



**Submission of the American Civil Liberties Union (ACLU) to the  
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The American Civil Liberties Union (ACLU) contributes this submission to the Universal Periodic Review of the United States. The ACLU is a nationwide, nonprofit, nonpartisan organization dedicated to protecting human rights and civil liberties in the United States. The ACLU is the largest civil liberties organization in the country, with affiliate offices in 50 states and over 1.5 million members.

In the United States, more than 2.2 million people are locked behind bars on any given day, and people are incarcerated nearly 11 million times over an average year, while an additional 4.5 million people are on probation or parole.<sup>1</sup> Jails across the country are incarcerating 462,000 people pre-trial who have not even been convicted of a crime.<sup>2</sup> The United States locks up more people, both in absolute numbers and per capita, than any other country. Blacks and Latinos represent 56 percent of the adult prison population, while only 28 percent of the U.S. general population.<sup>3</sup> Since the 1970s, extreme sentencing laws and practices are keeping people incarcerated for far longer than ever before. The National Research Council reported that half of the 222 percent growth in state prison populations between 1980 and 2010 was due to an increase of time served in prison for all offenses.<sup>4</sup>

The following submission addresses excessive and disproportionate sentences in the United States, including life and life-without-parole sentences and the death penalty, that violate U.S. human rights commitments and are out of step with sentencing practices internationally.

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## **Life and life-without-parole sentences in the United States**

In the United States, nearly 162,000 prisoners—one in nine people in prison—are serving life sentences today, more than a third of whom are sentenced to life without the possibility of parole.<sup>5</sup> Those serving life sentences in the United States account for nearly a third of all life prisoners around the world. The Sentencing Project has found that an additional 44,311 individuals are serving de-facto life sentences of 50 years or more—sentences that exceed the convicted person’s natural lifespan.<sup>6</sup> Together, those serving life and de-facto life sentences represent nearly 14 percent of the U.S. prison population, or one in seven people behind bars.<sup>7</sup> In eight states, at least one in five prisoners is serving a life or de-facto life term.<sup>8</sup> In California, Louisiana, and Utah, one in three state prisoners is serving such whole-life sentences.<sup>9</sup> Nearly half of those serving whole-life sentences are Black.

Nearly 12,000 people have been sentenced to life or de facto life for crimes committed as juveniles, over 2,300 of whom are serving life without the possibility of parole.<sup>10</sup> Despite Supreme Court rulings that limit the use of juvenile life without parole sentences, and despite judicial decisions and legislative reforms in some states that have banned juvenile life without parole in the past few years, there is no law that bans it on a federal level and at least half of all states still allow judges to impose the sentence on children.<sup>11</sup>

Of those currently serving life or de facto life sentences, more than 17,000 were convicted of nonviolent crimes, thousands of whom are serving life without the possibility of parole.<sup>12</sup> The ACLU’s research found that as of 2013, 3,262 people were serving life without the possibility of parole for nonviolent drug and property crimes.<sup>13</sup> Many of them are serving life without parole for their first criminal conviction, about half were sentenced under habitual offender laws, and we estimate that more than 65 percent are Black.<sup>14</sup> As a result of the expansion of the crimes eligible for harsh sentences to include a greater range of offenses, even people convicted of low-level nonviolent offenses are punished with life-without-parole sentences, often because of prior convictions. For example, the ACLU documented cases of people serving life without parole under three-strikes laws for petty nonviolent offenses, including serving as a middleman in a sale of \$20 worth of marijuana, siphoning gasoline from a truck, shoplifting three belts, stealing a box of candy from an unlocked office, breaking into a parked car and stealing a woman’s bagged lunch, attempting to cash a stolen check, and possessing a bottle cap smeared with heroin residue.<sup>15</sup>

Today, the number of people serving life sentences in U.S. prisons is higher than ever before, having increased nearly five-fold since 1984. Life sentences have increased exponentially even though violent crime declined sharply all over the country during that period and prison populations have generally been declining since 2010. Life-without-parole sentences have risen nearly four times as quickly as parole-eligible life sentences.<sup>16</sup> The population serving life without parole has more than tripled since 1992, to 53,290.<sup>17</sup>

## **Key reasons why there has been a rise in life and other excessive sentences in the United States**

Life without parole was virtually nonexistent before the 1970s, but it became prominent in the United States following the Supreme Court's 1972 decision in *Furman v. Georgia*, which temporarily abolished the death penalty. Since the mid-1970s, there has been explosive growth in the number of people serving life and life-without-parole sentences. This growth is largely because of "tough-on crime" policies that drove state and federal legislators to pass laws creating draconian sentencing and parole schemes. Because of these policies, the average time served for all major categories of crime has increased in the vast majority of states over the last three decades.

There are two main categories of policies that are driving the increase in life sentences in the United States. At the front end, excessively punitive prosecutorial practices and harsh sentencing laws such as habitual offender laws, mandatory minimums, and other harsh determinate sentencing schemes have driven the increase in life sentences. At the back end, limitations on release such as truth-in-sentencing laws and other policies that increase the amount of time prisoners must serve before becoming eligible for release, the abolition of parole, the creation of categories of crimes that are ineligible for release, and the declining chances of release through parole even for parole-eligible prisoners have led to the increase in life sentences.

*Harsh sentencing laws such as mandatory minimums and habitual offender laws:*

Mandatory minimum sentencing laws require judges to punish people convicted of certain crimes by at least a mandatory minimum number of years in prison. Beginning in the mid-1970s and increasing throughout the 1980s and 1990s, lawmakers around the country enacted harsh mandatory minimum sentencing laws designed to severely punish the manufacture, use, and sale of drugs, among other crimes. Mandatory minimum laws require automatic prison terms for those convicted of certain crimes. These inflexible, often extremely lengthy, sentencing laws prevent judges from tailoring punishment to the individual and the seriousness of the offense, barring judges from considering factors such as the individual's role in the offense or the likelihood he or she will commit a subsequent crime.

Three-strikes and other habitual offender laws mandate certain sentences for a third felony conviction and expand the number of crimes subject to life sentences. Three-strikes laws have had a dramatic effect on sentencing throughout the country. Today, all 50 states and the federal government have some form of habitual offender or three-strikes law. These laws often are extremely severe. For example, 30 states and the federal government have habitual offender laws that *mandate* life-without-parole sentences for certain crimes; in seven states, the life-without-parole sentence is mandatory even if every offense is nonviolent. The application of these laws is all the more troubling given the range of minor offenses that are charged as felonies in the first place.

*"Truth in sentencing" laws, the abolition of parole, and other limitations on release:*

At the same time that states and the federal government were passing laws to dramatically increase sentences, there was also a significant push to guarantee that prisoners served a significant portion of their sentences before receiving parole or being granted "good time"

credits. The federal system abolished parole in 1984, and a number of states followed suit. By the end of 2000, 16 states had completely abolished discretionary parole, 28 states required a prisoner to serve 85 percent of his or her sentence before becoming eligible for parole, and four states abolished parole only for people convicted of certain violent crimes. During this period, many states also rolled back earned compliance provisions, known as “good time” credits, that enable prisoners to earn the possibility of parole through good behavior or completing education and treatment programs while incarcerated.

The declining prospects for parole have also driven the increase in life and other harsh sentences in the United States.<sup>18</sup> Parole—a process by which people may be released from prison before their maximum release date—used to be an integral part of the U.S. justice system. Today, parole and other release mechanisms (like medical, geriatric, or work release) are under-utilized, broken, or non-existent. In states that *do* have parole, parole boards operate in secrecy, with limited guidance, and with few required qualifications for board members.<sup>19</sup> While the parole board acts like a court—holding often adversarial hearings and setting or extending the amount of time a person will spend in prison—these boards are not professional, specialized entities but political bodies, usually serving at the will and whim of the governor.<sup>20</sup>

Parole boards rarely release people, even when a person has support from prison staff, the community, and the judge who sentenced them. Parole rates have been declining for years and are as low as 0.5% in Florida and 9% in Ohio.<sup>21</sup> Parole boards routinely make release decisions based on a few minutes of review, without ever meeting the parole applicant, without even reading the prisoner’s file, and without providing any reasons for denying parole. Parole boards place so much emphasis on the crime of conviction that other factors, like youth at the time of the crime and subsequent change and rehabilitation, are routinely disregarded.<sup>22</sup> As a result, even model prisoners who can safely return to their families and communities spend unnecessary decades behind bars. And when parole is denied, a prisoner may wait more than a decade for another chance at freedom. Even before the first review, many prisoners spend decades in prison waiting for the first chance to show they have been rehabilitated.

## **The death penalty**

The death penalty in the United States is in large part declining and limited to select jurisdictions, though substantial problems remain that stand in violation of the United States’ international legal obligations. Since 1976, when the modern death penalty era began, the United States has executed 1,507 people.<sup>23</sup> As of mid-2019, 2,673 people remained on death row across the United States.<sup>24</sup> Twenty-nine states formally retain the death penalty, as does the federal system and the military.<sup>25</sup> In these jurisdictions, the death penalty is applied in an arbitrary and discriminatory manner, based on race, geography, socioeconomic status, and the quality of representation. There remains an intolerably high risk that innocent people will be sentenced to death or executed. In the modern period, 166 innocent people have been exonerated from death rows.<sup>26</sup> Tragically, not all innocent people have escaped execution. For example, in 2017, Arkansas executed Ledell Lee, though he had steadfastly maintained his innocence, and the courts denied him the opportunity to conduct critical DNA testing that could have exculpated him of the crime.<sup>27</sup> Prisoners with intellectual disabilities and severe mental illness continue to face execution and those with strong claims of intellectual disability remain on death row,

despite the Supreme Court's decision in *Atkins v. Virginia*. Facing a shortage of drugs to use in lethal injection procedures, states have turned to risky and untested methods of execution, often resulting in excruciating pain and tortuous executions as well as increased secrecy surrounding their procedures.

Racial bias continues to play an unacceptable role in all stages of capital proceedings—from jury selection to sentencing. The race of the victim is a major factor in determining who will face a capital prosecution and receive a death sentence.<sup>28</sup> The federal government has never fulfilled its commitment in the UPR process to study racial disparities in the death penalty.<sup>29</sup>

While the death penalty in the United States is practiced predominantly at the state level, there has been a rise in federal capital prosecutions since the start of the Trump Administration.<sup>30</sup> In July 2019, the Department of Justice announced it would resume the federal death penalty, which has not been used in the United States since 2003. President Trump has also called for expanded use of the death penalty to include drug offenses.<sup>31</sup> Death penalty prosecutions continue at the Guantanamo military commissions, with troubling due process and fair trial violations.<sup>32</sup>

### **Out of step with the world: The United States is an outlier in its sentencing practices**

The United States is far out of step with the rest of the world in its practice of sentencing individuals to life in prison without the possibility of parole. The United States is among a minority of countries (20 percent) known to have life-without-parole sentences, while the vast majority of countries that do provide for such sentences place stringent restrictions on when they can be issued and limit their use to crimes of murder.<sup>33</sup> Such sentences are rare in other countries and were ruled a violation of human rights in a decision by the European Court of Human Rights that required an opportunity for review of the sentences of the 49 prisoners serving life without parole in the United Kingdom at that time, all of whom were convicted of murder.<sup>34</sup> Commitment to the principles of the fundamental rights to humane treatment, proportionate sentence, and rehabilitation has led a large number of states to *de jure* or *de facto* prohibit life-without-parole sentences. Life-without-parole sentences are prohibited in the constitutions of a number of OAS Member States,<sup>35</sup> while other countries have legally abolished life-without-parole sentences.<sup>36</sup> There also is a growing consensus against life without parole in Europe,<sup>37</sup> where the United Kingdom and the Netherlands are the only two countries that still sentence people to life without parole. According to a University of San Francisco School of Law study, the per capita number of prisoners serving life-without-parole sentences in the United States is 51 times that of Australia, 173 times that of the United Kingdom, and 29 times that of the Netherlands.<sup>38</sup>

The death penalty today is generally forbidden by law and widely abandoned in practice in most countries outside the United States. Today, over 140 nations have abolished the death penalty either by law or in practice and, of the 58 countries that have retained the death penalty, only 21 carried out known executions in 2011. All of Western Europe has abolished the death penalty, either by law or in practice. In total, 71 percent of the world's nations have abolished the death penalty in law or practice; only 58 of 197 retain it.<sup>39</sup>

## **Recommendations to reduce the imposition of life, capital, and other excessive sentences in the United States**

Ending mass incarceration in the United States requires significant sentencing reform. Criminal legal policies and practices must consider incarceration the very last resort, rather than the first response to crime. Sentencing and parole reform are key to both slowing down the flow of people going into our prisons and removing obstacles to release after an appropriate amount of time. In addition, decision-makers must have the discretion to review individual cases and determine when it is appropriate to release prisoners, many of whom have served decades for crimes that merit shorter prison terms.

In December 2018, President Trump signed the FIRST STEP Act into law after it passed through Congress with bipartisan support.<sup>40</sup> The federal legislation includes important sentencing and good conduct reform provisions that have led to the release of 3,100 federal prisoners,<sup>41</sup> yet it is only a modest first step and much more comprehensive sentencing and release reform is required. For instance, some reform provisions of the FIRST STEP Act limiting some mandatory minimum sentences in the future are not retroactive and as a result thousands of people in federal prisons today serving sentences under now-reformed statutes will not benefit, including many people who will die in prison without retroactivity.

### *Sentencing reform:*

- Congress and state legislatures should enact comprehensive sentencing reform legislation, including federal legislation that eliminates mandatory minimums for drug crimes and other reforms of mandatory minimum and three-strikes laws. These reforms should apply retroactively, so those already serving harsh sentences may seek relief.
- Congress should pass federal legislation to create a “Second Look” process that allows anyone who has served 10 years or more to apply for resentencing before a decision-making body.
- Congress and state legislatures should pass legislation that limits life sentences to 20 years, ends mandatory life in prison without parole sentences, implements the second look process outlined above, and eliminates juvenile life without parole sentences by allowing people convicted as children to petition for resentencing in the original sentencing court.

### *Parole and federal release reform:*

- Congress should pass federal legislation and the federal Bureau of Prisons should enact policies that allow people to file for elderly release after age 50 directly with the courts.
- States should adopt or expand presumptive parole models such as exist in South Dakota where the burden is on the parole board to provide evidence for why a person needs to remain in prison. Under this system, parole applicants would be released at the parole eligibility date unless the parole board, in consultation with the Department of Corrections and having reviewed the individual’s record while incarcerated, objects.
- States should expand release eligibility for all offenses; set a fair, holistic criteria for release decision-making; increase transparency and fairness in release hearings and decisions; ensure petitioners for release who are denied are able to reapply immediately

for reconsideration; and eliminate the ability of governors to block the release of an individual whom the parole board has approved for release.

*Executive clemency reform:*

- Expand executive clemency, in which the president or a state governor may order a commutation of sentence. The president and state governors should commit to an expansive clemency process that regularly reviews cases of individuals in prison and that would include:
  - Across-the-board, proactive review of entire categories of persons incarcerated in federal and state prisons, including those incarcerated for drug possession, the elderly, the sick, and people serving extraordinarily long sentences.
  - A presumption of release for certain categories of persons; for example, people still serving time for drug-related offenses where there has been a subsequent change in the law reducing or eliminating incarceration for those offenses.

*End the death penalty:*

- The federal government should impose a national moratorium on the use of the death penalty and Congress should pass legislation abolishing the federal death penalty. Meanwhile, the federal government should study the racial disparities in the imposition of death sentences.
- State governments and courts should abolish the death penalty, joining the 21 U.S. states that have already done so.

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<sup>1</sup> Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, Prison Policy Initiative (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>; Danielle Kaebler, *Probation and Parole in the United States, 2016*, Bureau of Justice Statistics (Apr. 26, 2018), <https://www.bjs.gov/index.cfm?ty=pbse&sid=42>.

<sup>2</sup> *Id.*

<sup>3</sup> John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison is Shrinking*, Pew Research Center (Apr. 30, 2019), <https://www.pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-blacks-and-whites-in-prison/>.

<sup>4</sup> Jeremy Travis, Bruce Western, and Steve Redburn, *The Growth of Incarceration in the United States* (The Nat'l Academies Press, 2014), [https://johnjay.jjay.cuny.edu/nrc/NAS\\_report\\_on\\_incarceration.pdf](https://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf).

<sup>5</sup> *Still Life: America's Increasing Use of Life and Long-Term Sentences*, The Sentencing Project (2017), <https://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf>. See also *Life Goes On: The Historic Rise in Life Sentences in America*, The Sentencing Project (2013), <https://sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf>.

<sup>6</sup> *Still Life*, *supra* note 5.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Tipping Point: A Majority of States Abandon Life-Without-Parole Sentences for Children*, The Campaign for the Fair Sentencing of Youth (Dec. 3, 2018), <https://www.fairsentencingofyouth.org/wp-content/uploads/Tipping-Point.pdf>

<sup>12</sup> *Still Life*, *supra* note 5.

<sup>13</sup> *A Living Death: Life Without Parole for Nonviolent Offenses*, American Civil Liberties Union (2013), <https://www.aclu.org/report/living-death-life-without-parole-nonviolent-offenses>.

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- <sup>14</sup> *Id.*
- <sup>15</sup> *Id.*
- <sup>16</sup> *Still Life*, *supra* note 5.
- <sup>17</sup> *Id.*
- <sup>18</sup> See, e.g. *Delaying a Second Chance: The Declining Prospects for Parole on Life Sentences*, The Sentencing Project (2017), <https://www.sentencingproject.org/wp-content/uploads/2017/01/Delaying-a-Second-Chance.pdf>.
- <sup>19</sup> *False Hope: How Parole systems Fail Youth Serving Extreme Sentences*, American Civil Liberties Union (Nov. 2016), <https://www.aclu.org/report/report-false-hope-how-parole-systems-fail-youth-serving-extreme-sentences>.
- <sup>20</sup> *Id.*
- <sup>21</sup> *Id.*
- <sup>22</sup> *Id.*
- <sup>23</sup> Total number of executions as of October 3, 2019. *Execution Database*, Death Penalty Information Center, available at <https://deathpenaltyinfo.org/views-executions>. [Hereinafter “DPIC”].
- <sup>24</sup> *Death Row U.S.A.: Spring 2019*, NAACP Legal Defense Fund (April 1, 2019), [https://www.naacpldf.org/wp-content/uploads/DRUSASpring2019.pdf?\\_ga=2.39533155.1319348451.1569530167-546631662.1569530167](https://www.naacpldf.org/wp-content/uploads/DRUSASpring2019.pdf?_ga=2.39533155.1319348451.1569530167-546631662.1569530167).
- <sup>25</sup> *Facts About the Death Penalty*, DPIC (Sep. 26, 2019), <https://files.deathpenaltyinfo.org/documents/pdf/FactSheet.f1569505379.pdf>. See also *With and Without the Death Penalty*, DPIC (Oct. 11, 2018), <https://deathpenaltyinfo.org/states-and-without-death-penalty>.
- <sup>26</sup> *Facts About the Death Penalty*, *supra* note 25. See also, *Innocence: List of Those Freed from Death Row*, DPIC (Nov. 5, 2018), <https://deathpenaltyinfo.org/innocence-list-those-freed-death-row>.
- <sup>27</sup> Elizabeth Vartkessian, *Ledell Lee Never Had a Chance*, The Marshall Project (Apr. 27, 2017), <https://www.themarshallproject.org/2017/04/27/ledell-lee-never-had-a-chance>.
- <sup>28</sup> See generally, *Race and the Death Penalty*, DPIC, <https://deathpenaltyinfo.org/race-and-death-penalty>.
- <sup>29</sup> Draft Report of the Working Group on the Universal Periodic Review on its Twenty-Second Session: United States of America, ¶ 176.1-292, U.N. Doc. A/HRC/WG.6/22/L.10 (May 21, 2015).
- <sup>30</sup> Jim Mustian, *Under Trump, Federal Death Penalty Cases are Ticking Up*, AP News (Oct. 31, 2018), <https://www.apnews.com/20bb9bfc954248bda8b13b4a4240adad>.
- <sup>31</sup> Amanda Holpuch, Jessica Glenza, and Ben Jacobs, *Trump Calls for Death Penalties for Drug Dealers as Focus of Opioids Plan*, The Guardian (Mar. 19, 2018), <https://www.theguardian.com/us-news/2018/mar/19/donald-trump-death-penalty-drug-dealers-opioids-new-hampshire>.
- <sup>32</sup> *Guantánamo Bay*, DPIC, available at <https://deathpenaltyinfo.org/Guantanamo>.
- <sup>33</sup> *Cruel and Unusual: U.S. Sentencing Practices in a Global Context*, Univ. of San Francisco School of Law: Center for Law and Global Justice, 8 (May 2012), <https://www.usfca.edu/sites/default/files/law/cruel-and-unusual.pdf>.
- <sup>34</sup> See, *Vinter and Others v. The United Kingdom*, App. Nos. 66069/09, 130/10, and 3896/10, Eur. Ct. H.R. (July 9, 2013).
- <sup>35</sup> Catherine Appleton and Bent Grover, *The Pros and Cons of Life Without Parole*, 47 *British J. Criminology* 597, 610 (2007).
- <sup>36</sup> *Id.* at 608.
- <sup>37</sup> Dirk van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink?*, 23 *Fed. Sentencing Rev.* 39 (2010).
- <sup>38</sup> *Cruel and Unusual*, *supra* note 33, at 8.
- <sup>39</sup> *Abolitionist and Retentionist Countries*, DPIC, available at <http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries>.
- <sup>40</sup> Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act (FIRST STEP Act) of 2018, Pub. L. 115-391, S. 756 (115<sup>th</sup> Congress), signed into law December 21, 2018.
- <sup>41</sup> Matt Zapotosky, *3,100 inmates to be released as Trump administration implements criminal justice reform*, Washington Post (Jul. 19, 2019), [https://www.washingtonpost.com/national-security/3100-inmates-to-be-released-as-trump-administration-implements-criminal-justice-reform/2019/07/19/7ed0daf6-a9a4-11e9-a3a6-ab670962db05\\_story.html?noredirect=on](https://www.washingtonpost.com/national-security/3100-inmates-to-be-released-as-trump-administration-implements-criminal-justice-reform/2019/07/19/7ed0daf6-a9a4-11e9-a3a6-ab670962db05_story.html?noredirect=on).