



**The Advocates for Human Rights,
a non-governmental organization in special consultative status with ECOSOC
submits this**

Shadow Report on the Death Penalty in the United States of America

**with Section V co-submitted by
the Greater Caribbean for Life and Puerto Rican Coalition against the Death Penalty**

for consideration during the

**85th Session of the United Nations Committee on the Elimination of Racial Discrimination
13–14 August 2014**

List of Themes: Paragraph 2(a), Paragraph 4, Paragraph 5(b)

The Advocates for Human Rights (The Advocates) is a volunteer-based non-governmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. The Advocates conducts a range of programs to promote human rights in the United States and around the world, including monitoring and fact finding, direct legal representation, education and training, and publications. In 1991, The Advocates adopted a formal commitment to oppose the death penalty worldwide and organized a Death Penalty Project to provide pro bono assistance on post-conviction appeals, as well as education and advocacy to end capital punishment. The Advocates currently holds a seat on the Steering Committee of the World Coalition Against the Death Penalty.

The Greater Caribbean for Life is an organization constituted on October 2, 2013 to unite Caribbean abolitionist organizations and individuals, reflecting the highest respect to right to live in the struggle against death penalty. This initiative began on October 19, 2011, by a group of organizations and individuals from countries of the Greater Caribbean opposed to the application of the capital punishment that participated in the International Conference on the Death Penalty in the Great Caribbean organized in Madrid by the Community of Sant' Edigio. The Greater Caribbean for Life was constituted with the purpose of campaigning for and working towards the permanent abolition of the death penalty in the Greater Caribbean and supporting Caribbean abolitionist activists and organizations in this region (comprised by the Caribbean Islands,

Mexico, Central America, Colombia, Venezuela and the Guyanas) and collaborating with the international abolitionist community.

The Puerto Rican Coalition against the Death Penalty (PCADP) is a non-party, non-sectarian organisation incorporated in Puerto Rico in March 2005 to promote the elimination of the capital punishment. The PCADP aims to join efforts among the different abolitionist organisations and activists in Puerto Rico. Its Statement of Principles emphasises that it does not believe in the impunity of a crime and identifies with the pain of the families of both the victims and the accused. It rejects the death penalty inside and outside Puerto Rico. The PCADP aims at excluding Puerto Rico from the scope of the Federal Death Penalty Act, as is the case for other federal laws. It also intends to mark its opposition in every case in which death penalty certification is to be requested by federal prosecutors in Puerto Rico. The PCADP has been a member of the World Coalition since 2006. As of June 2007, the PCADP was composed of more than 40 religious, political, student, community, labor union, professional, and human rights advocacy organisations.

EXECUTIVE SUMMARY

1. Thirty-two states, the U.S. federal government, and the U.S. military retain the death penalty in the United States. Since the United States' last review before the Committee in 2008, the number of states retaining the death penalty has decreased. Four states—Maryland (2013), Connecticut (2012), Illinois (2011), New Mexico (2009)—have since abolished the death penalty. During that same time period, however, 247 inmates were executed nationwide; 116 of those executed—or more than 46% of the total—were non-white, including seven foreign nationals.¹
2. This report addresses five main issues with regard to the United States' use of the death penalty and how the death penalty disproportionately affects minorities in the United States:
 - **Racial Bias. (List of Themes: Paragraph 2(a).)** Racial bias is pervasive in the application of the death penalty in the United States. The race of the victim is the most indicative factor in determining who is charged and sentenced with death. If the victim is white, a defendant is more likely to be sentenced to death than if the victim is black. The race of the defendant also increases the likelihood of a death sentence, and black persons are disproportionately overrepresented on death row in comparison to the general population. See Recommendations and Questions on page 9.
 - **Innocence. (List of Themes: Paragraph 5(b))** The death penalty system in the United States has wrongfully convicted and sentenced innocent persons to death. Since 1973, 144 individuals have been exonerated from death row, and a recent study suggests that if all death-sentenced defendants in the United States remained under sentence of death indefinitely, at least 4.1% would be exonerated. Moreover, minorities tend to be overrepresented among exonerees, particularly in sexual assault, robbery, and drug cases. Also of great concern are the at least 10 individuals who have been executed despite strong evidence of their innocence.

When exonerees are released, they face numerous challenges in reintegrating into society. They may face social, economic, and legal hurdles. In addition, the right to compensation for wrongful imprisonment varies widely from state-to-state. Sixteen retentionist U.S. states do not have compensation laws for the wrongfully convicted to seek reparation. In states that do have compensation laws, exonerees must often overcome onerous procedural and eligibility barriers. If they succeed, the compensation they may receive can be meager and very often falls short of the corollary federal standards for such compensation. See Recommendations and Questions on page 16.

- **Consular Notification. (List of Themes: Paragraph 4)** The United States is a party to the Vienna Convention on Consular Relations (VCCR), and Article 36 requires States Parties arresting or detaining foreign nationals to notify them of their right to communicate with consular officials. The United States' failure to meet its obligations to

¹ Citations omitted, citing various sources from the Death Penalty Information Center.

provide timely consular notification when arresting or detaining foreign nationals, as well as its failure to review and reconsider those cases in which timely consular notification was not given, constitutes a form of national origin discrimination in violation of Articles 5(a) and 6 of ICERD. The United States has failed many times to comply with its consular notification duties in capital cases, and the International Court of Justice (ICJ) ordered the United States to provide review and reconsideration of the cases of 51 Mexican nationals who had been sentenced to death. To date, the United States has failed to pass implementing legislation to give effect to the ICJ's decision, and in the meantime, Texas has since executed four Mexican nationals who were covered by that ICJ decision. In addition, only a handful of U.S. courts have recognized the availability of judicial remedies for consular notification violations, but even in these jurisdictions, procedural default rules can still bar remedies for foreign nationals who failed to raise the VCCR claim at the right time or in the right way. See Recommendations and Questions on page 23.

- **Lethal Injection. (List of Themes: Paragraph 2(a))** All of the 32 retentionist U.S. states and the U.S. federal government use lethal injection as the primary means of executing prisoners. The traditional three-drug lethal injection procedure has come under constitutional challenge in a number of states for causing cruel and unusual punishment in violation of the Eighth Amendment of the U.S. Constitution. The U.S. Supreme Court has held that the lethal injection method used by the state of Kentucky does not qualify as cruel and unusual punishment. Since then, however, a number of regulations by foreign governments and the European Union have restricted the supply of drugs used in the three-drug procedure. As these drugs have become increasingly harder to obtain, U.S. states have turned to other drugs that can be used singly to administer a lethal dose. In turn, pharmaceutical companies have refused to supply these drugs for execution purposes in the United States. As these drugs become increasingly difficult to obtain, states have turned to questionable sources—including compounding pharmacies selling drugs that are not FDA-approved—to obtain the drugs required to administer executions. In addition, several U.S. states have passed secrecy laws to conceal the identities of these drug suppliers, thus allowing states to withhold critical information to detainees seeking assurances about the drugs' quality and effectiveness and making it impossible for them to bring a legal challenge to the method of execution. Obtaining execution drugs that are outside of federal regulation increases the risk of tampering and reduced drug efficacy, which in turn heightens the risk of cruel or inhuman treatment or punishment during an execution. The prevailing racial discrimination in the application of the death penalty in the United States means these due process violations and concomitant cruel and unusual forms of punishment fall disproportionately on racial minorities. See Recommendations and Questions on page 31.
- **Puerto Rico. (List of Themes: Paragraph 2(a))** Puerto Rico has been an abolitionist territory for 85 years, with both constitutional prohibition and historical opposition to capital punishment. However, federal prosecutors aggressively seek the death penalty in Puerto Rico at a higher rate than in other states. The certification of death penalty cases in Puerto Rico is significantly higher if the perpetrator is from an ethnic minority: for instance, all defendants in the 25 death penalty prosecutions in Puerto Rico were from ethnic minorities. The composition of juries in the territory is unfairly skewed, because

only those who can speak a significant amount of English may sit on a jury, and those that are unwilling to impose the death penalty are almost certainly stricken despite widespread rejection of capital punishment among Puerto Ricans. Also, Puerto Ricans are overrepresented nationwide on states' death row. See Recommendations on page 37.

BACKGROUND

The Convention on the Elimination of Racial Discrimination

3. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was adopted on December 21, 1965 by the United Nations General Assembly. ICERD recognizes the human right to be free from any distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life. The United States is one of 177 parties to ICERD.
4. Pursuant to Article 5, "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of ... (a) The right to equal treatment before the tribunals and all other organs administering justice; (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution."
5. Article 6 provides that "States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."
6. CERD's General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system (General Recommendation XXXI) identifies steps to be taken to gauge the existence and extent of racial discrimination in States' criminal justice systems and strategies to prevent such discrimination.

The Committee on the Elimination of Racial Discrimination's Review (2008)

7. CERD last reviewed the United States' compliance with the ICERD in 2008 and indicated that it remained concerned about "the persistent and significant racial disparities with regard to the imposition of the death penalty, particularly those associated with the race of the victim." CERD recommended that the United States "undertake further studies to identify the underlying factors of the substantial racial disparities in the imposition of the death penalty, with a view of elaborating effective strategies aimed at rooting out discriminatory practices." CERD also reiterated its previous recommendation from its Concluding Observations of 2001 that the United States "adopt all necessary measures, including a moratorium, to ensure

that death penalty is not imposed as a result of racial bias on the part of prosecutors, judges, juries and lawyers.”²

The United States’ Submission

8. In its 2013 Periodic Report to CERD (U.S. State Report)³, the United States briefly addressed CERD’s concluding observations from its 2008 review of the United States’ fourth, fifth, and sixth periodic reports, by referring to Part I B, section 3 of the Common Core Document of the United States submitted with its Fourth Periodic Report to the United Nations Committee on Human Rights concerning the International Covenant on Civil and Political Rights dated December 30, 2011 (Common Core Document).
9. The Common Core Document indicates that as of 2011, capital punishment was available in 34 states and under federal law for crimes of murder or felony murder, though in recent years the Supreme Court had narrowed the categories of crimes that may constitutionally be subject to the death penalty. The Common Core Document states that a defendant eligible for the death penalty is entitled to a determination that the death sentence is appropriate in his case, and the jury must be allowed to consider mitigating evidence in support of a sentence less than death. The Common Core Document also describes procedural protections available to all criminal defendants, including the right to a fair hearing by an independent tribunal, the presumption of innocence, minimum guarantees for the defense, the right to review by a higher tribunal, the right to trial by jury, the right to challenge the makeup of the jury, and others. The Common Core Document indicates that the number of states that have the death penalty, the size of the death row population, and the number of death sentences and executions all declined in the past decade. The Common Core Document recognizes the overrepresentation of minority persons, particularly Blacks/African Americans, on death row. The United States recognized the controversy created by this overrepresentation, as well as controversies related to the use of lethal injection.
10. The U.S. State Report states that since the date of the Common Core Document, two additional states, Connecticut and Maryland, abolished the death penalty through legislation.⁴ The United States also addressed CERD’s recommendation that the United States impose a moratorium on the death penalty, stating there is vigorous public debate on this matter, but the U.S. Constitution grants the democratically elected governments at the federal and state levels the power to decide whether to make available the death penalty in their respective jurisdictions.⁵

REPORT

11. This report examines five aspects of death penalty law, policy, and practice in the United States. Section I (paragraphs 12–21) assesses the influence of racial bias on decisions to

² U.N. Committee on the Elimination of Racial Discrimination, U.N. Doc.CERD/C/USA/CO/6, May 8, 2008, ¶ 23.

³ Periodic Report of the United States of American to the United National Committee on the Elimination of Racial Discrimination, dated June 12, 2013 (U.S. State Report), ¶¶ 69, 70.

⁴ Id. ¶ 69.

⁵ Id. ¶ 70.

charge capital crimes and to seek the death penalty. Section II (paragraphs 22–37) discusses the problem of wrongful convictions in the United States, and discusses U.S. compliance with exonerees’ right to an effective remedy. Section III (paragraphs 38–52) addresses U.S. compliance with the *Avena* decision by the International Court of Justice to provide remedies for violations of the Vienna Convention on Consular Relations and the United States’ overall compliance with consular notification obligations arising under the convention. Section IV (paragraphs 53–67) analyzes whether standard lethal injection procedures constitute cruel and unusual punishment, and identifies developing legal and corporate resistance to those procedures. Section V (paragraphs 68–75) describes the racial bias against Puerto Ricans, a Hispanic group, through the disproportionately heavy use of the death penalty by the federal government and by U.S. states. All of these Sections affect Article 5(a), 5(b) and/or 6 of ICERD and General Recommendation XXXI for the reasons given below.

I. Racial Bias in the Imposition of the Death Penalty in the United States⁶

12. **In states where the death penalty is used most often, defendants in racial minority groups fare worse than white defendants.** The U.S. State Department acknowledged in the U.S. State Report that it “faces challenges . . . in its provision of legal representation to indigent criminal defendants and . . . these challenges are felt acutely by members of racial and ethnic minorities.”⁷ Racial and ethnic disparities “continue to exist” in the criminal justice system and the use of the death penalty is still left to the individual governments of each of the 50 states.⁸ This Report addresses the two most recurring indicators of racial bias in the implementation of the death penalty: (1) race of the victim and (2) race of the defendant.⁹

⁶ Although this report pertains to racial bias as a factor in U.S. death penalty cases, it is consistent with respected studies that have suggested racial bias in the American criminal justice system generally. See, for example, *World Report 2013*, published by Human Rights Watch on January 31, 2013. That report concludes that “[r]acial and ethnic minorities have long been disproportionately represented in the [U.S.] criminal justice system.” HUMAN RIGHTS WATCH, *WORLD REPORT 2013: EVENTS OF 2012* 644 (2013).

⁷ Periodic Report of the United States of American to the United National Committee on the Elimination of Racial Discrimination, dated June 12, 2013 (U.S. State Report), ¶ 62.

⁸ *Id.* ¶¶ 65, 70.

⁹ Reputable studies have also shown that racial bias continues to exist in the selection of juries in states that authorize the death penalty. G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425 (2010). A state court judge in North Carolina recently vacated death sentences for three African-American defendants because of clear evidence of racial bias in the selection of juries. *Report on Race and the Death Penalty*, AM. CIVIL LIBERTIES UNION, Dec. 13, 2012, <http://www.aclu.org/capital-punishment/judge-finds-racial-bias-three-more-death-penalty-cases-north-carolina-under-state> (last visited June 25, 2014); see also ALEX MIKULICH & SOPHIE CULL, LOYOLA UNIVERSITY NEW ORLEANS, *DIMINISHING ALL OF US: THE DEATH PENALTY IN LOUISIANA* 28 n.82 (2012). African-Americans comprise about one-third of the population of the entire State of Louisiana and almost half the population in some parishes. *Id.* at 28. Nevertheless, it is rare that more than one or two African-Americans are selected to be on juries in capital punishment trials in that state. *Id.*; *Sourcebook of Criminal Justice Statistics*, HINDELANG CRIMINAL JUSTICE RESEARCH CENTER, UNIVERSITY AT ALBANY, <http://www.albany.edu/sourcebook/>; Tim Lyman, *Caddo (LA) Parish Report on Race, Homicides, and Prosecutions, 1988-2008* 5-9 (2011), available at <http://ssrn.com/abstract=1743712>; Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433 (2005); Charles Ogletree, *Black Man’s Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 17

13. During the past 37 years, **80% of all persons sentenced to death have been executed for murders involving white victims, even though the numbers of white and black persons murdered are virtually equal.**¹⁰ This is a longstanding and pervasive problem: even as long ago as 1987, the U.S. Supreme Court ruled that reliable statistical evidence suggesting racial bias in the trial of any defendant could not be used to vacate a death sentence.¹¹
14. In a 2013 report, the Death Penalty Information Center investigated **interracial murder cases** throughout the United States and found **glaring racial bias**. According to that report, 20 white defendants have been executed for murdering African American victims since 1976; during the same time period, 259 black defendants have been executed for murdering white victims.¹² These data are consistent with other recent studies. For example, a comprehensive review of the connection between the races of defendants and victims during a 10-year period in the state of California¹³ concluded that 27.6% of the murder victims in California were white, but more than 80% of defendants executed had been convicted of killing white victims.¹⁴
15. One of the most decisive factors affecting who is charged with a death-eligible offense is the race of the victim. That is, **the prosecution is more likely to charge and seek the death penalty when the defendant is African American and the victim is white than when the defendant is white and the victim is African American.**¹⁵
16. **People of color constitute more than half of the 3,170 people sentenced to death in the United States.**¹⁶ The state of Louisiana's use of the death penalty is perhaps the starkest of all American states, although its ranking is a matter of degree. Louisiana has the highest percentage of death-row prisoners who are African American of any U.S. state.¹⁷ Black people make up only 13.1% of the U.S. population, yet constitute 42% of the total death row population.¹⁸ Use of the death penalty in the state of Texas illustrates how defendants of color are disproportionately represented on death row:

(2002); Glenn L. Pierce & Michael L. Radlet, *Death Sentencing in East Baton Rouge Parish, 1990-2008*, 71 LA. L. REV. 647, 670 (2011).

¹⁰ *U.S. Supreme Court Declines to Hear Case Involving Improper Race-Base Testimony*, American Bar Association Death Penalty Representation Project, 2012, Vol. V issue #1.

¹¹ *McClesky v. Kemp*, 481 U.S. 279 (1987).

¹² *Facts About the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited June 25, 2014).

¹³ Glenn Pierce and Michael Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides 1990-1999*, 46 SANTA CLARA L. REV. 1 (2005).

¹⁴ *Ibid.*; see also Jennifer L. Eberhardt et. al, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2005).

¹⁵ Scott Phillips, *Status Disparities in the Capital of Punishment*, 43 L. & SOC'Y REV. 807 (2009); see also Thomas P. Sullivan, *The Death Penalty: 35 Years of a Failed Experiment*, THE HILL CONGRESS BLOG (June 29, 2011, 9:06 AM), <http://thehill.com/blogs/congress-blog/judicial/168943-the-death-penalty-35-years-of-a-failed-experiment>.

¹⁶ *Racial Bias*, EQUAL JUSTICE INITIATIVE, <http://www.eji.org/deathpenalty/racialbias> (last visited June 25, 2014).

¹⁷ ALEX MIKULICH & SOPHIE CULL, LOYOLA UNIVERSITY NEW ORLEANS, *DIMINISHING ALL OF US: THE DEATH PENALTY IN LOUISIANA* (2012), at 4.

¹⁸ *Racial Bias*, EQUAL JUSTICE INITIATIVE, <http://www.eji.org/deathpenalty/racialbias> (last visited June 25, 2014); State & County QuickFacts, United States Census Bureau, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited June 25, 2014).

Over the last five years, nearly 75% of all death sentences in Texas have been imposed on people of color . . . While African-Americans comprised only 12% of the entire Texas general population, they comprise 39.8% of death row inmates.¹⁹

17. Black defendants in the United States face two significant disadvantages when compared to white defendants in similar cases, regardless of the analytical methods or underlying criteria. The first risk arises when the prosecuting attorney initially decides whether to charge a defendant with a capital offense. **Data continue to show a pattern of prosecutors, at the time of the charging determination, being influenced, either consciously or subconsciously, by the races of the defendants and the victims.** The second risk arises when, after a conviction, the death penalty actually may be imposed.
18. On a per-capita basis, Alabama imposes the death penalty more than any other American state.²⁰ One contributing factor for this statistic is **that Alabama law allows elected state judges to impose the death penalty by overriding a jury's sentence of life in prison; judges overturn the life sentences of approximately one-fifth of Alabama's death row inmates and resentence them to death.**²¹ The racial discrimination that this judicial discretion fosters is apparent in Alabama's death row statistics: Alabama currently has 198 prisoners on death row, and 99 (50%) of those prisoners are black,²² even though 70% of Alabamans are white.²³
19. Discriminatory practice is not the only contributing factor to racial bias in capital punishment. **Laws or lack thereof also allow racial biases to influence outcomes.** Recent legal amendments in the state of North Carolina curtailed protections against racial bias in that state's death penalty system. North Carolina's 2009 Racial Justice Act had mandated that courts vacate death sentences for any defendant if evidence showed that race was a factor in the imposition of the death penalty. Based on that law, four death row inmates had their sentences reduced to life imprisonment without the possibility of parole after presenting a statistical study showing "prosecutors in North Carolina were more than twice as likely to strike black jurors as they were white jurors, and that juries were more than 2 1/2 times as likely to sentence a defendant to death if at least one of the victims was white."²⁴ On June 5, 2013, however, the North Carolina Legislature repealed that Act, thus eliminating an

¹⁹ Texas Death Penalty Developments in 2012: The Year in Review, Texas Coalition to Abolish the Death Penalty.

²⁰ *Death Penalty Report*, EQUAL JUSTICE INITIATIVE (July 15, 2013) available at <http://www.eji.org/deathpenalty> (last visited June 25, 2014).

²¹ *Ibid.*

²² Alabama Inmates Currently on Death Row, Alabama Dep't of Corrections, <http://www.doc.alabama.gov/DeathRow.aspx> (last visited June 25, 2014).

²³ *State and County QuickFacts*, UNITED STATES CENSUS BUREAU (June 11, 2014), available at <http://quickfacts.census.gov/qfd/states/01000.html>.

²⁴ See Craig Jarvis, *Lawmakers Override Veto of Racial Justice Act Revamp*, NEWSOBSERVER.COM (July 3, 2012), available at <http://www.newsobserver.com/2012/07/03/2174838/senate-overrides-veto-of-racial.html> (last visited June 25, 2014).

important safeguard against North Carolina prosecutorial, judicial, and jury practices that use the race of a defendant or victim as a factor at trial and sentencing.²⁵

20. Racial discrimination throughout charging, jury selection, and sentencing decisions contribute to a pattern of racial bias in the death penalty.²⁶ The result is that persons of color who murder white victims are more likely to be charged with capital offenses and sentenced to death in the United States.
21. A 2014 report by The Constitution Project cites numerous studies that have found glaring racial disparities in the U.S. justice system.²⁷ The report makes the following recommendations for safeguarding racial fairness and proportionality: (1) develop a framework for collecting and monitoring data on the interplay between capital punishment and race; (2) adopt legislation to ensure that racial discrimination does not play a role in capital punishment; and (3) ensure racial and ethnic diversity among decision-makers.²⁸

Recommendations

- The following recommendations are compiled from the Constitution Project Report:
 - The United States should develop a framework for collecting and monitoring data on the interplay between the death penalty and race, including conducting studies to identify the root causes and factors of racial disparities pertaining specifically to the death penalty, with the objective of developing means to eliminate racial bias in the imposition of the death penalty and more broadly throughout the United States criminal justice system.
 - The United States should adopt legislation to ensure that racial discrimination does not play a role in capital punishment.
 - The United States should adopt measures to ensure racial and ethnic diversity among decision-makers.
- The United States should adopt all necessary measures, including a moratorium, to ensure that the death penalty is not imposed as a result of racial bias on the part of prosecutors, judges, juries, or lawyers.

²⁵ *Ibid.*; *North Carolina Repeals Law Allowing Racial Bias Claim in Death Penalty Challenges*, N.Y. TIMES (June 6, 2013).

²⁶ *Racial Bias*, NATIONAL COALITION AGAINST THE DEATH PENALTY, <http://www.ncadp.org/pages/racial-bias> (last visited June 25, 2014); *Racial Bias*, EQUAL JUSTICE INITIATIVE, <http://www.eji.org/deathpenalty/racialbias> (last visited June 25, 2014); *The Case against the Death Penalty*, ACLU (Dec. 11, 2012)

²⁷ *Irreversible Error: Recommended Reforms for Preventing and Correcting Errors in the Administration of Capital Punishment*, THE CONSTITUTION PROJECT (May 7, 2014), available at http://www.constitutionproject.org/wp-content/uploads/2014/06/Irreversible-Error_FINAL.pdf.

²⁸ *Id.* at 125-130.

Questions

- What steps is the United States taking to identify patterns and causes of racial discrimination, specifically in its death penalty system?
- What measures, if any, is the United States taking to address racial bias in the death penalty?
- What steps, if any, is the United States taking to ensure racial and ethnic diversity among decision-makers in connection with the imposition of the death penalty?

II. Wrongful Convictions and the Right to an Effective Remedy

22. Wrongful convictions are a grave concern in the United States. **Since 1973, 144 individuals have been exonerated from death row.**²⁹ These exonerations show that U.S. states have imposed the death penalty on innocent individuals and wrongly imprisoned them for years under a sentence of death; in fact, these individuals have spent a total of 1,505 years as wrongfully accused.³⁰ A recent study published in the Proceedings of the National Academy of Sciences estimates that if all death-sentenced defendants in the United States remained under sentence of death indefinitely, at least 4.1% would be exonerated (PNAS Study).³¹
23. The results of the PNAS Study and other available information points to an even **graver concern that there have been individuals who were likely innocent but executed**, and that additional innocent individuals are likely to be executed in the future.³² For example, Troy Davis, an African American, was convicted for the 1989 murder of a police officer, a conviction based solely on witness testimony and no physical evidence. Since his trial, seven of the nine eyewitnesses have recanted or contradicted their testimony, and one of the remaining witnesses was implicated by nine others as the actual murderer. Despite widespread calls for clemency, the state of Georgia executed Davis on September 21, 2011.³³
24. According to a February 4, 2014 report by the National Registry of Exonerations (National Registry), **black defendants are over-represented among exonerees from both prison**

²⁹ *Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row?scid=6&did=110> (last visited June 25, 2014).

³⁰ 1,505 is the number of years between their sentence to death and exoneration. *Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFORMATION CENTER, <http://deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited June 25, 2014).

³¹ *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES, available at <http://www.pnas.org/content/111/20/7230.full> (last visited June 25, 2014).

³² According to the Death Penalty Information Center, at least ten men with strong evidence of their innocence have been executed. See *Executed But Possibly Innocent*, DEATH PENALTY INFORMATION CENTER, <http://deathpenaltyinfo.org/executed-possibly-innocent> (last visited June 25, 2014). These persons include Troy Davis, Cameron Todd Willingham, Claude Jones, Gary Graham, Leo Jones, David Spence, Joseph O'Dell, Larry Griffin, Ruben Cantu, and Carlos DeLuna.

³³ See *I Am Troy Davis: The Fight for Abolition Continues*, AMNESTY INTERNATIONAL, <http://www.amnestyusa.org/our-work/cases/usa-troy-davis> (last visited June 25, 2014).

and death row populations, particularly in sexual assault, robbery, and drug cases.³⁴ For example, black defendants constitute 25% of prisoners incarcerated for rape, but 61% of those who were actually innocent and exonerated for such crimes.³⁵ Further, the Innocence Project reports that while most sexual assaults nationwide are among perpetrators and victims of the same race (the federal government says just 12% of sexual assaults are cross-racial), **two-thirds of all black men exonerated through DNA evidence were wrongfully convicted of raping white people.**³⁶

25. Of the 1,218 exonerations the National Registry has identified between January 1989 and December 2013, 47% were black; 11% were Hispanic; and 2% were Native American or Asian.³⁷ There are several reasons for wrongful convictions, including eyewitness misidentification, poor forensics (“junk science”), false confessions, snitch testimony, government misconduct, and ineffective assistance of counsel.³⁸ The National Registry lists the following most common causal factors for all exonerations: perjury or false accusation (56%); official misconduct (46%); and mistaken eyewitness identification (38%).³⁹ Further, according to the Innocence Project, of the 230 people who have been exonerated through DNA testing in the United States, 75% involved eyewitness misidentification.⁴⁰

26. Cross-racial misidentifications are viewed as one of the chief causes of the disproportionate number of minority exonerations. An Innocence Project report states, “In 53% of wrongful convictions cases [sic] involving eyewitness misidentification (that were later overturned through DNA testing), the witness and the perpetrator were of different races. These cases strongly suggest that people of color are more likely to be wrongfully convicted based on cross-racial misidentification than Caucasians. Cross-racial

³⁴ *Exonerations in 2013*, THE NATIONAL REGISTRY OF EXONERATIONS, at 15 (Feb. 4, 2014) available at https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf.

³⁵ *Exonerations in 2013*, THE NATIONAL REGISTRY OF EXONERATIONS, at 15 (Feb. 4, 2014) available at https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf. The Innocence Project provides similar statistics, stating, “While 29% of people in prison for rape are black, 64% of the people who were wrongfully convicted of rape (and then exonerated through DNA) are black.” *In 200th DNA Exoneration Nationwide Jerry Miller in Chicago is Proven Innocent 25 Years After Wrongful Conviction*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/In_200th_DNA_Exoneration_Nationwide_Jerry_Miller_in_Chicago_Is_Proven_Innocent_25_Years_After_Wrongful_Conviction.php (last visited June 25, 2014) [hereinafter *200 Exonerated*].

³⁶ *200 Exonerated, Exonerations in 2013*, THE NATIONAL REGISTRY OF EXONERATIONS, 15 (Feb. 4, 2014) available at https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf [hereinafter *Exonerations*].

³⁷ *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES, available at <http://www.pnas.org/content/111/20/7230.full> (last visited June 25, 2014).

³⁸ *Causes of Wrongful Convictions*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/causes-wrongful-convictions> (last visited June 25, 2014); *The Causes of Wrongful Conviction*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/> (last visited June 25, 2014).

³⁹ *Exonerations in 2013*, THE NATIONAL REGISTRY OF EXONERATIONS, 15 (Feb. 4, 2014) 17, available at https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf.

⁴⁰ *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of Misidentification*, THE INNOCENCE PROJECT, at 3, http://www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf (last visited June 25, 2014) [hereinafter *Reevaluating Lineups*].

misidentifications in the DNA exoneration cases involve an African American or Latino defendant 99% of the time, and a Caucasian defendant only 1% of the time.”⁴¹

27. While experts have developed lineup best practices that are designed to mitigate the risks of eyewitness misidentification, **there are no national standards or procedures for eyewitness identification** at this time.⁴² In 2004, the American Bar Association published *Best Practices for Promoting Accuracy of Eyewitness Identification Procedures*. These procedures included double-blind administration of photo spreads and lineups, including a reasonable number of foils to reduce the risk of guessing, ensuring the suspect does not stand out in any way from the foils, videotaping lineups, and other procedures.⁴³ The Innocence Project’s report, *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of Misidentification*, provides additional best practices for lineups, such as instructions to give eye witnesses when participating in a lineup or similar activity and sequential presentation procedures for photo arrays and lineups.⁴⁴ The report recognizes that these procedures may not address all complications related to eyewitness identification, including cross-racial misidentification, and suggests that in those cases, expert witnesses may be called to explain to the jury what scientific research shows about the impact of such factors on eyewitness identification.⁴⁵ Several jurisdictions have adopted these or similar procedures, or courts have issued instructions for juries that include factors to consider when evaluating eyewitness identification. But still other jurisdictions have yet to adopt these kinds of procedures.⁴⁶
28. **Court precedents and state laws bar expert testimony about the fallibility of eyewitness identification or leave admissibility determinations to the discretion of the trial judge.** Two retentionist states and the U.S. Court of Appeals for the 11th Circuit expressly bar expert testimony about the unreliability of eyewitness identification.⁴⁷ In 2012, the U.S. Supreme Court held that the U.S. Constitution does not require an inquiry into the reliability of an eyewitness identification when the circumstances surrounding the identification were not “unnecessarily suggestive.”⁴⁸ The vast majority of jurisdictions give trial judges wide latitude in determining whether to admit expert testimony on the unreliability of eyewitness identifications.⁴⁹ But because appellate courts “so often defer to a trial court’s exercise of discretion,” and because trial courts routinely exclude such testimony as invading the

⁴¹ Id. at 8.

⁴² Id. at 16.

⁴³ *Best Practices for Promoting Accuracy of Eyewitness Identification Procedures*, THE AMERICAN BAR ASSOCIATION (2004) available at <http://meetings.abanet.org/webupload/commupload/CR209700/relatedresources/ABAEyewitnessIDrecommendation.s.pdf> (last visited June 25, 2014).

⁴⁴ *Reevaluating Lineups*, supra note 40, at 16–21.

⁴⁵ Id. at 17.

⁴⁶ Id. at 24–25.

⁴⁷ Comment, *The Admissibility of Eyewitness-Identification Expert Testimony in Oklahoma*, OKLAHOMA L. REV. , 537–38 (2011).

⁴⁸ *Perry v. New Hampshire*, 132 S. Ct. 716 (2012).

⁴⁹ Comment, *The Admissibility of Eyewitness-Identification Expert Testimony in Oklahoma*, OKLAHOMA L. REV. , 528–37 (2011).

province of the jury, as unhelpful to the jury, or as the subject of common knowledge, this rule of deference in practice becomes a rule of “per se exclusion” of such expert testimony.⁵⁰

29. **Individuals who are exonerated and released from prison face numerous challenges in rebuilding their lives.** Almost all exonerees possess no assets at the time of their release, one-third have lost child custody due to their wrongful imprisonment, and many face severe challenges in obtaining employment or housing.⁵¹ A study by the Life After Exoneration Program found that one-half of exonerees reside with their family, and that two-thirds are not economically independent.⁵² Securing employment and appropriate housing is difficult for exonerees because expungement of the wrongful conviction from their criminal record does not happen automatically.⁵³
30. In addition, many exonerees have spent years in prison while others in their age group have been completing their education, acquiring job skills, or progressing on career paths.⁵⁴ In-prison educational programs are not available to many death row inmates during their prison terms, and they are often denied job training programs and literacy and GED classes given their sentence of death.⁵⁵
31. Exonerees not only have economic and legal needs, but also health care needs as many are affected by institutionalization;⁵⁶ Post-Traumatic Stress Disorder affects one-fourth of exonerees.⁵⁷ Only 10 of the 50 U.S. states’ compensation laws provide for social services, and a recent report by The Innocence Project found that just 15 exonerees had accessed these services.⁵⁸ Many lack adequate access to health care, and the problem is exacerbated as exonerees are not automatically eligible for Medicaid.⁵⁹ Because exonerees often work in short-term or low-paying jobs, they are often not provided health benefits through their employer, either.⁶⁰

⁵⁰ *Id.* at 535.

⁵¹ *Remedies*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=95&Itemid=88 (last visited June 25, 2014).

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 8.

⁵⁵ *Facts on Exoneration*, RESURRECTION AFTER EXONERATION, <http://www.r-a-e.org/about/facts-exoneration> (last visited June 25, 2014).

⁵⁶ *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 7. “Institutionalization” refers to how prisoners adjust to surviving the hostile living environment conditions of a prison. *Id.*

⁵⁷ *Remedies*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=95&Itemid=88 (last visited June 25, 2014).

⁵⁸ *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 16. The 15 exonerees may include both death sentenced and non-death sentenced individuals.

⁵⁹ *Id.* at 8.

⁶⁰ *Ibid.*

32. **Compensation is not guaranteed to exonerees for wrongful convictions and imprisonment, and it is a process fraught with barriers.** Some states have adopted compensation statutes, which variously provide an award based on actual damages, amount of time spent wrongfully accused, targeted aid (such as an education grant or health services), or a capped sum.⁶¹ Yet, these compensation statutes often have restrictions and fall short of adequate reparation. Several of these statutes compensate wrongful convictions at outdated and scant amounts and cap maximum compensation. For example, New Hampshire's compensation law grants a maximum award of just \$20,000 regardless of the number of years spent wrongfully imprisoned.⁶² Texas' legislation grants \$80,000 per year wrongfully imprisoned with no cap, but it bars an exoneree from filing a civil lawsuit.⁶³ Even when an exoneree successfully obtains compensation, the money may need to be redirected toward basic needs and legal fees. Kirk Bloodsworth, who was wrongfully imprisoned by the state of Maryland for nine years (two years of which on death row), applied for and received \$300,000 from the Maryland Board of Public Works.⁶⁴ But most of the money awarded went toward paying back the legal fees Kirk Bloodsworth incurred by his wrongful conviction.⁶⁵
33. In contrast, the U.S. federal government passed The Innocence Protection Act, which grants a maximum of \$100,000 per year for wrongful imprisonment on federal death row.⁶⁶ The majority of states' compensation laws, however, do not meet the U.S. federal standard of compensation.⁶⁷ This compensation does not apply to exonerees wrongfully imprisoned by states, yet these individuals are the vast majority of exonerees.
34. **State compensation laws also restrict eligibility** and may impose filing deadlines.⁶⁸ For example, in Tennessee and Utah, the deadline to bring a claim is one year.⁶⁹ Some states

⁶¹ *Compensation Laws*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited June 25, 2014); *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 29.

⁶² N.H. Rev. Stat. Ann. § 541-B: 14; *see also Compensation Laws*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited June 25, 2014); *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 30.

⁶³ Tex. Civ. Pract. & Rem. Code § 103.001; Tex. H.B. § 1736; *see also Compensation Laws*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited June 25, 2014); *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 30.

⁶⁴ K. Bloodsworth, Personal Communication, Aug. 15, 2013.

⁶⁵ *Ibid.*

⁶⁶ U.S. Senate, The Innocence Protection Act of 2002, 107th Cong., 2d sess., S.486, March 7, 2001.

⁶⁷ *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 15.

⁶⁸ *Compensation Laws*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited June 25, 2014).

⁶⁹ Tenn. Code Ann. § 9-8-108; Utah Code §§ 78B-9-405, 78B-9-405; *see also Compensation Laws*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited June 25, 2014).

impose limitations that bar individuals from bringing claims for compensation: Alabama and Texas' compensation statutes disqualify anyone with a post-exoneration felony conviction;⁷⁰ Missouri and Montana grant awards only to persons exonerated by DNA;⁷¹ and several states render any exoneree who entered a guilty plea as ineligible.⁷² In some states, the exoneree must not have "contributed" to his or her arrest or conviction to be eligible for an award.⁷³ These restrictions do not reflect the factors contributing to wrongful convictions in the first place; for example, disqualification for pleading guilty fails to take into account cases where false confessions led to wrongful convictions; in one study, false confessions constituted nearly 8% of the causes behind wrongful convictions.⁷⁴

35. Even when exonerees overcome these hurdles and successfully claim compensation, it can take years to receive the money. The average amount of time to obtain state compensation is three years.⁷⁵ But securing employment, housing, health care, and other basic needs poses an immediate challenge to these exonerees upon their release, and the support (if any) they receive upon release can be woefully inadequate. Resurrection after Exoneration reports that exonerees from Louisiana's prison system receive their possessions and \$10 from the Department of Public Safety and Corrections upon release.⁷⁶ Glenn Ford, an African American, was wrongfully imprisoned for more than thirty years before being exonerated. He was given only a debit card worth \$20 upon his release in early 2014. He and his lawyers will file for compensation to which he is legally entitled, but such **compensation is not guaranteed**.⁷⁷ For example, Albert Burrell was released from Louisiana's death row after serving 14 years for a crime he did not commit. Upon his release, the state gave Burrell \$10 and a denim jacket that was several sizes too large for him. Burrell has filed for compensation under Louisiana's compensation law, but was denied compensation on July 17, 2014, 13.5 years after his release.⁷⁸ The court justified its decision by stating Burrell was

⁷⁰ Tex. Civ. Pract. & Rem. Code § 103.154; Ala. Code § 29-2-159.

⁷¹ Mo. Rev. Stat. § 650.058; Mont. Code Ann. § 53-1-214. Montana's compensates a DNA exoneree through educational aid only. Mont. Code Ann. § 53-1-214.

⁷² *Compensation Laws*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited June 25, 2014); *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 27 and 29.

⁷³ *Compensation Laws*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited June 25, 2014); *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 27-31.

⁷⁴ *Causes of Wrongful Convictions*, DEATH PENALTY INFORMATION CENTER, <http://deathpenaltyinfo.org/causes-wrongful-convictions> (last visited June 25, 2014).

⁷⁵ *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 17.

⁷⁶ *Facts on Exoneration*, RESURRECTION AFTER EXONERATION, <http://www.r-a-e.org/about/facts-exoneration> (last visited June 25, 2014).

⁷⁷ Andrew Cohen, *Glenn Ford's First Days of Freedom after 30 Years on Death Row*, The Atlantic, March 14, 2014, <http://www.theatlantic.com/national/archive/2014/03/glenn-fords-first-days-of-freedom-after-30-years-on-death-row/284396/>.

⁷⁸ *Albert Ronnie Burrell v. Louisiana State, Reasons for Judgment*, Case No. 00000042613, Div. B 3d Jud. Dist. Ct., Parish of Union, State of Louisiana, July 17, 2014. C. Lloyd, Personal Communication, Aug. 15, 2013.

unable to show, by clear and convincing evidence, that he was factually innocent of the crime.⁷⁹

36. **Sixteen U.S. states that retain the death penalty have no compensation laws whatsoever for wrongful convictions.** Arizona does not have a compensation statute, yet eight individuals have been exonerated from its death row.⁸⁰ Civil litigation is another possibility to obtain compensation where compensation laws do not exist, but this option is unavailable when prosecutors and judges are at fault because they are typically immune from these lawsuits.⁸¹ The immunity bar is extremely high, particularly after 2011. John Thompson, an African American man, received \$10 and a bus ticket upon exoneration after 18 years in prison, 14 of which were on Louisiana's death row. He successfully sued the local New Orleans Parish District Attorney's office for \$14 million, only to have the U.S. Supreme Court overturn the decision by holding the prosecutor's office could not be held liable in this case.⁸² This decision effectively expanded prosecutors' immunities against lawsuits for their misconduct even more broadly, and it also revoked John Thompson's compensation for his years spent on death row as an innocent man. Even if an exoneree prevails in his or her civil claim, it can take years and costly litigation fees.⁸³
37. Article 6 provides that States shall assure to everyone within their jurisdiction the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of racial discrimination. Because racial discrimination within the U.S. justice system is one of the causes of innocent individuals being convicted of crimes, including capital crimes, and later being exonerated, **the lack of adequate compensation for exonerees disproportionately affects minorities and violates Article 6 of ICERD.**

Recommendations

- The United States should adopt and promote procedures such as those recommended by the American Bar Association and The Innocence Project designed to prevent or mitigate the negative effects of eyewitness misidentifications, including those resulting from cross-racial misidentifications.
- The following recommendations are compiled from The Innocence Project's report *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*:

⁷⁹ Ibid.

⁸⁰ *Compensation Laws*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited June 25, 2014); *Exonerations by State*, DEATH PENALTY INFORMATION CENTER, <http://deathpenaltyinfo.org/innocence-and-death-penalty#inn-st> (last visited June 25, 2014).

⁸¹ *Remedies*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=95&Itemid=88 (last visited June 25, 2014); *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 12.

⁸² *Connick v. Thompson*, 131 S. Ct. 1350 (2011).

⁸³ *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 13.

- Require U.S. states to adopt compensation legislation that provides at least \$100,000 per year on death row. This compensation should be untaxed.
- Require U.S. states to adopt legislation that provides for appropriate legal assistance or lawyers' fees associated with filing for compensation.
- Require U.S. states to adopt legislation that provides exonerees with adequate and appropriate services, including housing, transportation, education, physical and mental care, employment assistance, and other services to assist with reintegration.
- The United States should require U.S. states to issue an official apology for the wrongful conviction.
- Where official immunity presents barriers to accountability, the United States should ensure there are adequate and alternate mechanisms to hold prosecutors, judges, and law enforcement accountable when their conduct leads to wrongful convictions.

Questions

- What measures is the United States taking to prevent wrongful convictions stemming from cross-racial misidentifications and racial discrimination?
- What measures is the United States taking to provide accountability for prosecutors, judges, and law enforcement who engage in misconduct that leads to wrongful convictions, especially where there is evidence of racial discrimination?
- What measures is the United States taking to ensure adequate compensation, services, and support to death row exonerees of state-based wrongful convictions?

III. Capital Punishment and Consular Notification

38. The United States is a party to the Vienna Convention on Consular Relations (VCCR), Article 36(1), which requires parties arresting or detaining foreign nationals to inform such persons without delay of their right to have their consulate notified and, upon the foreign national's request, to so notify the consulate of the arrest or detention without delay.⁸⁴ The consulate has the right to communicate with and have access to the arrested or detained national and to arrange for his legal representation.⁸⁵
39. It is widely accepted that **foreign nationals often face significant disadvantages when interacting with the U.S. criminal justice system—disadvantages that commonly stem from language barriers, cultural barriers, and, at times, geographical barriers to**

⁸⁴ Vienna Convention on Consular Relations, signed Apr. 24, 1963, effective Mar. 19, 1967, 21 U.S.T. 77, 596 U.N.T.S. 262.

⁸⁵ *Ibid.*; see also *Honored in the Breach: The United States' Failure to Observe Its Legal Obligations Under the Vienna Convention on Consular Relations (VCCR) in Capital Cases*, REPRIEVE 2 (2012), available at http://www.reprive.org.uk/static/downloads/2013_02_26_PUB_VCCR_Report_Web.pdf.

evidence located in their native country that may assist their defense.⁸⁶ Consular officials help these individuals by visiting them, communicating with family members, arranging for legal representation, and assisting with investigations and evidence collection within the individual's native country. In no case is such assistance more invaluable than when a foreign national faces the death penalty.

40. The United States has repeatedly failed, and continues to fail, to comply with its VCCR consular notification responsibilities regarding foreign nationals in capital cases.⁸⁷

Paraguay, Germany, and Mexico have each brought consular notification cases against the United States in the International Court of Justice (ICJ).⁸⁸ **In the case involving 51 Mexican foreign nationals (*Avena*), the ICJ ordered the United States to provide review and reconsideration of the convictions and sentences of the foreign nationals** covered by such judgments.⁸⁹

41. Following the *Avena* decision, the United States withdrew from the optional protocol establishing ICJ jurisdiction over VCCR disputes involving the United States, thereby foreclosing the ability of other countries to pressure the United States to comply with its obligations by bringing cases in the ICJ.⁹⁰

42. The United States' failure to meet its obligations to provide timely consular notification when arresting or detaining foreign nationals, as well as its failure to review and reconsider those cases in which timely consular notification was not given, constitutes a form of national origin discrimination in violation of Articles 5(a) and 6 of ICERD.

⁸⁶ Vienna Convention on Consular Relations, signed Apr. 24, 1963, effective Mar. 19, 1967, 21 U.S.T. 77, 596 U.N.T.S. 262 at 2, 2 n.4.

⁸⁷ See, e.g., MARK WARREN, DEATH PENALTY INFO. CENTER, FOREIGN NATIONALS AND THE DEATH PENALTY IN THE U.S., available at <http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us> (last visited June 25, 2014); *Honored in the Breach: The United States' Failure to Observe Its Legal Obligations Under the Vienna Convention on Consular Relations (VCCR) in Capital Cases*, REPRIEVE 2 (2012), available at http://www.reprive.org.uk/static/downloads/2013_02_26_PUB_VCCR_Report_Web.pdf, *passim*; Bruce Swartz, Deputy Assistant Att'y Gen., Crim. Div., Address Before the S. Judiciary Comm. (July 27, 2011), available at <http://www.justice.gov/criminal/pr/testimony/2011/crm-testimony-110727.html> ("Despite the fact that these [consular notification] obligations already exist, instances in which notification is not provided continue to occur").

⁸⁸ See *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States)*, 1998 I.C.J. 5 (Nov. 10) (alleging the United States failed to fulfill its VCCR obligations in the case of Paraguayan national, Angel Breard, who had received a death sentence in the State of Virginia, but dismissed at Paraguay's request following execution of Breard); *LaGrand Case (Germany v. United States)*, 1999 I.C.J. 1 (Mar. 3) (alleging the United States failed to fulfill its VCCR obligations with respect to German foreign nationals Karl and Walter LaGrand, who were subsequently executed before the ICJ's judgment was issued); *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 128 (Mar. 31).

⁸⁹ *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 128 (Mar. 31). In *Avena*, the Mexican government alleged that the United States had failed to comply with Article 36 of the VCCR in 52 separate cases involving Mexican nationals who had been convicted and sentenced to death. The ICJ held that the United States had violated the Vienna Convention in 51 of the 52 cases.

⁹⁰ Letter from Condoleezza Rice, U.S. Sec'y of State, to Kofi Annan, Sec'y-Gen. of the U.N. (Mar. 7, 2005).

43. In response to *Avena*, President George W. Bush issued a Memorandum directing state courts to give effect to the ICJ decision.⁹¹ **The State of Texas refused to review the case of death row inmate Jose Medellin, of Latino ethnicity**, and Medellin petitioned the United States Supreme Court for relief.⁹² The Court held that, without implementing legislation, the *Avena* decision was not automatically binding domestic law, and that **the President did not have the authority to order states to bypass their procedural rules and comply with the ruling** of the ICJ.⁹³ Thereafter, on August 5, 2008, Texas executed Medellin without first reviewing his case as directed under *Avena*.⁹⁴
44. Subsequently, **Texas executed three more Mexican foreign nationals** represented in the *Avena* case. On July 7, 2011, Texas executed Humberto Leal Garcia, of Latino ethnicity.⁹⁵ On January 22, 2014, the state executed Edgar Tamayo, also Latino, despite requests for a new hearing made by Secretary of State John Kerry, former Governor of Texas Mark White, and Mexican Foreign Minister José Antonio Meade Kuribreña.⁹⁶ Then on April 9, 2014, Texas executed Ramiro Hernandez Llanas.⁹⁷
45. **Currently, 138 foreign nationals from 36 different countries, 59 of whom are from Mexico alone, sit on the death rows** of 15 states and the U.S. federal government,⁹⁸ with California, Florida, and Texas collectively holding 74% of the reported total.⁹⁹ To date, **only state courts in Oklahoma and Nevada have fully applied the ICJ’s requirement of ‘review and reconsideration.’**¹⁰⁰ Most of the remaining jurisdictions strictly apply procedural rules that prevent death-sentenced foreigners from receiving meaningful and

⁹¹ Memorandum from President George W. Bush to the Att’y Gen., Compliance with the Decision of the I.C.J. in *Avena* (Feb. 28, 2005), available at <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>.

⁹² See *Medellin v. Texas*, 552 U.S. 491, 498 (2008).

⁹³ See *id.* at 506, 530–32.

⁹⁴ See *The Issue of Foreign Nationals in the Courts*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/medellin-v-texas> (last visited June 25, 2014).

⁹⁵ See *ibid.*

⁹⁶ Jon Herskovitz, *Texas Executes Mexican National Despite Diplomatic Protests*, REUTERS (Jan. 27, 2014) available at <http://www.reuters.com/article/2014/01/27/us-usa-execution-texas-mexico-idUSBREA0Q12T20140127>; *New Voices: Former Texas Governor Calls for Hearing for Edgar Tamayo*, DEATH PENALTY INFO. CENTER, available at <http://www.deathpenaltyinfo.org/new-voices-former-texas-governor-calls-hearing-edgar-tamayo> (last visited June 25, 2014).

⁹⁷ *Texas Executes Ramiro Hernandez Llanas, Over Protests*, THE MEXICAN GULF REPORTER (April 9, 2014) available at <http://www.mexicogulfreporter.com/2014/04/texas-executes-ramiro-hernandez-llanas.html>.

⁹⁸ See *Reported Foreign Nationals Under Sentence of Death in the U.S.*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us#Reported-DROW> (last visited June 25, 2014).

⁹⁹ See *ibid.*

¹⁰⁰ See *Torres v. State*, 120 P.3d 1184, 1190 (Okla. Crim. App. 2005) (finding that Torres was actually prejudiced by the failure to inform him of his rights under the VCCR but that no relief was required because the Governor of Oklahoma had already granted him clemency and limited his sentence to life without the possibility of parole); *Gutierrez v. State*, No. 53506, 2012 Nev. Unpub. LEXIS 1317, at *4-6 (Nev. Sept. 19, 2012) (finding Gutierrez “arguably suffered actual prejudice due to the lack of consular assistance” and remanding the case for an evidentiary hearing to determine the matter); see also Sandra Babcock, *Nevada’s Supreme Court Upholds ICJ Ruling on Consular Rights of Mexicans*, DEATH PENALTY WORLDWIDE (Sept. 25, 2012, 5:04 AM), <http://blog.law.northwestern.edu/cihr/2012/09/nevadas-supreme-court-upholds-icj-ruling-on-consular-rights-of-mexicans.html> (last visited June 25, 2014).

unfettered review of VCCR violations.¹⁰¹ Moreover, Texas in the *Medellin* case affirmatively disclaimed any responsibility to ensure that the United States' international legal obligations are fulfilled with respect to the foreign nationals on its death row.¹⁰²

46. Since the U.S. Supreme Court has already held that the *Avena* decision is not binding on states without federal legislation,¹⁰³ unless the courts of each state that has the death penalty independently recognize the rights of foreign nationals to meaningful judicial review and remedies for VCCR consular notification violations¹⁰⁴ (an unlikely possibility in light of Texas' actions in *Medellin*), **federal legislation remains the only potential mechanism to ensure that the United States complies with its international obligations by providing access to effective remedies for Article 36 violations.**¹⁰⁵
47. In 2011, Senator Patrick Leahy introduced Senate Bill 1194, the Consular Notification Compliance Act of 2011, in the U.S. Senate. The Act would have required all U.S. jurisdictions to comply with Article 36 of the VCCR and would have provided for federal court review of any claim of an Article 36 violation by anyone sentenced to death in a state or federal court.¹⁰⁶ Despite support from President Obama's administration,¹⁰⁷ the bill died in committee. Since then, no similar federal legislation has been introduced in either house of the U.S. Congress. The U.S. Department of State did include proposed legislative language in the budget it sent to Congress for consideration for fiscal year 2014. This legislation would have implemented *Avena*'s review and reconsideration mandates and would have provided redress for violations of VCCR consular notification rights of individuals charged with capital offenses.¹⁰⁸ On July 25, 2013 the Senate Appropriations Committee included the implementing language in the fiscal year 2014 Senate Foreign Operations bill 1372 (for the second year in a row). The proposed legislation was remedial rather than preventative, as it focused on remedies for existing violations rather than improving future compliance with Article 36. The legislation died without passage, and the bill that did pass did not contain the consular notification language.¹⁰⁹

¹⁰¹ In 2006, the U.S. Supreme Court upheld the application of state procedural barriers to foreclose merits review of Article 36 claims that were not raised in a sufficiently timely manner. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 360 (2006) (holding that U.S. states may subject Article 36 claims "to the same procedural default rules that apply generally to other federal-law claims). See also Mark Warren, *Understanding the Sanchez-Llamas Decision*, Foreign Nationals, Consular Rights, and the Death Penalty, <http://users.xplornet.com/~mwarren/sanchezllamas.html> (last visited June 25, 2014).

¹⁰² See *Medellin v. Texas*, 552 U.S. 491, 498 (2008).

¹⁰³ See *ibid.*

¹⁰⁴ See *id.* at 536–37 (Stevens, J., concurring) (indicating that the states could voluntarily adhere to the mandates set forth in *Avena*).

¹⁰⁵ See *id.* at 498.

¹⁰⁶ S. 1194, 112th Cong. §§ 2, 4 (2011).

¹⁰⁷ See, e.g., Bruce Swartz, Deputy Assistant Att'y Gen., Crim. Div., Address Before the S. Judiciary Comm. (July 27, 2011), available at <http://www.justice.gov/criminal/pr/testimony/2011/crm-testimony-110727.html>; Harold Hongju Koh, Legal Advisor U.S. Dept. of State, Remarks at Georgetown University Law Center (Oct. 17, 2012).

¹⁰⁸ U.S. DEPT. OF STATE, CONGRESSIONAL BUDGET JUSTIFICATION, VOLUME 1: DEPT. OF STATE OPERATIONS (2013).

¹⁰⁹ S. 1372, 113th Cong. § 7083 (2013); see also H.R. 3547, 113th Cong. (2014). The United States Judicial Conference's Committee on Rules of Practice and Procedure has proposed amendments to the Federal Rules of Criminal Procedure that would require federal courts to inform foreign nationals of their consular rights at the

48. In the United States’ Fourth Periodic Report, the United States asserts that it is actively exploring “options for giving domestic legal effect to the *Avena* judgment, including pursuing legislation to implement that judgment. The United States asserts that it “fully supports” the adoption of the Consular Notification Compliance Act of 2011, S. 1191, and is committed to its timely enactment.¹¹⁰ **The United States emphasizes its outreach efforts to inform street-level officials of the country’s VCCR consular notification obligations via a Consular Notification and Access Manual, training seminars, and other training materials.¹¹¹ While advancing awareness of consular notification and access is important, such efforts have not resulted, and are not likely to result, in 100% compliance with the United States’ obligations.** In fact, as discussed further in paragraph 51 below, available statistics show that current compliance with VCCR consular notification obligations is woefully inadequate. Moreover, considering that compliance can mean the difference between life and death for foreign nationals facing the death penalty,¹¹² anything short of 100% compliance is unacceptable. Reliance on voluntary compliance schemes is inadequate.
49. Going forward, there is a need—independent of the remedial aspects of Article 36 violations under the VCCR—to ensure future compliance with Article 36, which would also remediate these ongoing violations of ICERD. Three U.S. states have laws that address consular notification rights. California amended its penal code to require notification of consular rights for detained foreigners within three hours of arrest.¹¹³ Oregon mandates police who detain a foreigner for mental illness must inform the foreigner of the right to communicate with his or her consulate, but it has no such guarantee subsequent to criminal arrests, aside from a law enforcement duty to understand the VCCR requirements and the situations in which they would apply.¹¹⁴ In 2000, Texas issued a magistrate’s guide to Article 36 requirements, recommending that when “foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified” and that courts offer at arraignment “without delay, to notify the foreign national’s consular officials of the arrest/detention.”¹¹⁵
- 50. These state measures do not always guarantee foreigners effective access to their consulate and therefore they do not comply with Article 36.** Texas has insisted that

detainee’s first appearance in court. COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, AND CRIMINAL PROCEDURE, AND THE FEDERAL RULES OF EVIDENCE 202-12 (2012). Amendments to this effect have been pending since 2010. If approved, this rule change would apply to foreign nationals appearing in federal court, but it would not apply in state courts.

¹¹⁰ Fourth U.S. Report, ¶ 158.

¹¹¹ *Id.* ¶ 159.

¹¹² See *Reported Foreign Nationals Under Sentence of Death in the U.S.*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us#Reported-DROW> (last visited June 25, 2014). (“[T]he available data indicates that timely consular assistance significantly reduces the likelihood that death sentences will be sought or imposed on foreign nationals facing capital charges.”).

¹¹³ The Penal Code of California, Arts. 834(c), 851.5.

¹¹⁴ OR.REV.STAT. ch. 426.228 (9)(a), ch. 181.642(2) (2007).

¹¹⁵ Office of the Attorney General of Texas, *Magistrate’s Guide to Consular Notification under the Vienna Convention* (2000), pp. 7-9.

procedurally defaulted VCCR claims (where defendants are assumed to have waived their right to object to VCCR violations because of a failure to raise that issue at the appropriate time, at the appropriate stage of proceedings, or using the appropriate procedure) cannot be reviewed, thus foreclosing relief for most death-sentenced foreigners in that state. Also, Florida courts have generally not recognized Article 36 violations as cognizable claims. Florida amended its law in 2001 so that the government's failure to provide consular notification "shall not be a defense in any criminal proceeding against any foreign national and shall not be cause for the foreign national's discharge from custody."¹¹⁶

51. The statistics for compliance with VCCR consular notification and access requirements reflect the ineffectiveness of the actions the United States has taken thus far to meet its obligations. According to the Death Penalty Information Center (DPIC), as of April, 11 2014, 138 foreign nationals from 36 different countries remained under sentence of death in the United States.¹¹⁷ **In only three of those cases does the DPIC have evidence that consular rights were provided by authorities without delay, while in at least 76 cases, a consular rights violation was raised in court proceedings or otherwise reported. In fact, the DPIC reports only seven cases of complete compliance with Article 36 requirements out of more than 160 reported death sentences** (including those executed, reversed on appeal, or exonerated and released). Statistics cited in a report by Reprieve are consistent with the DPIC's findings.¹¹⁸ Of the 102 foreign nationals on death row in various U.S. states about whom Reprieve was able to collect undisputed data, it found VCCR consular notification compliance in just five cases (or **non-compliance in 95.1% of cases**). Moreover, Reprieve reported that of the six foreign nationals on federal death row, it had data in four cases, and in only one of those four had the federal government complied with VCCR consular notification obligations, despite the existence of federal regulations requiring compliance.¹¹⁹ Reprieve reports only seven death row prisoners received VCCR notice, and in one case a federal judge ruled such notice to be legally inadequate. No individual state was found to have adequately complied with VCCR consular notification requirements.
52. **Since the ICJ's 2004 ruling in *Avena*, the United States has executed 10 foreign nationals, 9 of whom were Latino,¹²⁰ only one of whom was informed by authorities upon arrest of his consular rights.¹²¹** Without federal legislation requiring U.S. states

¹¹⁶ FLA.STAT. ch. 901.26 (2008), Arrest and detention of foreign nationals.

¹¹⁷ See *Reported Foreign Nationals Under Sentence of Death in the U.S.*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us#Reported-DROW> (last visited June 25, 2014).

¹¹⁸ See *Honored in the Breach: The United States' Failure to Observe Its Legal Obligations Under the Vienna Convention on Consular Relations (VCCR) in Capital Cases*, REPRIEVE 2 (2012), available at http://www.reprieve.org.uk/static/downloads/2013_02_26_PUB_VCCR_Report_Web.pdf at 1.

¹¹⁹ See 28 C.F.R. § 50.5 (2012).

¹²⁰ Citations omitted, citing various pages from DEATH PENALTY INFO. CENTER.

¹²¹ *Reported Foreign Nationals Under Sentence of Death in the U.S.*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us#Reported-DROW> (last visited June 25, 2014). Of the 10 foreign nationals executed since the *Avena* decision, five were from Mexico, three were from Cuba, one was from Honduras and one was from Jamaica. In seven of the 10 cases, Texas was the executing state. Two of the other cases were in Florida, and one was in Virginia. Only Angel Maturino Resendiz, a Mexican foreign national

holding foreign nationals on death row to comply with the ICJ's review and reconsideration mandate, additional individuals will die without knowing whether consular notification could have saved their lives or set them free. Further, without federal legislation implementing the VCCR consular notification and access rights of Article 36, it is likely that additional individuals will be placed on death row without having the opportunity to exercise their VCCR consular notification rights, which violates Articles 5(a) and 6 of ICERD.

Recommendations

- Foreign nationals on death row must receive the review and reconsideration of their convictions and sentences mandated by the ICJ's decision in *Avena*. Other foreign nationals should be notified of their consular notification rights in a timely manner as required under Article 36 of the VCCR and consistent with the United States' obligations under ICERD. The Committee should consider the following recommendations, adapted from the American Bar Association:¹²²
 - The Obama Administration and U.S. Congress should undertake all necessary measures to fully comply with the ICJ *Avena* decision, including by passing implementing legislation. The Obama Administration should also ensure that all individuals on federal death row receive the review and reconsideration mandated under *Avena* in cases where VCCR consular notification and access was not previously accorded under Article 36.
 - The Obama Administration and U.S. Congress should acknowledge the authority of the ICJ to adjudicate disputes over VCCR interpretation and related legal questions. They should take steps to confer binding force on ICJ judgments to which the United States is party.
 - The Obama Administration, U.S. Congress, and U.S. states and territories should take measures to ensure compliance with Article 36 requirements, *i.e.*, to provide timely consular information, notification, and access to arrested or detained foreign nationals. Such measures include adopting legislation to transpose Article 36 into law that: ensures a detained or arrested foreign national is advised without delay of his or her right to communicate with his consulate; that the U.S. or U.S. state officer then informs the appropriate official in that agency if the foreign national desires consular communication; and adopt legislation that allows a defendant's claim of an Article 36 violation to override procedural default rules that would exclude such claims.

executed by the State of Texas, reportedly received information regarding consular rights without delay after arrest as required under the VCCR.

¹²² The American Bar Association's Sections of Litigation, Criminal Justice, Individual Rights and Responsibilities, and International Law, Death Penalty Representation Project, and Commission on Immigration have adopted these recommendations in a Report to the House of Delegates, available at http://www.americanbar.org/content/dam/aba/migrated/Vienna_Convention_on_Consular_Relations_Article_36__2.authcheckdam.pdf.

- The Obama Administration, U.S. Congress, and U.S. states and territories should adopt policies and protocols to promote compliance with Article 36, including: making advisement of the rights under Article 36 a part of booking protocols for foreign nationals; ensuring that judicial officers notify foreign national defendants at a first appearance about their rights under Article 36; undertaking measures to disseminate policies and protocols to law enforcement on federal, state, and local levels; training for law enforcement, prosecutors, defense attorneys, and judges on their responsibilities under Article 36; and ensuring that officials conduct mandatory notification for foreign nationals of countries on the mandatory notification list.
- Congress and the Obama Administration should impress upon state authorities the critical importance of the reciprocal rights United States citizens enjoy while in foreign countries that are signatories to the VCCR.¹²³ For example, the VCCR consular notification and access rights of U.S. citizens in foreign countries may be jeopardized if other signatories respond to the United States' noncompliance by declining to comply themselves.
- Congress and the Obama Administration should take all steps necessary to prevent national origin discrimination within the United States justice system.

Questions

- What guarantees can the United States provide to ensure that it will pass legislation to implement the *Avena* decision?
- What steps is the United States taking to ensure that the federal government and U.S. states adopt policies and protocols to promote compliance with Article 36 of the VCCR and to prevent national origin discrimination within the United States justice system generally?
- How has the United States responded to the American Bar Association's recommendations on implementation of the *Avena* decision?

IV. Lethal Injection Policies and Cruel, Inhuman or Degrading Treatment or Punishment

53. The United States, as a signatory to ICERD, has committed to “prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of ... the right to security of person and protection by the State against violence or bodily

¹²³ The American Bar Association's Sections of Litigation, Criminal Justice, Individual Rights and Responsibilities, and International Law, Death Penalty Representation Project, and Commission on Immigration have adopted these recommendations in a Report to the House of Delegates, available at http://www.americanbar.org/content/dam/aba/migrated/Vienna_Convention_on_Consular_Relations_Article_36__2.authcheckdam.pdf.

harm, whether inflicted by government officials or by any individual group or institution.”¹²⁴ The Eight Amendment to the United States Constitution further prohibits “cruel and unusual punishments.”¹²⁵

54. The racial discrimination that results in a disproportionate number of minorities being subjected to the death penalty in the United States also means that **a disproportionate number of minorities in the United States are subject to death by lethal injection.** Of the 247 inmates executed since 2009, 116 were people of color and/or people of a non-U.S. national origin.
55. All of the 32 U.S. states that still retain the death penalty have adopted lethal injection as the exclusive or primary means of implementing capital punishment.¹²⁶
56. Lethal injection has traditionally been administered by injecting a prisoner with three consecutive drugs: (1) sodium thiopental, a “barbiturate sedative that induces a deep, coma-like unconsciousness;” (2) pancuronium bromide, “a paralytic agent that inhibits muscular-skeletal movements and . . . stops respiration;” and (3) potassium chloride, which “interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest.”¹²⁷ Proper administration of the first drug (sodium thiopental) should prevent the prisoner from experiencing pain from the paralysis and cardiac arrest caused by the second and third drugs.¹²⁸
57. **The three-drug injection procedure is intended to be a more humane alternative to older execution methods such as the electric chair or gas chamber. A number of recent executions, however, have cast the “humanity” of the procedure into doubt.** In 2006, Ohio’s execution of Joseph L. Clark, an African American, lasted nearly 90 minutes because prison officials had difficulties locating a suitable vein for the lethal injection.¹²⁹ In 2007, Ohio’s execution of Christopher Newton lasted nearly two hours, long enough that Newton was permitted to take a bathroom break.¹³⁰ And in 2009, the execution of Romell Broom, an African American, failed altogether, as Ohio technicians unsuccessfully searched for a suitable vein to inject for over two hours before finally abandoning the execution and sending Broom back to death row (where he still sits).¹³¹

¹²⁴ Article 5(b).

¹²⁵ U.S. CONST. amend. VIII.

¹²⁶ *Methods of Execution*, DEATH PENALTY INFORMATION CENTER, <http://deathpenaltyinfo.org/methods-execution> (last visited June 25, 2014).

¹²⁷ *Baze v. Rees*, 553 U.S. 35, 44 (2008).

¹²⁸ *Ibid.*

¹²⁹ Jim Provance & Christina Hall, *Clark Execution Raises Lethal-Injection Issues*, TOLEDO BLADE (May 4, 2006) available at <http://www.toledoblade.com/local/2006/05/04/Clark-execution-raises-lethal-injection-issues.html> (last visited June 25, 2014).

¹³⁰ Julie Carr Smyth, *Newton Execution Took Two Hours; Vein Couldn’t Be Located*, THE PLAIN-DEALER (May 25, 2007) available at http://blog.cleveland.com/pdextra/2008/11/newton_execution_took_two_hour.html (last visited June 25, 2014).

¹³¹ Bob Driehaus, *Ohio Plans to Try Again as Execution Goes Wrong*, N.Y. TIMES (Sept. 16, 2009) available at www.nytimes.com/2009/09/17/us/17ohio.html (last visited June 25, 2014).

58. Ohio is not the only state where prolonged and problematic executions have arisen. Similar problems with lethal injection procedures occur in other U.S. states. For example, Angel Diaz's 2006 execution by Florida officials lasted 34 minutes and required two rounds of injections to complete. It resulted in chemical burns on Diaz's arms where administrators had pushed needles through his veins into soft tissue.¹³²
59. Despite the widely reported details of such horrific executions, the U.S. Supreme Court held in 2008 that the three-drug method of lethal injection does not constitute "cruel and unusual punishment" in violation of the Eighth Amendment of the U.S. Constitution.¹³³ In *Baze v. Rees*, two inmates on Kentucky's death row challenged the use of the three-drug injection procedure, claiming that there is a "significant risk" that the procedure would not be properly followed, which would result in severe pain in violation of the Eighth Amendment.¹³⁴ The Supreme Court ruled otherwise, holding that "[s]imply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual [punishment]" under the Eighth Amendment.¹³⁵
60. Although the *Baze* decision did not require a change to the traditional three-drug protocol, **the U.S. lethal injection process has nonetheless faced upheaval over the last several years.** Challenges to other U.S. states' lethal injection procedures have since been brought in other state courts and, in some cases, have halted executions pending litigation.¹³⁶ Moreover, recent upheavals with regard to drug sourcing have cast into serious doubt whether states are able to ensure that their lethal injection policies do not constitute cruel and unusual punishment.
61. New policies adopted by foreign governments and regional authorities have hindered U.S. states' ability to procure the drugs necessary to administer lethal injections. In 2010, the UK government issued export restrictions on sodium thiopental after learning that the drug was used for executions in the United States.¹³⁷ In early 2011, the Italian government requested that American pharmaceutical company Hospira Inc., the world's largest manufacturer of sodium thiopental, guarantee that any drugs it produced in Italy would not be used for executions.¹³⁸ Hospira responded it was unable to guarantee compliance and halted production of sodium thiopental altogether.¹³⁹

¹³² Victoria Gill, *The Search For a Humane Way to Kill*, BBC NEWS MAGAZINE (Aug. 7, 2012) available at www.bbc.co.uk/news/magazine-19060961 (last visited June 25, 2014).

¹³³ *Baze v. Rees*, 553 U.S. 35 (2008).

¹³⁴ *Id.* at 49.

¹³⁵ *Id.* at 50.

¹³⁶ See *State-by-State Lethal Injection*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited June 25, 2014).

¹³⁷ Dominic Casciana, *US Lethal Injection Drug Faces UK Export Restrictions*, BBC NEWS, Nov. 29, 2010, <http://www.bbc.co.uk/news/uk-11865881?print=true> (last visited June 25, 2014).

¹³⁸ Makkiko Kitamura & Adi Narayan, *Europe Pushes to Keep Lethal Injection Drugs From U.S. Prisons*, BLOOMBERG BUSINESSWEEK, Feb. 7, 2013, <http://www.businessweek.com/articles/2013-02-07/europe-pushes-to-keep-lethal-injection-drugs-from-u-dot-s-dot-prisons> (last visited June 25, 2014).

¹³⁹ *Ibid.*

62. In December 2011, the European Commission (EC) of the EU tightened restrictions on exporting products that can be used for capital punishment.¹⁴⁰ The EC’s so-called “Torture Goods Regulation” imposes export controls on eight barbiturates, including sodium thiopental and pentobarbital.¹⁴¹ “The decision [to restrict such products] . . . contributes to the wider EU efforts to abolish the death penalty worldwide,” said EC Vice-President Catherine Ashton.¹⁴² This policy reiterates the moral opposition of European governments to capital punishment and their resistance to further the practice in any way in the United States.
63. **In addition to the policies adopted by foreign governments and the EU, the international business community has also begun taking steps to curtail its role in lethal injections.** In February 2011, on the heels of Hospira’s announcement that it would stop producing sodium thiopental, multinational pharmaceutical company Novartis and its subsidiary Sandoz announced they also had instructed distributors to stop selling sodium thiopental to other customers who had been importing it into the United States.¹⁴³
64. **In response to the scarcity of traditionally used lethal injection drugs, two approaches have emerged in retentionist states’ search for new execution methods: some have adopted new, experimental execution protocols using untested, manufactured drugs; others have turned to compounded drugs.** Under both approaches, **the use of such unchartered means of execution has demonstrably increased the risks of executions constituting cruel and unusual punishment** to alarming levels.¹⁴⁴ The following is a synopsis of recent executions using these new methods:
- a. On October 15, 2013, the state of Florida executed William Happ, the first inmate to be executed using an untested three-drug method utilizing midazolam hydrochloride in place of pentobarbital, which was no longer commercially available for purchase by prisons. It has been reported that the execution took twice as long as under the previous protocol and that the prisoner experienced severe pain.¹⁴⁵ The state executed Darius Kimbrough and Askari Muhammad, both African Americans, on November 11 and January 7, 2013, respectively, in the same manner.¹⁴⁶

¹⁴⁰ Ed Pilkington, *Europe Moves to Block Trade in Medical Drugs Used in US Executions*, THE GUARDIAN (Dec. 20, 2011) available at <http://www.guardian.co.uk/world/2011/dec/20/death-penalty-drugs-european-commission> (last visited June 25, 2014).

¹⁴¹ Makkiko Kitamura & Adi Narayan, *Europe Pushes to Keep Lethal Injection Drugs from U.S. Prisons*, BLOOMBERG BUSINESSWEEK (Feb. 7, 2013) available at <http://www.businessweek.com/articles/2013-02-07/europe-pushes-to-keep-lethal-injection-drugs-from-u-dot-s-dot-prisons> (last visited June 25, 2014).

¹⁴² Ed Pilkington, *Europe Moves to Block Trade in Medical Drugs Used in US Executions*, THE GUARDIAN (Dec. 20, 2011) available at <http://www.guardian.co.uk/world/2011/dec/20/death-penalty-drugs-european-commission> (last visited June 25, 2014).

¹⁴³ *Ibid.*

¹⁴⁴ Manny Fernandez, *Executions Stall as States Seek Different Drugs*, N.Y. TIMES (Nov. 8, 2013) available at <http://www.nytimes.com/2013/11/09/us/executions-stall-as-states-seek-different-drugs.html> [hereinafter Fernandez].

¹⁴⁵ *Florida Murderer Who Raped and Killed Woman is Left Writhing in Agony and Takes Twice as Long to Die as He is Executed Using New Untried Lethal Injection Drug*, DAILY MAIL (Oct. 16, 2013), <http://www.dailymail.co.uk/news/article-2462115/William-Happ-executed-Florida-executes-murderer-using-untried-lethal-injection-drug.html> (last visited June 25, 2014).

¹⁴⁶ Bill Cotterell, *Florida Executes Man with New Lethal Injection Drug*, Reuters, Oct. 15, 2013, <http://www.reuters.com/article/2013/10/16/us-usa-florida-execution-idUSBRE99F00020131016; Fla. Executes Man>

- b. The states of Ohio, Louisiana, and Arizona have adopted a new, two-drug execution protocol, composed of an untested combination of midazolam and hydromorphone. This is also the back-up protocol in Kentucky. Ohio used these drugs to execute Dennis McGuire on January 16, 2014. In a clearly botched execution lasting roughly 25 minutes, McGuire proceeded to violently gasp for breath and otherwise struggle—a condition known as ‘air hunger’.¹⁴⁷
- c. On July 23, 2014, the state of Arizona executed Joseph Rudolph Wood III using the same midazolam and hydromorphone protocol.¹⁴⁸ Wood’s attorneys had filed motions in state and federal courts over concerns about the drugs and the Arizona Department of Corrections’ refusal to provide information about the origins of the drugs it had procured for Wood’s execution.¹⁴⁹ But the Arizona Supreme Court lifted its stay of execution, and the U.S. Supreme Court lifted a stay issued by the U.S. Court of Appeals for the Ninth Circuit, allowing the execution to go forward without full disclosure of the sourcing of the drugs used in the execution.¹⁵⁰ A reporter who has witnessed many executions and who witnessed Wood’s execution stated that the drugs were administered at 1:54 pm, and that Wood was pronounced dead only at 3:49 pm, nearly two hours later.¹⁵¹ Ordinarily, the lethal injection process takes 10 or 11 minutes.¹⁵² During the execution, starting at 2:05 pm, Wood “gulped like a fish on land. The movement was like a piston: The mouth opened, the chest rose, the stomach convulsed.”¹⁵³ At times when the speaker from the execution chamber to the observation room was activated, the reporter could tell that during these convulsions, Wood made “a snoring, sucking [sound], similar to when a swimming-pool filter starts taking in air, a louder noise than [the reporter] can imitate It was death by apnea. And it went on for an hour and a half. I made a pencil stroke on a pad of paper, each time his mouth opened, and ticked off more than 640, which was not all of them, because the doctor came in at least four times and blocked my view.”¹⁵⁴

for *Illinois Woman’s 1986 Murder*, Associated Press, Oct. 15, 2013, <http://tbo.com/news/crime/happ-to-be-executed-today-for-1986-citrus-county-murder-20131015/>; Death Penalty Information Center, “Execution List 2013,” accessed Feb. 2, 2014, <http://www.deathpenaltyinfo.org/execution-list-2013>; Death Penalty Information Center, “Execution List 2014,” accessed Feb. 2, 2014, <http://www.deathpenaltyinfo.org/execution-list-2014>.

¹⁴⁷ *Ohio Execution Took 25 Minutes with New Drugs*, SKY (Jan. 16, 2014) available at <http://news.sky.com/story/1196057/ohio-execution-took-25-minutes-with-new-drugs> (last visited June 25, 2014).

¹⁴⁸ Matt Pearce et al., *Arizona Killer Takes 2 Hours to Die, Fueling Lethal-Injection Debate*, L.A. TIMES, July 23, 2014, <http://www.latimes.com/nation/nationnow/la-na-nn-arizona-execution-20140723-story.html>.

¹⁴⁹ Michael Kiefer, *Reporter Describes Arizona Execution: 2 Hours, 640 Gasps*, ARIZONA REPUBLIC, July 24, 2014, <http://www.azcentral.com/story/news/arizona/politics/2014/07/24/arizona-execution-joseph-wood-eyewitness/13083637/>.

¹⁵⁰ *Ibid.*

¹⁵¹ Michael Kiefer, *Reporter Describes Arizona Execution: 2 Hours, 640 Gasps*, ARIZONA REPUBLIC, July 24, 2014, <http://www.azcentral.com/story/news/arizona/politics/2014/07/24/arizona-execution-joseph-wood-eyewitness/13083637/>.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

- d. Late in 2013, Tennessee, North Carolina, and Missouri announced plans to use pentobarbital in a one-drug protocol, with Missouri and Tennessee stating their intent to obtain the drug through a compounding pharmacy.¹⁵⁵ Compounding pharmacies are not regulated by the FDA and compounded drugs are not FDA approved. This means that the FDA does not verify the safety or effectiveness of compounded drugs.¹⁵⁶
- e. On January 9, 2014, the state of Oklahoma carried out its first execution using compounded pentobarbital. **Concerns were raised that the execution had miscarried after the final words of the inmate, Michael Lee Wilson, an African American, were “I feel my whole body burning.”**¹⁵⁷ Thereafter, on January 24, Kenneth Eugene Hogan was executed using the same protocol.¹⁵⁸
- f. **On April 29, 2014, Oklahoma inmate Clayton Lockett, an African American man, died of a heart attack approximately 40 minutes after the state began his execution** by administering midazolam, the first drug in a three-drug protocol the state had not previously used.¹⁵⁹ Lockett was declared unconscious ten minutes after the administration of the midazolam; then, according to witnesses, **he began to nod, mumble and writhe on the gurney and appeared to some witnesses to be having a seizure.**¹⁶⁰ Thirty-three minutes later, Lockett died of a massive heart attack. Oklahoma governor Mary Fallin thereafter stayed the execution of Charles Warner, which had been scheduled to begin just two hours after Lockett’s execution, and ordered a full review of Oklahoma’s execution procedures.¹⁶¹

Lockett’s botched execution further supports arguments that states are engaging in cruel and unusual punishments in their administration of the death penalty. Of the 247 inmates executed since 2009, 116 were individuals who were people of color and/or of a national origin other than the United States. By these actions, **the United States violates ICERD Article 5(b) by failing to protect these individuals, a disproportionate number of whom are minorities, from violence or bodily harm inflicted by government officials.**

¹⁵⁵ Lucas L. Johnson II, *Tennessee Revises Protocol for Executions*, ASSOCIATED PRESS (Sept. 30, 2013) available at <http://www.memphisdailynews.com/news/2013/sep/30/tennessee-revises-protocol-for-executions>; Anne Blythe, *NC Public Safety Secretary Changes Death Row Execution Protocol*, NEWS AND OBSERVER, (Nov. 5, 2013) available at <http://www.newsobserver.com/2013/11/05/3344126/north-carolina-public-safety-secretary.html>; *Missouri Switches to New Execution Drug*, ASSOCIATED PRESS (Oct. 22, 2013) available at <http://deathpenaltynews.blogspot.com/2013/10/missouri-switches-to-new-execution-drug.html>.

¹⁵⁶ <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/PharmacyCompounding/ucm339764.htm>

¹⁵⁷ “*I Feel My Whole Body Burning: Last Words of a Man Executed by Lethal Injection in Oklahoma*,” DAILY MAIL (Jan. 10, 2014) available at <http://www.dailymail.co.uk/news/article-2536976/I-feel-body-burning-Man-executed-lethal-injection-Oklahoma-beating-convenience-store-worker-death-1995.html> (last visited June 25, 2014).

¹⁵⁸ *Profile of Kenneth Eugene Hogan’s Execution*, Clark County Prosecutor Database, available at <http://www.clarkprosecutor.org/html/death/US/hogan1364.htm> (last visited June 25, 2014).

¹⁵⁹ *State by State Lethal Injection*, DEATH PENALTY INFORMATION CENTER, available at <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited June 25, 2014).

¹⁶⁰ *Oklahoma Botches Execution of Clayton Lockett*, DEATH PENALTY INFORMATION CENTER, available at <http://www.deathpenaltyinfo.org/node/5760> (last visited June 25, 2014).

¹⁶¹ *Ibid.*

65. The measures that U.S. states have taken to procure lethal injection drugs escalate concerns about whether lethal injection constitutes cruel and unusual punishment, as states turn to unregulated and non-transparent sourcing for lethal injection drugs. **Some states are obtaining drugs from compounding pharmacies, which produce drugs that are not verified by the FDA for their “quality, safety and effectiveness.”**¹⁶² Other states are reportedly obtaining drugs from dubious sources. When supplies of sodium thiopental were scarce in 2010, Arizona executed Jeffrey Landrigan with drugs purchased from a pharmaceutical company operated in the back of a London driving school.¹⁶³ Nebraska and South Dakota, instead, have turned to questionable Indian drug manufacturers to source their lethal injection ingredients.¹⁶⁴ When drugs originate from sources outside of federal oversight and regulation, there is a **greater likelihood of tampering, improper labeling, and diminished potency, quality, and efficacy of those drugs**—factors which elevate the risk of a botched execution, such as what occurred with Oklahoma’s execution of Clayton Lockett.
66. **As U.S. states increasingly turn to questionable sources, several states have adopted secrecy laws to conceal the identity of the drug supplier.**¹⁶⁵ The Georgia State Assembly recently passed a law that classifies the identity of any person or company providing drugs for use in lethal injections as a “state secret.”¹⁶⁶ Other states, including Arkansas, Colorado, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee and Texas, have also adopted secrecy laws or protocols protecting the identity of their drug sources.¹⁶⁷ On March 26, 2014, an Oklahoma court struck down the state’s secrecy law, ruling that the law violated constitutional rights of due process.¹⁶⁸ Similar legal objections are being raised in other

¹⁶² The Special Risks of Pharmacy Compounding, U.S. Food and Drug Administration, <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm107836.htm> (last visited June 25, 2014).

¹⁶³ Andrew Hosken, *Lethal Injection Drug Sold from UK Driving School*, BBC NEWS (Jan. 6, 2011) available at http://news.bbc.co.uk/today/hi/today/newsid_9342000/9342976.stm (last visited June 25, 2014).

¹⁶⁴ *Kayem Pharma under fire over supply of lethal injection drug; Lundbeck Company of Denmark also caught up in legal tussle* (June 2, 2011) available at <http://deathpenaltynews.blogspot.co.uk/2011/06/kayem-pharma-under-fire-over-supply-of.html> (last visited June 25, 2014).

¹⁶⁵ Kathy Lohr, *Where Do Drugs For Lethal Injections Come From? Few Know*, NPR (July 30, 2013) available at <http://www.npr.org/2013/07/30/207026540/where-do-drugs-for-lethal-injections-come-from-nobody-knows> (last visited June 25, 2014); Abby Ohlheiser, *Texas Is Running out of Execution Drugs*, THE ATLANTIC WIRE (Aug. 1, 2013) available at <http://www.theatlanticwire.com/national/2013/08/texas-running-out-execution-drugs/67902/> (last visited June 25, 2014).

¹⁶⁶ Ed Pilkington, *Georgia Scrambles For Fresh Supply of Drugs to Execute Death Row Inmate*, THE GUARDIAN, (July 12, 2013) available at <http://www.guardian.co.uk/world/2013/jul/12/georgia-drugs-execute-death-row-inmate> (last visited June 25, 2014).

¹⁶⁷ Abby Ohlheiser, *Texas Is Running out of Execution Drugs*, THE ATLANTIC WIRE (Aug. 1, 2013) available at <http://www.theatlanticwire.com/national/2013/08/texas-running-out-execution-drugs/67902/> (last visited June 25, 2014). *Tennessee Plans Executions in Secret*, THE TENNESSEAN (Mar. 23, 2013), available at <http://www.tennessean.com/story/news/crime/2014/03/23/tennessee-plans-executions-secret/6765403/> (last visited June 25, 2014); *Secrecy Surrounds Execution Drugs in Most States*, THE ASSOCIATED PRESS (Apr. 5, 2014) available at <http://bigstory.ap.org/article/secrecy-surrounds-execution-drugs-most-states> (last visited June 25, 2014).

¹⁶⁸ *Execution Secrecy Laws Struck Down in Oklahoma and Texas*, EQUAL JUSTICE INITIATIVE (Mar. 28, 2014) available at <http://www.eji.org/node/890> (last visited June 25, 2014).

states out of concern that suppressing these suppliers' identities allows the state to withhold critical information about the drugs' effectiveness in executing a person without suffering.¹⁶⁹

67. The lack of available lethal injection drugs also has led some U.S. states to revert to execution methods that previously have been found to constitute cruel and inhuman treatment or punishment. Tennessee enacted a law in May 2014 that will allow the state to execute death row inmates using the electric chair in the event lethal injection drugs are unavailable.¹⁷⁰ Several states allow inmates to choose the electric chair instead of lethal injection, but Tennessee is the first to mandate use of this method since the Nebraska Supreme Court ended that state's sole use of electrocution as its execution method in 2008 by ruling it constituted cruel and unusual punishment under the state's constitution.¹⁷¹

Recommendations

- The United States and U.S. states should impose a moratorium on the death penalty in light of the risk of causing cruel and inhuman treatment or punishment by lethal injection, which, due to the prevalence of racial discrimination in the United States justice system, disproportionately affects minorities.
- Federal legislation should be adopted to ensure that lethal injections are carried out: (1) via well-tested procedures that do not subject the executed to unnecessary pain; (2) with full oversight and transparency of the sourcing and administration of the drugs; and (3) using drugs approved by the U.S. FDA.
- In full compliance with the decision of the U.S. Court of Appeals for the D.C. Circuit's decision in *Cook et al. v FDA et al.*,¹⁷² the FDA should refuse admission to any drug which is found to be in violation of § 21 U.S.C. 381(a).¹⁷³

¹⁶⁹ Ibid.

¹⁷⁰ *Tennessee Brings Back Electric Chair During Lethal Injection Drug Scarcity*, FOX NEWS (May 23, 2014) available at <http://www.foxnews.com/politics/2014/05/23/tenn-brings-back-electric-chair/> (last visited June 25, 2014).

¹⁷¹ Adam Liptak, *Electrocution Is Banned in Last State to Rely on It*, N.Y. TIMES (Feb. 9, 2008) available at http://www.nytimes.com/2008/02/09/us/09penalty.html?_r=0 (last visited June 25, 2014).

¹⁷² See *Cook et al., v. Food and Drug Administration et al.*, case number 12-5176, U.S. Court of Appeals for the D.C. Circuit.

¹⁷³ 21 U.S.C. § 381(a)(1)-(4) states:

(1) such article has been manufactured, processed, or packed under insanitary conditions or, in the case of a device, the methods used in, or the facilities or controls used for, the manufacture, packing, storage, or installation of the device do not conform to the requirements of section 360j (f) of this title, or

(2) such article is forbidden or restricted in sale in the country in which it was produced or from which it was exported, or

(3) such article is adulterated, misbranded, or in violation of section 355 of this title or the importer (as defined in section 384a of this title) is in violation of such section 384a of this title, or prohibited from introduction or delivery for introduction into interstate commerce under section 331 (ll) of this title, or

(4) the recordkeeping requirements under section 2223 of this title (other than the requirements under subsection (f) of such section) have not been complied with regarding such article, then such article shall be refused admission, except as provided in subsection (b) of this section. With respect to an article of food, if importation of such food is subject to, but not compliant with, the requirement under subsection (q) that

Questions

- What steps is the United States taking to provide appropriate transparency and information about states' lethal injection drug sources with a view to ensuring these drugs do not result in cruel or inhuman treatment or punishment and ensuring due process for detainees seeking to challenge their imminent execution as violating the prohibition on cruel and unusual punishment?
- What measures is the United States taking to ensure that state prison authorities do not unlawfully import or transfer drugs for use in lethal injection procedures?
- What assurances can the United States provide that new lethal injection protocols will not result in cruel or inhuman treatment or punishment?
- Will the federal government assist and cooperate with people sentenced to death in their efforts to determine the origins of the drugs that will be used for their lethal injections?

V. Puerto Ricans, a Hispanic population, are disproportionately subjected to the death penalty by the United States.

such food be accompanied by a certification or other assurance that the food meets applicable requirements of this chapter, then such article shall be refused admission. If such article is subject to a requirement under section 379aa or 379aa-1 of this title and if the Secretary has credible evidence or information indicating that the responsible person (as defined in such section 379aa or 379aa-1 of this title) has not complied with a requirement of such section 379aa or 379aa-1 of this title with respect to any such article, or has not allowed access to records described in such section 379aa or 379aa-1 of this title, then such article shall be refused admission, except as provided in subsection (b) of this section. The Secretary of the Treasury shall cause the destruction of any such article refused admission unless such article is exported, under regulations prescribed by the Secretary of the Treasury, within ninety days of the date of notice of such refusal or within such additional time as may be permitted pursuant to such regulations, except that the Secretary of Health and Human Services may destroy, without the opportunity for export, any drug refused admission under this section, if such drug is valued at an amount that is \$2,500 or less (or such higher amount as the Secretary of the Treasury may set by regulation pursuant to section 1498 (a)(1) of title 19) and was not brought into compliance as described under subsection (b).. [1] The Secretary of Health and Human Services shall issue regulations providing for notice and an opportunity to appear before the Secretary of Health and Human Services and introduce testimony, as described in the first sentence of this subsection, on destruction of a drug under the sixth sentence of this subsection. The regulations shall provide that prior to destruction, appropriate due process is available to the owner or consignee seeking to challenge the decision to destroy the drug. Where the Secretary of Health and Human Services provides notice and an opportunity to appear and introduce testimony on the destruction of a drug, the Secretary of Health and Human Services shall store and, as applicable, dispose of the drug after the issuance of the notice, except that the owner and consignee shall remain liable for costs pursuant to subsection (c). Such process may be combined with the notice and opportunity to appear before the Secretary and introduce testimony, as described in the first sentence of this subsection, as long as appropriate notice is provided to the owner or consignee. Clause (2) of the third sentence of this paragraph [2] shall not be construed to prohibit the admission of narcotic drugs the importation of which is permitted under the Controlled Substances Import and Export Act [21 U.S.C. 951 et seq.].

68. **Puerto Rico is an abolitionist territory.** It abolished the death penalty by statute on April 26, 1929.¹⁷⁴ Subsequently, in 1952, the Constitution of the Commonwealth of Puerto Rico prohibited the death penalty, stating that the “death penalty shall not exist” and affirming that “the right to life . . . is recognized as a fundamental right of man.”¹⁷⁵ In doing so, Puerto Rico became one of the very first jurisdictions in the world to constitutionally ban the death penalty.¹⁷⁶ The last execution in Puerto Rico took place on September 15, 1927. Puerto Rican opposition to capital punishment goes beyond its statutes. For example, in a survey conducted in 2013 by the largest circulation newspaper in Puerto Rico – at the time of a federal death penalty trial for 19 homicides—57% of the respondents were opposed to the death penalty for all cases and only 25% of the population favored it.¹⁷⁷
69. **Despite Puerto Rico’s longstanding constitutional prohibition and historical opposition to the death penalty, citizens of Puerto Rico are subject to capital punishment for federal crimes prosecuted by the United States Department of Justice.** The 1898 Treaty of Paris subordinated Puerto Rico to the jurisdiction of the United States. Notwithstanding its constitutional prohibition, federal prosecutors are permitted to seek the death penalty for certain crimes committed in Puerto Rico.¹⁷⁸ In 1994, the Federal Death Penalty Act was enacted and imposed the death penalty for 60 offenses.¹⁷⁹ The federal crimes carrying the threat of capital punishment include murder during a carjacking, during a bank robbery, and while using an illegal weapon, along with various drug-related crimes and espionage or treason.¹⁸⁰
70. **Federal prosecutors aggressively seek the death penalty in Puerto Rico at a much higher rate than other states.** The United States District Court for the District of Puerto Rico is one of the most active in certifying death penalty cases, although to date no death sentences have been imposed. Between 1998 and September 2012, the Department of Justice authorized the certification of 493 death penalty cases throughout the United States.¹⁸¹ Out of these, 25 cases were in the District of Puerto Rico (or about 5.1% of total death penalty cases),¹⁸² notwithstanding the fact that Puerto Rico accounts for only one percent of the U.S. population.¹⁸³ Further, in the last four years federal prosecutors in Puerto Rico filed 38 new

¹⁷⁴ See Act of Apr. 26, 1929, No. 42, § 1, 1929 P.R. Laws 232 (“The death penalty is hereby definitively abolished in Porto Rico.”) See also Elizabeth Vicens, *Application of the Federal Death Penalty Act in Puerto Rico: A New test for the Locally Inapplicable Standard*, 80 N.Y.U. L. REV. 350 (2005).

¹⁷⁵ P.R. CONST. art. II, ss 7.

¹⁷⁶ AMNESTY INTERNATIONAL, *Constitutional prohibitions of the death penalty* (Apr. 2005), AI Index: ACT 50/009/2005, available at <http://www.amnesty.org/en/library/asset/ACT50/009/2005/en/d8cfacd2-d50e-11dd-8a23-d58a49c0d652/act500092005en.pdf>

¹⁷⁷ *Fuerte rechazo a la pena de muerte*, EL NUEVO DÍA (April 10, 2013).

¹⁷⁸ *U.S. v. Martinez*, 252 F.3d 13 (1st Cir. 2002).

¹⁷⁹ See Pub. L. 103-322, Title VI, Sections 60001-26 (Sept. 13, 1994), 108 Stat. 1959 (codified at 18 U.S.C. §§ 3591-3598).

¹⁸⁰ *Ibid.*

¹⁸¹ FEDERAL DEATH PENALTY RESOURCE COUNSEL, *Federal Death Penalty* (May 14, 2014), available at https://www.capdefnet.org/FDPRC/pubmenu.aspx?menu_id=94&id=2094 (last visited July 6, 2014).

¹⁸² *Ibid.*

¹⁸³ The estimated population of the United States is approximately 316 million, while the population of Puerto Rico is 3.7 million. UNITED STATES CENSUS BUREAU, *Annual Estimates of the Resident Population: April 1, 2010 to July*

death penalty-eligible cases, increasing the average to 5.75 cases per year.¹⁸⁴ Only six states had higher rates of death penalty case certification, and all have significantly higher populations.¹⁸⁵ For example, Texas had approximately 30 federal death penalty certifications as of September 2012,¹⁸⁶ but it has a total population of 26 million, nearly nine times that of Puerto Rico.¹⁸⁷ Other states show far lower rates or even nonexistent death penalty certifications. Minnesota, despite having more than 1.5 million residents than Puerto Rico,¹⁸⁸ had seven capital crimes between 1995 and 2000, but the U.S. Attorney for the District of Minnesota did not recommend seeking the death penalty in any of those seven cases.¹⁸⁹ The likelihood that the death penalty is sought in Puerto Rico is three and a half times greater than in the rest of the United States.¹⁹⁰

71. **Similar to the rest of the United States,¹⁹¹ ethnic minorities constitute a disproportionate percentage of defendants being prosecuted with the death penalty in Puerto Rico.** The certification of death penalty cases in Puerto Rico is significantly higher if the perpetrator is from an ethnic minority. Of the 25 death penalty prosecutions in Puerto Rico between 1998 and 2012, all defendants were from ethnic minorities—mainly Hispanic.¹⁹²

Name	Race / Ethnic Group
Martinez, Ian Rosario	<i>Hispanic</i>
Colon-Miranda, Andres	<i>Hispanic</i>
Martinez-Velez, David Samuel	<i>Hispanic</i>
Rosario-Rodriguez, Edwin	<i>Hispanic</i>

I, 2013 – 2013 Population Estimates, available at <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited July 6, 2014).

¹⁸⁴ EDGARDO ROMAN, Puerto Rican Coalition Against the Death Penalty, *Mensaje de saludo de la Coalición Puertorriqueña contra la Pena de Muerte a la Asamblea de la Coalición Mundial* (June 20, 2014).

¹⁸⁵ See generally FEDERAL DEATH PENALTY RESOURCE COUNSEL, available at https://www.capdefnet.org/FDPRC/pubmenu.aspx?menu_id=94&id=1902 (last visited July 6, 2014).

¹⁸⁶ See generally *ibid.*

¹⁸⁷ See generally UNITED STATES CENSUS BUREAU, *Texas QuickFacts*, available at <http://quickfacts.census.gov/qfd/states/48000.html> (last visited July 6, 2014).

¹⁸⁸ UNITED STATES CENSUS BUREAU, *Minnesota Quick Facts* (July 8, 2014), available at <http://quickfacts.census.gov/qfd/states/27000.html> (last visited July 10, 2014).

¹⁸⁹ UNITED STATES DEPARTMENT OF JUSTICE, *The Federal Death Penalty System: A Statistical Survey (1988-2000)*, at T-14 (Sept. 12, 2000), available at <https://www.capdefnet.org/FDPRC/WorkArea/DownloadAsset.aspx?id=2354> (last visited July 10, 2014).

¹⁹⁰ Carmelo Campos Cruz, *Puerto Rico: la dimensión desconocida de la pena de muerte* (June 2013).

¹⁹¹ Seventy-four percent of capital defendants are ethnic minorities. FEDERAL DEATH PENALTY RESOURCE COUNSEL, *Current Stats re. Use of Federal DP* (May 14, 2014), available at https://www.capdefnet.org/FDPRC/pubmenu.aspx?menu_id=94&id=2094 (last visited July 10, 2014).

¹⁹² *Ibid.*

Name	Race / Ethnic Group
Valle-Lassalle, Victor Manuel	<i>Hispanic</i>
Marrero, Jose Rodriguez	<i>Hispanic</i>
Gomez, Edsel Torres	<i>Hispanic</i>
Pena-Gonzalez	<i>Hispanic</i>
Nieves-Alonso, Heriberto	<i>Hispanic</i>
Perez, Luis Gines	<i>Hispanic</i>
Perez, Ricardo Melendez	<i>Hispanic</i>
Alejando, Joel Rivera	<i>Hispanic</i>
Martinez, Hector Acosta	<i>Hispanic</i>
Gomez-Olmeda, David	<i>Hispanic</i>
Villegas, Hernardo Medina	<i>Hispanic</i>
Roman, Lorenzo Catalan	<i>Hispanic</i>
Ayala-Lopez, Carlos L.	<i>Hispanic</i>
Case, Lashaun	<i>Black</i>
Burgos-Montes, Edison	<i>Hispanic</i>
Lopez-Matias, Rodney	<i>Hispanic</i>
Riera-Crespo, Eduardo	<i>Hispanic</i>
Alers-Santiago, Raymond	<i>Hispanic</i>
Candelario-Santana, Alexis	<i>Hispanic</i>
Jimenez-Bencevi, Xavier	<i>Hispanic</i>

72. This reflects the larger phenomenon of ongoing ethnic bias that is pervasive throughout the death penalty as applied in the United States.¹⁹³
73. **Another form of ethnic disparity in federal prosecution of death penalty cases in Puerto Rico is in the selection of the jury.** First, only individuals who can speak, “read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form” can serve as jurors before a federal tribunal.¹⁹⁴ However, this effectively excludes between 80% to 90% of the population of Puerto Rico.¹⁹⁵ Additionally, in order to sit on a jury an individual must be willing to impose the death penalty; those who are unwilling are almost invariably stricken, even though the Constitution of Puerto Rico and a majority of its populace do not support the death penalty.¹⁹⁶ Therefore, a defendant being prosecuted for a death penalty case in Puerto Rico is not necessarily guaranteed a jury of his peers, or even individuals who speak his same language.
74. **Notwithstanding aggressive certification of federal death penalty, the people of Puerto Rico have rejected it in all cases.** In all twenty-five cases to date, no defendant in Puerto Rico has been sentenced to the death penalty. For example, in a recent death penalty proceeding, the jury found defendant Edison Burgos Montes guilty but rejected the death sentence in favor of life imprisonment.¹⁹⁷ Further, during the last campaign cycle of 2012, “all of the gubernatorial candidates showed their rejection” of the use of death penalty in Puerto Rico, and some of them even actively participated in public demonstrations.¹⁹⁸ This ongoing categorical rejection of the death penalty evidences the continued conviction of its people, as enshrined in the Puerto Rico Constitution, that the right to life is a fundamental human right.
75. **Puerto Ricans, like other ethnic minorities, are significantly over-represented on other states’ death rows.** As of February 2013, approximately thirty-two Puerto Ricans were waiting on death row in seven states.¹⁹⁹ As an illustrative example of this bias, in 2010 Puerto Ricans represented 2.98% of Pennsylvania’s population (366,082 of 12,281,054²⁰⁰), yet

¹⁹³ Ibid.

¹⁹⁴ 28 U.S.C. § 1865(b) (2006); Act of June 25, 1906, Pub. L. No. 294, ch. 3542, 34 Stat. 466 (defining the qualifications of jurors in the United States District Court for the District of Puerto Rico).

¹⁹⁵ See generally Jasmine B. Gonzales Rose, *The Exclusion of Non-English-Speaking Jurors: Remediating a Century of Denial of the Sixth Amendment in the Federal Courts of Puerto Rico*, 46 HARV. C.R.-C.L. L. REV. 497; see also U.S. Census Bureau, *Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over for Puerto Rico: 2006-2008* (April 2010), available at <https://www.census.gov/hhes/socdemo/language/> (last visited July 17, 2014).

¹⁹⁶ P. R. CONST. art. II, § 7.

¹⁹⁷ *Puerto Rico jury rejects death penalty in drug dealer case*, CHI. TRIBUNE (Sept. 27, 2012), available at http://articles.chicagotribune.com/2012-09-27/news/sns-rt-us-puertorico-deathpenaltybre88q1uu-20120927_1_capital-punishment-death-penalty-puerto-rico.

¹⁹⁸ Carmelo Campos Cruz, *supra* note 190.

¹⁹⁹ Puerto Rican Coalition Against the Death Penalty, Annual Report 2012, available at <http://www.worldcoalition.org/media/resourcecenter/PRCADP-AnnualReport2012-EN.pdf> (last visited July 10, 2014).

²⁰⁰ Sharon Ennis, Merarys Ríos-Vargas and Nora G. Albert, *The Hispanic Population: 2010*, US Census Bureau (May 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf> (last visited July 21, 2014).

constituted 6.39% of the persons awaiting execution in this state (14²⁰¹ of 219²⁰²). Like others facing the death penalty,²⁰³ Puerto Ricans are at risk of wrongful conviction.²⁰⁴ During the last fifteen years, two Puerto Ricans have been exonerated from death row in the United States after proving their innocence. On October 20, 2000, William Nieves was freed from Pennsylvania's death row after serving six years, when a Philadelphia jury acquitted him in a second trial.²⁰⁵ On January 3, 2003, Juan Roberto Melendez-Colon was exonerated and released from death row after serving nearly eighteen years in Florida for a murder he did not commit.²⁰⁶

Recommendations

- The United States should not request cases to be certified for the federal death penalty in Puerto Rico.
- The United States should undertake studies to identify the root causes and factors of ethnic disparities pertaining to the death penalty, including selective prosecution and ethnically disparate sentencing, with the objective of developing means to eliminate ethnic bias in the criminal justice system.
- The United States should adopt all necessary measures, including a moratorium, to ensure that the death penalty is not imposed as a result of ethnic bias on the part of prosecutors, judges, juries or lawyers.
- The United States should adopt all necessary measures, including interpretation services or a waiver of the English language requirement, to allow Spanish-speaking people to serve on juries in Puerto Rico and other territories with majority Spanish-speaking populations, to ensure defendants are sentenced by a jury of their peers and to involve a majority of these populations in the important civic duty of jury service.

²⁰¹ Instituto de Investigacion y Promocion de los Derechos Humanos, *Puertorriqueños y Descendientes de Puertorriqueños en Espera de Ejecución en los Estados Unidos* (March 12, 2011).

²⁰² Criminal Justice Project of the NAACP Legal Defense and Educational Fund, Inc., *Death Row U.S.A.*, (Winter 2011), available at http://www.naacpldf.org/files/publications/DRUSA_Winter_2011.pdf (last visited July 21, 2014).

²⁰³ Death Penalty Information Center, *Innocence: List of Those Freed from Death Row*, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row?scid=6&did=110> (last visited July 10, 2014). Since 1973, 144 individuals have been exonerated from death row. *Id.*

²⁰⁴ S. Gross et al., *The Rate of False Conviction of Criminal Defendants Who are Sentenced to Death*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES, April 28, 2014. This statistic represents the estimated prevalence from 1973 to 2004. *Ibid.*

²⁰⁵ Death Penalty Information Center, *supra* note 203.

²⁰⁶ *See, e.g., Protect the Innocent: Florida's Governor Must Veto the 'Timely Justice Act,'* HUFFINGTON POST, http://www.huffingtonpost.com/juan-melendez/florida-timely-justice-act_b_3285154.html (last visited July 10, 2014).