

Submission on Death By Incarceration to the UN International Independent Expert Mechanism to Advance Racial Justice and Equality in the Context of Law Enforcement

“[DBI] condemns men, women and children to die in prison. In doing this, the state is making the argument that it has the moral right to strip a human being of all hope and dignity until they die. This rationale is a byproduct of a historic cycle of violence that the United States was founded upon—slavery, racism, classism, misogyny, the genocide of Native Americans and the theft of their ancestral lands. The total lack of compassion and the dehumanization of DBI sentences has its roots in this historical legacy.”¹

I. Overview

This submission describes the United States’ racially discriminatory policy and practice of death by incarceration (“DBI”), more commonly known as life without parole (LWOP), life with parole (LWP), and “virtual life” sentences (sentences that exceed life expectancy). It is submitted by the groups listed below, and supplements a complaint several organizations sent to UN Special Procedures mandate-holders on September 15, 2022,² which we have also forwarded to the Expert Mechanism to Advance Racial Justice and Equality in the Context of Law Enforcement (“EMLER”). Our prior complaint alleges that the United States’ policy and practice of DBI must be abolished, including because it amounts to torture and is racially discriminatory, an arbitrary deprivation of life, and an arbitrary deprivation of liberty, all in violation of international human rights law. This submission highlights those sections of the complaint that focus on racial discrimination and includes specific recommendations for the EMLER’s upcoming visit to the United States.

Death by incarceration is the devastating consequence of a cruel and racially discriminatory criminal legal system that begins with violent policing and ends with the permanent abandonment of people in prisons, where lives—particularly Black lives—are cut short by the social, medical and psychological consequences of incarceration.³ This sentence impacts not only individuals, but entire communities, rupturing family ties and perpetuating intergenerational cycles of poverty and pain. This system is not driven by respect for life. It is not designed to address harm, violence, and its root causes, but compounds them, and in fact diverts resources and political will away from systems that do.⁴ Instead, it is rooted in the legacy of slavery and racial hierarchy in the United States⁵ and is designed to satisfy the racist political pressure to be tough on crime.⁶

Through DBI sentences, the United States deprives individuals of their human right to hope for a life outside of prison—a form of torture, cruel, inhuman, or degrading treatment condemned by the

¹ Written in 2022 by Right to Redemption Committee members Robert Labar, Vernon Robinson, Charles Bassett, and Terrell Carter, while serving LWOP sentences in Pennsylvania.

² <https://www.deathbyincarcerationistorture.com/the-complaint>.

³ Rachel López, Rachel, *The Unusual Cruelty of Nursing Homes Behind Bars*, 32 Fed. Sent’g Rep. 264 (2020).

⁴ Erin Reinhart, *Biden’s Plan for More Police Won’t Make America Safer*, TIME, Aug. 24, 2022, <https://time.com/6208047/police-crime-america/>.

⁵ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010); Douglas A. Blackmon, *Slavery by Another Name* (2008).

⁶ See, e.g., Working Grp. on Arbitrary Detention, *Rep. of Visit to the US*, ¶ 61, U.N. Doc. A/HRC/36/37/ADD.2 (July 17, 2017); Erin Reinhart, *Biden’s Plan for More Police Won’t Make America Safer*, TIME, Aug. 24, 2022, <https://time.com/6208047/police-crime-america/>.

European Court on Human Rights and the Committee Against Torture.⁷ It deprives people of the ability to show that they have changed—their right to redemption.⁸ Incarcerated people, their loved ones, and advocates in the United States refer to this as “death by incarceration” or “the other death penalty” to describe the reality of the sentence.⁹

The United States is a global leader in sentencing people to die in prison, though such sentences appear to be rising globally as well. One study concluded that more people are serving DBI sentences in the United States than in the other 113 surveyed countries combined, and that individuals serving LWOP in the United States made up more than 80 percent of those serving the sentence worldwide.¹⁰ DBI sentences drive the United States’ practice of mass incarceration.¹¹

II. Death by Incarceration Is Racist and Cruel and Must be Abolished

The United States disproportionately sentences people from racially and ethnically marginalized groups, in particular Black and Latinx people, to DBI. This is the inevitable consequence of a criminal legal system that is racially discriminatory at every step. Consistent with U.N. treaty bodies’ previous pronouncements calling for the abolition of policies that disproportionately subject people from racially and ethnically marginalized groups to some of the worst consequences of the criminal legal system, such as the death penalty and juvenile LWOP sentences,¹² EMLER should recommend the abolition of all DBI sentences in the United States.

International human rights bodies have emphasized that states must not use race or ethnicity as a factor in determining criminal sentences.¹³ But first in 2014 and most recently in 2022, the CERD Committee

⁷ CAT, *Concluding Observations on the Seventh Periodic Report of the Netherlands*, ¶ 35, U.N. Doc. CAT/C/NLD/CO/7 (Dec. 18, 2018); CAT, *Concluding Observations on the second periodic report of South Africa*, ¶ 19, U.N. Doc. CAT/C/ZAF/CO/2 (June 7, 2019); CAT, *Concluding Observations on the Third Periodic Report of Lithuania*, ¶ 12, U.N. Doc. CAT/C/LTU/CO/3 (June 17, 2014); CAT, *Concluding Observations on the seventh periodic report of Greece*, ¶ 37(d), U.N. Doc. CAT/C/GRC/CO/7 (Sep. 3, 2019); CAT, *Concluding Observations on the seventh periodic report of Poland*, ¶ 14, U.N. Doc. CAT/C/POL/CO/7 (Aug. 29, 2019); *Vinter v. United Kingdom*, App. Nos. 66069/09, 130/10 & 3896/10, ¶ 113 (July 9, 2013), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-122664%22%5D%7D>. See also, Juan E. Méndez (Special Rapporteur on torture), *Rep. on Children Deprived of Liberty*, ¶¶ 37, 74, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015) (life sentences are cruel, inhuman, or degrading when imposed on children).

⁸ Terrell Carter, Rachel López, Kempis Songster, *Redeeming Justice*, 116 Nw. U. L. Rev. 315, 328 (2021).

⁹ *Id.*

¹⁰ Dirk van Zyl Smit & Catherine Appleton, *Life Imprisonment: A Global Human Rights Analysis* 88, 94 (2019).

¹¹ ACLU, *A Living Death: Life without Parole for Nonviolent Offenses* 11 (2013), https://www.aclu.org/sites/default/files/field_document/111813-lwop-complete-report.pdf.

¹² CERD, *Concluding Observations of the Comm.: United States*, ¶ 27(d), (g), U.N. Doc. CERD/C/USA/CO/10-12 (Aug. 22, 2022); CERD, *Concluding Observations of the Comm.: United States*, ¶¶ 21, 23, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008); CERD, *Concluding Observations on the combined seventh to ninth periodic reports of the United States*, ¶¶ 20–21, U.N. Doc. CERD/C/USA/CO/7-9 (Sept. 25, 2014); Hum. Rts. Comm., *Concluding Observations on the fourth periodic report of the United States*, ¶¶ 8, 23, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014); CAT, *Concluding Observations on the combined third to fifth periodic reports of the United States*, ¶ 24, U.N. Doc. CAT/C/USA/CO/3-5 (Dec. 19, 2014); CAT, *Concluding Observations on the second periodic report of South Africa*, ¶¶ 18–19, U.N. Doc. CAT/C/ZAF/CO/2 (June 7, 2019).

¹³ CERD, *General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, in Report of the Committee on the Elimination of Racial Discrimination, ¶¶ 34–37, U.N. Doc. A/60/18(SUPP) (Aug. 17, 2005); see also Mutuma Ruteere (Special Rapporteur on contemporary forms of racism), Report on Racial and Ethnic Profiling in Law Enforcement Agencies, ¶¶ 23–24, U.N. Doc. A/HRC/29/46 (Apr. 20, 2015); Working Grp. of Experts on People of African Descent, Rep. on its twenty-first and twenty-second sessions, ¶ 55, U.N. Doc. A/HRC/39/69 (Aug. 15, 2018).

has expressed particular concern over the racism that pervades the United States' criminal legal system, including in sentences of life imprisonment.¹⁴

Yet, the racially disparate rates of harsh sentences, including DBI sentences, persist in the United States. While in 2020 only 12.4 percent of the US population was Black, 46 percent of all of those serving DBI sentences nationwide, and 59 percent of all those serving DBI sentences in the federal penal system, were Black.¹⁵ Stark racial disparities amongst Black and white people exist in virtually every state when it comes to DBI sentencing.¹⁶ Disparities in DBI sentencing also exist between Latinx people and non-Latinx white people.¹⁷

Racial disparities also exist with respect to rates of release. Unless they are resentenced, individuals sentenced to life terms can generally only be released through parole (unless sentenced to LWOP) or clemency – both of which are wholly discretionary and also infected by racial bias.¹⁸

A 2021 study found significant racial disparities in parole grants between Black and white applicants in New York, for example.¹⁹ Among all parole decisions reviewed by the New York Parole Board from October 2017 to October 2019, white applicants had a parole grant rate of 45 percent, while Black applicants had a rate of 38 percent.²⁰ Another study found significant racial disparities in parole outcomes for those sentenced to DBI in California.²¹

Similarly, other empirical studies suggest that racial disparities may also exist in the clemency context, which includes commutations and pardons.²² Using data on federal pardon grants from the Bush and Obama administrations, one study published in 2011 found that white applicants had a 12 percent chance of receiving a pardon, while Black applicants only had a 2 to 4 percent chance.²³ In Michigan,

¹⁴ CERD, *Concluding Observations of the Comm.: United States*, ¶¶ 26, 27, U.N. Doc. CERD/C/USA/CO/10-12 (Aug. 22, 2022); CERD, *Concluding Observations of the Comm.: United States*, ¶¶ 20-21, U.N. Doc. CERD/C/USA/CO/7-9 (Sept. 15, 2014).

¹⁵ Ashley Nellis, *No End in Sight: America's Enduring Reliance on Life Sentences* 19 (2021), <https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf>. Population data comes from *Race and Ethnicity in the United States: 2010 and 2020 Census*, US Census Bureau (Aug. 12, 2021), <https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html> [hereinafter 2020 US Census Data].

¹⁶ Nellis, *No End in Sight* at 19; 2020 US Census Data.

¹⁷ Quinn Cozzens & Bret Grote, *Abolitionist L. Ctr., A Way Out: Abolishing Death by Incarceration in Pennsylvania* 17, (2018), https://abolitionistlawcenter.org/wp-content/uploads/2018/09/ALC_AWayOut_27August_Full1.pdf; ACLU, *A Living Death*, at 31.

¹⁸ Terrell Carter et al. at 362–65.

¹⁹ Parole Preparation Project, *The Problem with Parole: New York State's Failing System of Release* 4, 13 (2021), <https://drive.google.com/file/d/1BstQpE8BufZ2HiqqJ2fNL1E2ieaJ7Nfr/view>.

²⁰ *Id.* at 13, 14. See also Michael Winerip et al., *For Blacks Facing Parole, Signs of Broken System in New York*, N.Y. Times, Dec. 4, 2016, <https://www.nytimes.com/2016/12/04/nyregion/new-york-prisons-inmates-parole-race.html>.

²¹ Kathryn M. Young & Jessica Perlman, *Racial Disparities in Lifer Parole Outcomes: The Hidden Role of Professional Evaluations*, L. & Soc'y Inquiry 1, 19 (2021).

²² See, e.g., Marvin Wolfgang et al., *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. Crim. L. & Criminology 301, 311 (1962); Margaret Vandiver, *The Quality of Mercy: Race and Clemency in Florida Death Penalty Cases*, 27 U. Rich. L. Rev. 315, 331 (1993).

²³ Dafna Linzer & Jennifer LaFleur, *Presidential Pardons Heavily Favor Whites*, ProPublica, Dec. 3, 2011, <https://www.propublica.org/article/shades-of-mercy-presidential-forgiveness-heavily-favors-whites>.

another study found that among commutation and executive pardon decisions granted to women from 2008 to 2010, a significant majority of these grants (72 percent) were awarded to white women.²⁴

III. DBI Sentences Are the Consequence of a Racist Criminal Legal System

Racially disparate rates of DBI sentences are not only a result of the racial bias at sentencing and release. They are the inevitable result of a racially discriminatory criminal legal system that is rooted in slavery and its legacy,²⁵ and which, at every step of the way, discriminates against people of color, particularly Black people, and ultimately leads to racially disparate rates of DBI.

The punitive power of the US criminal justice system is disproportionately imposed on communities of color that are subjected to poverty, housing and health insecurity, and violence at home. This systemic deprivation of resources, including education, healthcare, and other social support and services, is coupled with more policing and surveillance in these communities and exposure to the criminal legal system.²⁶

For example, UN bodies have expressed concern about the disproportionate rates of arrest and pre-trial detention of Black and Latinx people in the United States, which have an impact on sentences.²⁷ Pre-trial detention is especially important in the context of racially disparate sentencing as studies show that remaining in detention significantly increases the probability of a defendant's conviction, primarily through pressure to enter into guilty pleas.²⁸

Similarly, studies have also shown considerable racial disparities at the stages of charging and at trial, which also have an impact on sentencing.²⁹ Prosecutors have wide discretion in determining the initial charges for the arrested individual, which in most cases ends up becoming the final sentence.³⁰

This racial discrimination in every aspect of the criminal legal system inevitably results in the reality that Black people are disproportionately condemned to a premature death in prison. Black lives are sacrificed to the political pressure to be tough on crime, and the consequences ripple through their

²⁴ Carol Jacobsen & Lora B. Lampert, *Institutional Disparities: Consideration of Gender in the Commutation Process for Incarcerated Women*, 39 Signs: J. Women Culture and Soc'y 265, 270 (2013). See also, Ed Monahan et al., *A Comparison of Executions and Death to Life Commutations in Kentucky, 1901–2019*, 101 Prison J. 591, 603 (2021).

²⁵ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010); Douglas A. Blackmon, *Slavery by Another Name* (2008).

²⁶ Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis and Opposition in Globalizing California* (2007); Erin Reinhart, Biden's Plan for More Police Won't Make America Safer, TIME, Aug. 24, 2022, <https://time.com/6208047/police-crime-america/>.

²⁷ Working Grp. on Arbitrary Detention, Rep. of Visit to the US, at ¶¶ 57–59; CERD, *US Concluding Observations 2014*, at ¶ 20. See also, Arrests Rates by Offense and Race, 2018 (All Ages), Off. of Juv. Just. and Delinq. Prevention (2018), https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table_in=2&selYrs=2018&rdoGroups=1&rdoData=r; Will Dobbie & Crystal Yang, The Hamilton Project, Proposals for Improving the U.S. Pretrial System 6 (2019), https://www.hamiltonproject.org/assets/files/DobbieYang_PP_20190319.pdf; Bernadette Rabuy & Daniel Kopf, Prison Pol'y Initiative, Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time 2–3 (2016), <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf>.

²⁸ Will Dobbie, The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges, 108 Am. Econ. Rev. 201, 225 (2018).

²⁹ *Id.* at 29; Ginger Jackson-Gleich, Rigging the Jury: How Each State Reduces Jury Diversity by Excluding People with Criminal Records, Prison Pol'y Initiative (Feb. 18, 2021), <https://www.prisonpolicy.org/reports/juryexclusion.html>.

³⁰ Sonja B. Starr & M. Marit Rehavi, Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker, 123 Yale L.J. 2, 27 (2013).

families, communities, and future generations. Abolition of all death by incarceration sentences is not only necessary, but urgent in putting an end to their devastating and long-lasting impacts.

IV. Recommendations for the EMLER's Visit to the United States

During its visit to the United States, we urge the EMLER to conduct an investigation into the policy and practice of death by incarceration. To ensure an end to this practice, we urge the EMLER to find that:

1. All death by incarceration sentences in the United States, including LWOP sentences, are cruel in violation of the international prohibition on torture; racially discriminatory; and an arbitrary deprivation of life and liberty;
2. The United States should abolish all death by incarceration sentences, including LWOP sentences;
3. All prison sentences must include parole eligibility within a reasonable number of years;
4. All those eligible for parole should be released at their eligibility date, unless there is an evidence-based determination, through a process that meets international human rights standards, that the individual poses a current and real threat to public safety based on recent conduct in prison;
5. President Biden and the governors of all 50 states in the United States must exercise their clemency powers to commute the sentences of the over 200,000 people currently sentenced to death by incarceration in the US, granting them release or, at a minimum, the possibility of parole before an advanced age. Parole boards must be guided by the presumption of release.

During its visit to the United States, we urge the EMLER to meet with:

1. People currently incarcerated and serving death by incarceration sentences, to understand the physical, psychological, social, and human rights consequences of these sentences. The consequences of death by incarceration are particularly stark in the long-term care units within prisons, which often provide geriatric care to people who are non-ambulatory, suffer from dementia, or are in need of other special medical care. The signatory organizations would be able to help EMLER identify these units and assist in planning such visits.
2. Families, friends, and loved ones of those who are serving death by incarceration sentences, to understand the consequences of these sentences on families and communities. The signatory organizations would be able to organize visits between these individuals and EMLER.

During its visit, we also urge the EMLER to ask the United States government the following questions:

1. What legal and policy measures are state and federal governments undertaking to eliminate death by incarceration sentences? For example, are governments retracting laws that impose life without parole, life with parole, "virtual life," and other lengthy sentences, so as to comply with international obligations, including the prohibition on torture and racial discrimination? Are states passing initiatives led and informed by the experiences of incarcerated and formerly incarcerated people and advocates to dismantle legal structures that produce death by incarceration?

2. What legal and policy measures and other steps are federal and state governments undertaking to ensure that all prison sentences include parole eligibility within a determined and reasonable number of years, and to ensure that parole-eligible individuals are released at their eligibility date?
3. What steps are federal and state governments undertaking to address racial bias in parole and clemency, to ensure that parole and clemency decisions are based on pre-established, clear criteria, and that release is granted if those criteria are met?

Respectfully submitted,

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Amistad Law Project
California Coalition for Women Prisoners
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DROP LWOP Coalition
Families United to End LWOP
Release Aging People in Prison
Right to Redemption
The Sentencing Project