



THE PERMANENT MISSION
OF THE
UNITED STATES OF AMERICA
TO THE
UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS
IN GENEVA

February 13, 2024

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Special Rapporteur on contemporary forms of racism
Geneva, Switzerland

Ms. Heba Hagrass
Special Rapporteur on the rights of persons with disabilities
Geneva, Switzerland

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Special Rapporteur on extrajudicial, summary or arbitrary executions
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Dr. Alice Jill Edwards
Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment
Geneva, Switzerland

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Geneva, Switzerland

Ms. Claudia Mahler
Independent Expert on the enjoyment of all human rights by older persons
Geneva, Switzerland

Dear Special Procedures Mandate Holders,

Please find enclosed the U.S. response to your communication dated June 19, 2023.

Sincerely,

Ambassador Michèle Taylor
Permanent Representative to the
UN Human Rights Council

OHCHR REGISTRY

16 FEB. 2024

Recipients :.....*SPB*.....
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Enclosure

U.S. response to June 19, 2023, letter regarding racial discrimination in prison sentencing

Thank you for your June 19 letter requesting information on the criminal justice system in the United States. The United States is committed to identifying and addressing disparities in the U.S. criminal justice system, including in prison sentencing. In response to your inquiries, we have gathered information regarding the U.S. criminal justice system, as well as allegations of racial discrimination in prison sentences involving individuals of African descent, Latino individuals, and individuals from other racial and ethnic groups.

A Note on Federal vs. State Systems

The U.S. Constitution is the supreme law of the land in the United States. It creates a federal system of government in which power is shared between the federal government and the state governments. The federal government and each of the state governments have their own court systems.

Related to these separate court systems, states and the federal government have distinct sets of laws and regulations that govern whether acts are illegal. Each court system, whether belonging to a state or the federal government, is responsible for imposing punishments on individuals found guilty of violating those laws. Accordingly, a state may elect to have a punishment for a certain crime under its state laws that is harsher than the punishment available for the same crime under federal law (or vice versa). Further, under certain circumstances, a defendant may be criminally charged and convicted under both federal and state systems for the same underlying illegal activity. However, this is not a common occurrence.

The federal procedural rules for criminal cases can be found in the Federal Rules of Criminal Procedure, which govern the procedure of criminal trials. Each state has its own rules which govern procedures for criminal cases within its court system.

Statistics

The Bureau of Justice Statistics (BJS) is the primary statistical agency of the U.S. Department of Justice. Its mission is to collect, analyze, publish, and disseminate information on crime, criminal offenders, victims of crime, and the operation of justice systems at all levels of government. BJS also provides financial and technical support to state, local, and tribal governments to improve both their statistical capabilities and the quality and utility of their criminal history records.

BJS stores the full data sets, surveys, and codebooks for most of its data collections at the National Archive of Criminal Justice Data (NACJD). These archived data allow researchers to conduct secondary analysis of BJS data.

Full datasets and related documentation can be found by topic at <https://bjs.ojp.gov/data/topic>.

Select publication series, studies, and data collections relevant to your request include:

- National Prisoner Statistics Program: <https://bjs.ojp.gov/data-collection/national-prisoner-statistics-nps-program>
- Annual Survey/Census of Jails: <https://bjs.ojp.gov/data-collection/annual-survey-jails-asj>
- Recidivism and Reentry Data: <https://bjs.ojp.gov/topics/recidivism-and-reentry>
- Survey of Prison Inmates: <https://bjs.ojp.gov/data-collection/survey-prison-inmates-spi>

The Office of Research and Data in the U.S. Sentencing Commission publishes periodic reports on federal sentencing practices and tracks the application of the sentencing guidelines. These data reports provide information concerning the types of crimes committed, the offenders who commit those crimes, the punishments imposed, and the manner in which the sentencing guidelines were applied.

Existing publications include:

- Sourcebook of Federal Sentencing Statistics: <https://www.ussc.gov/research/sourcebook-2022>
- 2023 Demographic Differences in Federal Sentencing: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231114_Demographic-Differences.pdf
- Life Sentences in the Federal System (2022): https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220726_Life.pdf
- Report at a Glance: Recidivism and Federal Sentencing Policy: <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/RG-recidivism-overview.pdf>

Access to Legal Aid

In 2023, the Office for Access to Justice (ATJ) released the *Access to Justice Spotlight: Fines and Fees* (<https://www.justice.gov/d9/2023-11/doj-access-to-justice-spotlight-fines-and-fees.pdf>) and the Department's *Dear Colleague Letter* (<https://www.justice.gov/opa/pr/justice-department-issues-dear-colleague-letter-courts-regarding-fines-and-fees-youth-and>) to state and local courts regarding criminal legal system fines and fees. Both of these publications address the often disproportionate impact of legal system fines and fees on communities of color and highlight steps state and local court systems can take, and many they are already taking, on how to address and mitigate these inequities.

ATJ also wrote the *Report and Recommendations Concerning Access to Counsel at the Federal Bureau of Prison's Pretrial Facilities* (https://www.justice.gov/d9/2023-07/2023.07.20_atj_bop_access_to_counsel_report.pdf), which describes the ways in which the right to counsel is critical for protecting fairness and accuracy in the criminal justice system. This report provides an overview of the Department's approach to ensuring access to counsel in Federal Bureau of Prisons pretrial facilities and proposes recommendations for further promoting such access.

In 2022, the U.S. Legal Aid Interagency Roundtable (LAIR) heard from over 70 state and local legal aid and advocacy organizations about the top federal forms and processes where simplification might significantly reduce the need for organizations' clients to seek legal assistance to access benefits, services, programs, or resolve disputes. The resulting report, *Access to Justice through Simplification: A Roadmap for People-Centered Simplification of Federal Government Forms, Processes, and Language* (<https://www.justice.gov/d9/2023-03/Legal%20Aid%20Interagency%20Roundtable%202022%20Report.pdf>), examines how simplifying government forms and processes can and already does help the American people access federal services, benefits, and programs. The report details how communities of color suffer from disproportionately high poverty rates and significant legal need. The report also includes a roadmap to help federal agencies expand access to federal government programs and services.

In 2023, LAIR released the report *Access to Justice in Federal Administrative Proceedings: Nonlawyer Assistance and Other Strategies* (<https://www.justice.gov/d9/2023-12/2023%20Legal%20Aid%20Interagency%20Roundtable%20Report-508.pdf>). The report describes challenges individuals face in federal administrative proceedings to access government benefits or services, remedy rights violations or resolve disputes and sets forth strategic solutions and highlights the work of LAIR's 28 federal agency members to address these barriers.

Steps to Address Racial Profiling and Biases

Racial profiling is an ineffective law enforcement technique and has a negative impact on the communities affected.

The Department of Justice (DOJ) required training on “methods and strategies for more effective policing that rely upon non-discriminatory factors” in the United States’ New Orleans Police Department consent decree (<https://www.justice.gov/usdoj-media/crt/media/1109351/dl?inline>). In the Baltimore Consent Decree, the United States required the police department’s training on stops, frisks, searches, arrests, and use of force to “include training on how to take these actions in a non-discriminatory manner” (<https://www.justice.gov/crt/case-document/file/925036/download>).

In May 2022, the President signed Executive Order 14704 with the goal of building police-community trust, improving accountability, and enhancing public safety (<https://www.govinfo.gov/content/pkg/FR-2022-05-31/pdf/2022-11810.pdf>). As required by the Executive Order, the Justice Department revised its *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, Gender Identity, and Disability* (https://www.justice.gov/d9/2023-05/Sec.%209%28e%29%20-%20Guidance%20for%20Federal%20LEAs%20on%20the%20Use%20of%20Protected%20Characteristics_FINAL%205.25.23_508.pdf). The updated guidance adds disability as a protected characteristic and sets benchmarks and timelines for the development and implementation of training, data collection, and accountability provisions.

DOJ, DHS, and the Department of the Interior have made significant progress to implement the Executive Order's 90+ deliverables. Some of the most notable deliverables include the National Law Enforcement Accountability Database (<https://www.justice.gov/olp/national-law-enforcement-accountability-database>); accreditation; grantmaking; and the Department's strategic plan to support the goals of the Interagency Alternatives and Reentry Committee.

Other helpful publications include:

- Understanding Bias: A Resource Guide: <https://www.justice.gov/file/1437326/download>
- Rehabilitation, Reentry, and Reaffirming Trust: https://www.justice.gov/d9/2023-04/the_department_of_justice_strategic_plan_pursuant_to_section_15f_of_executive_order_14074.pdf

Addressing Structural Racism and Racial and Ethnic Disparities

President Biden believes that it is time we acknowledge the legacy of systemic racism in our criminal justice system and work together to eliminate the racial disparities that endure to this day. Doing so serves all Americans. The Administration's work includes:

- **Justice Department Action to Ensure Accountability and Encourage Reform.** Since 2020, the Department of Justice (DOJ) has opened 11 pattern-or-practice investigations of law enforcement agencies for systemic misconduct; these investigations are an important tool to reform troubled police departments. DOJ also restored and improved the voluntary Collaborative Reform program, providing technical assistance to police departments that ask for help to reform their practices and build trust, and has awarded millions of dollars in grants for de-escalation and anti-bias training.
- **Improving Prosecutorial Guidance to Prevent Unduly Harsh Sentencing.** The DOJ withdrew guidance issued in the previous Administration that generally required prosecutors to always charge the harshest sentences, replacing it with guidance that restored discretion to make decisions about charging, plea agreements, and advocacy at sentencing based on an individualized assessment of relevant facts.
- **Prioritizing Action to End Racial Disparities in Cocaine Sentencing.** As President Biden first advocated in 2007, he continues to call on Congress to end once and for all the crack/powder cocaine sentencing disparity that has had a disproportionate impact on Black individuals and make the change fully retroactive. This step would provide immediate sentencing relief to 10,000 individuals, more than 90% of whom are Black, currently serving time in federal prison pursuant to the crack/powder disparity. The Administration has urged the swift passage of the EQUAL Act. As an initial step, in December 2022 the Attorney General issued guidance to federal prosecutors on steps they should take to promote the equivalent treatment of crack and powder cocaine offenses – but Congress still needs to act.

- **Implementing an Executive Order Limiting Use of Private Prisons.** The President ordered DOJ not to renew contracts for privately-operated criminal detention facilities, covering the Bureau of Prisons (BOP) and U.S. Marshals Service (USMS). To date, over 8,000 people have been moved out of privately owned or operated facilities.
- **Initiating a whole-of-government effort to promote reform of the criminal justice system.** The President's Executive Order 14074 also established a new interagency Alternatives and Reentry Committee to develop a strategic plan with recommendations on how to safely reduce unnecessary criminal justice system interactions, improve rehabilitation, and support successful reentry while addressing existing disparities in the federal, state, local, Tribal, and territorial juvenile and criminal justice systems.
- **Supporting Second Chances.** In April 2022, in honor of Second Chance Month, the President announced grants of clemency to 78 individuals, along with a series of over 20 actions from a dozen federal agencies to support returning citizens. President Biden pardoned additional individuals who were convicted of simple possession of marijuana, attempted simple possession of marijuana, or use of marijuana in October 2022 (<https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/06/granting-pardon-for-the-offense-of-simple-possession-of-marijuana/>) and December 2023 (<https://www.whitehouse.gov/briefing-room/presidential-actions/2023/12/22/a-proclamation-on-granting-pardon-for-the-offense-of-simple-possession-of-marijuana-attempted-simple-possession-of-marijuana-or-use-of-marijuana/>).

The United States takes seriously the importance of addressing racial and ethnic disparities at all levels in the justice system, and we are working with federal, state, and local authorities, as well as other interested parties, to do just that. For example:

- The Department's Bureau of Justice Assistance supports the Justice Reinvestment Initiative (JRI), which uses a data-driven process to help states achieve more fair, effective, and efficient criminal justice systems. Since 2007, more than 33 states had participated in the JRI and implemented policies aimed at reducing or slowing the growth of correctional populations. During a period of significant growth in correctional populations and associated costs, JRI policies are estimated to have averted over \$3 billion in corrections costs, reinvested over \$650 million into strategies that improve outcomes, and averted prison population growth by nearly 70,000 people. Today, states seek JRI to address high recidivism rates, manage rebounding correctional populations, and meet the significant behavioral health needs of justice-involved individuals while addressing racial disparities across the justice system. A number of states have adopted reforms focused on addressing racial and ethnic disparities in the justice system. Maryland, for example, eliminated mandatory minimum sentences for certain drug offenses and addressed the sentencing disparity between powder and crack cocaine, after data analyses identified these policies as significant drivers of racially disparate outcomes. With 87 percent of people under correctional control in Minnesota on supervision, state leaders enacted reforms to probation administration and funding, which are aimed at addressing overrepresentation of Black and Native American people within their respective probation and prison systems.

- Justice Counts, supported by the Department’s Bureau of Justice Assistance, is a national initiative focused on improving the accessibility and usability of criminal justice data across the country. Justice Counts provides technology and tools to elevate key state and local criminal justice metrics and create a cross-system view of criminal justice activity. In particular, this initiative will provide a new opportunity to examine racial disparities in arrest, sentencing, and community supervision data that are present in a variety of state and local systems. As of September 2023, state and local partners in 16 states are sharing their data and information in a manner that will allow for these jurisdictions to better identify and analyze challenges in their respective systems, compare their data with other jurisdictions, and learn together how they can improve outcomes.
- Another project, funded by the Department’s Bureau of Justice Assistance and led by the Center for Court Innovation and the National Judicial College, focused on improving procedural justice in criminal courts. The multi-year collaboration concluded with the publication of a practical guide to communication strategies that can be used to promote perceptions of fairness in the court context.
- The Bureau of Justice Assistance (BJA) through the Adult Treatment Court Program plans to address equity and inclusion in treatment court through the following strategies:
 1. Expand the use of the National Center for State Court (NCSC) and Treatment Court Institute Equity and Inclusion Assessment Tool (EIAT) and the American University Racial and Ethnic Disparities (RED) Program Assessment Tool through training and technical assistance.
 2. Require applicants to describe a plan to collect and examine access and retention data to identify and eliminate disparities that exist in the treatment court program and that the plan may include the use of the EIAT and or the RED Program Assessment Tool.
 3. Expand TTA to support the unique needs of women in treatment courts to increase referral, retention, and graduation rates.
 4. Partner with Treatment Court Institute to support the development of the Habilitation Empowerment Accountability Therapy (HEAT) program into an evidence-based practice.
 5. BJA continues to work with our state treatment court TTA partners to expand HEAT training throughout the country.

Additional information can be found here:

- **FACT SHEET: The Biden-Harris Administration Advances Equity and Opportunity for Black Americans and Communities Across the Country:**
<https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/27/fact-sheet-the-biden-%E2%81%A0harris-administration-advances-equity-and-opportunity-for-black-americans-and-communities-across-the-country/>

- FACT SHEET: Biden-Harris Administration Takes Action During Second Chance Month to Strengthen Public Safety, Improve Rehabilitation in Jails and Prisons, and Support Successful Reentry: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/28/fact-sheet-biden-harris-administration-takes-action-during-second-chance-month-to-strengthen-public-safety-improve-rehabilitation-in-jails-and-prisons-and-support-successful-reentry/>

Sentencing

The United States has made it a priority to reduce racial and ethnic disparities in sentencing at all levels of the criminal justice system and to support sentencing reform, including at the federal level.

The United States has taken many steps over the last several years to achieve these goals:

- The United States, through the work of the United States Sentencing Commission, continually monitors the federal criminal justice system to identify racial and ethnic disparities in federal sentencing and in the system more generally. The Sentencing Commission is an independent body in the judicial branch of government that, among other things, collects and analyzes sentencing data, serving as a resource to all in the U.S. government and to the public.
 - The Commission has released numerous reports over the last several years identifying disparities – existing and emerging – in various aspects of the federal criminal justice system, including, for example, increased sentencing disparities since the Supreme Court’s decision in *Booker v. United States* made the federal sentencing guidelines advisory. As to racial disparities in particular, the Commission found that, controlling for the type of offense and other important factors, Black male offenders received significantly longer imprisonment sentences than White male offenders. The most recent report can be found here: *2023 Demographic Differences in Federal Sentencing Report* (<https://www.usc.gov/about/news/press-releases/november-14-2023>).
- In 2022, the Attorney General issued a new charging policy that requires federal prosecutors to make an individualized assessment in determining which particular charges fit the specific circumstances of each case, are consistent with the purpose of the federal criminal code, and fairly represent the defendant’s criminal conduct. The new policy also disfavors the use of mandatory minimum sentencing statutes and directs prosecutors not to pursue the enhanced penalties applicable to crack cocaine offenses.
- With respect to federal cocaine sentencing policy more broadly, the Administration has expressed support and advocated for the enactment of the EQUAL Act, which would eliminate the remaining disparity in sentencing policy between offenses involving crack and powder cocaine. The United States further supports applying any enacted changes retroactively to all persons serving federal sentences for crack cocaine offenses.

- The United States continues to implement the First Step Act, described by many as the most significant federal criminal justice reform measure in several decades, which has contributed to reducing the federal prison population significantly since the Act's enactment in 2018.
 - The First Step Act authorized reforms of the federal prison system to promote re-entry for federal prisoners, including a requirement that the Department of Justice develop a risk and needs assessment system for the Federal Bureau of Prisons to assess the recidivism risk of federal prisoners and place them in programs to reduce that risk; changes to mandatory minimum sentences for certain drug offenses; retroactive application of the Fair Sentencing Act of 2010 for incarcerated offenders who received longer sentences for possession of crack cocaine than they would have for powder cocaine; and an expansion of courts' ability to sentence low-level, nonviolent drug offenders to less than the required mandatory minimum.
 - These reforms helped to address racial disparities in the federal criminal justice system, as, for example, 91 percent of those receiving sentence reductions under the provision applying the Fair Sentencing Act reforms retroactively were African American.

Probation and Parole

In August 2023, the U.S. Sentencing Commission, by a majority vote, allowed for delayed retroactive application of Amendment 821 relating to criminal history – meaning that certain currently incarcerated individuals could be eligible for reduced sentences made effective beginning on February 1, 2024. The Commission also adopted its next set of policy priorities that include, among other things, reviewing and potentially amending how the guidelines treat acquitted conduct for purposes of sentencing as well as assessing the degree to which certain U.S. Bureau of Prisons practices are effective in meeting the purposes of sentencing.

The Commission voted to delay implementation of any order granting such reduced sentences to ensure that, to the extent practicable, all individuals who are to be released have the opportunity to participate in reentry programs and transitional services that will increase the likelihood of successful reentry to society.

Additionally, the Department of Justice has advocated to the U.S. Sentencing Commission to focus on and address systemic sentencing reform in the coming years. This advocacy reflects the President's commitment to criminal justice reform.

The U.S. Congress has introduced legislation that would ensure that all federal prisoners have the opportunity to seek reduction of their sentence after some specified period of time in prison. Many states have already adopted these so-called "second look" sentencing provisions that would provide the possibility of release for all or most people serving long prison sentences.

Federal legislation has also been introduced that would provide incentives for states to establish or support programs that divert individuals from incarceration; eliminate policies that drive excessive and unnecessarily lengthy terms of imprisonment, including by repealing mandatory

minimum penalties for certain offenses; cap sentences at 20 years; mandate review of sentences automatically after 15 years; implement policies that increase opportunities for early release; and repeal policies that restrict or curb parole eligibility. Many states have adopted these kinds of reforms, and more are being proposed each year.

In addition, the U.S. Sentencing Commission voted to expand the availability of sentence reductions for those serving unusually long sentences, including life sentences without the possibility of parole. At the state level, so-called second look sentencing has been enacted in several states that would give all, including those sentenced to life without the possibility of parole, a chance at release.

The Bureau of Justice Statistics collects administrative data from probation and parole agencies in the United States, which includes the total number of adults on state and federal probation and parole on January 1 and December 31 of each year, the number of adults entering and exiting probation and parole supervision each year, and the characteristics of adults under the supervision of probation and parole agencies. Published data include both national- and state-level data and cover all 50 states, the federal system, and the District of Columbia.

Additional information can be found here:

- Probation and Parole in the United States: <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ppus21.pdf>
- U.S. Clemency Statistics: <https://www.justice.gov/pardon/clemency-statistics>

Life Without Parole (LWOP)

At the federal level, the U.S. Congress eliminated parole in 1984, as part of the Sentencing Reform Act. The United States is not aware of any efforts to reinstate the pre-1984 federal parole system. However, there have been other significant developments at the federal and state levels. The Supreme Court eliminated mandatory life without parole sentences (LWOP) for juveniles in 2012, and legislation has been introduced in Congress to eliminate all LWOP for juveniles in the federal system.

In addition, at the federal level, the United States Sentencing Commission recently voted to expand the availability of sentence reductions for those serving unusually long sentences, including LWOP. At the state level, so-called second look sentencing has been enacted in several states that would give all, including those sentenced to LWOP, a chance at release.

Conclusion

Thank you once again for raising these important issues. We hope the text above provides some useful information. We note as well that the United States responded to similar questions during our International Covenant for Civil and Political Rights (ICCPR) review last year, as well as during the visit of the Special Rapporteur on contemporary forms of racism to the United States in 2023.