

# PRISONS

*Violations of Articles 1, 2 and 5 of the  
International Convention on the Elimination of all forms of  
Racial Discrimination in  
U.S. Prisons*

A Response to the Periodic Report of the United  
States of America April 2007

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## EXECUTIVE SUMMARY

The United States has the highest reported incarceration rate in the world. More than 2.3 million people are behind bars in U.S. prisons and jails. As a result of the convergence of racism in the education system, the racially discriminatory impacts of policing and racially disparate exercises of prosecutorial discretion the jail and prison population is disproportionately composed of people of color.

In its report to the Committee, the United States' discusses several mechanisms by which it can investigate and prosecute "torture, cruel, inhuman, and degrading treatment of punishment, or other abuse."<sup>1</sup> It only explicitly mentions one instance related directly to racial discrimination (in ¶ 178 where it provided technical assistance to a corrections department that was segregating prisoners based on race).

Given the over-representation of people of color within prisons and jails, it is certainly relevant in a report on racial discrimination to look more widely at the means by which those who are abused in prisons can receive some redress. Unfortunately, it has become increasingly difficult for even the most egregious abuses to be remedied by the courts. The Civil Rights Division of the US Department of Justice can prosecute criminally state and local officials who deprive persons of rights protected by the Constitution and laws of the United States. However, it is difficult to convict a corrections officer in a trial in front of a jury without overwhelming circumstantial and forensic evidence, a videotape or a cooperating correctional officer. This leads many to conclude that accountability cannot come from criminal prosecution of liable parties, as in fact this approach merely perpetuates a criminal legal system that dehumanizes all those involved.

Currently there is legislation in effect entitled the Civil Rights of Institutionalized Persons Act (CRIPA) which would allow for the initiation of litigation to remedy egregious conditions in prison and jails that violate the Constitution or laws of the United States. However, the number of different facilities that are covered under CRIPA (including nursing homes, mental health facilities, facilities for persons with developmental disabilities, and juvenile facilities as well as jails and prisons) and the limited resources and wide responsibilities of the Special Litigation Section, as well as the restrictions imposed by the Prison Litigation Reform Act (PLRA), have severely limited the effectiveness of CRIPA in recent years.

Therefore, violations of the Convention are commonplace in US prisons and jails. This report not only documents the lack of response from facilities and other agencies, and the absence of remedies for prisoners who have been discriminated against, it also documents in detail the realities for persons in US prisons and jails. (Issues affecting juveniles who are incarcerated are detailed in the report of the Working Group on Juvenile Justice).

Conditions in prisons and jails in the US are horrific. The notion of rehabilitation in most facilities has been forgotten and prisons/jails have become warehouses for many of the marginalized segments of American society. This is evidenced by among many things,

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<sup>1</sup> U.S. Report ¶¶ 173-178.

the significant decrease in the 1980s and 1990s of state and federal spending for correctional education programs. The linkage between lack of education and incarceration rates, as well as, patterns of recidivism is well documented. Therefore, it is easy to see how the US is playing a role in keeping prisons and jails in the US filled by denying opportunities for prisoners to educate themselves.

In the US we have created some of the harshest conditions for those that are incarcerated. Examples include the use of solitary confinement (which is referred to as being in “a prison within the prison”) and the increased building and usage of super maximum security prisons where prisoners are locked down 23 hours a day. Data indicates that prisoners of color are confined in long term isolation at a much higher rate than white prisoners. We also have a prison system that is moving slowly to eliminate sexual violence in prisons despite the passage of the Prison Rape Elimination Act of 2003.

Health care disparities in prisons/jails are alarming. The report documents concerns about infectious diseases such as Hepatitis C and HIV/AIDS, lack of or poor mental health treatment and substance abuse issues. This section further details the specific issues that are experienced by transgender and gender variant prisoners. For example only a small minority of states<sup>2</sup> and the Federal Bureau of Prisons provide hormone replacement therapy for qualifying transgender and gender variant persons; none provide for sexual reassignment surgery, despite its acceptance as part of the standard of care for transgender persons.<sup>3</sup> This section of the report also reveals the specific health care issues related to women prisoners. For example concerns regarding reproductive health like gynecological needs of women in prison are often dismissed as not important by prison officials. Many women have also experienced being shackled to the hospital bed while giving birth.

The rise in the prison population in the US has also interfered with and is severely eroding the preservation of family unity for families with incarcerated parents of color and their children. This section of the report documents the alarming number of children with a parent in a state or federal prison and the effects on the family unit. It also documents how the foster care system overlaps with the criminal justice system, concerns about visitation and maintaining contact with family members through other mechanisms like phone calls and the problems that are encountered. It also documents how the federal Adoption and Safe Families Act of 1997 (ASFA) has had a devastating impact on the ability of incarcerated parents to maintain custody of their children while incarcerated. More and more incarcerated parents are having their parental rights terminated while they are incarcerated. Finally, Appendix A and B provide the U.S. Department of Justice and U.S. Department of Health and Human Services with detailed

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<sup>2</sup> According to research by Human Rights Watch, as of 7/2/07, only Georgia, Kansas, Texas, Virginia, Wisconsin, California, Colorado, Michigan, Idaho, Alabama, as well as a few large county jails such as Los Angeles County and San Francisco County provide any transgender-specific medical treatment of any kind. Many of these state policies were created following medical malpractice and personal injury lawsuits filed by transgender persons imprisoned in these respective states.

<sup>3</sup> TGI Justice Project, 2007

examples of ways state-level Departments of Corrections and child welfare agencies could maintain family unity when families are enmeshed in the criminal justice system.

The ability for people of color who are incarcerated to exercise their political will and freedom and their religious beliefs is also disproportionately impacted with US prisons and jails. In the post 9-11 world prisoners that practice Islam have been targeted even more severely than before.

The plight of Native American prisoners in US prisons and jails is often not documented because in many jurisdictions they are not counted separately from white prisoners. Therefore, many of their unique experiences are not captured and brought to the forefront in the discussion of prison related issues. This report seeks to document the experiences and raise the visibility of Native American prisoners. General Recommendation XXXI ¶B(e) makes it clear that respect for, and recognition of traditional systems of justice of indigenous peoples should occur and ¶ B(f) also refers to necessary changes in the prison regime that need to be made to take into account cultural and religious practices. On both counts the US is failing miserably to meet these recommendations.

In August of 2005 the world watched as tens of thousands of people in New Orleans, Louisiana were displaced because of Hurricane Katrina. Approximately 6,500 adults and youth were imprisoned in Orleans Parish Prison (OPP). The treatment of prisoners during and after Hurricane Katrina is detailed in this report. An overwhelming majority of those prisoners, almost 90% were black.

The report concludes with a series of recommendations the US government, other federal and state agencies can adopt that will lessen violations of the Convention in the future for incarcerated people of color and other protected groups under CERD in the US.

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*Violations of articles 1, 2 and 5 of the ICERD in U.S. Prisons and Jails: A Response to the Periodic Report of the United States of America*<sup>4</sup>

**Introduction**

The United States has the highest reported incarceration rate in the world. More than 2.3 million people are behind bars in U.S. prisons and jails. As a result of the convergence of racism in the education system, the racially discriminatory impacts of policing and racially disparate exercises of prosecutorial discretion (discussed in the reports of the Working Group on Policing and the Working Group on Court Access) the jail and prison population is disproportionately composed of people of color.

As noted by the U.S. in ¶ 162 of its Periodic Report Blacks and Hispanics together account for about one quarter of the general population but more than 60% of the jail and prison population. According to the latest statistics from the US Department of Justice, as of June 30, 2006,<sup>5</sup> there were 905,600 African Americans and 459,300 Latino/as incarcerated. Black men comprised 41% of the men in custody. Black women were 34% of women in local, state and federal prisons and Latina women 16%.<sup>6</sup>

An estimated 4.8% of black men and 1.9% of Hispanic men were in prison or jail, compared to 0.7% of white men. (The figures provided by the U.S. in ¶ 162 for 2005 refer to prisons only and do not include the jail population.)<sup>7</sup> More than 11% of black males age 25 to 34 were incarcerated. Black women were incarcerated in prison or jail at nearly 4 times the rate, and Hispanic women at twice the rate, of white women.

Native Americans are not counted separately from whites in the Department of Justice statistics but statistics from states with higher percentages of Native populations show that they are also overrepresented in the jail and prison population. For example, in Montana, according to the 2000 U.S. Census, Native Americans, the state's largest non-white group, comprise just 6.2 percent of Montana's population but 20 percent of those in correctional institutions. Nineteen percent of the 3,704 Montana men and boys being held in correctional institutions are Native American. Nearly one-third of the 429 women in correctional institutions are Native American.

From the time a Native person comes in contact with the criminal justice system, their experience is framed by racism and the refusal to recognize that their culture and their spirituality as interwoven with their identity. Compounding this, Aboriginal identity is viewed as a 'problem' only resolved by its extinction. Aboriginal people hold a collective goal to maintain and preserve their "difference." This puts them in immediate conflict with the criminal justice system in the United States whose focus is to maintain control of communities, ensure conformity with racialized norms and power relations, and to insure that the balance of power

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<sup>4</sup> This response is to the following report: *Periodic Report of the United States of America to the U.N. Committee on the Elimination of All Forms of Racial Discrimination*. April 2007 (hereinafter "US Report").

<sup>5</sup> Prison and Jail Inmates at Mid Year 2006, Bureau of Justice Statistics Bulletin, US Department of Justice, June 2007

<sup>6</sup> Crime and delinquency, 2004; 368-389, Richie, B.

<sup>7</sup> Jails hold pre-trial detainees and those serving shorter sentences, generally two years or less.

between the state and its citizens is maintained. For members of indigenous tribes who remain citizens of independent nations with distinct policies and practices, many of the U.S. criminal justice policies violate their most fundamental rights.

The Convention recognizes that racial discrimination is a barrier to the full realization of human rights. Article 2 of the Convention obliges states to nullify any law or practice *which has the effect* of creating or perpetuating racial discrimination. Existing data regarding racial disparities in the prison and jail populations make it clear that the impacts of criminal justice and prison policies and practices fall disproportionately on people of color, in violation of article 2. The health risks of overcrowded facilities and inadequate medical care, the levels of violence and abuse, the long-term impacts on employment, civic participation, welfare, housing, etc. are disproportionately experienced by people of color. Articles 2 and 5 of the Convention clearly require the United States to take action at the federal and state levels to rectify these discriminatory impacts.

Indeed, in 2001 the Committee expressed concern regarding the fact that “the majority of federal, state and local prison and jail inmates in the State party are people of color, and that the incarceration rate is particularly high with regard to African Americans and Hispanics,” and recommended that the U.S. take “firm action” on the matter.<sup>8</sup>

Moreover, in General Recommendation XXXI, issued in 2005, the Committee urged State parties to pay “the greatest attention” to a number of possible indicators of racial discrimination, including “[t]he proportionately higher crime rates attributed to persons belonging to [minority] groups, particularly as regards petty street crime and offences related to drugs and prostitution...” and “the number and percentage of persons belonging to [minority groups] who are held in prison or preventive detention...”<sup>9</sup>

### **The Legal Framework**

In its report to the Committee, the United States discusses several mechanisms by which it can investigate and prosecute “torture, cruel, inhuman, and degrading treatment of punishment, or other abuse.”<sup>10</sup> It only explicitly mentions one instance related directly to racial discrimination (in ¶ 178 where it provided technical assistance to a corrections department that was segregating prisoners based on race).

Given the over-representation of people of color within prisons and jails, it is certainly relevant in a report on racial discrimination to look more widely at the means by which those who are abused in prisons can receive some redress. Unfortunately, it has become increasingly difficult for even the most egregious abuses to be remedied by the courts. The Civil Rights Division of the US Department of Justice can prosecute criminally state and local officials who deprive persons of rights protected by the Constitution and laws of the United States. However, it is

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<sup>8</sup> Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America. 14/08/2001. A/56/18 ¶395

<sup>9</sup> CERD General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system A/60/18, pp98-108, ¶¶ 1(d) and 1(e),

<sup>10</sup> U.S. Report ¶¶ 173-178.

difficult to convict a corrections officer in a trial in front of a jury without overwhelming circumstantial and forensic evidence, a videotape or a cooperating correctional officer. This leads many to conclude that criminal prosecution of liable parties is ineffective, and in fact it merely perpetuates a criminal legal system that dehumanizes all those involved.

The Civil Rights Division Special Litigation Section also enforces the Civil Rights of Institutionalized Persons Act (CRIPA) which gives the United States authority to initiate litigation to remedy egregious conditions in prison and jails that violate the Constitution or laws of the United States. However, the number of different facilities that are covered under CRIPA (including nursing homes, mental health facilities, facilities for persons with developmental disabilities, and juvenile facilities as well as jails and prisons) and the limited resources and wide responsibilities of the Special Litigation Section, as well as the restrictions imposed by the Prison Litigation Reform Act (PLRA), have severely limited the effectiveness of CRIPA in recent years.

Despite the many thousands of prisons and jails in the country and the fact that the Department receives more than 4800 written complaints per year regarding conditions in prisons and jails, in 2004 it opened only one new investigation into a prison or jail case, and it filed only one case in court.<sup>11</sup> In 2003, no new prison or jail cases were filed. In its report (at ¶ 175), the US refers to a number of investigations undertaken in 2006 but it is unclear if any of these were in prisons as it does not give this information here (acknowledging that the number it provides covers all types of facilities) nor on its web page or elsewhere despite repeated requests from NGOs for the Department to provide more detail of its investigations.

PLRA has seriously restricted the ability of the courts to take effective action. Particularly egregious is the PLRA's provision establishing that "no federal civil action may be brought by a prisoner for mental or emotional injury....without a prior showing of physical injury." This provision would deny lawsuits over the damaging effects of racial discrimination. In addition, courts have used this provision to dismiss cases involving forcible strip searches, body cavity searches and even sexual abuse, unnecessary shackling of prisoners' hands and feet while they are in solitary confinement, and confinement in cells so small that the prisoners could not sit down. Even when prisoners are able to circumvent PLRA's restrictions and bring their cases to court, the requirement for the showing of "deliberate indifference" to basic human needs by prison administrations sued for Constitutional violations makes it extremely difficult for prisoners to prevail.<sup>12</sup>

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<sup>11</sup> *Department of Justice Activities Under the Civil Rights of Institutionalized Persons Act, Fiscal Year 2004*, available at [http://www.usdoj.gov/crt/split/documents/split\\_cripa04.pdf](http://www.usdoj.gov/crt/split/documents/split_cripa04.pdf)

<sup>12</sup> See for example, *Wilson v. Seiter*, 501 U. S. 294 (1991) and *Farmer v. Brennan*, 511 U.S. 825 (1994).

**I. The State Party has failed to meet its obligations under Article 2 to mitigate the racially discriminatory harm to people of color who are disproportionately impacted by the inhumane and damaging conditions within U.S. prisons and jails.**

**Introduction**

According to the U.S. Periodic Report, African Americans in 2005 represented a smaller percentage of both the prison and jail population than they did in 1995<sup>13</sup>. However, the actual numbers of people in prison continues to rise and the current level of disproportionate representation of African Americans in U.S. prisons and jails remains completely unacceptable. The percentages of other non- white groups, particularly Latinos/as who are incarcerated are increasing. As a result, people of color in the U.S. continue to experience the disproportionate impact of conditions in prisons and jails.

The US report concedes in ¶ 165 that the “disparities in incarceration rates are complex” but suggests that they are related primarily to differential involvement in crime. Yet, the most striking fact about the huge increase in the US prison population over the past three decades, is that it has shown no correlation with crime rates. While there is some evidence that poor young black men commit more violent crime than white men, violent crime overall has dropped dramatically in the past decade. The increase in the percentage of the prison population imprisoned for violent crime is a result of more and longer prison sentences. Much of the increase in incarceration overall has resulted from increased drug sentences and the racially discriminatory effect of US drug policy has been clearly demonstrated. Recent research shows that, although poor men and men of color were much less involved in crime in 2000 than twenty years earlier, their chances of going to prison rose to historically high levels.<sup>14</sup> The systemic racism that has resulted in so many people of color being among the disadvantaged who are driven to commit the majority of street crime is clear from all the sections of this report. The political response to pander to racism and to deal with social problems and economic disparities through increased use of incarceration has brought about the huge and disproportionate imprisonment of people of color.

Conditions inside U.S. prisons are deplorable in many respects. Many institutions suffer from overcrowding, inadequate medical and mental health care, the lack of qualified health care staff, minimal educational opportunities, and very few employment opportunities. Despite the U.S. government’s claims (discussed above) that CRIPA is an effective tool for remedying human rights violations in prisons and jails, the reality is that the U.S. Department of Justice conducts very few investigations into prison or jail conditions each year. Prisoner activists continue to report on the racial abuse they experience at the hands of racist, repressive correctional officers. As described in the following account, internal administrative investigations into staff and correctional officer’s misconduct are routinely dismissed.

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<sup>13</sup> US Report, ¶¶ 163.

<sup>14</sup> See, for example, Western, Bruce, *Punishment and Inequality in America*, Russell Sage Foundation, 2006

“Today is Thursday, November 15th, 2007. SCI-Houtzdale is emerging from a 50-hour lockdown initiated by a senseless gang brawl between the Latin Kings and Bloods. All the while, the festering spectre of racism hangs over Houtzdale like a pall. As inmate's attack each other, ostensibly fighting over pride and disjointed idealism those charged with the reform and safety of society's errants are conspiring to bury a hate crime.”<sup>15</sup> The hate crime this prisoner is referring to was by a white Correctional Officer at SCI Houtzdale in Pennsylvania who was accused of hanging a noose on Black prisoners cell door. A grievance was filed and the officer was interviewed. He admitted hanging the noose claiming he meant no harm and that it was a joke. The investigator felt that he was sincere and having known him for years reported to the prisoner that she was sure nothing like this would happen again. National headlines from Jena, Louisiana and various locales across the country have shown that the "hangman's noose" has had a renaissance of sorts among frustrated and angry whites. In isolated communities like Houtzdale and others near prisons, the attitudes of residents on issues of racial tolerance are decidedly hostile, if they exist at all. The resolution of this incident was decidedly glib about the use of an implement of racial intimidation and murder whose very form hearkens back to the hellish end of Reconstruction. “It is beyond dispute that this C.O. hung a noose, however, he shall remain exempt from the selfsame legal process which so easily sent us here.”<sup>16</sup>

### **Part A: Use of Solitary Confinement/Supermax Prisons**

The glaring absence of information about who resides in super maximum (“super-max”) prisons and isolation units in U. S. prisons is testimony to the secrecy surrounding these facilities. Nevertheless, what data does exist indicates that prisoners of color are confined in long term isolation at a much higher rate than white prisoners. Notwithstanding the overall disproportionate representation of minorities in the U.S. prison system, the population of super-max security control units reflect even more striking and disturbing racial disparities.

A former Michigan Department of Corrections psychologist now working to monitor conditions in control units and provide expert witness testimony for prisoners states that whites are disproportionately represented in lower security levels and protective custody in U.S. prisons, while minorities are disproportionately represented---relative to their percentage in the prison system as a whole---in super-max and maximum security prisons and units. He further notes, “I especially found this to be true in Michigan, where I have the most direct experience.”<sup>17</sup> Dr Terry Kupers reports in his book “Prison Madness” that the population of super maximum security units is up to 90 or 95 percent Black and Latino/a.<sup>18</sup>

The American Friends Service Committee’s STOPMAX Campaign receives hundreds of letters a year regarding the oppressive and tortuous conditions inflicted upon prisoners in isolation units across the country. Recently an official log sheet from a long term segregation unit in

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<sup>15</sup> Prisoner testimony received by Fed Up/Human Rights Coalition, Pittsburgh, PA., Nov. 2007

<sup>16</sup> Ibid

<sup>17</sup> Walsh Phd, Robert, former MI Doc psychologist

<sup>18</sup> Kupers Ph.D, Terry, Prison Madness, The Mental Health Crisis Behind Bars and What We Must Do About It, San Francisco, Jossey-Bass Publishers, 1999,

Pennsylvania was received detailing the racial disparities therein. The total population was listed as 34 which comprised 28 Blacks, 3 whites and 3 Hispanics.

At California's High Desert Prison in Susanville, the Behavior Modification Unit (BMU) holds 28 men; 20 African American; 7 Latino; and 1 white. Prisoners are crying out for assistance with what they claim is a repressive, racist, underground 'illegal' program. This program is yet to be approved by the Office of Administrative Law or the Administrative Procedures Act.<sup>19</sup> Prisoners report regular cell extractions, being forced to stand in the snow for hours in T-shirts and boxers, and having to finish their food within 2 minutes or risk receiving infractions.

The increasing classification of prisoners as Security Threat Gang (STG) members, using broad and random definitions of the term has heavily impacted prisoners of color. It is often the color of ones skin, not any evidence or actual activity that brands innocent prisoners as gang members. In some states STG's are defined just as 'Asian' or 'Black Muslims', to name just two. Once classified into an STG, prisoners invariably find themselves confined in isolation for indeterminate lengths of time with the only commonly known criteria to return to general population being to 'snitch' on other gang members or report gang activity. 'Snitching' in prison is tantamount to writing ones own death warrant. Thus prisoners sent to administrative housing for assumed gang affiliation often linger for years in solitary confinement, sometimes until they reach their maximum sentence.

Racial discrimination is rife within supermax units. Over the past few decades super maximum security prisons have sprouted up all over the United States, primarily in rural white communities where they have been promoted to alleviate the economic depression of these areas. The vast majority of correctional officers who work in such facilities are white, and have had little exposure to people of color outside of the prison context.

Testimony received from supermax prisoners depict atmospheres of racial discrimination and hostility. Although many of the letters received by prisoner rights activists are from African-American prisoners, white prisoners also describe the behavior of supermax guards as particularly aggressive and degrading toward black prisoners, Prisoners report regular use of racial slurs, including "nigger" by supermax officials and frequent racialized confrontations. Prisoners also report that guards sometimes try to perpetuate racial animosities among prisoners held in super-max by, for example, deliberately placing a black prisoner in a cell between two known white supremacists.<sup>20</sup>

For instance, a 2000 Human Rights Watch ("HRW") report on US prison conditions cites frequent incidents of physical abuse, racial harassment and excessive use of force at Virginia's two super-maximum security prisons, Red Onion State Prison and Wallens Ridge. Black and white prisoners alike at Wallens Ridge describe an atmosphere of pervasive and blatant racism, and report that corrections officers routinely use such terms as "boy" and "nigger" when addressing prisoners. One white prisoner told HRW that an officer said to him, when referring to a black prisoner alleged to have engaged in sexual misbehavior, "What do you expect from a

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<sup>19</sup> Written testimony by 6 High Desert Prison, BUM prisoners, Aug-Oct. 2007-(on file AFSC Phila.)

<sup>20</sup> Cold Storage, Super Maximum Security Confinement in Indiana, Human Rights Watch, 1997

fucking nigger?” Another white prisoner wrote HRW that one guard was “so excited about being able to shoot ‘niggers...’[H]e couldn’t wait to shoot some of them black bastards.”<sup>21</sup>

A former Wallens Ridge supermax prisoner described the racial harassment experienced by black prisoners as “living in the shadow of the valley of death. Up in the mountains where there is no black mercy, no black sympathy. The treatment of brothers is inhuman and words alone cannot explain it. Imagine, if you can, creating an atmosphere of so-called criminals (mostly black) who is considered less than human, who has no outside support to hear his cry. Place him in an environment where he is governed by staff (all whites) whose only contact of blacks has been through media propaganda etc.”<sup>22</sup>

A black prisoner at the notoriously racist and abusive Red Onion supermax facility wrote to the American Friends Service Committee that on his arrival he was forced to strip for a body search in the presence of a female guard. When he protested, he was stunned with a high voltage taser gun in the presence of the warden and the presiding major shouted “Boy, you’re at Red Onion now” and then told the officers to “get that nigger out of here”. The subsequent grievance filed by this prisoner was denied.

Human Rights Watch representatives reported that during their July 1997 visit to the Secured Housing Unit at Carlisle's Wabash Valley Correctional Facility in Indiana they were startled to find an African-American prisoner in a cell covered with racist graffiti. Among the cell's more prominent markings was the slogan "White Power," which was scrawled on the wall in thick, four-foot-high black letters and interrupted by a large swastika, the phrase "fuck all niggers" scratched into the mirror, and an intricate drawing of a hooded Klansman poised over the bed.<sup>23</sup>

Additionally, due to the stark racial disparities in the prisoner population confined to super-max facilities, the unbearably severe conditions of confinement in supermax prisons and units have impermissible racially discriminatory effects, in violation of the Convention.

The employment of sensory deprivation as a form of behavior modification and social control in such facilities clearly endangers the mental health and well being of prisoners. Numerous studies have documented the effects of solitary confinement on prisoners, characterizing them as Special Housing Unit Syndrome or SHU Syndrome. Some of the many symptoms of SHU Syndrome include:

- visual and auditory hallucinations
- hypersensitivity to noise and touch
- insomnia and paranoia
- uncontrollable feelings of rage and fear
- distortions of time and perception
- increased risk of suicide
- PTSD

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<sup>21</sup> Red Onion State Prison, Super Maximum Security Confinement in Virginia, Human Rights Watch, 1999

<sup>22</sup> Testimony of former Wallens Ridge prisoner to Thousand Kites project staff, Appallshop, KY

<sup>23</sup> Cold Storage, Super Maximum Security Confinement in Indiana, Human Rights Watch, 1997

If an incarcerated person is not mentally ill when entering an isolation unit, by the time they are released their mental health has been severely compromised. Extended periods of sensory deprivation cause conditions and symptoms that are often permanent. As a result, many prisoners are released directly to their communities, largely poor communities of color, with myriad mental health problems.

The U.S. government's racially disparate employment of super-max detention facilities and practices and failure to address clear systemic racism within such facilities violates articles 2(1)(a) and (c) and 5 (b) of the Convention, and is contrary to the Committee's interpretation of the obligations of State parties under these provisions as articulated in General Recommendation XXXI, ¶ 38 (a) and (c).

### **Part B: Lack of Access to Education**

Over the past two decades, prison education programs have been sharply curtailed even as the prison population has swelled, reflecting a shift away from rehabilitation as a goal of incarceration. During the 1980s and 1990s, state and federal spending for correctional education programs decreased significantly.<sup>24</sup>

The passage of legislation in 1994 prohibiting the use of federal grant money for prisoner education, effectively cutting all funding to postsecondary education in prisons, was emblematic of this shift in U.S. policy. In 1998, the federal government reversed a policy requiring states to spend *at least* 10% of block education grant funds for correctional education. Under the new policy, states were told that they could spend *no more* than 10% on education in prisons. As a result, state spending on educational programs for adult prisoners has dropped drastically. Attitudes at the state level have similarly disfavored investment in education for prisoners. For example, in 1999, voters in a northeastern state (New Jersey) approved a state constitutional amendment prohibiting the use of lottery funds to pay for prisoner education programs of *any* type.

Current information about the current state of prison education programs is difficult to obtain.<sup>25</sup> What data is available indicates that in state prisons, from 1990 to 2000, the proportion of prison staff providing educational services fell from 4.1 to 3.2 %, creating an average ratio of 95.4 prisoners per instructor.<sup>26</sup> A drop in prisoner participation in prison educational programs has accompanied the drop-off in public investment. For example, the percentage of state prison prisoners who reported taking education courses fell from 57% in 1991 to 52% in 1997.

Given the prevalence of low literacy or illiteracy in the prison population and the link between literacy issues and learning disabilities, special and remedial programs are of particular importance in prisons. Yet, only about 39% of state prisons provided special education programs and only 20% of private prisons offered special education.

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<sup>24</sup> See, e.g., Educational Testing Service, LOCKED UP AND LOCKED OUT: AN EDUCATIONAL PERSPECTIVE ON THE U.S. PRISON POPULATION, 2006 at 5

<sup>25</sup> Id. at 16-17 (noting that the most recent data available on state expenditures on correctional education comes from 1993-1994)

<sup>26</sup> Id. at 17.

Education provides hope and the possibility of change to incarcerated persons. It also reduces the likelihood of recidivism. The current United States policy of warehousing prisoners in institutions that provide few or no educational opportunity damages all prisoners and society as a whole. Moreover, the policy takes a sharply disparate toll on prisoners of color. BJS statistics indicate that in 1997, about 44% of Black state prison prisoners and 53% of Latino/a prisoners had not completed high school or its equivalent, compared to 27% of white prisoners.

Reflecting national trends, people imprisoned in New York State are disproportionately from low-income backgrounds, lacking educational and economic opportunities. Ninety percent of people in New York City jails do not have a high school equivalency, and between 50 and 70% of the population reads English below a sixth grade level. More than 50% of people in New York State prisons do not have a high school diploma.

These figures make clear that policies which deny literacy training and educational programs to prisoners disproportionately disadvantage people of color and serve to reinforce structural discrimination outside of the prison walls. Self-evidently, these policies also serve to return prisoners of color to their communities with low skills and limited prospects.

We are aware of no systematic policy initiatives at the federal level or in the states to attempt to restore the prison educational programs that were sharply curtailed in the 1990s. While there has been renewed focus on education as part of programs for those leaving prisons, these programs tend to be limited in scale and to target only prisoners who are nearing release dates.

Moreover, cutbacks in funding for prison education programs mean that programs managed by prisoners and supported by volunteers are even more critical. However, these programs may not be able to run effectively without support from prison administrators. At a maximum security prison in New Jersey, for example, administrators have sharply reduced the classroom space and hours available to a prisoner-managed literacy program that has operated successfully for over twenty years. The vast majority of the tutors and students in this program are African-American. While the restrictions have purportedly been based on institution-wide security concerns, they too have had a disproportionate effect on prisoners of color.

The U.S. government's cuts to federal funding for prison education programs, combined with its directive to states to limit funding for such programs, have had the effect of denying the prison population, which disproportionately made up of people of color, the right to education and training, in violation of article 2 (1)(a) and (c) and (2) as well as article 5 (e)(v).

### **Part C: Sexual Assault & Rape**

Nationwide, sexual assault and rape in prisons are significantly underreported. The United States government has taken an affirmative step to recognize the urgent need to understand and eliminate rape and sexual assault in prison by the passage of the Prison Rape Elimination Act in 2003. However, the U.S. has much further to go to ensure compliance among its member states.

This is compounded by the “absence of uniform reporting”<sup>27</sup> by systems or facilities, according to the most recent Bureau of Justice Statistics (BJS) Special Report on sexual violence by correctional authorities. The report goes on to say that “higher or lower counts among facilities may reflect variations in definitions, reporting capacities and procedures for reporting allegations. . . .<sup>28</sup>”. This makes it hard to document the full scope of the problem. Therefore, sexual assault and rape in prison continues to be a national problem. Implementation of legislation and policies by state and county governments to eliminate sexual violence in prisons have been slow.

Depending on which study you read, approximately 1 in 3 women in US society will be survivors of sexual assault during their lifetime. In prison these statistics are significantly higher. They are in fact, staggering with some reports citing 85% of women prisoners as survivors of sexual assault. Female prisoners have survived trauma at unbearably high levels. Trauma has riddled the lives of many women who enter prison where they are subjected to re-traumatization over and over again. Arrest, hand-cuffing, shackling, strip searching, sexual harassment, and verbal abuse are all situations which put women in prison at risk for further traumatization. Moreover, despite being imprisoned and presumably safe from harm, in many prisons throughout the US, women suffer from sexual abuse by staff which often occurs at routine medical examinations.

The BJS report revealed consistent patterns of sexual violence in correctional facilities. For example males constituted 82% of the victims of prisoner-on-prisoner sexual violence<sup>29</sup> and on average victims were younger than perpetrators. In 2006, 44% of victims were age 24 or younger, while 81% of perpetrators were age 24 or older<sup>30</sup>.

The BJS report also revealed that “substantiated incidents” of staff sexual misconduct and harassment during 2006 in more than half the incidents was reported by the victim or another prisoner<sup>31</sup>. This statistic may be misleading however, because it gives the appearance that many prisoners feel empowered to report incidents of abuse. However, in this report there are examples of the retaliation that occur when prisoners report not only incidents of sexual violence by prison/jail staff but mistreatment in general. This is a real issue because 54% of the staff involved in these incidents in prisons and 98% in jails are correctional officers<sup>32</sup>. Correctional officers are the staff that have the most contact with prisoners and therefore have a significant impact on their lives’ while they are incarcerated.

The sexual violence inflicted by staff usually occurs outside the prisoner’s living area. This fact implies that staff should be monitored more closely in many facilities. Prison/jail staff have access to prisoners in a way that makes them able to carry out these abuses. The report also documents, that “[s]taff had victimized more than one prisoner in 18% of the incidents that were substantiated.<sup>33</sup>”

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<sup>27</sup> Bureau of Justice Statistics Special Report, *Prison Rape Elimination Act of 2003: Sexual Violence Reported by Correctional Authorities, 2006*. August 2007, NCJ 218914 at page 1.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid. at 4.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid at 7.

<sup>32</sup> Ibid. at 8

<sup>33</sup> Ibid at 7.

The BJS special report which has been issued for 3 years now (following the passage of the Prison Rape Elimination Act) give facilities insight into when sexual violence likely occurs in prisons and jails. Armed with this data changes could be made to staffing and security measures, etc. during those times. However, that has not occurred at many facilities.

The BJS report documents that medical follow up for prisoners is lacking after incidents of staff sexual misconduct. According to Table 12<sup>34</sup>:

- 8% of prisoners in prisons and 5% in jails are given a medical examination
- 1% of prisoners in prisons and 18% in jails are administered a rape kit
- 3% of prisoners in prisons and 2% in jails are tested for HIV/AIDS
- 3% of prisoners in prisons and 2% in jails are tested for other STDs
- 17% of prisoners in prisons and 8% in jails are provided counseling or mental health treatment
- 79% of prisoners in prisons and 74% in jails are given none of the above

Individuals of the lesbian, gay, bisexual and transgender (“LGBT”) community are often discriminated against in everyday life, and are subject to particularly brutal abuses within U.S. criminal justice systems. Again, because people of color are disproportionately imprisoned, LGBT people of color are disproportionately more likely to experience sexual assault and rape in prison.

Recent studies and surveys have shown that transgender and gender variant prisoners<sup>35</sup> are more likely to be the victims of sexual assault and rape in prisons, largely due to their gender status and indifference or outright encouragement by prison staff.<sup>36</sup> In 2007, a Latina transgender woman filed suit against the state of California for allowing her to be raped repeatedly by her cellmate over a three-week period.<sup>37</sup> According to her testimony in court, she asked therapists, medical staff, and prison custody staff to move her while the attacks continued, only to be told to “man up” (fight back), and returned to her cell. It was not until her cellmate slashed her with a box cutter during a particularly violent assault was she finally moved.

Furthermore, transgender and gender variant people are usually placed in cells according to their birth sex rather than their gender identity (the gender they identify with). In 2001, Amnesty International reported the case of an African American lesbian who was detained in a facility in California on a first-time, non-violent offense and sent to segregation in a men’s prison. The

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<sup>34</sup> Ibid at 9.

<sup>35</sup> “Transgender” broadly describes people who do not conform to traditional societal gender roles. This term includes transsexuals, transvestites and cross-dressers, as well as masculine women and feminine men. This term describes a person’s deeply felt sense of *gender*, and is therefore distinct from sexual orientation. “Gender variant” describes people who also transgress traditional gender roles and expressions, but for personal or cultural reasons do not call themselves “transgender.”

<sup>36</sup> TGI Justice Project, 2007; Jenness et. al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault*, Center for Evidence-Based Corrections, UC Irvine, Apr 27, 2007. The Jenness study found that transgender prisoners in California were 15 times more likely to be sexually assaulted than non-transgender persons, and that 50% of transgender subjects had been raped in prison.

<sup>37</sup> TGI Justice Project, <http://www.tgijp.org/giraldo.html>, last accessed October 24, 2007

male guards harassed and threatened her for being a lesbian and she was raped by three other prisoners.<sup>38</sup>

As a result of such inappropriate placements, gender variant and intersex people are highly visible among the prisoner population, and are frequent targets of homophobic and transphobic violence and brutality by correctional officials, which in turn places them at greater risk of verbal, physical and sexual abuse by other prisoners. Moreover, individuals who are harassed based on their gender identity are often disciplined for suspected homosexual activity based on their perceived sexual orientation: transgender individuals report that they are subjected to disproportionate isolation and solitary confinement. While in this confinement they report regular physical and sexual assault, harassment, and denial of food and urgent medical services by correctional officers has particularly been reported that correction officers often refuse transgender prisoners access to medical care after a rape or assault.<sup>39</sup>

#### **Part D: Health Care Disparities**

As is the case with failure to provide adequate educational services in prisons, due to the disproportionate rates of incarceration of people of color, failure to provide adequate health care services disparately impacts racial minorities in the U.S., in violation of the Convention.

Although prisoners are guaranteed adequate medical care under the Eighth Amendment of the U.S. Constitution,<sup>40</sup> the quality of health care provided in U.S. prisons is severely lacking in several respects. Litigation dating back to the 1970s which has never been overturned has imposed a high standard on substantiating claims of medical neglect. In *Estelle v. Gamble*<sup>41</sup> the U. S Supreme Court held that, “[i]n order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.”<sup>42</sup> Although on it’s face this sounds like a reasonable conclusion, deliberate indifference to medical needs is by no means easy to prove and does not allow for a remedy for racially discriminatory (in purpose or effect) denial of adequate health care. To the contrary, CERD General Comment XXXI ¶ 38(a) implies that not only should medical, psychological and social services be given to prisoners but that those services should also take into account their cultural backgrounds.

As an initial matter, obtaining even the most basic medical care in prison can be a difficult process. In many instances, a request must first be filed and then a Medical Technical Assistant decides whether the prisoner will see a physician. Prisoners often are required to pay co-pay fees and wait long periods of time for an appointment. Follow-up appointments can be difficult to

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<sup>38</sup> AMNESTY INTERNATIONAL, CRIMES OF HATE, CONSPIRACY OF SILENCE 30 (2001).

<sup>39</sup> “*It’s War in Here*”: A Report on the Treatment of Transgendered and Intersex People in New York State Men’s Prisons (Sylvia Rivera Law Project 2007)

<sup>40</sup> “Know your rights. Medical, dental and mental health care.” ACLU Prison Project. 8 October 2007. [http://www.aclu.org/images/asset\\_upload\\_file690\\_25743.pdf](http://www.aclu.org/images/asset_upload_file690_25743.pdf)

<sup>41</sup> *Estelle v. Gamble*, 429 U.S. 97 (1976).

<sup>42</sup> *Ibid* at 106.

arrange, and confidentiality is often broken. Institutional procedures such as “lock downs” can further burden the process of obtaining necessary and prompt health care.<sup>43</sup>

Another considerable hindrance to the provision of adequate medical care behind bars is the use of private for-profit groups to supplement prison health care systems. Correctional Medical Services (CMS), one such company that operates in 24 states, has come under scrutiny in Delaware and Michigan for cutting corners and limiting the number of outside referrals prisoners are allowed, as well as for substituting less trained staff in place of regular doctors. EMSA Correctional Care, another private health care company, was found to have hired doctors who have been charged with misconduct, some of whom were prohibited from practicing medicine in the U.S. outside of prisons. Moreover, incarcerated individuals have been found to have been threatened with denial of medical care if they report staff incompetence.<sup>44</sup>

For instance, the State of Maryland recently switched to using for-profit providers of medical care in its prison system, and requires a co-pay from prisoners on their initial sick call request, effectively precluding many prisoners, who tend to be some of the poorest individuals in America, from obtaining even basic medical care in its prisons. Treatment is only provided without payment when the illness is an emergency.<sup>45</sup> To the average American citizen, a \$5 co-pay may seem affordable. However, when one considers the circumstances of prisoners without financial support from the outside or who work in prison industries for extremely low wages, a \$5 co-pay can represent more than a day's earnings.

Conversely, an initiative undertaken by the State of Texas provides an example of how a little innovation can produce considerable improvements. In 2001, Texas was providing such inadequate health care for its prison population of 145,000 that U.S. District Judge William Wayne Justice, who was engaged in oversight of Texas prisons, expressed serious doubts about healthcare inside prison walls. At the time, Texas also had a rapidly expanding elderly prison population, thereby increasing the burdens on an already inadequate prison health care system. In 2004, the University of Texas Medical Branch (UTMB) partnered with Texas Tech University Health Sciences Center and the Texas Department of Criminal Justice to allow the universities to become the basic health care providers for the entire state prison system. The medical schools employ video conferencing to conduct general examinations of prisoners without having to transport them, unless in need of specific equipment or treatment. The university's research abilities ensure comprehensive and competent assessments, diagnoses, treatments, and medication. The 2001 Corrections Yearbook concluded that Texas is paying less for high-quality, compressive health care than any other state in the nation.

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<sup>43</sup> Ibid.

<sup>44</sup> “ACLU and PJC Urge Maryland Board to Reject Contract with Company Known for Providing Deficient Medical Care in Prisons” American Civil Liberties Union. 1 June 2005.

<http://www.aclu.org/prison/gen/14742prs20050601.html> >

<sup>45</sup> Sentiments, Gus G. and Garland, Greg. “Ailing System Struggles with Inmate Care.” Baltimore Sun. 10 June 2005.

## a. Infectious Disease

Infection rates for certain diseases in prisons far surpass those of the general public, particularly for HIV/AIDS, other sexually transmitted diseases (STDs), tuberculosis (TB), and Hepatitis A, B, and C. It has been estimated that the rate of AIDS in correctional systems is five to seven times greater than in the general population. The rate of hepatitis among the U.S. prison populations is estimated between 15 and 30 percent,<sup>46</sup> and cases of TB in prisons are five times the national average.<sup>47</sup> An analysis conducted for the U.S. Congress, by the National Commission on Correctional Health Care, found that 20 to 26 percent of the U.S. population living with HIV/AIDS, 29 to 32 percent of persons with Hepatitis C, and 38 percent of those with TB were *released* from a correctional facility.<sup>48</sup> Transmitted through unprotected sex, tattooing, sharing syringes, and close living quarters, and fostered by inadequate prison health care, these diseases are ravaging the prison population. Public health experts are beginning to ponder the consequences of this health crisis, as the large majority of these prisoners will one day be released back to society.

### Hepatitis C

Hepatitis C is a blood-borne viral disease caused by the hepatitis C virus (“HCV”). It primarily affects the liver. According to the Center for Disease Control, approximately 3.9 million Americans, or 1.8 percent of the U.S. population, have been infected with HCV.<sup>49</sup> However, these numbers do not count the homeless, people in prison, and people in the military. Consequently, others estimate the number is closer to 5 million. HCV disproportionately hits communities of color. African Americans and Latinos are, respectively, three and two times more likely to be HCV-positive than whites.<sup>50</sup> African Americans have the highest HCV rate followed by Native Americans, Latinos and whites.<sup>51</sup>

Many policies and practices in California Women’s prisons around HCV testing and treatment violate the human rights of people inside women’s prisons and contribute to the continuing spread and progression of HCV, in many cases leading to late stage liver disease and death. The testing and treatment of HCV in prison is marked by the failure to offer non-mandatory, confidential HCV testing to all people in women’s prisons who are at risk for infection; the lack of informed consent for such testing; the failure to report test results to women in a timely fashion; and the lack of effective treatment for HCV people in prison. The experience of such people is also marked by a devastating lack of access to information and education in many respects, including recommended diet and lifestyle changes, possible symptoms and side effects, medications and their contra-indications, follow-up care, and test results and analysis of the meaning of those results. Finally, not only has prison staff almost completely failed to respond

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<sup>46</sup> ROBERT D. HASNER, *SPECIAL NEEDS OFFENDERS IN THE COMMUNITY* (2007).

<sup>47</sup> Renee Rizdon and Anne De Groot, *TB in Corrections: Constant Companion and Future Scourge*, *INFECTIOUS DISEASES IN CORRECTIONS REP.* (May 2007).

<sup>48</sup> Travis, Jeremy and Visher, Christy, p. 36.

<sup>49</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, *NATIONAL HEPATITIS C PREVENTION STRATEGY* (Summer 2000). National Foundation for Infectious Diseases, “Hepatitis C Fact Sheet,” *available at* <http://www.nfid.org/factsheets/hepc.html>.

<sup>50</sup> NATIONAL FOUNDATION FOR INFECTIOUS DISEASES, *HEPATITIS C FACT SHEET*

<sup>51</sup> [www.epidemic.org/theFacts/theEpidemic/USRiskgroups](http://www.epidemic.org/theFacts/theEpidemic/USRiskgroups)

to repeated complaints about HCV testing and care, but in some cases they have actually retaliated against individuals who have filed complaints about care.

*“I am now terminal from them not treating me for over a decade. I think my life is worth something.”<sup>52</sup>*

For people in women’s prisons who are aware that they are HCV positive, regardless of whether they learned inside or outside the prison, accessing effective treatment of HCV is extremely difficult. Interviews and other research indicate that very few receive treatment for HCV and even fewer are told of the potential risks in treatment for those who are HIV-HCV co-infected, as many are. In addition, many women have started treatment and been unable to finish because the debilitating but treatable side effects are not addressed early enough, or at all.

The prison doctors’ unwillingness or inability to provide informed, professional care means that the people in women’s prisons often have to take almost full responsibility for their care, including researching treatment options and advocating to get any care at all. One woman in 2003 described the inaccessibility of treatment despite urgent health conditions. “I am still running a fever everyday. I still have blood in my urine. They still don’t know where it’s coming from. The pain I’m in is getting so much worse! A few weeks ago my stomach swelled up so bad. They will not give me nothing for pain. I am in Ad-Seg (solitary confinement) right now and it is so much harder to get treatment back here.”<sup>53</sup>

If one is able to get treatment, the treatment provided is often dangerous and sometimes life threatening. Haphazard and insufficient medical care for HCV and related illnesses were widespread among the people inside prison. One woman observed several other women overdose on the medication used to treat their HCV because they were not prescribed appropriate, height and weight-relative, amounts.<sup>54</sup>

As a result of the lack of adequate treatment and the abysmal conditions in the prison many women who enter prison HCV-positive end up with severe liver damage, in some cases requiring a liver transplant. Persons in California women’s prisons who require a liver transplant find it almost impossible to even get on the waiting list. In fact, despite the absence of specific restrictions on access for prisoners, no person in a women’s prison in California, to our knowledge, has ever gotten on the transplant list.

Rather than taking steps to remedy the numerous abuses around HCV testing and treatment in women’s prisons, the response of the California Department of Corrections and the California’s government to the HCV pandemic has been slow and grossly inadequate. In fact, the CDCR has often gone beyond negligence to obstruct the ability of people in women’s prison to get adequate compensation and relief from human rights violations.

Not only has the government response to the HCV epidemic been grossly inadequate, but complaints about care often leads to retaliation or even worse care. One woman filed a 602

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<sup>52</sup> Letter on file with Justice Now.

<sup>53</sup> Letter on file with Justice Now

<sup>54</sup> Letter on file with Justice Now.

against a doctor who mishandled and dismissed a serious reaction she had related to her HCV treatment. As a result of the 602 she filed, the doctor refused her treatment.<sup>55</sup>

U.S. law on testing and treatment of HCV for people in prison in the United States falls mostly under the cruel and unusual clause of the 8<sup>th</sup> Amendment. HCV care in prisons has rarely been held by courts to violate the Amendment, which requires a serious medical need accompanied by deliberate indifference. In *Estelle v. Gamble*, the Supreme Court held that “deliberate indifference to serious medical needs of prisoners” violates the Eighth Amendment, which prohibits cruel and unusual punishments stating, “[t]his is true whether the indifference is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.”<sup>56</sup> In general, “courts have found that [HCV] infection . . . constitutes a ‘serious medical need.’”<sup>57</sup> Deliberate indifference is usually the critical hurdle. The requirement to prove intent makes these cases particularly difficult.

In addition, in 2000, in response to the growing HCV pandemic the Centers for Disease Control, Federal Bureau of Prisons, and several states developed protocols for the testing and treatment of HCV in prisons. These protocols, which provide detailed recommendations on testing and treatment, appear to be either violated regularly or carry stringent requirements that prohibit many people inside from receiving treatment.

## **b. Mental Health**

Mental disorders have become increasingly prevalent in prisons. This is largely due to the fact that many people who cannot or do not receive adequate mental health care in the community come into contact with the criminal justice system. National Alliance on Mental Illness (NAMI) estimates that there are 500,000 people with mental illness in US prisons.

In the mid-1950s the mental hospitals across the US were closed and community health models were lifted up as best practices and emerged all over the country. Coupled with the development of new medications to treat mental illness, many of these patients were released to the community, with the belief that the drugs would alleviate their symptoms.<sup>58</sup> But funding coordination and commitment was lacking and these models quickly deteriorated, resulting in three times as many people with mental disorders entering prisons than mental health hospitals today.<sup>59</sup> Specific mental disorders have shown to be more problematic for prisoners than for the general population, especially mood disorders (bipolar disorder, depression), schizophrenia, and personality disorders.<sup>60</sup> For instance, as correctional officers are often not trained to recognize or effectively respond to the sometimes bizarre, disruptive, or violent behavior of prisoners with

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<sup>55</sup> Notes on file with Justice Now

<sup>56</sup> *Estelle v. Gamble* 429 U.S. 97, 104-105 (1976).

<sup>57</sup> Pamela K. Sutherland and David C. Fathi, *For Prisoners Suffering from Hepatitis C and other Effects of Incarceration, the Trial Lawyer is Often their only Hope*, 39 TRIAL 26, 30 (Oct. 2003).

<sup>58</sup> *Ibid.*

<sup>59</sup> “Ill-Equipped: U.S. Prisons and Offenders with Mental Illness.” Human Rights Watch. 8 October 2000 <<http://www.hrw.org/reports/2003/usa1003/>>

<sup>60</sup> Hasner, Robert D.

mental illness, they often are placed in “supermax” confinement, where they are held in isolation cells for 23 hours per day, hardly an environment that is conducive to positive mental health. One study of New York State prisons indicates that 64% of prisoners in isolation are mentally ill. With the racial disparities noted in the previous section on solitary confinement, it is safe to assume that once again mental illness affects people of color in prison at disproportionate levels.<sup>61</sup>

Studies have shown that prisoners with mental disorders do not receive the treatment they need. The Federal Bureau of Prisons conducted a survey that found over 36 percent of state and 25 percent of federal prisoners with a high need for mental health services received no treatment at all.<sup>62</sup> As a result of conditions of confinement, mentally ill prisoners often suffer agonizing symptoms such as delusions, hallucinations, extreme mood swings, and paranoia. While in this state they are left to deteriorate. Some correctional placement options, most notably solitary confinement, can lead to even greater risks for the development of, or exacerbation of existing mental health issues.<sup>63</sup>

For example, about one of every ten New York State prisoners suffers from mental illness. As members of the general prison population, these inmates are often disciplined for outbreaks they can't control. Prison personnel are not trained to identify or manage psychiatric disorders and often inflict harsh punishments, such as food deprivation, physical restraint, and placement in solitary confinement which can lead to devastating effects such as suicide. As many as 70% of prisoners in New York State who commit suicide also have a history of mental illness. New York State prison psychiatric wards have only enough space for a fraction of the mentally ill prisoners, forcing many of them into the general prison population or into solitary confinement. Disturbed prisoners will spend on average seven times longer in solitary confinement as compared to other prisoners.

There are many reasons prisoners with mental illnesses do not receive necessary treatments. Mental health care is costly, and correctional facilities are increasingly oriented toward punishment rather than rehabilitation. Mentally ill prisoners, and particularly those who are considered “disruptive” and have long disciplinary histories, are often considered a burden.<sup>64</sup> In many cases, correctional officers and medical staff are not adequately trained to address the needs of mentally ill prisoners.

### **c. Substance Abuse**

Persons with substance abuse problems are increasingly warehoused in prisons as a result of the U.S. government's declared “war on drugs.” In 1980, drug offenders made up 25 percent of federal prisoners; by 2003, this figure rose to close to 60 percent.<sup>65</sup> The majority of prisoners

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<sup>61</sup> Kupers, Ph.D., Terry,

<sup>62</sup> Travis, Jeremy and Visher, Christy, p. 40

<sup>63</sup> Kupers, Ph.D., Terry. “Declaration of Terry A. Kupers, M.D., M.S.P.” U.S. District Court for the Western District of Wisconsin. Case N. 00-C-421-C. 9 August 2001.

<sup>64</sup> “Ill-Equipped: U.S. Prisons and Offenders with Mental Illness.” Human Rights Watch. 8 October 2003  
<<http://www.hrw.org/reports/2003/usa1003/>>

<sup>65</sup> Johnson, Robert.

with substance abuse issues are in need of treatment, yet they are often not provided such treatment in correctional facilities.

Although there are no studies that systematically measure the prevalence of substance (including alcohol) abuse and involvement in prisons, there is little doubt that prisoners are disproportionately affected by substance abuse disorders. It has been reported that 64 percent of adult male, and 67 percent of adult female arrestees tested positive for the use of drugs.<sup>66</sup> In a self-report study conducted by the Federal Bureau of Prisons, 59 percent of state prisoners reported drug use in the month prior to their arrest; 34 percent said they were under the influence of drugs at the time of arrest and 36 percent reported being under the influence of alcohol when the offense was committed. Notably, the National Center on Addiction and Substance Abuse has found that alcohol is more closely linked to the commission of *violent* crime than drugs, and twenty percent of prisoners in state and federal prisons were under the influence of alcohol at the time their violent crime was committed, while only three percent of violent offenders were under the influence of cocaine or crack alone, and one percent were under the influence of heroine alone.<sup>67</sup>

Clearly, a large majority of prisoners are in need of drug and alcohol treatment, but the availability of such treatment in prison is rare, and resources to meet the needs of prisoners with substance abuse issues are scarce.

For women in prison this lack of treatment is particularly acute. Furthermore the substance abuse programs that exist are generally administered on a one-size-fits-all, model, a model designed for men. Women require gender specific, trauma informed treatment and counseling to address the complex issues of trauma, violence, mental illness and substance abuse that permeate their lives. Although examples of good programs exist intermittently around the country, the availability of bed space in these special treatment units is scarce. Furthermore the increasing fiscal cuts to prison programming has shut down some of the more effective models. For instance the highly regarded Residential Substance Abuse Treatment (RSAT) program designed by Stephanie Covington (Center for Gender Justice) as a trauma-informed, sanctuary healing model at SCI Cambridge Springs in Pennsylvania, was closed in 2005 after only 4 years of operation. Many women praised this intensive treatment as having changed and saved their lives. Lack of appropriate treatment and continued drug use behind prison walls contributes to recidivism upon release.<sup>68</sup>

#### **d. LGBT Prisoners**

As prisoners, transgender and gender variant people suffer the same medical neglect as is typical for all prisoners. While transgender-specific health care is widely accepted by the medical community nationwide, many prison medical staff members are either unfamiliar with these treatments, or willfully withhold such treatment out of personal bias. Only a small minority of

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<sup>66</sup> Hasner, Robert D.

<sup>67</sup> Ibid, p. 29

<sup>68</sup> Travis, Jeremy and Visher, Christy.

states<sup>69</sup> and the Federal Bureau of Prisons provide hormone replacement therapy for qualifying transgender and gender variant persons; none provide for sexual reassignment surgery, despite its acceptance as part of the standard of care for transgender persons.<sup>70</sup> Refusal of prescribed treatments can cause long-term psychological and physical damage, including but not limited to loss of bone density, heart and liver damage, and suicidal ideation. Follow-up care when treatment is issued – such as counseling, monitoring hormone levels, and breast cancer screening – are nearly non-existent in all jurisdictions, increasing patients’ risk of developing cancer and other long-term health problems. Because transgender and gender variant people of color are similarly disproportionately imprisoned as in the larger population, it is transgender and gender variant persons of color who suffer the most from the short- and long-term consequences of this medical neglect. For more information on issues facing transgender persons in prison in the largest state prison system in the country – California – please see Appendix C.

Although the Eighth Amendment guarantees prisoners the right to adequate health care, there is a clear bias against provision of humane treatment services for prisoners. The belief that scarce resources should not be so graciously allocated to health care for "criminals" has led to the paradox that prisoners are all too often denied even the most basic medical care. Since the majority of currently incarcerated people will one day return back to the communities they came from, addressing the health care needs of prisoners is a crucial public health issue. Doing so would most likely be cost effective even though it cannot be measured in terms of the justice it serves.

#### **e. Women Prisoners**

Statistics show that African American and Latina women constitute the fastest growing prison population in America, increasing 6 fold from the mid-1980’s to present. Two thirds of women in local jails, state and federal prisons are Black, Latina, or members of other non-white ethnic groups.

Historically underrepresented at all levels of the criminal justice system, women in prison are invisible and ignored. A system created by males for males has forgotten and seriously neglected the diverse and specific needs of women.

African American female prisoners bear the quadruple burden of their race/ethnicity, class, gender and status as a criminal. That being Black, being a woman, being poor, and being a prisoner confers serious health risks is clear. Because incarcerated women are ‘invisible’, there has been little in the way of research and policy development that would advance their health status. Thus it is no surprise that for the most part, the health of women prisoners is much worse than that of men in prison and that of women in the general population.

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<sup>69</sup> According to research by Human Rights Watch, as of 7/2/07, only Georgia, Kansas, Texas, Virginia, Wisconsin, California, Colorado, Michigan, Idaho, Alabama, as well as a few large county jails such as Los Angeles County and San Francisco County provide any transgender-specific medical treatment of any kind. Many of these state policies were created following medical malpractice and personal injury lawsuits filed by transgender persons imprisoned in these respective states.

<sup>70</sup> TGI Justice Project, 2007

The war on drugs and harsh mandatory sentencing laws have been the major forces in driving up the numbers of women of color in prison. Consequently, the health problems of incarcerated women are those that commonly affect these women in the community, including high rates of such chronic illnesses as hypertension, asthma, diabetes, Hepatitis C and HIV. Incarceration poses unique threats to women because access to medical care is usually arbitrary, discouraging and difficult to navigate with few effective mechanisms to redress grievances. The experiences of imprisoned women is a clear reminder that having a 'right' or 'choice' means absolutely nothing without access to the resources needed to carry out that choice.

## **Reproductive Health**

The gynecological needs of women in prison are often dismissed as not important by prison officials. Medical concerns that relate to reproductive health and the psychosocial issues that surround them are largely overlooked. Given that many women, particularly poor women and women of color who enter prison are often survivors of sexual assault and lacked health care prior to entering prison, they are at much greater risk for high-risk pregnancies and other reproductive health problems, such as human papilloma virus (HPV) which is a risk indicator for cervical cancer.

Women complain of lack of regular gynecological exams, erratic access to breast exams and screening for STD's. Pap tests which can be life-saving and prevent cervical cancer are offered inconsistently. Many women report that even after having a Pap test, follow up is often non-existent, thus permitting cervical cancer to progress undiagnosed and unaddressed.

In most prisons and jails women are screened at intake for pregnancy, but follow up is rare. Often women do not know that they are pregnant for several weeks. Even when positive results are given to women, pregnancy counseling is not offered. Dealing with the emotional stress of being pregnant in prison is often complicated by the layering of other stressors such as past trauma, substance abuse and mental health issues. Women in prison rarely receive the professional help and support they need in deciding whether to carry a pregnancy to term or have an abortion.

Access to abortion is extremely difficult. Beyond the restrictions on access that all women face, such as the mandatory 24-hour delays in place in 21 states, women in prison must deal with the additional barriers of the prison itself, and whether they can get a counselor to make the necessary arrangements for the procedure. Compounding all of this are the staffing issues that women must face. Shortages of correctional officer's to escort women to a clinic are often the reason behind late term abortions.

Whether a woman decides to carry her baby to term or have an abortion, in 48 states, the District of Columbia and the Federal Bureau of Prisons there is no legislative protection for women against shackling during transport to a hospital or clinic or during childbirth or an abortion. Shackling during childbirth endangers both women and their children. Using restraints such as belly chains and leg or wrist irons on pregnant women is in direct violation of international standards such as the UN Standard on Minimum Rules for the Treatment of Prisoners.

This abysmal health care in prison has led a significant number of women to face destruction of their ability to conceive or give birth biologically, creating a modern equivalent of forced sterilization of women of color.

Women in California prisons have reported feeling coerced into having hysterectomies or the removal of ovaries in response to fibroid tumors, or being asked to consent without full disclosure of information or while under sedation.<sup>71</sup> Of the 11,000 women in CA prisons 28% are African American, although they comprise only 6.7% of the general population. As prison medical facilities are so aggressively administering hysterectomies and other procedures which result in sterilization in CA prisons, it is clear that women of color are suffering these effects at disproportionate levels.<sup>72</sup> These tactics represent the reproductive oppression of women of color in prison.

The federal and state governments' failure to provide adequate health care to the prison population, which is disproportionately made up of people of color, has a racially discriminatory effect in violation of article 2 (1)(a) and (c) and 5 (e)(iv) of the Convention.

## **II. The State Party has failed to enact policies and practices to ensure the preservation of family unity for families with incarcerated parents of color and their children in compliance with its obligations under articles 1, 2 and 5 (e)(IV).**

Between 1991 and 1999, the number of children with a parent in State or Federal prison increased by more than 100 percent. For children outside the foster care system, there are no state agencies responsible for the well-being of the current 1.5 million children with parents in prison, nor for the additional 6.8 million children in the U.S. whose parents are under other forms of Correctional supervision.<sup>73</sup> There is no accountability or oversight of Federal, State or local law enforcement, judiciary, and other criminal justice agencies for the impact their policies have on children. African-American and Latino/a children are nine and three times, respectively, more likely than their white counterparts to have an incarcerated parent.<sup>74</sup> Given these statistics and the child welfare and prison policies described below, incarcerated individuals of color and their children are more likely to be denied recognition and enjoyment of their fundamental right to maintain family integrity, recognized by the Committee's interpretation of the Convention in General Recommendation XXXI ¶¶ 38(a) and 41.

Parents, children and corrections officials value strong family bonds during incarceration. Regular familial contact not only reduces the emotional and psychological trauma to children caused by separation from their parent, but it also has positive impacts on many imprisoned parents, including reducing the likelihood of recidivism upon release thereby also promoting

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<sup>71</sup> Levi, Robin, Justice Now, Reproductive Justice - Newsletter, Off Our Backs, vol 86

<sup>72</sup> Ibid

<sup>73</sup> Women in Prison Project, Correctional Association of New York, *Imprisonment and Families Fact Sheet*, (March 2007), available at [www.correctionalassociation.org](http://www.correctionalassociation.org).

<sup>74</sup> Christopher J. Mumola, U.S. Dep't of Justice, *Incarcerated Parents and their Children*, (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf>.

public safety.<sup>75</sup> Yet, for children who are in the foster care system during a parent's imprisonment, child welfare and correctional policies and practices undermine the maintenance of family relations, parental self-improvement and parental involvement in their children's well-being.

As an initial matter, the majority of incarcerated parents in the U.S. are effectively denied contact with their children because they are incarcerated in prisons far from their communities, the cost of phone calls from prison is exorbitant, and many facilities lack child-friendly prison practices, including visiting rooms. For instance, 84% of parents in federal prison and 62% of those in state prison are housed 100 miles or more from where their children live, and many prison facilities are inaccessible by public transportation.<sup>76</sup>

With respect to phone contact, NGOs report that phone usage rates in prison have become a new form of state-sanctioned corporate profit. Some companies charge up to 10 times the 'normal' rate for phone calls in correctional institutions; a large percentage of that charge goes to the state system and is *not or very rarely* reinvested in programs or other services to help incarcerated people and their families. If a parent is housed far away from her family, the price of talking on the phone is simply unmanageable, yet imperative for most children. For low-income families of color the location of prisons and the cost of telephone calls either lead to restricted parent-child contact, economic strain on the family unit, or both.

To add insult to injury, under federal child welfare law a parent-child relationship can be permanently severed after a child has been in foster care for 15 months, and the risk is increased if the parent has not been able to maintain consistent contact with the child and her caregivers. Given the increasingly long prison sentences imposed in the context of the "war on drugs" and under "truth in sentencing" laws, the possibility of facing the termination of parental rights is a frightening corollary of incarceration for many incarcerated parents of color.

The federal Adoption and Safe Families Act of 1997,<sup>77</sup> commonly known as ASFA, was enacted in response to a growing concern regarding the numbers of children who linger in foster care without any "permanency." Ten years after ASFA's implementation, another picture has emerged; one that is devastating the lives of incarcerated individuals and families of color as well as their communities.

ASFA was intended to increase the safety and permanency of children in foster care by shifting state focus and efforts away from family reunification toward termination of parental rights in order to make children available for adoption. ASFA mandates that the local family service agency initiate termination of parental rights (TPR) proceedings when a child is out of the home

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<sup>75</sup> Women in Prison Project, "Imprisonment and Families Fact Sheet." March 2007 (available at: [http://www.correctionalassociation.org/WIPP/WIPP\\_main.html](http://www.correctionalassociation.org/WIPP/WIPP_main.html)) . See also, "Families as a Resource in Recovery from Drug Abuse: *An Evaluation of La Bodega de la Familia.*"

E. Sullivan, M. Mino, K. Nelson, & J. Pope 2002

Available at:

[http://www.vera.org/publications/publications\\_2c.asp?section\\_id=16&project\\_id=&sub\\_section\\_id=5&publication\\_id=163&publication\\_content\\_id=250](http://www.vera.org/publications/publications_2c.asp?section_id=16&project_id=&sub_section_id=5&publication_id=163&publication_content_id=250)

<sup>76</sup> Mumola, *ibid.*

<sup>77</sup> Public Law 103-89.

for 15 of the most recent 22 months unless there is a “compelling reason” not to do so, the child is placed with kin, or the agency has not made reasonable efforts to reunify the family unit.

Although the Adoption Assistance and Child Welfare Act of 1980 (“Child Welfare Act”) mandates states to reunify children in foster care with their families whenever possible by making “reasonable efforts,” such as assisting them with improvement of parenting skills and other challenges, including those stemming from poverty and substance abuse, the law did not define “reasonable efforts.” As a result, states have been left with insufficient guidance as to the scope of efforts they are required to undertake to help families in crisis remain intact, and particularly those with an incarcerated parent.<sup>78</sup> A 1987 report by the National Council of Juvenile and Family Court Judges found that many judges “remain[ed] unaware of their obligation to determine if reasonable efforts to preserve families ha[d] been made. Other judges routinely ‘rubber stamp[ed]’ assertions by social service agencies” that reasonable efforts had been made.”

Instead of defining the “reasonable efforts” requirement and specifying the kinds of reunification measures required prior to the initiation of TPR proceedings, ASFA merely dictates *when* efforts to reunify families — regardless of what those efforts actually entail — should cease.<sup>79</sup> While ASFA did not eliminate state agencies’ statutory obligation to make reasonable efforts to reunify families with children in foster care (and even recognizes their mandate to do so by including their failure to do so as one of the three exceptions), it imposed strict time limits on those efforts, and yet again left them undefined.<sup>80</sup> Such time limits have particularly dire impacts for incarcerated parents, the majority of whom are people of color. Moreover, because adoption has not kept pace with terminations of parental rights, many children of incarcerated parents continue to languish in the system, only now as “freed” legal orphans. Parents whose rights have been terminated under ASFA are predominantly of color, and specifically African American. In this reality, the legal term of “freeing” children for adoption is particularly disturbing and reminiscent of the treatment of African American children during slavery.

Without the aid of child welfare case workers making reasonable efforts towards parent-child reunification, incarcerated parents are unlikely to be able to satisfy the “compelling reason” exception to automatic termination of parental rights after 15 months. An even shorter deadline for reunification can be imposed in cases of abandonment of an infant or if a parent has been convicted of a felony. In such cases, the requirement that the state engage in “reasonable efforts” to reunify the family are waived and initiation of proceedings to terminate of parental rights can proceed more quickly. Such unreasonable and unrealistic timelines for family reunification disproportionately impact incarcerated individuals and families of color, many of whom are serving sentences of longer than 15 months.

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<sup>78</sup> Allard, Patricia and Lynn Lu, Brennan Center for Justice at New York University School of Law, *Rebuilding Families, Reclaiming Lives: State Obligations to Children in Foster Care and their Incarcerated Parents*, (2006), available at [http://brennancenter.org/subpage.asp?key=42&proj\\_key=56](http://brennancenter.org/subpage.asp?key=42&proj_key=56)

<sup>79</sup> Ibid

<sup>80</sup> Ibid

The State is under an affirmative statutory obligation to make reasonable efforts to reunify incarcerated parents and their children before filing a petition to terminate parental rights. Unfortunately, since the 20-year implementation of this legal obligation, the state has yet to adequately satisfy it. The disproportionate effects of child welfare laws on incarcerated parents of color violates articles 1, 2 and 5(e) (iv) of the Convention, and are inconsistent with the ¶¶ 38 and 41 of General Recommendation XXXI, which interpret the Convention to afford a right to maintain family ties while incarcerated without discrimination on the basis of race.

**III. The state party failed to meet its obligations under Article 5 of the CERD to ensure that people of color who are incarcerated have the right to exercise political will and freedom without being disproportionately impacted within U.S. prisons and jails.**

**Census/Redistricting**

Forty eight of the fifty states<sup>81</sup> refuse to allow people in prison to vote, in violation of Article 5 of the CERD which requires universal suffrage and prohibits actions that reduce the ability of racial groups to exercise political rights. This disfranchisement disproportionately affects U.S. Blacks and Latinos, who are 60% of the U.S. prison population<sup>82</sup>, but only 27% of the total population.<sup>83</sup>

In this section we address the practice by which states credit these disfranchised Black and Hispanic prisoners disproportionately to white legislative districts, which constitutes a separate violation of Article 5.

U.S. Supreme Court decisions require each state's legislative districts to be substantially equal in population. In this way, each resident is given the same representation in government. To account for changing populations, each state must update its districts at least once per decade.

However, all 50 states draw their districts based on flawed data from the U.S. Census that counts prisoners as if they were residents of the prison location, not of their home addresses. Under U.S. common law, people are residents of the place they choose to reside with an intent to remain, and as incarceration is involuntary, it should not qualify as a residence.<sup>84</sup> In most states, this is explicit. For example, the New York State Constitution declares: "for purposes of voting, no person shall be deemed to have gained or lost a residence, by reason of his presence or absence ... while confined in any public prison."<sup>85</sup>

Yet all 50 states insist on using the flawed Census data to apportion their legislative districts, resulting in dilution of the votes of the urban and communities of color from which prisoners disproportionately come. According to *Importing Constituents: Prisoners and Political Clout in New York*, the first study to quantify the redistricting impact of disfranchised prison populations,

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<sup>81</sup> All states but Maine and Vermont currently bar people in prison for felonies from voting.

<sup>82</sup> Paige M. Harrison and

Allen J. Beck, *Prisoners in 2005*, Bureau of Justice Statistics, p. 8 (November 2006) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf> (last viewed September: 26, 2007)

<sup>83</sup> U.S. Census 2000 Quick facts. Available at <http://quickfacts.census.gov/qfd/states/00000.html> (last viewed: September 26, 2007)

<sup>84</sup> *Stifel v. Hopkins*, 477 F.2d 1116 (6th Circuit 1973).

<sup>85</sup> N.Y. Const. art. II, § 4.

counting people in prison as residents of the prisons and not their homes cost New York City a net loss of 43,740 residents to prison towns outside the city.<sup>86</sup> The transfer of this large, predominantly of color, non-voting population to upstate prisons, where it is counted as part of the population base for state legislative redistricting, artificially enhances the representation afforded to predominantly white, rural legislative districts.

In New York State, 62% of the population is white<sup>87</sup>, but the prison population is 82% Black or Latino.<sup>88</sup> Sixty-six percent<sup>89</sup> of prisoners come from New York City, but all of the 43 new prisons built in New York since 1976 have been built outside the city in disproportionately white areas.<sup>90</sup>

As a result, 98% of New York State's prisoners -- who are not allowed to vote -- are credited to state Senate districts that are disproportionately white as compared to the State's overall population.<sup>91</sup> These white legislators whose districts are dependent on including prison populations make little pretense of providing actual representation to the prisoners in their districts. Indeed, representatives of such districts do not merely ignore their incarcerated constituents, but advocate policies inimical to their interests. Two upstate white state senators, Dale Volker and Michael Nozzolio, whose districts contain 17% of the state's prisoners, have been the strongest advocates of retaining New York State's harsh Rockefeller Drug Laws requiring long mandatory prison sentences.<sup>92</sup>

Senator Volker has been particularly blunt in denying that he represents the interests of the 8,951 prisoners assigned to his district, 77% of who are Black or Latino. As reported in a 2002 interview,

Senator Volker says it's a good thing his captive constituents can't vote, because if they could, "They would never vote for me."<sup>93</sup>

Senator Volker has more prisoners in his district than any other senator except one.<sup>94</sup> Without the prison population, Senator Volker's district would not have sufficient population to qualify as a district under the U.S. Supreme Court's one-person-one-vote rule; yet he disclaims any interest in representing the prisoners who are crucial to his senate seat. This problem is not limited to

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<sup>86</sup> *Importing Constituents* (Main Report, Part IV), available at <http://www.prisonpolicy.org/importing>. *Importing Constituents* combines Department of Correctional Services data on the demographics of its prison population with the legislative district lines and data published by the New York State Legislative Task Force on Demographic Research and Reapportionment. Hereinafter *Importing Constituents*.

<sup>87</sup> U.S. Census 2000, Summary File 1, Table P4, and New York State Department of Correctional Services, *The Hub System: Profile of Inmates Under Custody on January 1, 2000* p. i (2000).

<sup>88</sup> *Ibid.*

<sup>89</sup> *Importing Constituents* (Further Research & Methodology).

<sup>90</sup> *Ibid.*

<sup>91</sup> Peter Wagner, Prison Policy Initiative, "98% of New York's prison cells are in disproportionately white districts," (posted January 17, 2005), available at <http://www.prisonersofthecensus.org/news/2005/01/17/white-senate-districts/> (last viewed Sept. 23, 2007).

<sup>92</sup> *Importing Constituents* (Main Report, Part VI and Fig. 10.)

<sup>93</sup> Jonathan Tilove, *Minority Prison Inmates Skew Local Populations as States Redistrict* (2002), at <http://www.prisonpolicy.org/news/newhousenews031202.html> (last visited September 26, 2007).

<sup>94</sup> *Importing Constituents* (Fig. 10)

New York. For example, prisoners constitute 12% of the population of one Texas legislative district<sup>95</sup>, and 15% of one Montana district<sup>96</sup>.

Thus, apportioning state legislative districts with data that credits disfranchised Black and Latino prisoners to white legislative districts dilutes the voting strength of Black and Latino populations, in violation of the United States' obligation under Article 5, which gives all groups the equal right to "to take part in the Government as well as in the conduct of public affairs."

**IV. The state party has failed to meet its obligations under Article 5 of the CERD, as interpreted by General Comment XXXI, ¶¶ 5(f) and 38(a), to ensure that people of color who are incarcerated have the right to practice their religious beliefs in U.S. prisons and jails.**

**Religious Discrimination Against Incarcerated People of Color**

Although the Religious Land Use and Institutionalized Persons Act (RLUIPA), enacted in 2000, protects against substantial burdens on the religious rights of prisoners,<sup>97</sup> the events of September 11, 2001 have led to prison policies which, in the guise of preventing terrorist recruitment in prisons, have worked to curtail the religious rights of incarcerated Muslims, many of whom are African-American. For example, since September 11th there have been anecdotal reports that the Office of Homeland Security has requested that Muslims in prison be placed in isolation each time the national "terror alert" code rises.

The impact of concern about terrorism on the religious rights of Muslim prisoners is made clear by a report issued in April 2004 by the Department of Justice on federal policy affecting selection of Muslim chaplains.<sup>98</sup> The report explicitly refers to the "large populations of non-Arab Muslim inmates" who according to an FBI source "are increasingly valuable for terrorism recruitment since they may not receive the same level of scrutiny as Middle Eastern Muslims."<sup>99</sup> It then suggests that the "real threat of radicalization comes from prisoners, not chaplains, contractors, or volunteers."<sup>100</sup> Specific mention is made of problems arising from "Prison Islam," described as a variety of Islam that results "when inmates follow Islam without direction or analysis. . ."<sup>101</sup>

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<sup>95</sup> Peter Wagner and Rose Heyer, Prison Policy Initiative, *Importing Constituents: Prisoners and Political Clout in Texas*, Prison Policy Initiative (November 2004), available at <http://www.prisonersofthecensus.org/texas> (last viewed September 23, 2007).

<sup>96</sup> Peter Wagner, Prison Policy Initiative, *Importing Constituents: Prisoners and Political Clout in Montana*, Prison Policy Initiative, (December 2004) available at <http://www.prisonersofthecensus.org/montana> (last viewed September 23, 2007).

<sup>97</sup> For a detailed discussion of the first four years of case law under RLUIPA, see Derek L. Gaubatz, RLUIPA AT FOUR: EVALUATING THE SUCCESS AND CONSTITUTIONALITY OF RLUIPA'S PRISONER PROVISIONS, 28 Harv. J.L. & Pub. Pol'y 501 (2005). In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Supreme Court unanimously upheld the constitutionality of the statute.

<sup>98</sup> See U.S. Department of Justice, Office of the Inspector General, A REVIEW OF THE FEDERAL BUREAU OF PRISONS' SELECTION OF MUSLIM RELIGIOUS SERVICE PROVIDERS (April 2004). The report is available online at "<http://www.usdoj.gov/oig/special/0404/final.pdf>."

<sup>99</sup> Id. at 7.

<sup>100</sup> Id. at 8.

<sup>101</sup> Id.

The population of "non-Arab Muslim inmates" discussed in the report is not further identified by race, but it is plain that this is an overwhelmingly African-American population. The report indicates that approximately 9,000 (or 6 percent) of federal prisoners seek Islamic religious services, and it notes further that about 85% of federal prisoners are either Sunni or members of the Nation of Islam.<sup>102</sup> Although the DOJ concern about "Prison Islam" would suggest that BOP should work to ensure that adequate numbers of Muslim chaplains are employed in the system, the report acknowledges that there is a "critical shortage of Muslim chaplains"--one for every 900 Muslim prisoners. When there is no chaplain, services are provided by volunteers, contractors, or prisoners.<sup>103</sup> Yet, despite the shortage of chaplains, BOP policy has curtailed their recruitment. As of 2004, BOP would only accept Muslim chaplains who have graduate school accreditation, experience, references, and endorsement by a national organization. However, in 2003 the BOP stopped hiring candidates endorsed by the only national organization that had submitted the necessary paperwork because that organization had come under scrutiny by the FBI. After the report was issued, the BOP reportedly was making efforts to modify its policies to recruit more chaplains. However, to date it appears that the severe shortage continues. Indeed, it appears that the major result of the report has been further screening of potential chaplains and volunteers for doctrinal acceptability.<sup>104</sup>

In the absence of chaplains or volunteers, prisoners of necessity must conduct their own services. As was indicated above, however, the report views prisoner-led services as problematic.<sup>105</sup> Indeed, the OIG expresses agreement with the principle that it is inappropriate for prisoners "to assume leadership positions in BOP facilities, including the position of surrogate chaplain."<sup>106</sup> Accordingly, it recommends that the BOP "restrict the use of inmates to lead religious services,"<sup>107</sup> and take other steps to control the content of services. *Id.* Other, even more explicit, regulation of religious expression is recommended, including an inventory of chapel materials and the development of a central registry of "acceptable material."<sup>108</sup>

The recommendation to inventory chapel materials led to a decision by the BOP in June 2007 to purge prison chapel libraries of books and materials that could "discriminate, disparage, advocate violence or radicalize."<sup>109</sup> Although this purge was not limited to Muslim texts, it was sparked by the 2004 OIG report on Muslim service providers. As the purge was taking place, BOP

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<sup>102</sup> *Id.* at 5.

<sup>103</sup> *Id.*

<sup>104</sup> See Office of the Inspector General, United States Department of Justice, ANALYSIS OF THE RESPONSE BY THE FEDERAL BUREAU OF PRISONS TO RECOMMENDATIONS IN THE OIG'S APRIL 2004 REPORT ON THE SELECTION OF MUSLIM RELIGIOUS SERVICES PROVIDERS, July 2004, for a discussion of the follow up to the April report. The online version can be found at <http://www.cybersafe.gov/oig/special/0404/response.pdf>.

<sup>105</sup> *Id.* at 42, 49.

<sup>106</sup> *Id.* at 49.

<sup>107</sup> This recommendation is of doubtful legality under RLUIPA. See *Spratt v. Rhode Island Department of Corrections* (1st Cir. 2007) 2007 WL 1031462 (Remanding for trial a prisoner's claim that his rights under RLUIPA were violated by a Rhode Island prison's blanket ban on preaching by inmates. The prisoner, a born again prisoner, had been preaching in the facility without incident for years, and the appeals court said the policy could not be sustained on the basis of generalized fears about potential security threats.)

<sup>108</sup> *Id.* at 55.

<sup>109</sup> For a description of the purge and its background, see Banerjee, Neela, "Prisons to Return Purged Items," *New York Times*, 9/27/07. The discussion here relies upon the information in this article.

began to develop an "approved" list of acceptable books. The new policy forced prison chapel libraries to dispose of thousands of books that had been collected over many years. Public outcry and a lawsuit prompted the Bureau to reverse the policy and return many of the books. Other practices ostensibly intended to respond to fears of "radicalization" have received less publicity but are equally troublesome.

Other religious groups have also been targeted in prison. For example, Native American prisoners have also historically been denied access to practice their traditional religious rituals such as sweat lodges. They are often denied access to other traditions such as seeing traditional healers. Many Latina/o prisoners practice Santeria and are often labeled gang members rather than members of a religious denomination.

## **V. Violations of the Rights of Native American/Indigenous Prisoners in US Prisons and Jails**

### **Introduction**

Native people are disproportionately represented in the prison population at higher rates than any other racial group in the United States. Because Aboriginal people's numbers are small, they are often categorized as "other" when research is done on the needs or characteristics of prison or jail populations. This enhances the general lack of understanding of the existence and needs of Aboriginal prisoners, as well as of Aboriginal culture and spiritual practices, thereby insuring the profound isolation of Native people in prisons and jails.

As a consequence, Native prisoners are more likely to be targeted as "rule breakers" by guards and prison officials thus spending long periods of time in disciplinary units. This results in longer prison sentences and less likelihood of parole or furlough. Because of the preponderance of racism toward Native people in the United States, Native prisoners are more likely to be targets of violence within the jail. These conditions combined with loss of contact with Tribal communities while an individual is incarcerated have put Native prisoners at great risk for suicide. When they return to their home communities they are scarred by their prison experience and ill prepared to live among us in a balanced way.

### **Native People in US Prisons and Jails**

The disproportionate level of incarceration for Native people and the resultant problems they encounter in US prisons and jails arise from the very limited jurisdiction that the Tribes have over "crime" committed on Tribal land, discussed in greater detail in the report of the Working Group on Indigenous Peoples. If Tribes had broader jurisdiction, they could apply traditional accountability measures that are grounded in healing and problem solving rather than punishment and incarceration. The impacts of this limited jurisdiction are compounded by a lack of resources to address social issues within the context of the Tribal community. Until Tribes are able to exercise sovereignty and their jurisdictional rights and are able to access to sufficient resources to address social issues in a culturally consistent way, Aboriginal People in the United States will continue to be imprisoned in vastly disproportionate numbers. They will also carry

the struggle to maintain their own identity and culture into the prisons and jails where they are held.

### **Adjudication in Tribal Court**

Often times, when Tribal members are adjudicated in Tribal court, they are confronted with insurmountable barriers. In many cases, judges, defense attorneys or prosecutors are not Native people and the Tribal court is modeled after district courts in the communities surrounding the Tribe. This creates an immediate cultural conflict that can be a platform for failure. Traditional Native justice practices are focused on bring a good resolution to the problem at hand and putting in place supports so that it does not happen again. Therefore, there is a hope that courts, law enforcement or corrections will make things “better.” Instead, Tribal members are placed on bail conditions that they cannot meet and expected to avail themselves of resources that don’t exist. If the same offenses were tried in district courts, the person would likely be referred to program and given a Continuance Without a Finding which would disappear from their records when their program is completed. This reality translates into violations of bail conditions and probation, more criminal convictions, longer prison sentences and longer criminal records for Native people tried in Tribal Courts. Eventually, when the person commits a crime that the Tribe does not have jurisdiction over, the record of failure compiled in Tribal Court follows them and makes alternative disposition of the offense much less likely.

### **Adjudication in White Courts**

In South Dakota, when Lakota people are accused of murder, they are encouraged to accept a plea to manslaughter. They are told they will be eligible for release after fifteen years. Native defendants are willing to accept the plea bargain rather than face a sure murder conviction by an all white jury in superior court. Many of these defendants are young people between the age of 17 and 19. Some of these young men are entering their 27<sup>th</sup> year of incarceration. To date, no Native person convicted of manslaughter has been released from custody through the parole process. At the same time, former Governor William Janklow who was found guilty of manslaughter for a vehicular homicide of a Native woman only served 100 days in county jail as punishment.

### **Incarceration**

In most cases, state and federal prisons and county jails are far from Tribal communities. This makes it very difficult if not impossible for family members to visit their loved ones in prison. This is compounded by the relentless poverty that Aboriginal people continue to live in as a result of a 500 year history of colonialism and genocide in the US. Many Native families do not have the financial resources to advocate effectively for their loved ones when they are in prison. Unlike many nations whose citizens are entitled to consular assistance while imprisoned in the U.S. most Tribes do not have an advocacy office for Tribal members who are in U.S. prisons. This places Native prisoners at a disadvantage if they become ill in prison or are subjected to

racially discriminatory treatment by guards or prison administration. As a result of their isolation from their communities, Native prisoners spend more time in high security settings than do white prisoners. This means that they have less access to resources that may assist in their eventual transition back to their communities.

As noted in the Report of the Working Group on Health Disparities, Native people struggle with many serious chronic health problems including diabetes, hypertension, and depression. The prison environment itself exacerbates these conditions. Health care in US prisons is marginal, for Native prisoners it can be very difficult to access. This is compounded because there are few established lines communication between Tribal clinics and correctional institutions. Even though some jurisdictions allow for transfer of prescriptions from Indian Health Services clinics to county jails, Native prisoners are routinely denied their medications when they are brought to the jail. Because the Tribal Clinics are not perceived to be equivalent to other health care providers, prison doctors often decide the individual should be observed before medication is administered. This is particularly dangerous when an individual has previously been prescribed psychotropic medication. Denial of medication results in withdrawal and immediate psychological decompensation. As the psychological condition worsens, the individual is tagged as a behavior problem and placed in punitive segregation. Aboriginal people do not perceive themselves as separate from other Tribal communities. Family life and ones role within the community is who they are. Therefore; segregation is particularly destabilizing for Tribal people, even more so for those who are mentally ill. This cycle is one reason for the high suicide rate of Native prisoners.

Because Native prisoners are so isolated from their communities of origin, they usually have to rely upon their own skills to negotiate a hostile medical system. Since acute medical complaints are often voiced to racially intolerant correctional staff first, immediate care is often denied to Native prisoners. It is only when a medical problem becomes undeniable that these prisoners receive attention. Native prisoners have died in prison simply because they were refused treatment for a known medical condition.<sup>110</sup> Even Leonard Peltier, the most well known Native American prisoner, continues to be denied necessary medical treatment for Diabetes related illnesses.

### **Lack of Access to Ceremony**

Because Native spirituality is an integrated part of our culture it is vitally important that Native prisoners have access to their religious ceremonies. Even though the Religious Land Use and Institutionalized Persons Act guaranteed this access, few jurisdictions have put in place adequate regulations to facilitate this essential right. For Aboriginal people spiritual health, physical health and emotional health are interwoven. When one strand of this braid is removed, the whole person suffers. Even when access to ceremony is not completely denied, the right to participate in religious and cultural traditions while incarcerated is seriously impeded.

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<sup>110</sup> Peter Gabriel, a Passamaquoddy Tribal member died from septicemia caused by an untreated diabetic lesion on his leg. Prison guards listened to his cries for weeks before he was “released” to the local hospital where he died a few days later.

Spiritual Leaders and Pipe Carriers are Native Americans greatest treasures. It is because of them and the work they do in Tribal communities that Aboriginal people, have the hope to be the strong people living in abundance that they once were. These Leaders volunteer their time to go into prisons or jails. When these Leaders go into correctional institutions, they are routinely disrespected. They are treated differently than all other religious volunteers. Spiritual Leaders and Pipe Carriers have been strip-searched, have had their medicines, eagle feathers and Pipes handled disrespectfully by corrections officials, and have had ceremonial objects such as smudge bowls confiscated by the prison officials. The most sacred medicine is tobacco. Most ceremonies require an offering of tobacco. Even though this is very different than smoking cigarettes, most prisons do not allow ceremonial use of tobacco.

The core ceremony is the Sweat Lodge Ceremony; it is equal to the Eucharist in Christian traditions. Through this ceremony, the participant is reborn and able to better begin their healing process. This is necessary for the individual and the community they are returning to. Some states allow the Sweat Lodge Ceremony in some of their prisons, but many do not. Often, even when the Ceremony is allowed, insurmountable barriers are put in place.

Chaplains in the prisons are either Christian or Muslim. This creates a unique problem for a Native person in crisis. If they determine they need spiritual counsel on an individual level, they have no choice but to go to the prison chaplain. This is especially critical when an individual is placed in segregation. Often they are offered a bible or a Koran. Native prisoners report being given “Conquering Indians” pamphlets by Christian chaplains to guide them to Christianity. If a Spiritual Leader or Pipe Carrier comes in to “minister” to a Native prisoner, they are treated like a “visitor” and have to see that person in a visiting cubicle where they are separated by glass and speak over the phone. In contrast, the Christian chaplain can go into the prisoner’s cell and pray with them.

### **Particular Needs of Women**

Because, as described in greater detail in the report of the Working Group on Indigenous Peoples many Native people were forcibly removed from their communities as children and sent to residential schools where they were physically and sexually abused, many Native women arrive in prison after enduring a lifetime of abuse. Each experience within the prison environment beginning with the initial strip search is a trigger for posttraumatic stress disorder. Because of racism that leads to general disrespect of Native women and the conclusion that Native women might be “hiding something,” Native women are strip searched more often during their incarceration than other prisoners. Each time this happens, they are traumatized again.

Because the numbers of Native women in prison and jail are even smaller than the number of men, oftentimes there is only one Native woman in a jail or prison at a given time. This is an unequivocal insurance that her needs will not be met because penal institutions are not structured to respond to individual needs. This is even truer when the needs are rooted in a culture despised by the dominant society. Historically and presently, prisons and schools in the United States have been systematically used to strip Native people of their culture and alienate them from their way of life.

## **Impact of the US Prison System on Native people**

When Native people go to prison, they return to our communities full of rage from the prison experience, isolated from themselves and their own feelings and more violent than when they went in. This has a dramatic impact because our communities are so condensed and interwoven that one individual can have an immense and lasting negative impact on the lives of many others in the community.

As the numbers of Tribal people returning from prison increases, the overall health of Aboriginal communities is severely impacted. Prison has become a root cause of crime in Aboriginal communities. There is no direct mechanism for Tribal communities to address this issue.

## **VI. Violations of the Rights of Individuals Incarcerated in the Wake of Hurricanes Katrina and Rita**

### **Introduction**

In the aftermath of Hurricane Katrina the world watched as thousands of people, the majority poor and Black, were abandoned in the Gulf South. Many of those left to die were locked inside the flooding Orleans Parish Prison. While some of their stories, and the stories of those incarcerated at New Orleans' "Camp Greyhound" post-Katrina, have been exposed,<sup>111</sup> the vast majority of those imprisoned before, during and after Katrina—collectively, the "Prisoners of Katrina"—suffered, and continue to suffer, silently. Moreover, discussion of an appropriate remedy for the egregious violations of human rights suffered by the "Prisoners of Katrina" has not been prominent.

Katrina exposed the deep poverty and inequality that is the continuing legacy of criminal justice policies and racism – along with the very human effects of how our society invests in prisons and jail cells rather than providing the support systems (education, health care, housing, and infrastructure like levees) that make us safe. Katrina illustrated the way we as a nation increasingly deal with social ills: Police and imprison primarily poor Black communities for "crimes" that are reflections of poverty and desperation.

Critical Resistance, a national grassroots organization whose Southern Regional Office is based in New Orleans, calls for amnesty for those arrested for trying to take care of their basic needs in the aftermath of Hurricane Katrina and those whose cases have been impacted by the storm.

### **I. Policing and Prisons in Pre- and Post-Katrina New Orleans**

When Hurricane Katrina hit New Orleans, approximately 6,500 (and possibly as many as 8,000) adults and youth were incarcerated in Orleans Parish Prison (OPP), exempted from the otherwise

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<sup>111</sup> See, e.g., Laura Maggi, *Inmate Lost in System Resurfaces: After 13 Months He Gets His Day in Court*, NEW ORLEANS TIMES-PICAYUNE, Nov. 29, 2006; Gwen Filosa, *ACLU Sues Over Arrest*, NEW ORLEANS TIMES PICAYUNE, Jan. 27, 2007.

mandatory city-wide evacuation. In the words of Sheriff Marlon Guzman, Orleans parish prisoners were left to stay “where they belong.”<sup>112</sup>

Prior to Katrina, New Orleans had the highest incarceration rate of any large city in the nation, a rate that is double the national average (already higher than any other nation).<sup>113</sup> Orleans Parish was 66.6% Black, but almost 90% of prisoners at OPP were Black. On average, 60% of OPP prisoners were there on attachments, traffic violations and municipal infractions—“crimes” which often boiled down to failure to pay a fine.

### **A. The Prisoners of Katrina**

After being abandoned for days in a flooded jail and held at gunpoint on a freeway overpass, as many as 8,500 people, the majority of them pre-trial, remained incarcerated in prisons and jails throughout Louisiana for months following the storm.<sup>114</sup> The human and civil rights violations suffered are innumerable. This report outlines case examples highlighting abusive arrest practices, cruel conditions of imprisonment, denial of due process, and illegal incarceration—and points to the urgent need to remedy any lasting effects the Prisoners of Katrina face.

### **B. The Criminalization of New Orleans Residents**

In the weeks following the storm, media coverage was racially charged. Far less reported was the subsequent realization that most reports of serious and violent crime were simply false.<sup>115</sup> In response to this misperception of crime, emphasis was placed on law enforcement. By focusing on law enforcement and punishment, further suffering was generated in two ways: first, those who were swept up and incarcerated faced abusive conditions and prolonged, illegal imprisonment; second, an already faltering relief effort was further debilitated by draining valuable resources, people power, time and attention away from the urgent needs of thousands still stranded in New Orleans.<sup>116</sup>

### **C. Camp Greyhound**

One of Louisiana officials’ top priorities in the rebuilding of New Orleans was the construction of a make-shift jail, Camp Greyhound, located within the Greyhound bus station in downtown New Orleans. Over 1200 people were cycled through Camp Greyhound during the six weeks it was open,<sup>117</sup> clear evidence that arrest and incarceration were a primary means of dealing with the post-storm crisis. Early on, the vast majority of arrests were for acts broadly characterized as

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<sup>112</sup> Transcript of CNN Coverage of Press Conference, Aug. 28, 2005, <http://transcripts.cnn.com/TRANSCRIPTS/0508/28/bn.04.html>.

<sup>113</sup> *Id.*

<sup>114</sup> This number is based on the files and approximation of Phyllis Mann, a criminal defense lawyer who led a team of attorneys in efforts to locate evacuated prisoners and petition for their release. Phyllis E. Mann, *Hurricanes Katrina and Rita—A Year Later in Louisiana*, CHAMPION 6, 7 (2006).

<sup>115</sup> Jim Dwyer & Christopher Drew, *Storm and Crisis: Lawlessness; Fear Exceeded Crime’s Reality in New Orleans*, N.Y. TIMES, Sept. 29, 2005, at A1; Matt Welch, *They Shoot Helicopters, Don’t They?*, REASON MAGAZINE, Dec. 2005.

<sup>116</sup> For an exhaustive account of the abusive conditions prisoners suffered at Orleans Parish Prison, Camp Greyhound, and prisons around the state, see generally ACLU, *supra* note 1.

<sup>117</sup> Gwen Filosa, *ACLU Sues Over Arrest*, NEW ORLEANS TIMES-PICAYUNE, Jan. 27, 2007, at 1.

“looting,” which ranged from acts of desperation such as taking much needed supplies, to theft born of opportunity.<sup>118</sup> In the ensuing weeks, other common reasons for arrest included vehicle theft and resisting arrest, as well as curfew violations and public intoxication.<sup>119</sup> That so many arrests were made during a period when the city was “largely empty and water logged” suggests that law enforcement was throwing its net widely and operating at exceptional levels.<sup>120</sup>

#### D. Legal Limbo

Virtually all of the prisoners who were evacuated and those booked through Camp Greyhound were sent to prisons around the state, denied access to attorneys, courts, and often, any information about their case or exactly why they were being held.<sup>121</sup> Prisoners were also denied contact with their families.<sup>122</sup>

For those who were given a bond hearing, Attorney Phyllis Mann reports that, rather than releasing people, local judges set bonds higher than many could pay.<sup>123</sup> As a result, many accepted guilty pleas in order to be released.<sup>124</sup> Many others, however, were not even given that chance.

A team of attorneys, including Mann, found that individuals who were caught in legal limbo after Louisiana’s criminal legal system collapsed fell into several categories.

- Of those who were arrested before Katrina, some were unable to post bail before the storm and were lost in the shuffle afterwards.
- Some were arrested so soon before the storm that they never saw an attorney or magistrate courtroom.
- Of those who were arrested during and after the storm, some never had a bond hearing; some were unable to post bond and subsequently had no access to an attorney.<sup>125</sup>
- Many people in both groups were held beyond their release dates or for longer than the maximum amount of time to which they could have been sentenced.

More than a year after the storm, Mann wrote that people arrested in New Orleans continued to do “police-sentencing time”—waiting 45 days on a misdemeanor or 60 days on a felony before the D.A. decided not to prosecute;<sup>126</sup> “DA time”—for those unable to post bond because of overcharging; and “Katrina time”—sitting in jail since being evacuated, even well beyond release dates.<sup>127</sup>

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<sup>118</sup> By September 8, more than 200 arrests had been made: 178 for “looting,” 26 for possession of stolen vehicles, 20 for resisting arrest, 14 for theft and 9 for attempted murder. Garrett & Tetlow, *supra* note 31, at 145.

<sup>119</sup> *Id.*

<sup>120</sup> See Simon, *supra* note 51, at 1.

<sup>121</sup> *Id.*

<sup>122</sup> Garrett & Tetlow, *supra* note X, at 139

<sup>123</sup> *Id.* at 145.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 149.

<sup>126</sup> As a means of comparison, consider San Francisco: the District Attorney must make a decision within 72 hours on whether or not to prosecute someone brought in on a felony offense; those arrested on misdemeanor charges must go to court on the next business day.

<sup>127</sup> Mann, *supra* note 32, at 8.

Three international human rights treaties, signed and ratified by the United States, govern the fundamental rights and freedoms that should have protected survivors of Hurricane Katrina.<sup>128</sup>

## **II. The Legal Case for Amnesty**

### **A. International Human Rights Treaty Obligations**

The Convention on the Elimination of All Forms of Racial Discrimination (CERD) resolves “to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices.”<sup>129</sup>

The International Covenant on Civil and Political Rights (ICCPR) recognizes “the inherent dignity and...the equal and inalienable rights of all members of the human family.”<sup>130</sup>

And the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) calls for more effective measures to be taken in the struggle against torture and cruel, inhuman and degrading treatment, and includes specific provisions pertaining to law enforcement practices and incarceration.<sup>131</sup> The response of local, state and federal government to Hurricane Katrina finds the U.S. in breach of all three of these treaties.

### **B. Violations of International Treaty Obligations**

The treatment of Prisoners of Katrina constituted an egregious abrogation of their international human rights. The right to due process of law and freedom from arbitrary arrest or detention; the right to have one’s case timely heard in an established tribunal or court of law; and freedom from torture or cruel, inhuman or degrading treatment, for example, apply in unique and essential ways to prisoners.

The call for Amnesty falls within the framework of CERD’s Article 6 requirement that “just reparation” be afforded individuals whose human rights and fundamental freedoms are violated. *Abandoned and Abused: Orleans Parish Prisoners in the Wake of Hurricane Katrina*, compiled by the American Civil Liberties Union, provides extensive documentation of clear violations of Article 10 of the ICCPR, that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person,”<sup>132</sup> and CERD’s Article 5 prohibition “against violence or bodily harm whether inflicted by government officials or by any individual group or institution.”<sup>133</sup>

The report, *In the Shadows of the War on Terror: Persistent Police Brutality and Abuse in the United States*, co-authored by members of Columbia Law School’s Human Rights Clinic,

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<sup>128</sup> All of these treaties can be found in their entirety on the website of the Office of the High Commissioner for Human Rights: [www.unhcr.ch/html/intlinst.htm](http://www.unhcr.ch/html/intlinst.htm). The Convention on the Elimination of All Forms of Racial Discrimination was signed September 28, 1966 and ratified October 21, 1994. The International Covenant on Civil and Political Rights was signed on October 5, 1977 and ratified on June 8, 1992. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was signed April 18, 1988 and ratified October 21, 1994.

<sup>129</sup> *Preamble* to CERD, available at <http://www.ohchr.org/english/law/cerd.htm>.

<sup>130</sup> *Preamble* to ICCPR; available at <http://www.ohchr.org/english/law/ccpr.htm>.

<sup>131</sup> *See generally*, Convention Against Torture, available at [http://www.unhcr.ch/html/menu3/b/h\\_cat39.htm](http://www.unhcr.ch/html/menu3/b/h_cat39.htm).

<sup>132</sup> ACLU, *supra* note 2; ICCPR Art. 10(1).

<sup>133</sup> CERD Art. 5(b).

INCITE! Women of Color Against Violence, and the American Friends Service Committee, amongst others, implicates Articles 2, 4, 7 and 10 of the ICCPR.<sup>134</sup>

Given the extremely disproportionate representation of African-Americans in OPP and amongst those who suffered police harassment and brutality in the weeks and months following the storm, the above reports document violations of Articles 2, 5 and 6 of CERD, as well.<sup>135</sup> Broadly, the criminalization and incarceration of African-American residents of New Orleans before, during and after Hurricane Katrina violated CERD's prohibitions on state-sponsored racial discrimination. The treaty's requirement of equal treatment before the law was flatly proscribed through racially discriminatory arrest and incarceration practices and denial of liberty and justice to those who were imprisoned.

### III. Historical Examples of Amnesty

The most well known example of a national policy of amnesty occurred in South Africa as that nation dismantled its own system of racial apartheid. The newly elected black South African government established a Committee on Amnesty as a fundamental part of its Truth and Reconciliation Commission (TRC).<sup>136</sup> A grant of amnesty meant that criminal proceedings were halted, any conviction was void and deemed not to have occurred, any sentence was terminated, those who were imprisoned were immediately released, and records of conviction were expunged.

Within the United States, a far-reaching policy of amnesty in the form of Presidential pardon was utilized by President Carter in order to end all pending and future prosecutions against Vietnam War resisters. Carter's act served as a blanket amnesty for all who had or potentially could face draft evasion charges.<sup>137</sup> Such a grant of blanket amnesty could serve as a model for granting pardon to a group of persons rather than on a case-by-case basis.

### Conclusion

Granting an amnesty or pardon and criminal record expungement would not be the first unprecedented aspect of Hurricane Katrina. The systematic way in which thousands of people's human and constitutional rights were violated is equally unparalleled in this country's history.

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<sup>134</sup> See, *In the Shadows of the War on Terror: Persistent Police Brutality and Abuse in the United States – A report prepared for the United Nations Human Rights Committee on the occasion of its review of The United States of America's Second and Third Periodic Report to the Human Rights Committee* (May 2006), available at: <http://www.afsc.org/news/2006/human-rights-report.htm>.

<sup>135</sup> The provisions of the ICCPR guard against many of the same human rights violations as does CERD, and also prohibit discrimination on the basis of race. Yet the creation of CERD as a separate treaty was not merely redundant. By explicitly highlighting discrimination on the basis of race, CERD underscores both the continued prevalence of such discrimination and the international community's commitment to eradicate it. The fact that the events of Hurricane Katrina find the United States in such egregious abrogation of both CERD and ICCPR demonstrates the extent to which we, as a nation, have much work to do to eliminate racism. The severity of abuses which occurred in the days, months and years since the storm make the imperative of remedying & repairing these abuses—to whatever extent possible—that much more significant.

<sup>136</sup> Promotion of National Unity and Reconciliation Act, Act No. 34 of 1995, available at: <http://www.doj.gov.za/trc/legal/act9534.htm>

<sup>137</sup> See Harold Jordan, *What Happened to Vietnam Era War Resisters?*, AMERICAN FRIENDS SERVICE COMMITTEE, <http://www.afsc.org/youthmil/conscientious-objection/Vietnam-war-resisters.htm>.

Widespread deprivation of liberty was a prominent feature of the response to Hurricane Katrina which has neither received sufficient attention nor official condemnation. Public recognition of this reality should compel an official move to grant Amnesty, and in some way, remedy the injustice suffered by prisoners of Katrina and their families.

## **VII. RECOMMENDATIONS**

To comply with the obligations the U.S. has assumed upon ratification of the CERD, the U.S. should undertake the following appropriate measures:

### **Use of Solitary Confinement**

The party should work with all jurisdictions to address the following recommendations related to super maximum security prisons and all solitary confinement units in prisons:

1. End inhumane and unconstitutional conditions of isolation in prison.
2. Prohibit the use of taser guns as offensive weapons.
3. Prohibit the use excessive force.
4. Restrict and regulate restraints and chairs.
5. Assure that segregation is a last resort.
6. Prohibit the use of sensory deprivation.
7. Prohibit the use of segregation for mentally ill prisoners.
8. Stop releasing prisoners from segregation directly to the streets.
9. Assure that there are adequate and qualified medical and mental health staff.
10. Assure racial diversity of staff is representative of prisoner population.
11. Transition people safely from segregation as soon as possible.
12. Develop productive and rehabilitative programs within segregation units.
13. Assure prisoners due process when segregation is imposed.
14. Clarify specific criteria for prisoners release from segregation.
15. Demand independent oversight of super max prisons and solitary confinement units.

### **Health Care Disparities**

The party state should assist all jurisdictions to revise their health care delivery systems and policies in the following areas:

1. Improve access to health care and health education materials and trainings for prisoners and medical staff, including ensuring that all jurisdictions provide transgender-related health care that is commensurate with generally-accepted medical practice.
2. Improve mechanisms to ensure confidentiality of medical information, with policies flexible enough to allow for family members and advocates to assist patients.
3. Improve access to “free world” physicians, including specialists in transgender-specific medical care.
4. Foster discourse in public health schools and local public health departments on the impact of the lack of adequate health care in prisons on the overall health of communities.
5. Assure non-mandatory, confidential screening, testing and appropriate treatment for infectious diseases that conforms to the professionally accepted standard of care.

6. Assure that women have access to comprehensive reproductive health care, including regular pap tests, breast exams, pregnancy testing and counseling, regular prenatal and post natal care, and appropriate nutritional supplements.
7. Assure that women have access to abortion.
8. Prohibit the use of shackling for pregnant women at any time during labor, childbirth or during an abortion.
9. Assure that substance abuse programming for women addresses issues of trauma and the layering of abuse prevalent in women's lives.
10. Re-assess allocation of financial resources to prison health care, and conduct cost-benefit analyses of providing comprehensive care in prisons.
11. Demand that legislators, executive branch officials, and correctional administrations commit adequate resources to identify and treat mentally ill prisoners.
12. Ensure that prisons partner with medical and mental health providers from the community.
13. End co-payments for prisoners health care.
14. Extend Medicaid and Medicare to eligible prisoners.

### **LGBT Issues**

1. Allow transgender and gender variant people to choose to serve their sentences in either women's or men's prisons, regardless of genitalia. Gender identity, gender presentation, and the overall safety of the prisoner – not genitalia – should determine placement. Prison officials in Spain have decided to allow qualifying prisoners to choose whether to serve their sentences in women's prisons or men's prisons.<sup>1</sup> Various Australian states, as well as Canada, have also allowed for this.<sup>138</sup>
2. Increase funding for transgender-inclusive drug rehabilitation (including harm reduction strategies), medical care and, job training and low-income housing at local levels. The state should also produce and distribute educational materials for employers and landlords on the transgender prisoners about protections in the state's anti-discrimination statutes.
3. Provide training programs for all corrections staff, administrators, and prisoners on issues affecting LGBT persons inside and outside of prisons, and ban programs and services that perpetuate anti-LGBT sentiment among prisoners and prison staff.

### **Family Integrity**

There are numerous remedies available to the state that could ensure incarcerated parents of color and their children enjoyment to the fundamental right to maintain family integrity are met pursuant to Article 1, 2 and 5 (e)(IV) of Convention:

1. Extend the Termination of Parental Rights timelines for family reunification where a parent is incarcerated for offenses unrelated to child abuse;
2. Establish of a system of subsidized legal guardianship subsidy as an alternative to terminating parental rights;

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<sup>138</sup> Human Rights Watch, 2007.

3. Specifying the scope of reasonable efforts and family reunification services states should provide in order to meet the unique needs of incarcerated parents and their children (see Appendix A – Family Unity: Sample Inter-agency Protocol);
4. Implement protocols and procedures between child serving agencies and department of corrections to assist incarcerated individuals to maintain family integrity;
5. Utilize the *Children’s Bill of Rights*<sup>139</sup> as a tool to review and audit policies and practices to ensure that law enforcement, judiciary, correctional and criminal justice policies are not causing children undue harm and violating children’s rights (see Appendix B- *Children of Incarcerated Parents - A Bill of Rights*);
6. Expand alternative to incarceration (ATIs) programs, so parents are not unnecessarily incarcerated and separated from their children;
7. Include Family Impact Statements in sentencing considerations and decision-making to ensure that children’s voices are heard;
8. Include proximity to children as criteria in prison assignment, transfers and location to facilitate the maintenance of the parent-child bond; and
9. Develop accountability mechanisms of all government agencies which track and measure the impact of criminal justice policies and practices on children and families.

### **Census/Redistricting**

1. State legislatures and other redistricting authorities should cease basing legislative and other districts on flawed Census data that counts prisoners as residents of the prison location.
2. The U.S. Census should count prisoners as residents of their home addresses, and make that data available for purposes of decennial redistricting.

### **Rights of Incarcerated Individuals in the Wake of Hurricanes Katrina and Rita**

Today, the frequent use of background checks, particularly for housing and employment, greatly jeopardizes displaced residents’ right to return home. Individuals with a criminal conviction or a pending case, as well as their family members can be excluded from public housing and job opportunities. In the context of Hurricane Katrina, the call for amnesty is a call to address the injustices suffered by those stranded in a chaotic system, and ensure that those who have charges pending or convictions on their records for Katrina-specific “crimes” can move forward with their lives.

Louisiana law provides legal mechanisms whereby individuals can gain something akin to amnesty. Executive pardon and criminal record expungement are the two most appropriate such remedies.

1. Halt prosecutions, terminate prison sentences, waive fees and fines, and clear criminal records, of Katrina-related arrests and incarceration.
2. Grant pardons for Katrina-related arrests and incarceration whereby an individual is restored to “a status of innocence.” A grant of pardon allows for the destruction of all records of arrest and conviction for the pardoned individual.
3. Establish a blanket grant of amnesty for Katrina-related arrests and incarceration.

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<sup>139</sup> See [www.sfcipp.org](http://www.sfcipp.org) for the full text of the *Children of Incarcerated Parent’s Bill of Rights*.

By halting prosecutions, terminating prison sentences, waiving fees and fines, and clearing criminal records, the formal and informal effects of Katrina-related arrests and incarceration would be mitigated, and people's ability to return home and reestablish their lives facilitated.

Executive pardon is a constitutionally guaranteed remedy in Louisiana. Executive pardon has been interpreted by the Supreme Court of Louisiana as restoring "the pardoned individual [to] a status of innocence of crime."<sup>140</sup> A grant of pardon allows for the destruction of all records of arrest and conviction for the pardoned individual.

For those who were arrested but never convicted, record expungement is a possible remedy. Expungement means removal of a record from public access but does not mean destruction of the record. In general, misdemeanor arrest records may be destroyed and felony arrest records may be expunged. Although expungement does not remove something from someone's record in quite the same way as executive pardon—whereby an individual is restored to "a status of innocence"—it can similarly mitigate barriers to housing or employment.<sup>141</sup>

A blanket grant of amnesty modeled on the TRC's hearings in South Africa or President Carter's grant could minimize the long-term consequences of arrest, conviction and imprisonment before, during and after Hurricane Katrina.

## **Conclusion**

*The Prison Working Group* thanks the Committee for its consideration of this report in evaluating the U.S.'s compliance with the CERD.

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<sup>140</sup> *State v. Lee*, 171 La. 744, 746 (1931).

<sup>141</sup> It is important, however, to recognize that Louisiana's remedies for expungement and pardon do not go nearly far enough. They are time-consuming, costly, and narrow in scope. As a result, most prisoners of Hurricane Katrina will not be adequately remedied through these mechanisms.

**Signatories to the Prison Report:**

**Violations of Articles 1, 2 and 5 of the International Convention on the Elimination of all forms of Racial Discrimination in U.S. Prisons**

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## **Appendix A: Sample Inter-agency Protocol for Department of Corrections & Child Welfare Agencies<sup>142</sup>**

The following is a non-exhaustive list of reasonable reunification efforts Congress should require child welfare agencies and departments of corrections to make to aid families with incarcerated parents:

### Parental Self-Improvement

Child welfare agencies and corrections departments shall develop a protocol to facilitate a parent's self-improvement while in prison and following release.

- (1) Agencies shall identify the problems leading to parental incarceration.
- (2) Agencies shall facilitate expedited access to appropriate rehabilitative programs. Where programs are not available in prison, efforts shall be made to establish the necessary programs or provide alternatives to such programs.
- (3) Where programs needed for self-improvement are not available, through no fault of the parent, the inability to access rehabilitative services shall not be held against the parent, but shall be held against the agency in any determination of the reasonableness of the agency's reunification efforts.
- (4) Agencies shall aid parents to develop a transition plan from prison to their communities that can enable successful reunification with their children and that does not conflict with any existing service plan with the child welfare agency.

### Parental Involvement

To facilitate incarcerated parents' involvement in planning for the future and well-being of their children, corrections departments and child welfare agencies shall develop a protocol that addresses the following:

- (1) Agencies shall implement procedures to locate the parents of children in the foster care system to facilitate immediate efforts towards reunification.
- (2) Agencies shall implement procedures to facilitate incarcerated parents' communication with their children's caseworkers and the adults caring for their children.

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<sup>142</sup> Allard, Ibid at 40.

- (3) Agencies shall implement procedures to facilitate parents' participation in Family Court hearings and case planning reviews.
- (4) Agencies shall develop procedures so that parents' absences from prison for Family Court hearings or case planning reviews will not detrimentally affect their participation in rehabilitative programs.

#### Parent-Child Bond

Agencies shall establish procedures to facilitate meaningful contact between children and their parents.

- (1) Agencies shall provide at least one monthly visit, provided it is in the best interest of the child.
- (2) Agencies shall establish visiting policies sensitive to the needs of children and their caregivers.
- (3) Agencies shall provide visiting rooms that are child-friendly.
- (4) Agencies shall facilitate weekly telephone calls.

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<sup>i</sup> "Transsexuals can choose jails," May 3, 2006, at [http://www.news24.com/News24/World/News/0,,2-10-1462\\_1892464,00.html](http://www.news24.com/News24/World/News/0,,2-10-1462_1892464,00.html).