Committee, the United States acknowledged significant racial disparities in the imposition of the death penalty and, specifically, the overrepresentation of minorities on death row.<sup>21</sup> The United States committed to “[u]ndertake studies to determine the factors of racial disparity in the application of the death penalty, to prepare effective strategies at ending possible discriminatory practices.”<sup>22</sup> The federal government has not yet made progress on this commitment.

Recently, President Barack Obama acknowledged that there are “significant problems” with the death penalty, and specifically highlighted racial bias as one of the problems. President Obama called on Attorney General Eric Holder to investigate the use of the death penalty in the

United States.<sup>23</sup> It is unclear what type of investigation or review Attorney General Holder will conduct and no further information has been provided at this time.

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

In its Concluding Observations on the Fourth Periodic Report of the United States, the UN Human Rights Committee expressed concern about the racial disparities in the death penalty “that disproportionately affect African Americans, exacerbated by the rule that discrimination has to be proven case-by-case.”<sup>24</sup> The Committee recommended that the United States impose a federal moratorium on the death penalty, “engage with retentionist states with a view to achieving a nationwide moratorium,” “take measures to effectively ensure that the death penalty is not imposed as a result of racial bias,” and “consider acceding to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.”<sup>25</sup>

In 2009, the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions also observed racial disparities in the United States capital punishment system and found that “the death penalty is more likely to be imposed when the victim is White, and/or the defendant is African-American.”<sup>26</sup> When he raised these concerns with federal and state officials in the United States, he was, in his own words, “met with indifference or flat denial.”<sup>27</sup> He recommended a systemic review and response to continuing racial bias.

The Inter-American Commission on Human Rights has repeatedly expressed deep concerns about the racial bias in the administration of capital punishment in the United States.<sup>28</sup>

## **VI. Recommended Questions**

1. What progress, if any, has the United States made to fulfill its UPR commitment to study the racial disparities of the death penalty?
2. In response to a letter from Human Rights Watch, the Office of the Attorney General stated that, in July 2011, it had approved amendments to a “[p]rotocol incorporating a number of substantive and procedural improvements to the Department’s decision-making processes for potential capital cases.” The Office also directed the “Capital Case Unit to complete its ongoing data collection and retrieval enhancement project” as “this process has the potential to overcome some of the statistical impediments encountered in prior studies.” What is the current status of these efforts?<sup>29</sup>
3. What steps is the United States taking to ensure that the death penalty is not imposed disproportionately based on race?

4. What steps is the United States taking to ensure that capital juries are racially diverse?

## VII. Suggested Recommendations

1. The United States should immediately cease all federal death penalty prosecutions and impose a moratorium on executions to ensure that racial bias does not play a role at any stage of the capital punishment process. It should encourage state governments to do the same.
2. The United States should fulfill its commitment in the UPR process to study the racial disparities of the death penalty in the United States and fully implement the recommendations of the Special Rapporteur on extrajudicial, summary, or arbitrary executions to review and respond to racial discrimination in the administration of capital punishment.
3. In the event that capital prosecutions and executions continue, the United States should institute a permanent independent review committee to determine whether racial bias played a role in capital cases on a case by case basis, and/or pass legislation or binding administrative rules to ensure the same.

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1 U.S. Dep't of State, *Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights* (Dec. 30, 2011), available at <http://www.state.gov/j/drl/rls/179781.htm>.

2 Deborah Fins, NAACP Legal Def. and Educ. Fund, Inc., *Death Row USA* 1 (Jan. 1, 2014), available at [http://www.naacpldf.org/files/publications/DRUSA\\_Winter\\_2014.pdf](http://www.naacpldf.org/files/publications/DRUSA_Winter_2014.pdf).

3 See, e.g., Katherine Beckett, et al., *The Role of Race in Washington State Capital Sentencing, 1981-2012* (Jan. 27, 2014), available at <http://www.deathpenaltyinfo.org/documents/WashRaceStudy2014.pdf>; David Baldus, et al., *Racial Discrimination in the Administration of the Death Penalty: the Experience of the United States Armed Forces (1984-2005)*, 101 J. Crim. Law & Criminology 1227 (Fall 2011); Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 Ariz. L. Rev. 305 (2009); Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 Hous. L. Rev. 807, 812 (2008); John J. Donohue III, *Capital Punishment in Connecticut, 1973-2007: A Comprehensive Evaluation From 4600 Murders To One Execution* (2008), available at [http://works.bepress.com/john\\_donohue/55](http://works.bepress.com/john_donohue/55); Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. Rev. 161, 164 (2006); Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 Santa Clara L. Rev. 1, 38 (2005); Amnesty Int'l, *United States of America: Death by Discrimination – the Continuing Role of Race in Capital Cases* (Apr. 2003); Glenn Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988-1997*, iii (Mar. 2002); Isaac Unah & Jack Boger, *Race and the Death Penalty in North Carolina: An Empirical Analysis, 1993-1997* (2001); U.S. Dep't of Justice, *The Federal Death Penalty System: A Statistical Survey (1988-2000)* (Sept. 12, 2000); Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976-1991*, 20 Am. J. of Crim. Justice 17, 24-27 (1995); Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 Fla. L. Rev. 1, 22-28 (1991); U.S. Gen. Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* 5 (1990); Samuel R. Gross & Robert Mauro, *Death and Discrimination: Racial Disparities in Capital Sentencing* 66, 68-69 (1989).

4 *Batson v. Kentucky*, 476 U.S. 79 (1986).

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- 5 Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (Aug. 2010), available at <http://eji.org/eji/files/EJI%20Race%20and%20Jury%20Report.pdf>.
- 6 Barbara O'Brien & Catherine Gross, *Report on Jury Selection Study* (Sept. 29, 2011), available at [https://www.aclu.org/files/assets/jss\\_revised\\_report\\_with\\_appendix\\_29\\_sept\\_2011.pdf](https://www.aclu.org/files/assets/jss_revised_report_with_appendix_29_sept_2011.pdf).
- 7 *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987).
- 8 See, e.g., Scott E. Sundby, *The Loss of Constitutional Faith: McCleskey v. Kemp and the Dark Side of Procedure*, 10 Ohio St. J. Crim. L. 5, 5 n.2 (Fall 2012) (collecting cites).
- 9 ACLU, *North Carolina v. Robinson* (Apr. 20, 2012), available at <https://www.aclu.org/capital-punishment-racial-justice/north-carolina-v-robinson>.
- 10 ACLU, Blog of Rights, *Sweeping Ruling about Racial Bias in Capital Jury Selection Shows the Need for Sweeping Reforms* (Dec. 17, 2012), available at <https://www.aclu.org/blog/capital-punishment-racial-justice/sweeping-ruling-about-racial-bias-capital-jury-selection>.
- 11 Kim Severson, *North Carolina Repeals Law Allowing Racial Bias Claim in Death Penalty Challenges*, N.Y. Times (June 5, 2013); ACLU, *In Battle of Racial Bias vs. Racial Justice in North Carolina, Governor Insists on Racial Bias* (June 21, 2013), available at <https://www.aclu.org/blog/capital-punishment-racial-justice/battle-racial-bias-vs-racial-justice-north-carolina-governor>.
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- 13 Ronald Weich & Carlos Angulo, *Justice on Trial: Racial Disparities in the American Criminal Justice System* 195 (2000).
- 14 Deborah Fins, NAACP Legal Def. and Educ. Fund, Inc., *Death Row USA* 38 (Jan. 1, 2014) available at [http://www.naacpldf.org/files/publications/DRUSA\\_Winter\\_2014.pdf](http://www.naacpldf.org/files/publications/DRUSA_Winter_2014.pdf).
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- 16 ACLU, Blog of Rights, *30 Years a Prisoner* (Mar. 24, 2014), available at <https://www.aclu.org/blog/capital-punishment/30-years-prisoner>.
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- 18 U.N. Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination* (Feb. 2008), U.N. Doc. CERD/C/USA/CO/6.
- 19 U.S. Dep't of State, *Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination* (June 12, 2013), available at <http://www.state.gov/documents/organization/210817.pdf>.
- 20 U.S. Dep't of State, *Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights concerning the International Covenant on Civil and Political Rights*, Common Core Document of the United States of America (Dec. 30, 2011), available at <http://www.state.gov/j/drl/rls/179780.htm>.
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- 22 *U.S. UPR Accepted Recommendations* ¶ 95 (Mar. 2012), available at <http://www.humanrights.gov/wp-content/uploads/2012/03/USAcceptedRecommendations-2010UPR.pdf>.
- 23 Peter Baker, *Obama Orders Policy Review on Executions*, N.Y. Times (May 2, 2014).
- 24 U.N. Comm. on Human Rights, *Concluding Observations on the Fourth Periodic Report of the United States of America* ¶ 8 (Apr. 23, 2014), U.N. Doc. CCPR/C/USA/CO/4.
- 25 *Id.*
- 26 Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to the United States of America* ¶ 17 A/HRC/11/2/Add.5 (May 28, 2009).
- 27 *Id.* at ¶ 18.
- 28 Inter-Am. Ct. H.R., *The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition* 161-76 (Dec. 31, 2011), Doc. 68 OEA/Ser.L/V/II.
- 29 Letter from Antonio M. Ginatta, Advocacy Director, Human Rights Watch U.S. Program, to Esther Brimmer, Assistant Secretary, U.S. Dep't of State Int'l Org. Affairs (Jan. 25, 2011) (on file with Human Rights Watch); Letter from Kevin Carwile, Chief, U.S. Dep't of Justice Capital Case Unit (Mar. 7, 2012) (on file with Human Rights Watch).



## The Right to Vote

### I. Issue Summary

Nearly fifty years after the passage of the Voting Rights Act (VRA), which Congress passed in 1965 to block widespread discriminatory voting practices, many states and localities continue to impose restrictions on access to the polls. Through both restrictions on the right to vote and changes in the administration of elections, these barriers most significantly impact the rights of minorities and ultimately violate the ICERD mandate of non-discrimination in political participation. ICERD requires the U.S., through affirmative steps, to “undertake to prohibit and to eliminate racial discrimination,” including, “the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage.”<sup>1</sup> ICERD requires the U.S. to affirmatively “amend, rescind, or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination,” and to do so at the federal, state, and local levels.<sup>2</sup>

Last year, the U.S. Supreme Court in *Shelby County v. Holder* severely limited critical protections in the Voting Rights Act against race discrimination. Since the decision, progress has been made by both the executive branch of the government and private individuals and organizations through litigation, advocacy, and federal action to bring an end to these barriers to voting. Civil and human rights organizations, including the ACLU, continue to litigate and advocate ending discriminatory practices, and under the Obama Administration the executive branch has taken a more active role in enforcing voting laws and challenging discriminatory voting changes. Following the 2012 election and reports of widespread barriers to the polls, including long lines, the U.S. government formed the Presidential Commission on Election Administration.<sup>3</sup> Under the guidance of the legal counsels of each major party candidate, the Commission put forth a series of recommendations to improve the country’s election administration process. The Department of Justice has also stepped up its enforcement of the Voting Rights Act and the Attorney General has embraced criminal re-enfranchisement reforms. Although progress is being made, racial minority and language minority voters still face many obstructions and set-backs. Additional action is needed from the United States to ensure that every citizen has an equal and unrestricted right to vote.

### *The Voting Rights Act*

On June 25, 2013, in the case *Shelby County v. Holder*, the U.S. Supreme Court struck down the “coverage formula” of the Voting Rights Act of 1965 - one of the Act’s key provisions, which has helped to protect the right to vote for people of color for nearly 50 years.<sup>4</sup> For decades, certain states and localities had to submit all of their voting changes to the federal government (either the Justice Department or the D.C. District Court) for approval before they could be implemented, a process known as “preclearance.” The coverage formula – Section 4(b) of the Act -- determined which jurisdictions fell under the government’s purview. In *Shelby*, the

Court declared the coverage formula unconstitutional. Before the Supreme Court struck down the coverage formula, Section 5 was still actively combatting discriminatory barriers, through both the Justice Department’s administrative review or through court actions. Just as Section 5 has given tangible protections to millions of voters since 1965, its absence through the loss of Section 4(b) leaves the door open for discrimination and disenfranchisement.

In January 2014, a bipartisan group of Congressmen and Senators introduced the Voting Rights Amendment Act of 2014.<sup>5</sup> The bill seeks to go beyond a static, geographically based statute and instead will be flexible and forward-looking, capturing jurisdictions that have recently engaged in acts of discrimination. While the bill does not reinstate everything that was lost in the *Shelby* decision, when viewed holistically, this bill seeks to give the public the opportunity to learn about discriminatory voting changes and stop them, through different sets of tools, before they can disenfranchise voters.

Following *Shelby*, litigants have shifted from using Section Five to using Section 2 of the Voting Rights Act as a primary means of defense against discrimination in voting. The standard for Section 2 protects citizens against the discriminatory *effect* of facially neutral election laws, when the law interacts with social and historical conditions to cause an inequality in voting, similar to what is required by ICERD.<sup>6</sup> Specifically, Section 2 protects against election law changes that have either the purpose or in some circumstances the effect of denying or abridging the right to vote based on race or ethnicity.<sup>7</sup> Although Section 2 is a valuable tool in stopping discriminatory voting practices after they occur, in its current form, it lacks the hallmarks of Section Five that prevented discrimination from occurring in the first place. Section Five’s preclearance mechanism “freezes” voting changes before enactment —before voting changes— can disenfranchise voters. Section 2 does not require jurisdictions to provide notice of the proposed change, and while Section 2 does allow victims of discrimination in voting to seek remedies in court, it is often only after the discrimination occurs. Only when the powerful tools of Section Five and other updated provisions of the Voting Rights Act can operate under a new regime, will discrimination in voting be adequately prevented.

### ***Criminal Disfranchisement***

An estimated 5.85 million citizens cannot vote as a result of criminal convictions, including nearly 4.4 million of those who have been released from prison and are living and working in the community.<sup>8</sup> Nationwide, one in 13 African-Americans of voting age has lost the right to vote—a rate four times the national average.<sup>9</sup> Available data suggests criminal disenfranchisement laws may also disproportionately impact Latino citizens because of their overrepresentation in the criminal justice system.<sup>10</sup> Many of the current criminal disenfranchisement laws proliferated in the Jim Crow era and were intended to bar minorities from voting.<sup>11</sup>

The U.S. continues to be the world leader in the incarceration of its own citizens.<sup>12</sup> The reach of the American correctional system has expanded significantly over the course of the past half-century.<sup>13</sup> In the last few decades, the number of disfranchised citizens has been increasing due to an incarceration boom fueled by mandatory minimum sentences and the “war on drugs.”<sup>14</sup> The U.S. remains one of the few western democratic nations that exclude such large numbers of people from the democratic process. Almost half of European countries preserve the right to vote for all incarcerated persons and a smaller number of countries impose a time limited ban on voting for a few categories of prisoners.<sup>15</sup>

Although some progress has been made, including Attorney General Eric Holder’s recent statements in support of the easing of restoration requirements,<sup>16</sup> these reforms do not go far enough to address the disfranchisement of millions of Americans following a criminal conviction. Approximately 40 percent of states already have more expansive policies than those proposed by the Justice Department.<sup>17</sup> In addition, the Department’s proposal<sup>18</sup> that individuals must wait until after probation and parole fuels confusion among election officials and returning citizens, and the requirement to pay fines before voting is tantamount to a poll tax.<sup>19</sup>

Currently, individuals with criminal convictions are subject to a patchwork of state laws governing their right to vote. The scope and severity of these laws varies widely, ranging from the uninterrupted right to vote to lifetime disfranchisement, despite completion of one’s full sentence.<sup>20</sup> Although voting rights restoration is possible in many states, and some recent progress has been made,<sup>21</sup> it is frequently a difficult process that varies widely across states.<sup>22</sup> Individuals with criminal convictions may lack information about the status of their voting rights or how to restore them. Furthermore, confusion among election officials about state law contributes to the disenfranchisement of eligible voters.<sup>23</sup>

### ***De Facto Disfranchisement and Voter ID Laws***

Recently, racial discrimination in elections has taken more subtle, yet no less pernicious, forms, such as requiring government-issued photo identification that many voters do not have, adding unnecessary burdens to the voter registration process, creating confusion around criminal disfranchisement laws, and narrowing the time within which voters can cast their ballot. For many voters, and in particular African-American voters, these burdens on the exercise of their right to vote are insurmountable and create widespread *de facto* disfranchisement.

Thirty states require voters to present government-issued photo identification at the polls to vote in federal, state, and local elections. Voter ID laws prevent thousands of registered voters from exercising their right to vote if they do not have, or, in many instances, cannot obtain, the limited identification states accept for voting. As such, these laws impede access to the polls and

are at odds with the fundamental right to vote. The ACLU represents eligible voters in Wisconsin, North Carolina, Pennsylvania, Texas, and other states who would be disfranchised by attempts in those states to impose a voter ID requirement. Research shows that more than 21 million Americans do not have government-issued photo identification; a disproportionate number of these Americans are low-income, racial and ethnic minorities, and elderly.<sup>24</sup> Even if the photo IDs are offered for free, the birth certificates, passports, or other documents required to obtain a government-issued ID cost money, and many eligible voters simply cannot afford to pay for them. A disproportionate number of the Americans who cannot afford to pay for the required documents needed to secure a government-issued photo ID belong to racial minorities.<sup>25</sup> As many as 25 percent of African Americans of voting age lack government-issued photo ID, compared to only 8 percent of their White counterparts.<sup>26</sup> And 18 percent of Americans over the age of 65 do not have government-issued photo ID.<sup>27</sup>

Increasingly, Section 2 has been successfully used to challenge photo ID requirements, most recently in a legal victory overturning Wisconsin's photo ID law.<sup>28</sup> The use of Section 2, however, does not negate the need for repairing the Voting Rights Act through Congressional action, in light of the critical protections that were provided by Section Five and were lost in the *Shelby* case.

## **II. CERD Committee Position**

In 2008, the Committee welcomed the 2006 re-authorization of the Voting Rights Act.<sup>29</sup> However, the Supreme Court decision in *Shelby* greatly restricted the ability to enforce the most impactful provisions of the VRA. The Voting Rights Amendment Act of 2014 would go a long way in identifying and preventing the types of discrimination that the VRA blocked prior to *Shelby*.

The Committee also expressed continuing concern about “the disparate impact that existing felon disenfranchisement laws have on a large number of persons belonging to racial, ethnic, and national minorities” and noting “particular concern that in some states, individuals remain disenfranchised even after the completion of their sentences”.<sup>30</sup>

## **III. U.S. Government Response**

In its 2013 report, the U.S. government discusses the Department of Justice's extensive enforcement of statutes that protect the right to vote, including the Voting Rights Act.<sup>31</sup> The report states that the Justice Department handled record numbers of new voting-related litigation, including challenges to statewide redistricting plans and state photo identification requirements for voting where those changes would have a racially discriminatory effect.<sup>32</sup> Prior to the *Shelby* decision, in 2011-2012, the Justice Department received approximately 2,200 redistricting plans

for review under Section Five and blocked 14 voting changes under Section Five. In the aftermath of the *Shelby* decision, the Justice Department no longer has the ability to review and preclear changes under Section Five. Since the decision, the Justice Department has shifted resources towards bringing additional challenges under Section Two, including challenges in Texas and North Carolina;<sup>33</sup> however, Congressional action is needed to repair the damage to the Voting Rights Act done by the Supreme Court.

In the report, the U.S. government cited constitutional authority for deferring to individual state's responsibility for determining eligibility to vote, while also recognizing U.S. Congress' power to regulate elections and eradicate discrimination in voting.<sup>34</sup> While not calling for passage of the Democracy Restoration Act yet, the government referenced the proposed legislation. In light of the systemic racial impact criminal disenfranchisement laws have, we believe the executive branch should endorse these federal reforms and take additional administrative action where possible, as described below.

#### **IV. Other UN and Regional Human Rights Bodies Recommendations**

In its 2014 Concluding Observations on the United States, the UN Human Rights Committee urged the United States to ensure voter identification requirements and new eligibility requirements do not impose “excessive burdens on voters resulting in de facto disenfranchisement.”<sup>35</sup> It also expressed concern about state-level disenfranchisement laws, noting their “disproportionate impact on minorities.”<sup>36</sup>

A 2013 report by the Office for Democratic Institutions and Human Rights (ODHIR) of the Organization for Security and Cooperation in Europe (OSCE) raised concerns regarding voting rights violations and made recommendations including providing full representation rights in Congress for citizens resident in the District of Columbia and United States territories. The report also recommended reviewing voter ID and criminal disenfranchisement laws and bringing them in line with human rights law and 1990 OSCE Copenhagen Document.<sup>37</sup>

During the 2010 Universal Periodic Review process, the U.S. delegation expressed its commitment to “ensuring political participation by all qualified voters through enforcement of voting rights laws.”<sup>38</sup> The U.S. government also supported in part a recommendation that it ensure the right to vote “both by persons deprived of their liberty and persons who have completed their prison sentences.”<sup>39</sup>

## **V. Recommended Questions**

1. Will the U.S. government expand and clarify its support of automatic restoration of voting rights to citizens upon their release from incarceration for disfranchising convictions?
2. Will the U.S. government oppose voting restrictions for those on parole or probation or with unpaid fees or fines?
3. Will the U.S. government support:<sup>40</sup>
  - a. Enacting federal legislation that mandates uniform standards in federal elections for longer early voting periods, no excuses absentee voting, the distribution, casting and counting of provisional ballots, thereby eliminating the confusing patchwork of state laws;
  - b. Additional training and support for poll workers and election officials;
  - c. Enforcement of state and federal voting rights laws, where poll workers or state election officials are still not complying with the law; and
  - d. An increase in future funding for election administration, so that, for example, long lines are never caused by a lack of paper ballots or a lack of or inequitable distribution of electronic voting machines in minority or poor neighborhoods?

## **VI. Suggested Recommendations**

1. Congress must pass and the President sign the Voting Rights Amendment Act of 2014, in order to provide the necessary tools and protections to the Voting Rights Act that were lost following *Shelby County v. Holder*.
2. The Department of Justice should endorse and urge Congress to pass the Democracy Restoration Act<sup>41</sup> and clarify its support of automatic restoration of voting rights to citizens upon their release from incarceration for disfranchising convictions, and oppose restrictions for those on parole or probation or with unpaid fees or fines.
3. The U.S. government should investigate the disproportionate impact of criminal disenfranchisement laws on minority populations and issue a report of its findings, including data on disenfranchisement rates by race and ethnicity.

4. The Bureau of Prisons should take administrative steps immediately to provide information to incarcerated individuals regarding voting rights restoration upon release and return to their home state. The Democracy Restoration Act would require similar reforms.
5. In addition, the Department of Justice should require federal prosecutors to provide notice to defendants in federal criminal cases regarding the loss of their right to vote as a result of a plea agreement to any disfranchising crime (misdemeanor or felony).

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1 Art. 5(c).

2 See Art. 2(1)(c); Art. 2(1)(a).

3 Presidential Comm'n on Election Admin., *The American Voting Experience* (Jan. 2014), available at <https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf>.

4 *Shelby County, Ala. v. Holder*, 133 S.Ct. 2612 (2013).

5 Voting Rights Amendment Act of 2014, H.R.3899/S. 1945, 113th Cong. (2014).

6 See Article 1(1); See also Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America* 11 U.N. Doc.

CERD/C/USA/CO/6 (May 2008), available at <http://2001-2009.state.gov/documents/organization/107361.pdf>.

7 See 42 U.S.C.A. § 1973.

8 Christopher Uggen, Sarah Shannon, & Jeff Manza, The Sentencing Project, *State-Level Estimates of Felon Disenfranchisement in the United States, 2010* 1 (2012), available at

[http://sentencingproject.org/doc/publications/fd\\_State\\_Level\\_Estimates\\_of\\_Felon\\_Disen\\_2010.pdf](http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf).

9 Jean Chung, The Sentencing Project, *Felony Disenfranchisement: A Primer* 2 (2014), available at

[http://sentencingproject.org/doc/publications/fd\\_Felony%20Disenfranchisement%20Primer.pdf](http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf).

10 See, e.g., Paul Guerino et al., Bureau of Justice Statistics, *Prisoners in 2010* 27 (Feb. 2012),

<http://www.bjs.gov/content/pub/pdf/p10.pdf>.

11 Deborah J. Vagins and Erika Wood, *The Democracy Restoration Act: Addressing A Centuries-Old Injustice* 3-5 (Mar. 2010), available at

<http://www.acslaw.org/files/ACS%20Issue%20Brief%20Vagins%20and%20Wood.pdf>.

12 *Smart Justice, Fair Justice: Campaign to End Mass Incarceration*, ACLU, <https://www.aclu.org/smart-justice-fair-justice-0>

13 Lauren E. Glaze And Erika Parks, Bureau of Justice Statistics, *Correctional Populations in the United States, 2011* (Nov. 2012), <http://www.bjs.gov/content/pub/pdf/cpus11.pdf>.

14 E. Ann Carson & Daniela Golinelli, Bureau of Justice Statistics, *Prisoners in 2012-Advance Counts* (July 2013), <http://www.bjs.gov/content/pub/pdf/p12ac.pdf>. See also Human Rights Watch, *Targeting Blacks – Drug Law Enforcement in the United States* 2 (2008), available at <http://www.hrw.org/reports/2008/05/04/targeting-blacks>.

15 Laleh Ispahani, *Out of Step with the World: An Analysis of Felony Disfranchisement in the U.S. and Other Democracies* 3 (2006), available at <http://www.aclu.org/votingrights/exoffenders/25663pub20060525.html>; see also ACLU, *Democracy Imprisoned: A Review of the Prevalence and Impact of Felony Disenfranchisement Laws in the United States* (2013), available at

<http://www.aclu.org/votingrights/exoffenders/25663pub20060525.html>.

16 In February 2014, Attorney General Holder called upon state leaders and elected officials to pass reforms to restore voting rights. Although the calls for reforms are more limited than those provided in the Democracy Restoration Act, they are welcome statements from the DOJ. Att'y Gen. Eric Holder, Remarks on Criminal Justice Reform at Georgetown University Law Center (Feb. 11, 2014), available at

<http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140211.html>.

17 ACLU, Voting Rights for People with Criminal Records, <http://www.aclu.org/map-state-felony-disfranchisement-laws>

(last visited April 7, 2014) (contains a map detailing state laws).

18 The DOJ proposal includes restoring the right to vote for all who have served their terms in prison or jail, completed their parole or probation, and paid their fines. Att'y Gen. Eric Holder, Remarks on Criminal Justice Reform at Georgetown University Law Center (Feb. 11, 2014), available at

<http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140211.html>.

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- 19 Historically poll taxes, a fee that voters have to pay in order to vote in an election, have been used to deny African Americans and poor whites the right to vote. The use of poll taxes is prohibited by the Twenty-Fourth Amendment to the Constitution and the Voting Rights Act.
- 20 Three states (Florida, Iowa, and Kentucky) permanently disfranchise citizens with felony convictions unless the state approves individual rights restoration; two states (Maine and Vermont) allow all persons with felony convictions to vote, even while incarcerated; all other states fall somewhere in between. *See* ACLU, Voting Rights for People with Criminal Records, <http://www.aclu.org/map-state-felony-disfranchisement-laws> (last visited April 7, 2014) (contains a map detailing state laws).
- 21 Recently, bipartisan lawmakers in states with very restrictive laws, like Virginia and Kentucky, have made reforms and considered changes. *See* Letter from Robert F. McDonnell, Governor of the Commonwealth of Virginia, to the Honorable Janet V. Kelly, Sec’y of the Commonwealth (May 29, 2013), *available at* <https://commonwealth.virginia.gov/media/1803/2013GovernorLettertoSOC.pdf>. *See also* Press Release, Senator Rand Paul, *Sen. Paul Testifies in Support of Restoring Voting Rights; Constitutional Amendment Passes Kentucky Senate* (Feb. 19, 2014), *available at* [http://www.paul.senate.gov/?p=press\\_release&id=1109](http://www.paul.senate.gov/?p=press_release&id=1109).
- 22 ACLU, *Factsheet: The Democracy Restoration Act of 2014* (2014), *available at* <https://www.aclu.org/racial-justice-voting-rights/aclu-factsheet-democracy-restoration-act-2014>.
- 23 Lawyers’ Comm. for Civil Rights Under Law & The Sentencing Project, *The Discriminatory Effects of Felony Disenfranchisement Laws, Policies and Practices on Minority Civic Participation in the United States* (2009), <http://www.lawyerscommittee.org/admin/site/documents/files/Submission-to-UN-Minority-Forum.pdf>; Lawyers’ Comm. for Civil Rights Under Law, *Our Broken Voting System and How to Repair It: The 2012 Election Protection Report* (2013), <http://www.866ourvote.org/newsroom/publications/the-2012-election-protection-report-our-broken-voting-system-and-how-to-repair-it>.
- 24 Brennan Center for Justice, *Citizens Without Proof: A Survey of Americans’ Possession of Documentary Proof of Citizenship and Photo Identification* (Nov. 2006), *available at* [http://www.brennancenter.org/page/-/d/download\\_file\\_39242.pdf](http://www.brennancenter.org/page/-/d/download_file_39242.pdf).
- 25 *Id.*
- 26 *Id.*
- 27 *Id.*
- 28 *Frank v. Walker*, No. 2:11-CV-1128 (E.D. Wis. May 13, 2014). Co-counsel included the American Civil Liberties Union (ACLU), National Law Center on Homelessness & Poverty, ACLU of Wisconsin, and Dechert, LLP.
- 29 Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America* ¶ 6, U.N. Doc. CERD/C/USA/CO/6 (May 2008), *available at* <http://2001-2009.state.gov/documents/organization/107361.pdf>.
- 30 *Id.* at ¶ 27.
- 31 U.S. Dep’t of State, *Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination* ¶ 100 (June 12, 2013), *available at* <http://www.state.gov/documents/organization/210817.pdf>.
- 32 *Id.* at ¶ 101.
- 33 Press Release, U.S. Dep’t of Justice, *Civil Rights Division Highlights Accomplishments and New Records for 2013* (May 12, 2014), *available at* <http://www.justice.gov/opa/pr/2014/May/14-crt-497.html>.
- 34 U.S. Dep’t of State, *Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination* ¶ 102 (June 12, 2013), *available at* <http://www.state.gov/documents/organization/210817.pdf>.
- 35 UN Human Rights Comm., *Concluding Observations on the Fourth Periodic Report of the United States of America* ¶ 24, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014), *available at* [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FUSA%2FCO%2F4](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FUSA%2FCO%2F4).
- 36 *Id.*
- <sup>37</sup> Office for Democratic Inst. & Human Rights, Org. for Sec. & Cooperation in Europe, *Limited Election Observation Mission Report* (Feb. 13, 2013), *available at* <http://www.osce.org/odihr/elections/99573?download=true>.
- 38 UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: United States of America*, U.N. Doc. A/HRC/16/11 (January 4, 2011), *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/100/69/PDF/G1110069.pdf?OpenElement>.



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39 See U.S. Dep't of State, *U.S. Response to UN Human Rights Council Working Group Report* ¶ 8 (March 10, 2011), available at <http://www.state.gov/j/drl/upr/157986.htm>.

40 While the ACLU does not endorse all of the recommendations of the Presidential Commission on Election Administration, many election administration reforms would reduce the impact of long lines and inequitable resources on minority and language minority voters.

41 Democracy Restoration Act of 2014, H.R. 4459, S. 2235, 113th Cong. (2014), available at [http://www.brennancenter.org/sites/default/files/legislation/Democracy\\_Restoration\\_Act.pdf](http://www.brennancenter.org/sites/default/files/legislation/Democracy_Restoration_Act.pdf).

## **Discriminatory Treatment of Guestworkers and Undocumented Migrant Workers**

### **I. Issue Summary**

Across the United States, undocumented migrant workers and foreign nationals employed on a temporary basis (“guestworkers”) are subjected to numerous civil and human rights violations including trafficking, forced labor, employment abuses and discrimination on the basis of race, national origin, and immigration status. Notwithstanding the important work of the United States’ Equal Employment Opportunity Commission<sup>1</sup>, all too often, the U.S. government has failed to adequately enforce existing anti-trafficking, anti-discrimination, and labor laws, punish perpetrators, and provide redress to victims and survivors.

#### ***Guestworkers***

Guestworkers are especially prone to discrimination and abuse, due in part to the exploitation of visa application processes by duplicitous employers and recruiters and because of serious defects in the structure of the U.S. guestworker program. In particular, the government has failed to regulate and supervise visa schemes appropriately to prevent discrimination and abuse and has also failed to amend provisions of the guestworker program that invite labor trafficking and facilitate exploitation.

The United States administers two programs that allow employers to bring foreign guestworkers into the country for “unskilled” work on a temporary basis: the H-2(a) program for agricultural workers and the H-2(b) program for non-agricultural workers. Because of serious flaws in the structure of the latter, guestworkers become vulnerable to labor trafficking and racial and national origin discrimination. The H-2(b) program grants these foreign workers temporary, non-immigrant status in the United States; a status that binds workers to their “employer-sponsor” and makes the worker’s ability to obtain and retain status entirely dependent on their remaining on good terms with their employer. This precarious legal situation renders workers disposable commodities of the employer. For example, if workers should complain about discrimination or abuse, educate other workers about their legal rights, or protest about their compensation, their employer can very easily send them back to their country of origin, irrespective of the conditions of their employment. If guestworkers abandon their jobs, they often must choose to either return to their home country in crippling debt, or join the ranks of the nation’s undocumented workers.<sup>2</sup>

Guestworkers are generally afraid to be sent back to their home countries, because they often arrive in the United States saddled with huge debts paid to recruiters for recruitment fees and travel. That debt is often multiplied by high interest rates charged by the loan sharks who workers approach to fund payment for the fees. Because recruiters often misrepresent the terms

and conditions of employment opportunities in the United States, and because the U.S. government does not require these foreign recruiters to register or to even agree to follow U.S. law, fraudulent recruiters are often unaccountable for their actions. To make matters worse, the U.S. government has inadequate oversight mechanism to ensure that guestworkers are not mistreated after they arrive in the United States or that the contracts that workers sign with recruiters are honored after the workers are here and under the control of their "employer-sponsors." Because guestworkers are often migrants from poor countries in the global south and are housed in rural environs where they are isolated geographically, linguistically, and culturally, when they endure racial discrimination and abuse, these human rights violations are frequently hidden from public view.

### ***Undocumented Workers***

In *Hoffman Plastic Compounds, Inc. v. NLRB*, the 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 or her employer.<sup>3</sup> The *Hoffman* decision has been expanded by some federal courts and the National Labor Relations Board,<sup>4</sup> further undermining the ability of workers to access justice and remedies—solely on the basis of their immigration status—and perpetuating workplace discrimination on the basis of race and national origin.

*Hoffman* sanctions employers' denial of fundamental workplace rights by denying undocumented migrant workers back pay and a broader set of remedies.<sup>5</sup> Various state courts have also embraced the *Hoffman* rationale and expanded it to other contexts. States including California, Kansas, Florida, New Jersey, New Hampshire, New York, Pennsylvania, Michigan, and Illinois have limited the rights of undocumented workers to seek protection under state anti-discrimination and other laws and receive the remedies that would be due to them were it not for their immigration status.<sup>6</sup> As a result, when injured or killed on the job, undocumented workers are without protections or entitlements when terminated for discriminatory reason. In addition, they are denied overtime pay, workers' compensation (a state-based system that provides remuneration for employees who have been injured while working on the job), family and medical leave, or other benefits.

*Hoffman* has also exacerbated undocumented migrant workers' fears that they lack rights and protection in their places of employment because of their immigration status. Employers have informed workers of the *Hoffman* decision and have threatened them with dismissal without reinstatement or back pay if they complain about minimum wage, overtime, health and safety or other violations, or if they engage in trade union activities.<sup>7</sup> A collateral effect of post-*Hoffman* litigation continues to be that immigration status is a focal point in a great deal of employment-

related litigation. Because of immigrant workers' fears of drawing attention to their immigration status or the status of their family members, *Hoffman* has had a chilling effect that undermines the willingness and ability of migrant workers to enjoy and enforce their right to be free from discrimination.

At the federal level, while bills have been introduced that address *Hoffman*, Congress has failed to move any legislation forward that would reverse *Hoffman* and restore the rights of all workers to seek access to justice and adequate remedies. The Department of Labor and other federal agencies are still grappling with the meaning and effect of *Hoffman* on labor and employment law enforcement and this area of law remains murky. At the state and local level, in addition to facing court-sanctioned discrimination set forth by *Hoffman*, undocumented and other migrant workers have been targeted by an onslaught of anti-immigrant laws<sup>8</sup> that seek to deny migrants access to jobs, education, housing, and health care on the basis of their immigration status.

## II. Human Stories

### *Guestworkers*

There is, unfortunately, no shortage of examples<sup>9</sup> of exploitation and abuse under the guestworker program. In just one example, the ACLU and co-counsel<sup>10</sup> represent men from India trafficked through the H-2(b) guestworker program with recruiters' and employers' false promises of green cards and good industrial jobs on the U.S. Gulf Coast. However, when the Indian workers arrived in late 2006 and early 2007, they found themselves living in racially segregated, overcrowded, guarded labor camps. The Indian guestworkers were also victims of severe racial discrimination, which led in 2011 to a separate lawsuit by the Equal Employment Opportunity Commission.<sup>11</sup> Sadly, their experience, while horrific, is emblematic of the broader problems with the guestworker program.

### *Undocumented Workers*

**Leopoldo Zumaya**<sup>12</sup> is a Mexican national who fractured his leg when he fell out of a tree while picking apples in Pennsylvania. He had to endure three separate surgeries—to insert a metal plate and six screws in his ankle and leg, and to try to repair torn ligaments—and suffered from nerve damage and chronic regional pain disorder. Mr. Zumaya's employer initially paid his medical benefits, but when it became clear he would not be able to promptly return to work, his employer indicated his benefits would be suspended. Although the treating physician had told Mr. Zumaya his case was among the worst he had seen, he was deemed physically able to return to sedentary work. However, there was no work available for him with his physical limitations so Mr. Zumaya sought compensation for his workplace injury. Because of his immigration status, Mr. Zumaya was not entitled to wage loss benefits from the time he was released for sedentary work and was forced to accept a settlement of his claim for far less than he would have received if he had been documented.

**Francisco Berumen-Lizalde**<sup>13</sup> is a worker from Mexico who was employed as a painter in Wichita, Kansas. In November of 2005, he fell from scaffolding and fractured his hand. After filing for workers' compensation benefits, and just before a doctor's visit in December 2005 to determine the extent of his disability, he was arrested and charged with "document fraud" for having used false documents to get a job. He believes that he was turned in to immigration authorities because he filed a claim for workers' compensation. He was deported in February 2006. Mr. Berumen-Lizalde has been unable to secure the care to which he is entitled under Kansas law, was jailed for more than a month, was convicted of a felony, and deported, and has been effectively denied his right to the benefits to which he is legally entitled.

Leopoldo Zumaya and Francisco Berumen-Lizalde brought claims of discrimination based upon immigration status before the Inter-American Commission on Human Rights, which has deemed the case admissible.<sup>14</sup> Since the filing of the original petition in 2006, the United States has continued to deny undocumented workers full equal rights and remedies under labor and employment laws and has yet to file a formal response to the Commission regarding Mr. Zumaya and Mr. Berumen-Lizalde's case.

### **III. CERD Committee Position**

#### *Undocumented Workers*

In 2008, the CERD Committee expressed concern about the discriminatory treatment of migrant workers in the United States and adopted the following recommendation (para. 28):

"The Committee regrets that despite the various measures adopted by the State party to enhance its legal and institutional mechanisms aimed at combating discrimination, workers belonging to racial, ethnic and national minorities, in particular women and undocumented migrant workers, continue to face discriminatory treatment and abuse in the workplace, and to be disproportionately represented in occupations characterized by long working hours, low wages, and unsafe or dangerous conditions of work. The Committee also notes with concern that recent judicial decisions of the U.S. Supreme Court – including *Hoffman Plastics Compound, Inc. v. NLRB* (2007), *Ledbetter v. Goodyear Tire and Rubber Co.* (2007) and *Long Island Care at Home, Ltd. v. Coke* (2007) – have further eroded the ability of workers belonging to racial, ethnic and national minorities to obtain legal protection and redress in cases of discriminatory treatment at the workplace, unpaid or withheld wages, or work-related injury or illnesses (arts. 5(e)(i) and 6)."<sup>15</sup>

In its 2004 General Recommendation addressing discrimination against non-citizens, the CERD Committee called on state parties to "guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law"; to

“[r]emove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health”; and “eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects”, recognizing that “all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated.”<sup>16</sup>

#### **IV. U.S. Government Response**

##### ***Guestworkers***

The U.S. government’s report submitted to the CERD Committee in June 2013 does not acknowledge or address any of the flaws inherent in the United States’ guestworker program.

##### ***Undocumented Workers***

The U.S. government addressed this issue in its report to the CERD Committee submitted in June 2013 as follows:

“Regarding the Committee’s concerns about undocumented migrant workers, all workers in the United States, regardless of immigration status, are entitled to the protections of U.S. labor and employment laws, including those related to minimum wage, overtime, child labor, workplace health and safety, compensation for work-related injuries, freedom from unlawful discrimination, and freedom from retaliation... When investigating potential violations of labor or employment laws, [the U.S. Department of Labor] and EEOC do not inquire into the immigration status of the workers involved. In litigation, EEOC actively attempts to keep information about citizenship out of trials, and it uses injunctions and other devices to stop employer threats of violence or deportation against workers who complain. Employers are held accountable without regard to the legal status of workers, although limited remedies may not be available to undocumented workers.”<sup>17</sup>

“For example, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) placed a narrow limitation on a single remedy for a violation of the National Labor Relations Act in saying that undocumented workers may be denied back pay as a remedy for unfair labor practices for work not performed where such employment was secured through fraud and in violation of U.S. immigration law. The decision, however, does not preclude a range of other remedies that help to compensate and protect undocumented workers.”<sup>18</sup>

The U.S. government's response is carefully constrained and does not respond to the realities in both law and practice. While it is true that the federal statutes addressing labor and employment rights do not distinguish between documented and undocumented workers in their definition of a covered "employee," workers experience differential and discriminatory treatment in the workplace, and are not adequately protected against retaliation, whether it be unlawful termination, blacklisting for future employment or deportation. While the Department of Labor and the EEOC may not inquire into the immigration status of workers, employers do and actively seek to use immigration status as a deterrent, if not a complete defense, to liability. The current Memorandum of Understanding between the Department of Labor and Immigration and Customs Enforcement does not create an adequate firewall between enforcement of labor and employment rights and immigration enforcement, as evidenced by the case of Mr. Berumen-Lizalde.

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

In its 2014 Concluding Observations on the United States, the UN Human Rights Committee urged the U.S. to "ensure effective oversight of labor conditions in any temporary visa program" and specifically expressed concern that workers entering the U.S. under the H-2(b) work visa program are at "high risk of becoming victims of trafficking/forced labor."<sup>19</sup>

Through the 2010 Universal Periodic Review process, the U.S. government expressed support in part for a recommendation that it take necessary measures to ensure fair work conditions for workers belonging to minorities, regardless of their migratory status.<sup>20</sup> United States law and practice concerning protection of undocumented workers stand in contrast to established human rights law with respect to the bedrock principle of non-discrimination including on the basis of immigration status.<sup>21</sup>

## **VI. Recommended Questions**

### ***Guestworkers***

1. Particularly in light of its commitment during the UPR process to ensure fair conditions of work for migrant workers, what steps will the U.S. government take to address the flaws in its H-2(b) guestworker program so that the program is no longer a vehicle for trafficking, discrimination and abuse by employers and recruiters?
2. Has the U.S. government initiated any review of the H-2(b) guestworker program in light of the U.N. Human Rights Committee's April 2014 recommendation?

3. What steps will the U.S. government take to monitor the conditions of H-2(b) guest workers in the United States, including proactive protections against discrimination and abuse?
4. What steps will the U.S. government take to ensure that guestworkers, and undocumented workers are guaranteed the right to non-discrimination on the basis of race and national origin, in their enjoyment of all employment-related rights? And, recognizing that the failure to provide a remedy is tantamount to the denial of a right, what steps is the U.S. taking to ensure guestworkers and undocumented workers are protected by the full panoply of U.S. employment and labor laws, including the right to organize, minimum wage and overtime, worker safety protections, and effective remedies for abuse, harassment, and discrimination?

### ***Undocumented Workers***

Please explain what steps the United States has taken in response to the Concluding Observation and Recommendation (paragraph 28) from the 2008 Review. Specifically, in light of the U.S. Supreme Court Decision in *Hoffman Plastics*, please explain:

1. What steps has the United States taken to protect workers against retaliation when they seek to engage in freedom of association, or assert other rights in the workplace?
2. What steps has the United States taken to mitigate the chilling effect the Hoffman decision has had on workers seeking to enforce their basic labor rights, at both the federal and state levels?
3. What steps is the United States taking to penalize those employers who are improperly relying on the *Hoffman* decision to threaten or retaliate against employees for complaining about minimum wage, overtime, health and safety or other violations, or engaging in trade union activities?

## **VII. Suggested Recommendations**

### ***Guestworkers***

1. The U.S. should ensure that in any temporary visa program, workers have the ability to leave abusive U.S. employers and seek employment with other U.S. employers without having to leave the U.S. and return to their country of origin, and that employers bear the recruitment, visa processing, and travel costs of workers.



2. The U.S. should ensure that in any temporary visa program, there exists robust governmental oversight of labor conditions, and enforcement mechanisms verifying that employers comply with the terms of the contract. The U.S. government should also ensure that guestworkers are protected by the full panoply of U.S. employment and labor laws, including the right to organize, minimum wage and overtime, worker safety protections, and effective remedies for abuse, harassment and discrimination.
3. The U.S. should ensure that in any temporary visa program, there exists a rigorous and streamlined governmental process to deny visa applications of employers who have violated workers' rights under prior contracts.
4. The U.S. should ensure that in any temporary visa program, workers have a path to permanent residency and citizenship (with their families).

### ***Undocumented Workers***

1. The U.S. Congress should introduce and pass legislation that would address the *Hoffman Plastics* decision and ensure employment protections for non-citizens regardless of their immigration status.
2. The Obama Administration should promulgate regulations and guidance to ensure that all relevant federal agencies work affirmatively to guarantee non-citizens, regardless of their immigration status, non-discrimination in the protection and enjoyment of their rights in the workplace.
3. The Obama Administration should undertake a program to proactively educate state and local officials on the limits and applicability of the *Hoffman* decision, and should work with state and local officials to strengthen state anti-discrimination and other laws to ensure that all workers, regardless of their immigration status, are guaranteed their human rights to employment protections.

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1 See e.g., *EEOC v. Signal Int'l, LLC*, No. 12-557 (E.D. La. filed May 6, 2011); Press Release, U.S. Equal Employment Opportunity Commission, *EEOC Combats Labor Trafficking, Severe Abuse and Discrimination in Lawsuits Filed Today* (Apr. 20, 2011), <http://www.eeoc.gov/eeoc/newsroom/release/4-20-11.cfm>.

2 Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States* (2013), available at <http://www.splcenter.org/get-informed/publications/close-to-slavery-guestworker-programs-in-the-united-states>.

3 *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

4 See, e.g., *Palma v. NLRB*, 723 F.3d 176 (2d Cir. 2013); *Ambrosi v. 1085 Park Ave. LLC*, 2008 U.S. Dist. LEXIS 73930 (S.D.N.Y. Sept. 25, 2008); *Veliz v. Rental Serv. Corp. USA, Inc.*, 313 F. Supp. 2d 1317 (M.D. Fla. 2003); *20 Garcia v. Am. United Life Ins. Co.*, 2009 U.S. Dist. LEXIS 126391 (E.D. Tex. Dec. 9, 2009); *Martinez v. Freeman*, 2008 U.S. Dist. LEXIS 112290 (N.D. Ill. Feb. 22, 2008).

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5 See, e.g., *Renteria v. Italia Foods, Inc.*, No. 02 C 495, 2003 WL 21995190 (N.D. Ill. Aug. 21, 2003); *Escobar v. Spartan Sec. Serv.*, 281 F. Supp. 2d 895 (S.D. Tex. 2003).

6 See, e.g., *Crespo v. Evergo Corp.*, 366 N.J. Super. 391(N.J. Super. Ct. App. Div. 2004); *Reinforced Earth C. v. Workers' Compensation Appeal Bd.* 570 Pa. 464 (Pa. 2002); *Sanchez v. Eagle Alloy Inc.*, 254 Mich. App. 651 (Mich. Ct. App. 2003); *Rosa v. Partners in Progress, Inc.*, 152 N.H. 6 (N.H. 2005); *Balbuena v. IDR Realty LLC*, 6 N.Y. 3d 338 (N.Y. 2006).

7 See, e.g., Alfredo Corchado & Lys Mendez, *Undocumented Workers Feel Boxed In*, Dallas Morning News, July 14, 2002, at 1J; Nancy Cleeland, *Employers Test Ruling on Immigrants*, L.A. Times, April 22, 2002, at 1, available at <http://articles.latimes.com/2002/apr/22/business/fi-workers22>.

8 Several local legislatures have sought to condition a migrant worker's ability to reside in rental housing on his or her immigration status. Provisions have required all prospective renters to provide immigration status information and obtain a rental license or attempted to punish with sanctions or make vulnerable to litigation employers who hire undocumented migrants and landlords who rent to them. State legislatures have attempted to deter undocumented migrant workers from enrolling their children in public elementary, middle, and high schools and from going to hospitals by requiring school and hospital officials to inquire about and report on immigration status. Most of these state and local laws have been defeated. For a round-up of several local anti-immigrant laws and ACLU responses, see ACLU, *Local Anti-Immigrant State Laws*, available at <https://www.aclu.org/immigrants-rights/local-anti-immigrant-laws>. See also ACLU, *State Anti-Immigrant Laws*, available at <https://www.aclu.org/immigrants-rights/state-anti-immigrant-laws>.

9 Southern Poverty Law Center, *Close to Slavery-Guestworker Programs in The United States* (revised in 2013), available at <http://www.splcenter.org/sites/default/files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf>.

10 ACLU, David, et al. v. Signal International, LLC, et al., <https://www.aclu.org/human-rights/david-et-al-v-signal-international-llc-et-al> (last visited Jun. 24, 2014).

11 ACLU, EEOC v. Signal International, LLC, <https://www.aclu.org/human-rights/eec-v-signal-international-llc> (last visited Jun. 24, 2014).

12 See Petition, Inter-Am. Comm'n H.R., Nov. 1, 2006, available at [http://www.aclu.org/files/images/asset\\_upload\\_file946\\_27232.pdf](http://www.aclu.org/files/images/asset_upload_file946_27232.pdf).

13 *Id.*

14 See Written Observations for Case No. 12.834: Violations of the Human Rights of Undocumented Workers by the United States of America, July 31, 2013, available at <file:///Users/aadikasingh/Downloads/Written%20observations.pdf>.

15 Comm. on the Elimination of Racial Discrimination, *Concluding Observations on the United States of America* ¶28 (May 8, 2008) U.N. Doc. CERD/C/USA/CO/6.

16 Comm. on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination against Non-Citizens* (2004), U.N. Doc. CERD/C/64/Misc.11/rev.3.

17 *Id.* at ¶ 121.

18 *Id.* at n.17.

19 U.N. Human Rights Comm., *Concluding Observations on the Fourth Periodic Report of the United States of America* ¶14 (Apr. 23, 2014) U.N. Doc. CCPR/C/USA/CO/4, available at <http://www.refworld.org/docid/5374afcd4.html>.

20 Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review, United States of America*, UN Doc. No. A/HRC/16/11 (January 4, 2011).

21 Rights of Undocumented Workers, Advisory Opinion, OC-18/03, Inter. Am. Ct. H.R. (2003). The Inter-American Commission held that the principle of equality and non-discrimination is a *jus cogens* norm imposing upon all States the affirmative obligation to ensure equality and protect against discrimination, in the enjoyment of fundamental rights, including due process of law and access to justice. It then applied that principle to all migrant workers, regardless of legal status, recognizing the following fundamental rights: "157. ... the prohibition of obligatory or forced labor; the prohibition and abolition of child labor; special care for women workers, and the rights corresponding to: freedom of association and to organize and join a trade union, collective negotiation, fair wages for work performed, social security, judicial and administrative guarantees, a working day of reasonable length with adequate working conditions (safety and health), rest and compensation."

## **Predatory Lending and the Foreclosure Crisis**

### **I. Issue Summary**

Communities throughout the United States continue to struggle with the foreclosure crisis that started in 2007 in the aftermath of the collapse of the housing market. But the impact of the foreclosure crisis has been especially severe for racial and ethnic minority communities. These adverse racial effects have greatly exacerbated racial wealth gaps, thereby deepening preexisting inequality.

The racial justice implications of the foreclosure crisis are rooted in widespread discrimination that defined the subprime lending practices of the early 2000s. Subprime lending<sup>1</sup> and race were inextricably linked from the outset. In 2000, a report by the U.S. Department of Housing and Urban Development (HUD) found that borrowers in Black neighborhoods were five times more likely to refinance in the subprime market than borrowers in White neighborhoods, even when controlling for income.<sup>2</sup> Indeed, the report indicated that these disparities could not be justified by the economic status of borrowers, because “borrowers in upper-income Black neighborhoods were twice as likely as homeowners in low-income White neighborhoods to refinance with a subprime loan.”<sup>3</sup> These disparities became entrenched as subprime lending expanded. A 2006 report found that, within the subprime market, minority borrowers were over 30 percent more likely to get higher-rate loans than Whites, even after controlling for differences in credit risk.<sup>4</sup> Communities of color consistently received loans with higher price tags and riskier terms, even when White borrowers with similar qualifications received safer loans. These disparities resulted, in large part, from the systematic use of a discriminatory tactic known as “reverse redlining,” in which predatory lenders exploit the historic exclusion of minority neighborhoods from access to traditional credit (a practice known as “redlining”) to target those communities for toxic loans.

Predictably, discrimination in the subprime market led directly to massive disparities in foreclosure rates. By 2010, African-Americans and Latinos were, respectively, 47 percent and 45 percent more likely than Whites to face foreclosure.<sup>5</sup> The link between race, subprime lending, and elevated rates of foreclosure has become crystal clear. According to Princeton University researchers, “the greater the degree of Hispanic and especially Black segregation a metropolitan area exhibits, the higher the number and rate of foreclosures it experiences.”<sup>6</sup>

### **II. Human Stories**

Black and Latino homeowners throughout the country have struggled with onerous loans, and, in many instances, lost their homes as the result of these discriminatory practices.



**Rubie McCoy**, an African-American Detroit resident raising six kids, exemplifies the experience of individuals subjected to discriminatory lending practices. Ms. McCoy is a plaintiff in an ACLU lawsuit alleging that the practices of Morgan Stanley in purchasing loans from a notorious predatory lender, New Century Mortgage Company, led to discriminatory outcomes for African-American borrowers in Detroit. The New Century loan she received in 2006 contained a toxic combination of high risk features: it was structured to become increasingly expensive over time, and the costs to Ms. McCoy were inflated by the mortgage broker's intentional use of incorrect information on the loan application.<sup>7</sup> These terms led Ms. McCoy to a protracted effort to prevent her home from being foreclosed. The toxic nature of the loan terms fit a pattern of discrimination by New Century, a notorious predatory lender that was named by the federal Office of the Comptroller of the Currency as the "worst of the worst" among subprime lenders whose loans ended in foreclosure.<sup>8</sup> As alleged in the ACLU lawsuit, for New Century loans made in Detroit and the surrounding counties, an African-American borrower was 70 percent more likely than a White borrower with similar credit features to receive a high-cost loan.<sup>9</sup>

### III. CERD Committee Position

In General Recommendation 33 issued in 2009, the Committee addressed the global financial crisis, stating that it was "concerned by the consequences which the world financial and economic crisis could have on the situation of persons belonging to the most vulnerable groups, mainly racial and ethnic groups, leading to an aggravation of the discrimination they may suffer."<sup>10</sup>

The Committee further stated that States parties to the ICERD should: "Be mindful that their response to the current financial and economic crisis should not lead to a situation which would increase poverty and underdevelopment and, potentially, a rise in racism, racial discrimination, xenophobia and related intolerance against foreigners, immigrants, indigenous peoples, persons belonging to minorities and other particularly vulnerable groups all over the world."<sup>11</sup>

### IV. U.S. Government Response

The federal government has taken welcome steps in addressing the discriminatory lending practices that gave rise to the massively unequal effects of the foreclosure crisis. Since 2009, the Civil Rights Division of the U.S. Department of Justice has settled several high profile discrimination cases against subprime lenders.<sup>12</sup> These enforcement actions demonstrate a muscular use of anti-discrimination protections to penalize and deter racially discriminatory lending.

Additional action by the federal government, however, is necessary to ensure accountability and to safeguard against future discrimination. For example, while the

government has initiated discrimination cases against the lenders that originated predatory loans, it has not yet used its enforcement authority against the Wall Street banks that funded, purchased, and profited from predatory lending through the creation of mortgage backed securities. It should pursue such enforcement actions. Notably, several federal and state agencies jointly participate in a Financial Fraud Task Force, which includes a sub-group dedicated to unlawful conduct by banks in the course of creating residential mortgage backed securities.<sup>13</sup> Additionally, both the Fair Housing Act of 1968<sup>14</sup> and the Equal Credit Opportunity Act of 1974<sup>15</sup> prohibit conduct by purchasers of residential loans that results in a discriminatory impact on borrowers. One federal court has already recognized that the FHA provides a cause of action against an investment bank whose policies or practices result in racially adverse effects.<sup>16</sup> The Justice Department, HUD, and the Consumer Financial Protection Bureau, as well as other state or federal enforcement bodies, should aggressively pursue enforcement in this area.

Potential federal legislative action may also shape the future of the home mortgage market in ways that have deep implications for racial justice. Proposed legislation to substantially re-order the government's role in the secondary mortgage market has attracted criticism from civil rights advocates, who have argued that proposed changes would fail to ensure an inclusive and equitable system of home mortgage finance.<sup>17</sup> Similarly, the Federal Housing Finance Agency (FHFA) has opposed efforts by communities facing mass foreclosure to use the municipal power of eminent domain to secure reasonable principal reduction on mortgages that are underwater and therefore likely to end in foreclosure.<sup>18</sup> The municipalities that have considered this approach have significant African-American and Latino populations, which were subject to unfair lending; yet the FHFA has reacted by threatening to take action that would make it harder to offer fair credit in those communities.<sup>19</sup> Thus, the government's threatened actions would exacerbate the racially unequal effects of concentrated foreclosures.<sup>20</sup>

State and local governments have also played an important role in this area—in ways that have been both beneficial and harmful. Several municipal governments have taken action to hold banks accountable by suing institutions that engaged in discriminatory lending, arguing that cities with significant minority populations have absorbed the consequences of mass foreclosure—such as diminished tax base, blight, and other social harms—that followed as a consequence of their lending tactics.<sup>21</sup> On the other hand, some state governments—and, in particular, state judiciaries—have exacerbated the effects of abusive practices by diminishing the procedural protections available to individuals facing foreclosure.<sup>22</sup> While such practices are facially neutral, and undoubtedly harmful to all homeowners fighting to defend foreclosures, they are likely to have a disproportionate impact on communities experiencing elevated rates of foreclosure.

## V. Recommended Questions

1. What actions will the federal government take to hold accountable the major banks that fueled or encouraged discriminatory lending through their actions on the secondary mortgage market?
2. What legislative action is being considered to ensure that, going forward, the secondary mortgage market encourages lending practices designed to provide equitable and constructive access to credit in all communities?
3. What affirmative steps is the U.S. government taking to counteract the unequal economic harm suffered by communities of color as a result of the foreclosure crisis?

## VI. Suggested Recommendations

1. Congress should ensure that any reform of the secondary mortgage market is designed with an explicit focus on ensuring widely available, equitable credit opportunities in all communities, especially those that have traditionally not received fair access to credit.
2. The agencies composing the RMBS Working Group of the Financial Fraud Task Force should use their enforcement authorities to bring civil lawsuits against financial institutions whose policies for purchasing mortgage loans resulted in a discriminatory effect on minority borrowers.
3. The FHFA should formally rescind its threat to take action against municipalities that opt to use eminent domain to secure principal reduction for underwater loans. Additionally, it should end the ban on principal reduction for loans held by Fannie Mae and Freddie Mac.<sup>23</sup>

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<sup>1</sup> There is no legal definition of “subprime loan,” although the federal government has provided guidance on how to identify subprime loans. For example, the U.S. Department of Housing and Urban Development has published lists of lenders deemed “subprime.” Its most recent list was published in 2005. See *HUD Subprime and Manufactured Home Lender List*, U.S. Dep’t of Hous. and Urban Dev., available at <http://www.huduser.org/portal/datasets/manu.html>. Although the distinction between prime and subprime lending ostensibly tracks differences in a borrower’s creditworthiness, during the years prior to the foreclosure crisis many lenders and brokers simply tried to maximize the share of loans they originated on subprime terms. Lenders and brokers had incentives to steer as many borrowers as possible to subprime loans, which by definition tended to generate higher interest rates and costs. Not all subprime loans are predatory, but nearly all predatory loans are subprime. Most fundamentally, predatory loans place the borrower at an elevated risk of default or foreclosure. A federal interagency Statement on Subprime Lending issued in 2007 enumerates certain tactics that may indicate predatory lending. See Dep’t of the Treas., et al., *Statement on Subprime Lending*, 72 Fed. Reg. 37569, 37572 (July 10, 2007). Nonprofit groups have also published widely accepted guidance on the kinds of practices that may constitute predatory lending. See, e.g., Nat’l Community Reinvestment Coal., *The Broken Credit System: Discrimination and Unequal Access to Affordable Loans by Race and Age* 4 (2004).

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2 See U.S. Dep't of Hous. and Urban Dev., *Curbing Predatory Home Mortgage Lending* 22 (June 2000), available at <http://www.huduser.org/portal/publications/hsgfin/curbing.html>.

3 *Id.* at 23.

4 Debbie Gruenstein Bocian et al., *Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages* 3 (2006).

5 Debbie Gruenstein Bocian et al., *Foreclosure by Race and Ethnicity* 10 (2010).

6 Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 *Am. Soc. Rev.* 629, 644 (2010). See also Peter Dreier, *What Housing Recovery?*, *N.Y. Times* (May 8, 2014) at A27.

7 Complaint, *Adkins v. Morgan Stanley*, 12-cv-7667 (S.D.N.Y. Oct. 15, 2012), at ¶¶ 181-189.

8 Office of the Comptroller of the Currency, *Worst Ten in the Worst Ten*, available at <http://www.occ.treas.gov/news-issuances/news-releases/2009/nr-occ-2009-112b.pdf> (last accessed June 23, 2014).

9 *Id.* at ¶ 121.

10 Comm. on the Elimination of Racial Discrimination, *General Recommendation No. 33: Follow-Up to the Durban Review Conference* ¶ 6 (Sept. 29, 2009), U.N. Doc. CERD/C/GC/33.

11 *Id.* at ¶ 18.

12 See, e.g., Consent Order, *United States v. National City Bank*, 2:13-cv-01817 (W.D. Penn. Jan. 9, 2014); Consent Order, *United States v. Bank of America*, 3:12-cv-605 (W.D. N.C. Oct. 10, 2012); Consent Order, *United States v. Wells Fargo*, 1:12-cv-01150 (D.D.C. Sept. 21, 2012).

13 See <http://www.stopfraud.gov/leadership.html>.

14 See 42 U.S.C. § 3605.

15 See 15 U.S.C. 1691 *et seq.*

16 *Adkins v. Morgan Stanley*, No. 12-cv-7667, 2013 WL 3835198 (July 25, 2013).

17 See Joint Statement of Civil Rights Organizations, *Johnson-Crapo Doesn't Provide Credit Access for Communities of Color* (Mar. 21, 2014), available at <http://myhomeforgood.com/national-civil-rights-groups-say-as-released-johnson-crapo-does-not-provide-credit-access-for-communities-of-color/>.

18 Fed. Hous. Fin. Agency, *Statement on Eminent Domain* (Aug. 8, 2013), available at <http://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Statement-on-Eminent-Domain.aspx>.

19 See Dreier, *What Housing Recovery?*, *supra* note 5.

20 See Rachel Goodman, *Communities of Color Face Unexpected Foe in Foreclosure Prevention*, *ACLU Blog of Rights* (Dec. 5, 2013), available at <https://www.aclu.org/blog/racial-justice/communities-color-face-unexpected-foe-foreclosure-recovery>.

21 See, e.g., *Dekalb Cnty. v. HSBC N. Am. Holdings, Inc.*, 2013 WL 7874104 (N.D. Ga. Sept. 25, 2013); *Memphis v. Wells Fargo*, 2011 WL 1706756 (W.D. Tenn. May 4, 2011); *Mayor and City Council of Baltimore v. Wells Fargo*, 011 WL 1557759 (D. Md. Apr. 22, 2011).

22 See ACLU, *ACLU Charges High-Speed Florida Foreclosure Courts Deprive Homeowners of Chance to Defend Home* (Apr. 7, 2011), available at <https://www.aclu.org/racial-justice/aclu-charges-high-speed-florida-foreclosure-courts-deprive-homeowners-chance-defend-h> (last accessed June 23, 2014).

23 See Rachel Goodman, *Communities of Color Remain Underwater While the Tide Rises*, *ACLU Blog of Rights* (June 9, 2014), <https://www.aclu.org/blog/racial-justice/communities-color-remain-underwater-while-tide-rises>.

## **Lack of Due Process in American Indian Child Custody Proceedings in South Dakota**

### **I. Issue Summary**

During the 1800s, the United States federal government began corralling American Indian tribes and forcing them to live on reservations. Typically, the treaties that created these reservations placed the tribes under federal “protection.”<sup>1</sup> Not long afterwards, the federal government began allowing private organizations (religious groups, for the most part) to enter these protected enclaves and remove Indian children at their discretion, transporting them to boarding schools hundreds and sometimes thousands of miles away. By 1887, more than 200 of these schools had been established with an enrollment of over 14,000 Indian children. These schools often used harsh tactics, including corporal punishment and physical beatings, to compel the children to abandon their Indian culture and religion and adopt White ways. The premise of these schools was that Indian children needed a “proper” education and that Indian religion and culture were inferior to White religion and culture.<sup>2</sup>

This anti-Indian, ethnocentric bias continued throughout the next century in many parts of the United States, but finally Congress decided to take some action to combat it. An investigation conducted by Congress in the mid-1970s revealed that between 25 and 35 percent of all Indian children had been removed from their families by state welfare agencies and state courts and placed in foster or adoptive homes or residential institutions.<sup>3</sup> These percentages were far higher than for White children. In one state, the adoption rate for Indian children was eight times that of non-Indians; in another state, Indian children were thirteen times more likely than non-Indians to be placed in foster care by state courts.<sup>4</sup> What is more, most Indian children removed from their homes were placed with non-Indian families located off the reservation. One study showed that in sixteen states, 85 percent of the Indian children separated from their families were placed in non-Indian homes.<sup>5</sup> Studies also indicated that state social workers and judges often lacked a basic knowledge of Indian culture regarding child-rearing, were prejudiced in their attitudes, and removed children from their homes primarily because the family was Indian and poor.<sup>6</sup> An alarmingly high percentage of Indian children were placed in foster care or adoptive homes, Congress found, because state officials “have often failed to recognize the . . . cultural and social standards prevailing in Indian communities and families.”<sup>7</sup>

These removals were disastrous not only for many Indian children and their parents but also for their indigenous communities, which were losing their future generations. “The wholesale separation of Indian children from their families,” Congress concluded, “is perhaps the most tragic and destructive aspect of American Indian life today,” resulting in a crisis “of massive proportions.”<sup>8</sup>



The Indian Child Welfare Act (ICWA)<sup>9</sup> was passed by Congress in 1978 to address these problems. The stated purpose of the Act is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."<sup>10</sup> Congress recognized that nothing "is more vital to the continued existence and integrity of Indian tribes than their children."<sup>11</sup> ICWA was enacted to protect Indian children, their families, and their tribes, and to promote respect for tribal authority in matters of child custody.<sup>12</sup>

ICWA seeks to accomplish these goals by placing significant restrictions on the state's ability to remove Indian children from their families, and by giving tribal courts primary jurisdiction in most Indian custody cases.<sup>13</sup> ICWA places such significant restrictions on state courts in resolving Indian custody cases that many states contended it was unconstitutional. The U.S. Supreme Court, however, upheld the validity of the Act in 1989 on the grounds that Congress has the authority to pass this type of protective legislation for Indians.<sup>14</sup>

While ICWA has had great impact, its limitations are significant. For example, there is no regular and comprehensive review by any federal agency to ensure that states are complying with ICWA. Individual states are already required to report on a variety of measures regarding children in their care, but not on issues specific to ICWA compliance or the Indigenous children under state care. Requirements pertaining to ICWA should be added to these requirements. Including ICWA information in these reporting requirements would provide the information necessary to improve federal oversight and evaluate national ICWA compliance.

In addition, funding for tribal child welfare programs and individual state ICWA compliance efforts is pieced together through various federal child welfare programs. Even when aggregating these different programs and funding mechanisms, the funding is insufficient to ensure ICWA compliance and the tribes' ability to care for their own children and families as sovereign entities. This funding should be significantly increased to ensure that the rights of Indigenous children and families under the ICERD are protected.

### ***South Dakota***

Based on data collected by the state of South Dakota, the state's population in 2010 was 814,180, 8.9 percent of which was American Indian and Alaska Native. However, of the 1,485 children in state-mandated foster care, 52.5 percent were American Indian/Alaska Native. Of the remainder, 30 percent are White, six percent are Hispanic, two percent are African American, 0.5 percent are Asian, and the rest other races or ethnicities or combinations of races/ethnicities.<sup>15</sup> Thus, per capita, an American Indian child in South Dakota is 11 times more likely to be sent to foster care than a non-Indian child.<sup>16</sup>

Many Indians in South Dakota are convinced that these figures reflect intentional and unintentional racism, consistent with practices that have been condoned for decades in much of the United States. In March 2013, the ACLU filed a lawsuit in federal court in Rapid City, South Dakota on behalf of the Oglala Sioux Tribe and the Rosebud Sioux Tribe (two of the state's nine federally recognized Indian tribes) and on behalf of a class of all Indian families in Pennington County (Rapid City), against various state officials involved in the removal of Indian children from their homes under state child custody laws. The lawsuit alleges that the procedures and practices employed by these officials violate the Due Process Clause of the federal Constitution as well as provisions of the Indian Child Welfare Act of 1978 and result in the wrongful removal of scores of Indian children every year from their homes. The defendants include a state court judge, a county prosecutor, and the director of the South Dakota Department of Social Services.

Attached to the Plaintiffs' complaint is the transcript of a custody hearing involving Plaintiff Madonna Pappan, her husband, and their two children. The hearing lasted little more than 60 *seconds*. The court did not permit the Pappans to see the petition that had been filed against them by state officials. When Mr. Pappan asked what he was permitted to discuss, the court changed the subject and, a few seconds later, terminated the hearing. The court then signed an order which found that "active efforts have been made to provide remedial services and rehabilitative programs" to the Pappans, and that taking the Pappan children away from their parents "is the least restrictive alternative available," even though no evidence was introduced during the hearing on those issues. The order stripped the Pappans of custody over their children for at least 60 days and gave that custody to the officials who had filed the secret petition. The complaint claims that this is standard procedure in Pennington County in child custody hearings.<sup>17</sup>

The defendants filed a motion to dismiss the lawsuit. On January 28, 2014, Chief Judge Jeffrey Viken denied the motion.<sup>18</sup> Among other things, Judge Viken ruled that the two tribal plaintiffs have the right to raise these issues on behalf of the members of their tribes and that Indian parents may sue state officials as a class to challenge the practices occurring here. The lawsuit hopes to rectify many of the violations that are occurring. For several reasons, Judge Viken's ruling is a major step toward making those improvements. Among other things, Judge Viken agreed that "[k]eeping Indian parents in the dark as to the allegations against them while removing a child from the home for 60 to 90 days certainly raises a due process issue."<sup>19</sup> So, the court agreed that if Pennington County's child removal procedures really look the way our lawsuit describes them, those procedures violate the Due Process Clause and ICWA.

## II. Human Stories



**Madonna Pappan** is a member of the Oglala Sioux Tribe residing in Pennington County, South Dakota. Ms. Pappan and her husband had their two children taken from them in a hearing that lasted less than 60 seconds. The court did not permit the Pappans to see the petition that had been filed against them by the State of South Dakota and issued an order stripping the Pappans of custody over their children for at least 60 days. The court granted custody of the children to the officials who had filed the secret petition against the Pappans. The removal of her children caused both Ms. Pappan and her husband as well as her children severe emotional distress and trauma. The forced removal of the children caused Ms. Pappan's children to suffer emotional and psychological harm, including (to varying degrees) separation anxiety, bed-wetting, suicidal tendencies, emotional swings, and fear of being separated from their parents. To this day, Ms. Pappan's daughter, who was three years old at the time she was removed from the family, often wakes up in the middle of the night and goes to her mother's bedroom just to make sure she is there. Ms. Pappan was one of three tribal members who filed a lawsuit in South Dakota seeking to require state courts to provide full due process rights when Indian children are taken into custody under allegations of abuse or neglect.

## III. Other UN and Regional Human Rights Bodies Recommendations

While the Committee on the Elimination of Racial Discrimination has not yet considered this issue with regards to the U.S., it has commented on the need for preserving and protecting indigenous families in the context of other State Parties to the Convention where indigenous peoples' rights are involved:

### *CERD Concluding Observations: Canada 2012*

“The Committee recommends that the State party, in consultation with Aboriginal peoples, implement and reinforce its existing programmes and policies to better realize the economic, social and cultural rights of Aboriginal peoples, in particular through: (f) Discontinuing the removal of Aboriginal children from their families and providing family and child care services on reserves with sufficient funding...”<sup>20</sup>

### *CERD Concluding Observations: Australia 2010*

“The Committee notes with satisfaction the national apology for past negative government policies, issued by the State party on 13 February 2008 to indigenous peoples and in particular the Stolen Generations, as a first step towards genuine reconciliation and reparations to be made in recognition of the history of gross violations of human rights.”<sup>21</sup>

“While noting with interest the range of compensation payment schemes that have been implemented or recommended for implementation in the State party, the Committee regrets the absence of appropriate compensation payment schemes for Stolen Generations and stolen wages, which is inconsistent with article 6 of the Convention. The Committee reiterates its recommendation to the State party that it address appropriately and through a national mechanism past racially discriminatory practices, including through the provision of adequate compensation to all involved.”<sup>22</sup>

#### **IV. Recommended Questions**

1. The Indian Child Welfare Act of 1978 (ICWA) provides for national uniform procedural and substantive protections to prevent the removal of Indigenous children from their families, communities, and culture. However, a disproportionate number of native children are removed from their families and placed in out-of-home care. How does the United States plan to address this problem?
2. The most important provision of Indian Child Welfare Act recognizes Indigenous Nations’ inherent jurisdiction in child custody proceedings, yet due to insufficient resources (both a lack of sufficient funds and a sufficient number of trained staff) many tribes remain unable to fully exercise jurisdiction under the provisions of ICWA. How does the United States plan to address this problem?
3. Overwhelming anecdotal evidence suggests that Indigenous families face bias and racist treatment in United States public child welfare and private adoption systems and that there is wide spread non-compliance with ICWA. How will the United States investigate, verify, and correct these systemic rights violations?

#### **V. Suggested Recommendations**

1. The United States should, in consultation with the Indigenous nations in its borders, establish a robust federal review system to ensure that ICWA is fully implemented and enforced.
2. Requirements pertaining to ICWA should be consistent with other federal child welfare laws in the United States and should require and comprehensive federal review. Individual states should be required to report on issues specific to ICWA compliance and the Indigenous children under state care, in addition to the other existing measures regarding children in their care.

3. The federal government, specifically the Department of the Interior and Department of Health and Human Services, should work with tribes and states to collect accurate data, assess patterns in ICWA non-compliance in public child welfare and private adoption systems, and engage in corrective actions to ensure uniform nationwide ICWA compliance and the protection of Indigenous children and families under the Declaration.
4. The United States should increase funding to Indigenous nations in order to provide adequate family and child care services. Moreover, the United States government should provide adequate funding to state child serving systems to ensure ICWA compliance.
5. The United States should conduct an investigation into the biased treatment of Indigenous families in the State's child protection and child welfare systems. The United States, specifically the Department of Justice's Civil Rights division, should investigate these troubling practices and aggressively and effectively advocate for the fair treatment of Indigenous peoples in these child and family serving systems and for the full implementation of ICWA by each state within the United States.

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1 See Stephen L. Pevar, *The Rights of Indians and Tribes* 30-31 (2012).

2 See S. Lyman Tyler, *A History of Indian Policy* 88 (1973); Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. Kan. L. Rev. 713, 729 (1986).

3 See Indian Child Welfare Act of 1978: Hearings Before the Subcomm. on Indian Affairs of the House Comm. On Interior and Insular Affairs, 95th Cong., 2d Sess. (1978); Indian Child Welfare Act of 1977: Hearing on S.1214 Before the Senate Select Comm. on Indian Affairs, 95th Cong., 1st Sess. (1977). See also *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989); Barbara Ann Atwood, *Children, Tribes, and States* 155-59 (2010); B.J. Jones, Mark Tilden, & Kelly Gaines-Stoner, *The Indian Child Welfare Act Handbook* (2008); Myers, Gardner, & Geary, *Adoption of Native American Children and the Indian Child Welfare Act*, 18 S. Ct. J. 17 (1994); Patrice Kunesh-Hartman, *The Indian Child Welfare Act of 1978: Protecting Essential Tribes*, 60 U. Colo. L. Rev. 131 (1989).

4 See Indian Child Welfare Program Hearings before the Subcomm. on Indian Affairs, 93rd Cong., 2d Sess. 15 (1974), reprinted in 1978 U.S.C.C.A.N. 1530, 7531 (Statement of William Byler).

5 See Indian Child Welfare Act of 1977: Hearing on S.1214 Before the Senate Select Comm. on Indian Affairs, 95th Cong., 1st Sess. 538, 603 (1977); Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 93rd Cong., 2d Sess. 17 (1974).

6 See H.R. Rep. No. 1386, 95th Cong., 2d Sess. at 10 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7531-32.

7 25 U.S.C.A. § 1901.

8 H.R. Rep. 95-1386 at 9 (1978).

9 25 U.S.C. §§ 1901-1963.

10 25 U.S.C. Sec. 1902. See *Choctaw Indians v. Holyfield*, 490 U.S. at 32.

11 25 U.S.C. Sec. 1901(3). See *In re Elias L.*, 767 N.W.2d 98, 103 (Neb. 2009) (noting that some tribes will "face extinction" unless the pace of Indian child removal is diminished).

12 Barbara Ann Atwood, *Children, Tribes, and States* 164, 253 (2010).

13 Stephen L. Pevar, *The Rights of Indians and Tribes* 291-306 (2012).

14 See *Choctaw Indians v. Holyfield*, 490 U.S. 30.

15 See Child Welfare League of America, *South Dakota's Children 2012* (2013), <http://www.cwla.org/advocacy/statefactsheets/2012/southdakota.pdf>.

16 Though we are highlighting South Dakota as a case study, the disintegration of the Native American family as a result of racially-biased child custody practices is a ubiquitous issue across the United States. For more information

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on this issue on a national level, *see* Suffolk Univ. L. Sch., Indigenous Peoples Rights Clinic, <https://www.suffolk.edu/law/academics/clinics/21857.php>.

17 Copies of the complaint, the hearing transcript, and the court's order are available at:

[https://www.aclu.org/files/assets/ost1\\_complaint\\_with\\_exhibits\\_3\\_4\\_6.pdf](https://www.aclu.org/files/assets/ost1_complaint_with_exhibits_3_4_6.pdf).

18 *See Oglala Sioux Tribe v. Van Hunnik*, 2014 WL 317657 (D.S.D. Jan. 28, 2014).

19 *See Id.* at 17.

20 Comm. on the Elimination of Racial Discrimination, *Consideratin of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination* ¶ 19, (Mar. 9, 2012), U.N. Doc. CERD/C/CAN/CO/19-20, *available at*

<http://www.nwac.ca/sites/default/files/imce/CERD%20Concluding%20Observations%20-%20Canada%20-%20adv%20unedited%20version%20-%20%20Mar%202012.pdf> .

21 Comm. on the Elimination of Racial Discrimination, *Consideratin of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination* ¶ 4, (Aug. 27, 2010) U.N. Doc. CERD/C/AUS/CO/15-17 .

22 *Id.* at ¶ 26.