



**THE
SENTENCING
PROJECT**

RESEARCH AND ADVOCACY FOR REFORM

**Report of The Sentencing Project to
the United Nations Special Rapporteur
on Contemporary Forms of Racism,
Racial Discrimination, Xenophobia,
and Related Intolerance**

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

March 2018

The United States criminal justice system is the largest in the world. At yearend 2015, over 6.7 million individuals¹ were under some form of correctional control in the United States, including 2.2 million incarcerated in federal, state, or local prisons and jails.² The U.S. is a world leader in its rate of incarceration, dwarfing the rate of nearly every other nation.³

Such broad statistics mask the racial disparity that pervades the U.S. criminal justice system, and for African Americans in particular. African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, and they are more likely to experience lengthy prison sentences. African-American adults are 5.9 times as likely to be incarcerated than whites and Hispanics are 3.1 times as likely.⁴ As of 2001, one of every three black boys born in that year could expect to go to prison in his lifetime, as could one of every six Latinos—compared to one of every seventeen white boys.⁵ Racial and ethnic disparities among women are less substantial than among men but remain prevalent.⁶

The source of such disparities is deeper and more systemic than explicit racial discrimination. The United States in effect operates two distinct criminal justice systems: one for wealthy people and another for poor people and people of color. The wealthy can access a vigorous adversary system replete with constitutional protections for defendants. Yet the experiences of poor and minority defendants within the criminal justice system often differ substantially from that model due to a number of factors, each of which contributes to the overrepresentation of such individuals in the system. As former Georgetown Law Professor David Cole states in his book *No Equal Justice*,

These double standards are not, of course, explicit; on the face of it, the criminal law is color-blind and class-blind. But in a sense, this only makes the problem worse. The rhetoric of the criminal justice system sends the message that our society carefully protects everyone's constitutional rights, but in practice the rules assure that law enforcement prerogatives will generally prevail over the rights of minorities and the poor. By affording criminal suspects substantial constitutional rights in theory, the Supreme Court validates the results of the criminal justice system as fair. That formal fairness obscures the systemic concerns that ought to be raised by the fact that the prison population is overwhelmingly poor and disproportionately black.⁷

¹ U.S. Bureau of Justice Statistics, *Correctional Populations in the United States, 2015*, 2 tbl. 1 (Dec. 2016).

² U.S. Bureau of Justice Statistics, *Prisoners in 2016*, 3 tbl.2 (Jan. 2018) and *Jail Inmates in 2016*, 2 tbl.1 (Feb. 2018).

³ See International Centre for Prison Studies, *World Prison Brief* (2018).

⁴ U.S. Bureau of Justice Statistics, *Prisoners in 2016*, 8 tbl.6 (Jan. 2018).

⁵ Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 supp. 3 *The Prison Journal* 87S, 88S (Sept. 2011).

⁶ *Id.*

⁷ David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System*, 8-9 (1999).

By creating and perpetuating policies that allow such racial disparities to exist in its criminal justice system, the United States is in violation of its obligations under Article 2 and Article 26 of the International Covenant on Civil and Political Rights to ensure that all its residents—regardless of race—are treated equally under the law. The Sentencing Project notes that the United Nations Special Rapporteur is working to consult with U.S. civil society organizations on contemporary forms of racism, racial discrimination, and related intolerance. We welcome this opportunity to provide the UN Special Rapporteur with an accurate assessment of racial disparity in the U.S. criminal justice system.

Established in 1986, The Sentencing Project works for a fair and effective U.S. criminal justice system by promoting reforms in sentencing policy, addressing unjust racial disparities and practices, and advocating for alternatives to incarceration. Staff of The Sentencing Project have testified before the U.S. Congress and state legislative bodies and have submitted amicus curiae briefs to the Supreme Court of the United States on various issues related to incarceration and criminal justice policy. The organization’s research findings are regularly relied upon by policymakers and covered by major news outlets.

This report chronicles the racial disparity that permeates every stage of the United States criminal justice system, from arrest to trial to sentencing to post prison experiences. In particular, the report highlights research findings that address rates of racial disparity and their underlying causes throughout the criminal justice system. The report concludes by offering recommendations on ways that federal, state, and local officials in the United States can work to eliminate racial disparity in the criminal justice system and uphold its obligations under the Covenant.

RACIAL DISPARITY IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM

A. Policing

In 2016, black Americans comprised 27% of all individuals arrested in the United States—double their share of the total population.⁸ Black youth accounted for 15% of all U.S. children yet made up 35% of juvenile arrests in that year.⁹ What might appear at first to be a linkage between race and crime is in large part a function of concentrated urban poverty, which is far more common for African Americans than for other racial groups. This accounts for a substantial portion of African Americans’ increased likelihood of committing certain violent and property crimes.¹⁰ But while there is a higher black rate of involvement in certain crimes, white Americans overestimate the proportion

⁸ FBI Uniform Crime Reporting Program. Crime in the United States 2016. Available at: <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/persons-arrested>.

⁹ Puzzanchera, C., Sladky, A. and Kang, W. (2017). Easy Access to Juvenile Populations: 1990-2016. Available at: <http://www.ojjdp.gov/ojstatbb/ezapop/>; OJJDP Statistical Briefing Book. Available at: http://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05260.

¹⁰ Peterson, R. & Krivo, L. (2012). *Divergent Social World: Neighborhood Crime and the Racial-Spatial Divide*. New York, NY: Russell Sage Foundation

of crime committed by blacks and Latinos, overlook the fact that communities of color are disproportionately victims of crime, and discount the prevalence of bias in the criminal justice system.¹¹

In 1968, the Kerner Commission called on the country to make “massive and sustained” investments in jobs and education to reverse the “segregation and poverty [that] have created in the racial ghetto a destructive environment totally unknown to most white Americans.”¹² Fifty years later, the Commission’s lone surviving member concluded that “in many ways, things have gotten no better—or have gotten worse.”¹³

The rise of mass incarceration begins with disproportionate levels of police contact with African Americans. This is striking in particular for drug offenses, which are committed at roughly equal rates across races. “One reason minorities are stopped disproportionately is because police see violations where they are,” said Louis Dekmar, the president of the International Association of Chiefs of Police, and chief of LaGrange, Georgia’s police department.¹⁴ The chief added: “Crime is often significantly higher in minority neighborhoods than elsewhere. And that is where we allocate our resources.” Dekmar’s view is not uncommon. Absent meaningful efforts to address societal segregation and disproportionate levels of poverty, U.S. criminal justice policies have cast a dragnet targeting African Americans. The War on Drugs as well as policing policies including “Broken Windows” and “Stop, Question, and Frisk” sanction higher levels of police contact with African Americans. This includes higher levels of police contact with innocent people and higher levels of arrests for drug crimes. Thus:

- More than one in four people arrested for drug law violations in 2015 was black, although drug use rates do not differ substantially by race and ethnicity and drug users generally purchase drugs from people of the same race or ethnicity.¹⁵ For example, the ACLU found

¹¹ Ghandnoosh, N. (2014). Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies. Washington, D.C.: The Sentencing Project. Available at: <https://www.sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf>.

¹² Report of the National Advisory Commission on Civil Disorders: Summary of Report (1967). Available at: <http://www.eisenhowerfoundation.org/docs/kerner.pdf>.

¹³ Harris, F. & Curtis, A. (2018). The Unmet Promise of Equality. *The New York Times*. Available at: <https://www.nytimes.com/interactive/2018/02/28/opinion/the-unmet-promise-of-equality.html>.

¹⁴ Fletcher, M.A. (2018). For Black Motorists, a Never-Ending Fear of Being Stopped. *National Geographic*. Available at: <https://www.nationalgeographic.com/magazine/2018/04/the-stop-race-police-traffic/>.

¹⁵ FBI Uniform Crime Reporting Program. Crime in the United States 2015. Table 43A. Available at: <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-43>; Johnston, L. D., O’Malley, P. M., Bachman, J. G., & Schulenberg, J. E. (2012). Monitoring the Future: National Survey Results on Drug Use, 1975-2012. Ann Arbor, MI: The University of Michigan Institute for Social Research. Available at: http://www.monitoringthefuture.org/pubs/monographs/mtf-vol1_2012.pdf (Tbls. 4-5, 4-6, and 4-7); Beckett, K., Nyrop, K., & Pfingst, L. (2006). Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests. *Criminology*, 44(1), 105–37 (pp. 16–7); Riley, K. J. (1997). Crack, Powder Cocaine, and Heroin: Drug Purchase and

that blacks were 3.7 times more likely to be arrested for marijuana possession than whites in 2010, even though their rate of marijuana usage was comparable.¹⁶

- The highest officials in New York City had “turned a blind eye to the evidence that officers are conducting stops in a racially discriminatory manner,” Judge Shira A. Scheindlin concluded regarding the city’s stop-and-frisk tactic, declaring it unconstitutional in 2013.¹⁷ The policy, which broadly targeted male residents of neighborhoods populated by low-income people of color to uncover drugs and weapons, was shown to be ineffective, and this assessment was further validated when New York City continued its crime decline after scaling back Stop and Frisk. Yet other localities continue to deploy the practice.¹⁸
- New York City, like many other cities, remains reluctant to scale back Broken Windows Policing, a public safety approach that relies on clamping down on petty offenses and neighborhood disorder. Between 2001 and 2013, 51% of the city’s population over age 16 was black or Hispanic. Yet during that period, 82% of those arrested for misdemeanors were black or Hispanic, as were 81% of those who received summonses for violations of the administrative code (including such behaviors as public consumption of alcohol, disorderly conduct, and bicycling on the sidewalk).¹⁹ Yet research shows that order-maintenance strategies have had only a modest impact on serious crime rates and have caused great

Use Patterns in Six Major U.S. Cities. National Institute of Justice. Available at: <https://www.ncjrs.gov/pdffiles/167265.pdf> (pp. 15–16).

¹⁶ Edwards, E., Bunting, W., Garcia, L. (2013). *The War on Marijuana in Black and White*. New York, NY: American Civil Liberties Union. Available at: <https://www.aclu.org/files/assets/1114413-nj-report-rfs-rel1.pdf>.

¹⁷ Goldstein, J. (2013). Judge Rejects New York’s Stop-and-Frisk Policy. *The New York Times*. Available at: <http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html>.

¹⁸ Melamed, S. (2017). Study: High Rates of Stop-and-Frisk Even in Philly’s Lowest-Crime Black Areas. *Philadelphia Inquirer*. Available at: <http://www.philly.com/philly/news/crime/stop-frisk-policing-philadelphia-racial-bias-lance-hannon-villanova-20171002.html?eType=EmailBlastContent&eId=6a170eda-4358-4030-9b50-0039ec8090fc>; ACLU Foundation of Massachusetts & ACLU Racial Justice Program. (2014). *Black, Brown, and Targeted: A Report on Boston Police Department Street Encounters from 2007–2010*. Available at: https://aclum.org/sites/all/files/images/education/stopandfrisk/black_brown_and_targeted_online.pdf; Eaton, J. (2017). EXCLUSIVE: In Charlottesville, Black Residents 9 Times More Likely to be Stopped by Police. Think Progress. Available at: <https://thinkprogress.org/cville-stop-and-frisk-e884d2504656/>.

¹⁹ Chauhan, P., Fera, A. G., Welsh, M. B., Balazon, E., & Misshula, E. (2014). *Trends in Misdemeanor Arrests in New York*. New York, NY: John Jay College of Criminal Justice. Available at: http://www.jjay.cuny.edu/web_images/10_28_14_TOCFINAL.pdf (pp. 25–7); Ryley, S., Bult, L., & Gregorian, D. (2014) Exclusive: Daily News Analysis Finds Racial Disparities in Summons for Minor Violations in ‘Broken Windows’ Policing. *New York Daily News*. Available at: <http://www.nydailynews.com/new-york/summons-broken-windows-racial-disparity-garner-article-1.1890567>.

damage to communities of color.²⁰ These strategies also expose people of color to a greater risk of being killed during a police encounter.

In addition to pursuing policies that bring little gain in crime reduction and impose great costs on people of color, policymakers and criminal justice leaders have been late to address discriminatory policies for which they provide no justification—such as biased use of officer discretion and revenue-driven policing. Thus:

- In recent years, black drivers have been somewhat more likely to be stopped than whites but have been far more likely to be searched and arrested.²¹ The causes and outcomes of these stops differ by race, and staggering racial disparities in rates of police stops persist in certain jurisdictions—pointing to unchecked racial bias, whether intentional or not, in officer discretion. A closer look at the causes of traffic stops reveals that police are more likely to stop black and Hispanic drivers for discretionary reasons—for “investigatory stops” (proactive stops used to investigate drivers deemed suspicious) rather than “traffic-safety stops” (reactive stops used to enforce traffic laws or vehicle codes).²² Nationwide surveys also reveal disparities in the outcomes of police stops. Once pulled over, black and Hispanic drivers were three times as likely as whites to be searched (6% and 7% versus 2%) and blacks were twice as likely as whites to be arrested.²³ These patterns hold even though police officers generally have a lower “contraband hit rate” when they search black versus white drivers.²⁴
- “Ferguson’s law enforcement practices are shaped by the City’s focus on revenue rather than by public safety needs,” the Civil Rights Division of the Department of Justice (DOJ) concluded in 2015, after the police killing of Michael Brown brought national attention to police-community tensions in the St. Louis, Missouri suburb.²⁵ The DOJ found that black

²⁰ Ghandnoosh, N. (2014). *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System*. Washington, D.C.: The Sentencing Project. Available at: <https://sentencingproject.org/wp-content/uploads/2015/11/Black-Lives-Matter.pdf>.

²¹ U.S. Bureau of Justice Statistics, *Police Behavior during Traffic and Street Stops, 2011*, (Sept. 2013); The Stanford Open Policing Project. Available at: <https://openpolicing.stanford.edu/findings/>.

²² Epp, C. R., Maynard-Moody, S., & Haider-Markel, D. P. (2014). *Pulled Over: How Police Stops Define Race and Citizenship*. Chicago, IL: The University of Chicago Press.

²³ Langton, L. & Durose, M. (2013). *Police Behavior during Traffic and Street Stops, 2011*. U.S. Bureau of Justice Statistics; Eith, C. & Durose, M. R. (2011). *Contacts Between Police and the Public, 2008*. U.S. Bureau of Justice Statistics.

²⁴ Harris, D. (2012). Hearing on “Ending Racial Profiling in America,” Testimony of David A. Harris. United States Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Human Rights. Available at: <http://www.aila.org/content/fileviewer.aspx?docid=39289&linkid=245580> (p. 8).

²⁵ United States Department of Justice Civil Rights Division (2015). *Investigation of the Ferguson Police Department*. Available at: https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

residents' disproportionate rate of police stops, searches, and arrests resulted from city officials' growing reliance on municipal fines and fees which police officers and court officers were exhorted to deliver through aggressive enforcement of traffic violations and petty offenses. ArchCity Defenders, authors of an early and influential white paper on the troubled municipal court system, has demonstrated that many other St. Louis municipalities have similar or worse practices than Ferguson.²⁶

B. Pretrial

African Americans were incarcerated in local jails at a rate 3.5 times that of non-Hispanic whites in 2016.²⁷ These disparities stem in part from the policies and practices of policing described earlier, but are compounded by those introduced at this stage of processing. Given that nearly two-thirds (65%) of people in jail in 2016 were being detained prior to trial, policies and decisions influencing pretrial detention play a key role in driving the disparity in the jail population and beyond.²⁸

Pretrial detention has been shown to increase the odds of conviction, and people who are detained awaiting trial are also more likely to accept less favorable plea deals, to be sentenced to prison, and to receive longer sentences. Seventy percent of pretrial releases require money bond, an especially high hurdle for low-income defendants, who are disproportionately people of color.²⁹ Blacks and Latinos are more likely than whites to be denied bail, to have a higher money bond set, and to be detained because they cannot pay their bond.³⁰ They are often assessed to be higher safety and flight risks because they are more likely to experience socioeconomic disadvantage and to have criminal records. Implicit bias also contributes to people of color faring worse than comparable whites in bail determinations.

C. Sentencing

Although African Americans and Latinos comprise 29% of the U.S. population, they make up 57% of the U.S. prison population.³¹ This results in imprisonment rates for African-American and

²⁶ ArchCity Defenders (2015). *It's Not Just Ferguson: Missouri Supreme Court Should Consolidate the Municipal Court System*. St. Louis, MO. Available at: <http://www.archcitydefenders.org/wp-content/uploads/2014/07/Its-Not-Just-Ferguson-Consolidate-the-Municipal-Courts.pdf>; ArchCity Defenders (2014). *Municipal Courts White Paper*. St. Louis, MO. Available at: <http://s3.documentcloud.org/documents/1279541/archcity-defenders-report-on-st-louis-county.pdf>.

²⁷ U.S. Bureau of Justice Statistics, *Prisoners in 2016*, (Feb. 2018).

²⁸ U.S. Bureau of Justice Statistics, *Prisoners in 2016*, (Feb. 2018).

²⁹ Jones, C. E. (2013). "Give Us Free": Addressing Racial Disparities in Bail Determinations. *New York University Journal of Legislation and Public Policy*, 16(4), 919–62.

³⁰ Jones, C. E. (2013). "Give Us Free": Addressing Racial Disparities in Bail Determinations. *New York University Journal of Legislation and Public Policy*, 16(4), 919–62.

³¹ U.S. Bureau of Justice Statistics, *Prisoners in 2016*, (Jan. 2018); Rastogi, S. et al. (2011). *The Black Population: 2010*. U.S. Census. Available at: <https://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>; Ennis, S. R., Ríos-Vargas, M., & Albert, N. G. (2011). *The Hispanic Population: 2010*. U.S. Census. Available at:

Hispanic adults that are 5.9 and 3.1 times the rate for white adults, respectively—and at far higher levels in some states.³² Notably, these disparities exist for both the least and most serious offenses:

- Of the 277,000 people imprisoned nationwide for a drug offense, over half (56%) are African American or Latino.³³
- Nearly half (48%) of the 206,000 people serving life and “virtual life” prison sentences are African American and another 15% are Latino.³⁴

Among youth, African Americans are 4.1 times as likely to be committed to secure placements as whites, American Indians are 3.1 times as likely, and Hispanics are 1.5 times as likely.³⁵ Although levels of youth confinement have significantly declined in recent years, the racial gap between black and American Indian versus white youth has increased.³⁶

The racial disparities in the adult and juvenile justice systems stem in part from the policing and pretrial factors described earlier, and are compounded by discretionary decisions and sentencing policies that disadvantage people of color because of their race or higher rates of socioeconomic disadvantage.³⁷ These include:

- Biased use of discretion: Prosecutors are more likely to charge people of color with crimes that carry heavier sentences than whites. Federal prosecutors, for example, are twice as likely to charge African Americans with offenses that carry a mandatory minimum sentence than

<https://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf>.

³² U.S. Bureau of Justice Statistics, *Prisoners in 2016*, (Jan. 2018); Nellis, A. (2016). *The Color of Justice: Racial and Ethnic Disparity in State Prisons*. Washington, D.C.: The Sentencing Project. Available at: see also <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>.

³³ U.S. Bureau of Justice Statistics, *Prisoners in 2016*, (Jan. 2018)

³⁴ “Virtual life” sentences are 50 years or longer. See: Nellis, A. (2017). *Still Life: America’s Increasing Use of Life and Long-Term Sentences*. Washington, D.C.: The Sentencing Project. Available at: <https://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf>.

³⁵ Sickmund, M., Sladky, T.J., Kang, W., and Puzzanchera, C. (2017) *Easy Access to the Census of Juveniles in Residential Placement*. Available at: <http://www.ojjdp.gov/ojstatbb/ezacjrp/>

³⁶ Rovner, J. (2016). *Racial Disparities in Youth Commitments and Arrests*. Washington, D.C.: The Sentencing Project. Available at: <https://www.sentencingproject.org/wp-content/uploads/2016/04/Racial-Disparities-in-Youth-Commitments-and-Arrests.pdf>.

³⁷ Ghandnoosh, N. (2014). *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System*. Washington, D.C.: The Sentencing Project. Available at: <https://sentencingproject.org/wp-content/uploads/2015/11/Black-Lives-Matter.pdf>.

similarly situated whites.³⁸ State prosecutors are also more likely to charge black rather than similar white defendants under habitual offender laws.³⁹

- Policies that disadvantage people of color: Drug-free school zone laws mandate sentencing enhancements for people caught selling drugs in designated school zones. The expansive geographic range of these zones coupled with high urban density has disproportionately affected residents of urban areas, and particularly those in high-poverty areas – who are largely people of color.⁴⁰ Legislators in New Jersey scaled back their state law after a study found that 96% of persons subject to these enhancements were African American or Latino. All 50 states and the District of Columbia have some form of drug-free school zone law.
- Policies that disadvantage poor people: Most jurisdictions inadequately fund their indigent defense programs. While there are many high-quality public defender offices, in far too many cases indigent individuals are represented by public defenders with excessively high caseloads, or by assigned counsel with limited experience in criminal defense. Public defenders in Louisiana have recently sued the state and those in Kansas City, Missouri have protested their crushing caseloads.⁴¹

D. Parole

During the era of mass incarceration, a declining proportion of the prison population has a sentence that allows for discretionary release on parole, as lawmakers have required courts to shift from indeterminate sentences (whose release requires a discretionary parole decision) to fixed-term sentences (which have set release dates).⁴² Among sentences that allow for discretionary parole release, the process can be harder for people of color. Some research suggests that parole boards are influenced by an applicant's race in their decision making, though more research is needed in this

³⁸ Starr, S. B. & Rehavi, M. M. (2013). Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of. *The Yale Law Journal*, 123(2), 2-80.

³⁹ Crawford, C., Chiricos, T., & Kleck, G. (1998). Race, Racial Threat, and Sentencing of Habitual Offenders. *Criminology*, 36(3), 481–512.

⁴⁰ Porter, N. & Clemons, T. (2013). Drug-Free Zone Laws: An Overview of State Policies. Washington, D.C.: The Sentencing Project. Available at: http://sentencingproject.org/doc/publications/sen_Drug-Free%20Zone%20Laws.pdf.

⁴¹ Wiltz, T. (2017). Public Defenders Fight Back Against Budget Cuts, Growing Caseloads *HuffPost*. Available at: https://www.huffingtonpost.com/entry/public-defenders-fight-back-against-budget-cuts-growing_us_5a1440d3e4b08b00ba67341f.

⁴² Ghandnoosh, N. (2017). Delaying a Second Chance: The Declining Prospects for Parole on Life Sentences. Washington, D.C.: The Sentencing Project. Available at: <http://www.sentencingproject.org/wp-content/uploads/2017/01/32-lifer-parole-policies.pdf>.

area.⁴³ Racial bias among correctional officers also shapes parole outcomes. As revealed by a *New York Times* investigation on New York prisons, comparable in-prison conduct—a major determinant of parole decisions—may result in divergent prison disciplinary records for blacks and Latinos versus whites.⁴⁴ Based on an analysis of almost 60,000 disciplinary cases from the state’s prisons, reporters found that disparities in discipline were greatest for infractions that gave discretion to guards, such as disobeying a direct order.

Underinvestment and racial disparities also persist in community supervision—with many parole and probation systems offering supervision with little support, and with evidence that parole and probation officers are more likely to revoke people of color than whites for comparable behavior. For example, the Urban Institute’s examination of probation revocation rates in Dallas County, Texas; Iowa’s Sixth Judicial District; Multnomah County, Oregon; and New York City revealed that black probationers were revoked at disproportionate rates in all study sites at levels which “raise concerns about the presence of bias to the disadvantage of black probationers.”

E. Post Prison/Collateral Consequences

African Americans—particularly black men—are most exposed to the collateral consequences associated with a criminal record. In 2010, 8% of all adults in the United States had a felony conviction on their record.⁴⁵ Among African-American men, the rate was one in three (33%).⁴⁶ People with criminal records face a host of obstacles to re-enter society even after they have fully completed their term of incarceration or community supervision. These include barriers to securing steady employment and housing, to accessing the social safety net and federal student aid, and to exercising the right to vote.

Nearly one-third of U.S. workers hold jobs that require an occupational license, a requirement which sometimes bars and often poses cumbersome obstacles for people with criminal records.⁴⁷ In sectors that do not require licensing, employers are 50% less likely to call back white job applicants with

⁴³ Huebner, B. & Bynum T. (2008). The Role of Race and Ethnicity in Parole Decisions. *Criminology*, 46(4): 907-938; Morgan, K., & Smith, B.L. (2005). Victims, Punishment, and Parole: The Effect of Victim Participation on Parole Hearings. *Criminology and Public Policy*, 4(2), p. 355.

⁴⁴ Schwirtz, M., Winerip, M., & Gebeloff, R. (2016). The Scourge of Racial Bias in New York State’s Prisons. *The New York Times*. Available at: <https://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html>.

⁴⁵ Shannon, S. K. S., et al. (2017). The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010. *Demography*, 54:1795–1818.

⁴⁶ Shannon, S. K. S., et al. (2017). The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010. *Demography*, 54:1795–1818.

⁴⁷ Quinton, S. (2017). To Help Ex-Offenders Get Jobs, Some States Reconsider Licenses. *Stateline*. Available at: <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/03/08/to-help-ex-offenders-get-jobs-some-states-reconsider-licenses>.

incarceration histories than comparable applicants without prison records.⁴⁸ African American job applicants, who are less likely to receive callbacks than whites to begin with, experience an even more pronounced discrimination related to a criminal record. As scholar Devah Pager's research has revealed, whites *with* criminal records receive more favorable treatment than blacks *without* criminal records.⁴⁹ People with criminal convictions also face discrimination in the private rental market and those with felony drug convictions face restrictions in accessing government-assisted housing.⁵⁰

The Welfare Reform Act of 1996 imposed a lifetime denial of cash assistance and food stamps to people convicted in state or federal courts of felony drug offenses, unless states opt out of the ban.⁵¹ Given the dynamics of social class and the accompanying disparate racial effects of the criminal justice system, women and children of color are disproportionately impacted by this exclusionary law.⁵² By 2018, 24 states had fully opted out of the food stamp ban, 21 others had only done so in part, and five states continued to fully enforce the ban.⁵³ An even larger number of states continue to impose a partial or full ban on cash assistance for people with felony drug convictions.⁵⁴

Disenfranchisement patterns have also reflected the dramatic growth and disproportionate impact of criminal convictions. A record 6.1 million Americans were forbidden from voting because of their felony record in 2016, rising from 1.2 million in 1976.⁵⁵ Felony disenfranchisement rates for voting-age African Americans reached 7.4% in 2016—four times the rate of non-African Americans

⁴⁸ Pager, D. (2007). *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration*. Chicago, IL: University of Chicago Press.

⁴⁹ Pager, D. (2007). *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration*. Chicago, IL: University of Chicago Press.

⁵⁰ Pinard, M. (2013). Criminal Records, Race and Redemption. *New York University Journal of Legislation & Public Policy*, 16: 963-997; Navarro, M. (2014). Lawsuit Says Rental Complex in Queens Excludes Ex-Offenders. *The New York Times*. Available at: <https://www.nytimes.com/2014/10/31/nyregion/lawsuit-says-rental-complex-in-queens-excludes-ex-offenders.html>.

⁵¹ Mauer, M. & McCalmont, V. (2013). *A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits*. Washington, D.C.: The Sentencing Project. Available at: http://sentencingproject.org/doc/publications/cc_A%20Lifetime%20of%20Punishment.pdf.

⁵² Mauer, M. & McCalmont, V. (2013). *A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits*. Washington, D.C.: The Sentencing Project. Available at: http://sentencingproject.org/doc/publications/cc_A%20Lifetime%20of%20Punishment.pdf.

⁵³ Hager, E. (2016). Six States Where Felons Can't Get Food Stamps. *The Marshall Project*. Available at: <https://www.themarshallproject.org/2016/02/04/six-states-where-felons-can-t-get-food-stamps>.

⁵⁴ Hager, E. (2016). Six States Where Felons Can't Get Food Stamps. *The Marshall Project*. Available at: <https://www.themarshallproject.org/2016/02/04/six-states-where-felons-can-t-get-food-stamps>.

⁵⁵ Uggen, C., Larson, R., & Shannon, S. (2016). *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*. Washington, D.C.: The Sentencing Project. Available at: <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>.

(1.8%).⁵⁶ In three states, more than one in five voting-age African Americans is disenfranchised: Florida, Kentucky, and Tennessee.⁵⁷ The majority of disenfranchised Americans are living in their communities, having fully completed their sentences or remaining supervised while on probation or parole.

RECOMMENDATIONS TO THE UN SPECIAL RAPPORTEUR

As the research presented in this report indicates, the causes of the racial disparities in the U.S. criminal justice system are complex and deeply rooted. As studies repeatedly demonstrate, the cumulative impact of racial disparity is experienced throughout the country's criminal justice system. Beliefs that the current system is unaffected by centuries of an explicitly racist past is wishful thinking and potentially blinds decision makers to the implicit racial bias that orients the American consciousness and is embedded in its formal policies.

The United States can adopt concrete measures to reduce both the existence and the effects of racial bias in its criminal justice system. As such, The Sentencing Project respectfully urges the UN Special Rapporteur to recommend that the United States adopt the following recommendations.

End the war on drugs.

The United States should substantially end its War on Drugs. Specifically, the Department of Justice should reconsider and reduce the volume of low-level drug offenders prosecuted in federal court. State officials can also adopt law changes to divert prison-bound defendants into effective alternatives to incarceration programs. Local police departments should significantly scale back drug arrests. The resources saved by decreasing the number of prosecutions should be invested in evidence-based drug prevention and treatment measures.

Eliminate mandatory minimum sentences.

The United States should eliminate mandatory minimum sentences. Judges should be allowed to consider individual case characteristics when sentencing a defendant in every case. Mandatory sentences do not eliminate discretion in the courtroom—they simply shift it from judges to prosecutors, thereby reducing transparency in decision making.

⁵⁶ Uggen, C., Larson, R., & Shannon, S. (2016). 6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016. Washington, D.C.: The Sentencing Project. Available at: <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>.

⁵⁷ A gubernatorial reform in Virginia has removed that state from this ignominious list. See: Stolberg, S. G. & Eckholm, E. (2016). Virginia Governor Restores Voting Rights to Felons. *The New York Times*. Available at: <https://www.nytimes.com/2016/04/23/us/governor-terry-mcauliffe-virginia-voting-rights-convicted-felons.html>.

Reduce the use of cash bail.

Defendants should be detained pretrial only if they pose a safety or flight risk, not because they cannot afford to post bail. A well calibrated and transparent risk-assessment instrument can be used to determine who should be released on their own recognizance, who should be released with some requirements, and who should be detained.

Fully fund indigent defense agencies.

The United States should fully fund and staff indigent defense agencies through an appropriate mix of local, state, and federal resources. The federal government should increase support for training and technical assistance for indigent defense, and document shortcomings of jurisdictions that fail to meet established bar association standards for caseloads and professional training.

Adopt a policy requiring the use of racial impact statements.

Policies should be adopted at the federal and state levels requiring the use of racial impact statements for proposed sentencing policies. Such a policy would require legislators to prepare an analysis assessing the possible disparate racial consequences of any proposed legislation before enacting it in order to avoid any unintended disparate racial effects.⁵⁸ Four states—Iowa, Connecticut, Oregon, and New Jersey—have adopted racial impact statement requirements since 2008.

Develop and implement training to reduce racial bias.

The United States should develop and implement training designed to mitigate the influence of implicit racial bias at every level of the criminal justice system: police officers, public defenders, prosecutors, judges, jury members, and parole boards. While it is difficult to eliminate completely racial bias at the individual level, studies have repeatedly shown that it is possible to control for the effects of implicit racial bias on individual decision-making.⁵⁹ In other words, while it may be impossible in the current culture of the United States to ensure that individuals are cognitively colorblind, it is possible to train individuals to be *behaviorally* colorblind.⁶⁰ The United States should work with leading scholars on implicit bias to develop the most effective training programs, and couple this with systems of monitoring and accountability to reduce the influence of implicit racial bias.

⁵⁸ Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, 23 vol. 4 Criminal Justice 16 (Winter 2009).

⁵⁹ See, e.g., Ashby Plant & Michelle Peruche, *The Consequences of Race for Police Officers' Response to Criminal Suspects*, 16 Psy. Sci. 180, 183 (2005) (finding that repeated training of police officers on computer simulations eliminated racial shooter bias and that the effects were still present 24 hours later); Jeffrey J. Rachlinski et al., *Does Unconscious Bias Affect Trial Judges?*, 84 *Notre Dame L. Rev.* 1195, 1210 (2009).

⁶⁰ Jerry Kang & Kristen Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 *UCLA L. Rev.* 465, 466 (2010).

Address collateral consequences.

Denying the right to vote to an entire class of citizens is deeply problematic to a democratic society and counterproductive to effective reentry. The federal government should allow Americans to vote regardless of their conviction status, and certainly after they have concluded their sentences. States should also allow the full democratic participation of their citizens. Government officials should also revise policies that serve no public safety function but impose collateral consequences on people with criminal convictions—such as in the realms of employment, education, housing, and in the social safety net—and encourage similar reforms in the private sector.

CONCLUSION

For decades, the United States of America has employed mass incarceration as a convenient answer to inconvenient questions. These policies have produced dramatic rates of incarceration, with a particularly disproportionate impact on communities of color. In addition to the range of harmful consequences to people of color, mass incarceration has been a failed policy in regard to public safety outcomes. Research has documented that the effect of imprisonment on crime rates has been modest, and that at current levels the scale of incarceration is well past the point of diminishing returns for public safety. Mass incarceration has diverted resources from prevention and treatment initiatives that could have produced far more effective approaches to crime reduction.

In recent years, the U.S. government has addressed some of the glaring racial inequalities that permeate every aspect of its criminal justice system, but these efforts have been relatively modest in scope. The government continues to both foster and perpetuate inequalities in clear violation of its obligations under the International Covenant on Civil and Political Rights as well as other international agreements.

The proliferation of racial disparities in the U.S. criminal justice system has a profound impact on the lives of people of color. Behind each statistic lies the face of a young black man or woman whose potential has been cut short by a harsh prison sentence mandated by draconian drug laws. Behind each percentage point lies the face of a Latina child who will only know her parents through hurried, awkward visits in a prison visitation room. Behind each dataset lies a community of color bereft of hope because its young people have been locked away.

It is the human face—a face of color—of the racial injustice of the United States criminal justice system that is the most compelling reason for reform. It is time for the United States to take affirmative steps to eliminate the racial disparities in its criminal justice system.



RESEARCH AND ADVOCACY FOR REFORM

1705 DeSales St. NW, 8th Floor

Washington, D.C. 20036

Tel: 202.628.0871 • Fax: 202.628.1091

sentencingproject.org