



Cornell Law School
Cornell Center on the
Death Penalty Worldwide



**The United States' Compliance with the International Covenant on Civil and Political
Rights: The Death Penalty**

Submitted by The Advocates for Human Rights

a non-governmental organization in special consultative status with ECOSOC since 1996

The World Coalition Against the Death Penalty

and

The Cornell Center on the Death Penalty Worldwide

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The Advocates for Human Rights (The Advocates) is a volunteer-based nongovernmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. Established in 1983, 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 World Coalition Against the Death Penalty is a volunteer-based non-government organization committed to strengthen the international dimension of the fight against the death penalty. Established in 2002, its ultimate objective is to obtain the universal abolition of the death penalty. To achieve its goal, the World Coalition advocates for a definitive end to death sentences and executions in those countries where the death penalty is in force. In some countries, it is seeking to obtain a reduction in the use of capital punishment as a first step towards abolition.

The Cornell Center on the Death Penalty Worldwide is a US-based research, advocacy, and training center focused on capital punishment and international law. It publishes reports and manuals on death penalty issues, provides transparent data on death penalty laws and practices around the world, trains capital lawyers in best practices, and engages in targeted advocacy and litigation. Its staff and faculty advisors have collectively spent more than eight decades representing hundreds of prisoners facing the death penalty.

EXECUTIVE SUMMARY

1. The United States of America continues to carry out executions and sentence people to death.
2. Although over 2,654 individuals remain on death row in the United States, 2022 marked the country's eighth consecutive year with fewer than 30 executions and fewer than 50 new death sentences. At the start of the Biden Administration in 2021, the Department of Justice (DOJ) imposed a federal moratorium on executions, reversing course after the previous administration had resumed federal executions after a 17-year de facto moratorium. Although the strides under the current administration are a step forward, the DOJ is actively seeking the death penalty and defending existing death sentences. Additionally, a majority of states retain the death penalty, and many states are still sentencing and executing members of racial and ethnic minority groups at a disproportionate rate.
3. Women constitute slightly more than two percent of the death row population, with 53 women on death row. The overwhelming majority of these women were victims of severe and prolonged gender-based violence before their incarceration. Yet courts often fail to recognize such evidence as mitigation.¹
4. The primary method of execution is lethal injection. Botched executions continue to be a problem. Lethal injections often fail when execution teams are unable to set the intravenous line or when the drugs do not have their intended effect. Due to the unpredictability of the drugs' effects, people being executed may not even be conscious during the reading of the death warrant and may be too incapacitated to say their last words.
5. Wrongful conviction continues to be a serious problem in the United States. With more states allowing death sentences absent a unanimous verdict and a lack of effective legal representation, wrongful convictions are likely to continue. Foreign nationals are even more likely to be wrongfully convicted, as jurisdictions in the United States often fail to uphold their consular notification and access obligations.
6. This report addresses the United States' compliance with its human rights obligations under the International Covenant on Civil and Political Rights regarding the death penalty and provides several suggested recommendations to address death penalty issues in the United States.

The United States fails to uphold its obligations under the International Covenant on Civil and Political Rights

I. Right to life – The Death Penalty (List of Issues, para. 13)

7. In its 2019 List of Issues, the Committee requested further information on the death penalty in the United States, including the number of executions carried out, the sentences, ages, and ethnic origin of those sentenced to death, and the execution methods used.² The Committee also requested information on whether the execution methods used have been reviewed for

¹ Sandra Babcock and Nathalie Greenfield, *Gender, Violence, and the Death Penalty* (April 10, 2023), forthcoming, *California Western International Law Journal*, Vol. 53 (2023), Available at SSRN: <https://ssrn.com/abstract=4416558>.

² Human Rights Committee, *List of Issues prior to submission of the fifth periodic report of the United States*, (Apr. 18, 2019), U.N. Doc. CCPR/C/USA/QPR/5, ¶ 13(a)–(b).

compliance with the Covenant and the steps taken to prevent wrongful convictions and compensate the exonerated.³ Further, the Committee asked the United States for information on the steps taken to implement the International Court of Justice’s decision in *Mexico v. United States of America*.⁴ Lastly, the Committee asked whether the United States has considered a federal moratorium on executions, with a view toward abolishing the death penalty.⁵

8. In its 2021 State Party Report, the United States indicated that it was not considering a federal moratorium on the death penalty.⁶ The United States explained that the death penalty is primarily imposed for murder or participation in a murder, as well as certain drug-related crimes, treason, and espionage.⁷ The United States asserted that criminal defendants in capital cases have the right to challenge the makeup of the jury, and defendants who allege that the application of the death penalty was racially motivated may raise challenges in state and federal court.⁸ The United States affirmed that states “continue to evaluate the drugs used in lethal injection” because of recent court challenges ruling that certain lethal injection protocols inflict unconstitutionally cruel pain.⁹ The United States asserts that the “U.S. criminal justice system is designed to minimize the risk of wrongful convictions” through procedural safeguards like the “presumption of innocence, the proof beyond a reasonable doubt standard, the requirement of a unanimous jury, appointment of counsel for indigent defendants, discovery and due process rules, and appellate and post-conviction review.”¹⁰ Lastly, the United States asserted that it takes its international obligations with respect to consular notice and access seriously and has taken steps to comply with the *Mexico v. United States of America* decision, including presenting legislation, urging state authorities to give effect to the decision, updating the Federal Rules of Criminal Procedure to facilitate consular notification and access, and providing trainings and resources regarding consular notification and access.¹¹
9. As of 2023, 27 states, the United States Government, and the United States Military have the death penalty.¹² Three states recently abolished the death penalty,¹³ including Virginia which, since 1976, had carried out more executions than any state other than Texas.¹⁴ In addition, of

³ *Id.* ¶ 13(c)–(e).

⁴ *Id.* ¶ 13(f).

⁵ *Id.* ¶ 13.

⁶ Human Rights Committee, *Fifth periodic report submitted by the United States under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2020*, (Nov. 11, 2021), U.N. Doc. CCPR/C/USA/5, ¶ 45.

⁷ *Id.* ¶ 36.

⁸ *Id.* ¶¶ 37–38.

⁹ *Id.* ¶ 39.

¹⁰ *Id.* ¶ 40.

¹¹ *Id.* ¶¶ 41–43.

¹² DEATH PENALTY INFO. CTR., *State by State*, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last visited July 12, 2023).

¹³ Virginia, Colorado, and New Hampshire all abolished the death penalty in 2021, 2020, and 2019, respectively. DEATH PENALTY INFO. CTR., *State by State*, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last visited July 12, 2023).

¹⁴ John Gramlich, *10 Facts About the Death Penalty in the U.S.*, PEW RESEARCH CTR. (July 19, 2021), <https://www.pewresearch.org/short-reads/2021/07/19/10-facts-about-the-death-penalty-in-the-u-s/> (last visited July 12, 2023).

the 27 states that retain the death penalty, 3 now have gubernatorial moratoria on the death penalty,¹⁵ and 2 have “holds” on executions.¹⁶

10. Since the United States’ response to the List of Issues in early 2021, federal authorities have announced a moratorium on federal executions pending review of execution policies and procedures.¹⁷ Since taking office, the Biden Administration has reversed decisions of previous administrations to seek the death penalty in 27 cases.¹⁸

Federal Death Penalty

11. In the 2021 State Party Report, the United States noted that at the federal level, the death penalty is primarily imposed for murder or participation in a murder and that offenses other than murder could also lead to the death penalty.¹⁹ That report, however, fails to address the 1994 Violent Crime Control and Law Enforcement Act, which exacerbated racial disparities in the criminal justice system and continues to hurt members of racial and ethnic minority groups.²⁰ The law expanded the scope of the death penalty by authorizing the death penalty for 60 new federal offenses, levied harsh new penalties for youth in conflict with the law, and imposed mandatory sentences for individuals with three or more felony convictions.²¹ Five years after the law was enacted, 74% of individuals whom federal prosecutors recommended for the death penalty were members of racial or ethnic minority groups.²²
12. As of 2023, there are 42 people on federal death row, of which 17 (41.5%) are White, 17 (41.5%) are Black, 6 (14.6%) are Latinx, and 1 (2.4%) is Asian.²³ Members of racial and ethnic minority groups are still disproportionately overrepresented in death row.²⁴ For example, Black people represent about 13% of the overall United States population but account for 41.5% of the death row population in the federal system.²⁵ Part II of this report addresses racial disparities in the death penalty in greater detail.

¹⁵ California, Pennsylvania, and Oregon currently have a gubernatorial moratorium on the death penalty. DEATH PENALTY INFO. CTR., *State by State*, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last visited July 12, 2023).

¹⁶ Ohio currently has a hold on executions due to lack of access to drugs used for lethal injection. Arizona Governor Katie Hobbs stated, “Under my administration, an execution will not occur until the people of Arizona can have confidence that the state is not violation the law in carrying out the gravest of penalties” but has not declared an official moratorium. *Id.*

¹⁷ DEPT. OF JUSTICE, *Moratorium on Federal Executions Pending Review of Policies and Procedures* (July 1, 2021), <https://www.justice.gov/opa/page/file/1408636/download> (last visited July 12, 2023).

¹⁸ Alanna Durkin Richer & Michael Tarm, *Biden’s Justice Dept. Keeps Hard Line in Death Row Case*, AP News (Mar. 26, 2023), <https://apnews.com/article/federal-executions-president-joe-biden-attorney-general-merrick-garland-death-row-987c9f078d527220d75e728fa68d26a1> (last visited July 12, 2023).

¹⁹ Human Rights Committee, *Fifth periodic report submitted by the United States under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2020*, (Nov. 11, 2021), U.N. Doc. CCPR/C/USA/5, ¶ 36.

²⁰ AMERICAN PROGRESS, *3 ways 1994 Crime Bill Continues to Hurt Communities of Color* (May 10, 2019), <https://www.americanprogress.org/article/3-ways-1994-crime-bill-continues-hurt-communities-color/>.

²¹ *See id.*

²² *See id.*

²³ DEATH PENALTY INFORMATION CENTER, *Federal Death Penalty: Executions Under the Federal Death Penalty*, <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/executions-under-the-federal-death-penalty> (last visited July 15, 2023).

²⁴ *Id.*

²⁵ PRISON POLICY INITIATIVE, *Black People are Overrepresented on Death Row, While White People are Underrepresented*, <https://www.prisonpolicy.org/graphs/deathrowbyrace2020.html> (last visited July 19, 2023).

13. Since January 21, 2021, federal authorities have not carried out any new executions, due to the federal moratorium on executions put in place by Attorney General Merrick Garland in June 2021.²⁶ Nonetheless, earlier this year federal prosecutors sought and obtained a death sentence for Robert Bowers, who had been convicted of killing 11 Jewish worshipers at a synagogue in Pittsburgh.²⁷ Prosecutors had previously rejected Bowers' offer to plead guilty in exchange for a sentence of life without the possibility of parole.²⁸ Earlier in 2023, federal prosecutors had unsuccessfully sought the death penalty for Sayfullo Saipov, who had been found guilty of killing eight bicyclists in New York City.²⁹ The DOJ is still defending death sentences on appeal for some people currently on federal death row, such as Dylan Roof (a White man who fatally shot nine Black people in 2015), and Dzhokhar Tsarnaev (the orchestrator of the Boston Marathon bombing in 2013).³⁰ Additionally, the Biden administration set no policy on the federal death penalty, allowing the DOJ to make decisions on capital prosecution and appeals on a case-by-case basis.³¹ The DOJ's decision to defend existing death sentences and to seek the death penalty in some cases creates uncertainty regarding the Biden Administration's policy with respect to the federal death penalty.³²
14. The DOJ moratorium on executions came soon after the Trump Administration ended a 17-year *de facto* moratorium in 2020 and executed 13 prisoners.³³ Of the 13 prisoners executed, 6 were Black, 6 were White, and 1 was a member of the Navajo Nation.³⁴ Half of the Black prisoners executed were put to death for interracial murders, but every White prisoner was executed for the murder of a white victim.³⁵ Among the people executed were two people accused of murder committed in their teens, two people with strong evidence of intellectual disability, two people with severely psycho-social disabilities, and one person who undisputedly did not himself commit the killing.³⁶

²⁶ *Id.*

²⁷ *Jurors Sentence Robert Bowers to Death for 2018 Synagogue Shooting*, Death Penalty Information Center, Aug. 3, 2023, <https://deathpenaltyinfo.org/news/jurors-sentence-robert-bowers-to-death-for-2018-synagogue-shooting>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ DEATH PENALTY INFORMATION CENTER, *The Death Penalty in 2022: Year End Report* (Dec. 16, 2022), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2022-year-end-report>.

³¹ *Id.*

³² THE ASSOCIATED PRESS, *Biden's Justice Dept. Keeps Hard Line in Death Row Cases*, <https://apnews.com/article/federal-executions-president-joe-biden-attorney-general-merrick-garland-death-row-987c9f078d527220d75e728fa68d26a1> (last visited July 27, 2023).

³³ Federal Government Resumes Executions After 17-Year Hiatus, Executes Seven Prisoners in Three Months, American Bar Association, *available at* https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/fall-2020/federal-government-executes-seven-in-three-months/ (last visited July 17, 2023).

³⁴ *Id.*

³⁵ DEATH PENALTY INFORMATION CENTER, *The Death Penalty in 2021: Year End Report* (Dec. 16, 2021), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2021-year-end-report>.

³⁶ *Id.*

State Death Penalty Laws and Practices

15. As of May 2023, there are 2,654 individuals on death row in the United States compared to 2,414 in 2022 and 2,474 in 2021.³⁷ Statistics reveal racial bias in sentencing.³⁸ As of fall 2022, Black people made up 41.05% of people on death row, while White people, Latinx people, Indigenous people, and Asians accounted for 42.07%, 13.97%, 1.02%, and 1.90% of the death row population respectively.³⁹ Part II of this report addresses racial disparities in the death penalty in greater detail.
16. Five states carried out 7 executions in 2020, 5 states carried out 8 executions in 2021, and 6 states carried out 18 individuals in 2022.⁴⁰ To date in 2023, 5 states have carried out 17 executions.⁴¹
17. States' reliance on capital punishment is declining. Virginia became the 23rd state and the first southern state to end capital punishment when it abolished the death penalty on March 24, 2021.⁴² Meanwhile, out of the 27 states with the death penalty, governors in 5 states have placed official holds on executions; the governor of Oregon also commuted the sentences of the 17 people on the state's death row.⁴³ In the southern part of the United States, jurisdictions such as Texas and Missouri carry out the majority of executions. Oklahoma has stepped up executions and has scheduled 25 executions over a 29-month period, seeking to put to death 58% of the people on the state's death row.⁴⁴ In total, Oklahoma and Texas have carried out more than 45% of executions since 1976 and those two states were responsible for approximately 56% of executions in 2022.⁴⁵

Execution Methods for People Sentenced to Death

18. The Fifth Periodic Report indicated: "Lethal injection is the primary method of execution in all states that have the death penalty."⁴⁶ Since 1976, authorities have executed 1,393 people by lethal injection, 163 by electrocution, 11 by lethal gas, and 3 by firing squad.⁴⁷ In July 2019,

³⁷ WORLD COALITION AGAINST THE DEATH PENALTY, *United States: Legal States of the Death Penalty*, <https://worldcoalition.org/pays/united-states/> (last visited July 17, 2023).

³⁸ NAACP LEGAL DEFENSE EDUCATIONAL FUND, *Death Row U.S.A. Fall 2022*, <https://www.naacpldf.org/wp-content/uploads/DRUSAFall2022.pdf> (last visited July 15, 2023).

³⁹ *Id.*

⁴⁰ DEATH PENALTY INFORMATION CENTER, *The Death Penalty in 2020: Year End Report* (Dec. 16, 2020), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2020-year-end-report>.

⁴¹ *Execution Database*, Death Penalty Information Center, <https://deathpenaltyinfo.org/database/executions?year=2023&sort=state/asc> (last visited Sept. 5, 2023).

⁴² DEATH PENALTY INFORMATION CENTER, *The Death Penalty in 2022: Year End Report* (Dec. 16, 2022), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2022-year-end-report>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Human Rights Committee, *Fifth periodic report submitted by the United States under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2020*, (Nov. 11, 2021), U.N. Doc. CCPR/C/USA/5, ¶ 39.

⁴⁷ DEATH PENALTY INFORMATION CENTER, *Botched Executions*, <https://deathpenaltyinfo.org/executions/botched-executions> (last visited July 17, 2023).

the U.S. Attorney General directed the federal Bureau of Prisons to adopt a new lethal injection protocol.⁴⁸ States, on the other hand, have begun to experiment with execution methods.⁴⁹

19. Nearly all states and the federal government use lethal injection as their primary method of execution,⁵⁰ but South Carolina’s primary execution method is electrocution, and several states have designated electrocution, lethal gas, or firing squad as back-up methods if the primary method is found unconstitutional.⁵¹ The Death Penalty Information Center has compiled a comprehensive list of botched executions, including eight since January 2021.⁵² All of the botched executions since 2000 have been by lethal injection.⁵³
20. Lethal injections often fail when prison staff fail to set the intravenous execution line. In what came to be known as the “longest known execution in US history,” Joe Nathan James’ execution took three hours.⁵⁴ The first part of the process is supposed to take minutes, but the execution team “took hours to set the intravenous line” and punctured his body multiple times during the process.⁵⁵ His family subsequently filed a lawsuit alleging that James had lost consciousness prior to the reading of the death warrant and therefore was unable to speak his last words.⁵⁶
21. Prompted by botched executions, several states have adopted laws or policies to conceal their execution practices.⁵⁷ These secrecy laws have impeded the ability of defense teams to learn the identities of the drugs to be used or their origins.⁵⁸

Wrongful Convictions and Remedies for People Wrongfully Sentenced to Death

22. The Fifth Periodic Report asserted: “The U.S. criminal justice system is designed to minimize the risk of wrongful convictions.”⁵⁹ Despite alleged safeguards, wrongful convictions are not uncommon in capital cases.
23. For every eight people who have been executed in the United States, one person has been exonerated.⁶⁰ Together, the 35 people exonerated from death row since 2014 had served 848 years prior to their exonerations, or approximately 24 years on average.⁶¹

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ DEATH PENALTY INFORMATION CENTER, *Methods of Execution*, <https://deathpenaltyinfo.org/executions/methods-of-execution> (last visited July 17, 2023).

⁵¹ *Id.*

⁵² Death Penalty Information Center, *Botched Executions*, <https://deathpenaltyinfo.org/executions/botched-executions> (last visited Sept. 5, 2023).

⁵³ *Id.*

⁵⁴ Death Penalty Information Center, “Lethal Injection” accessed July 17, 2023, <https://deathpenaltyinfo.org/executions/lethal-injection>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Death Penalty Information Center, “Family Sues Alabama Over Longest Known Execution in US History” accessed July 17, 2023, <https://deathpenaltyinfo.org/news/family-sues-alabama-over-longest-known-execution-in-us-history>.

⁵⁸ *Id.*

⁵⁹ Human Rights Committee, *Fifth periodic report submitted by the United States under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2020*, (Nov. 11, 2021), U.N. Doc. CCPR/C/USA/5, ¶ 40.

⁶⁰ EQUAL JUST. INITIATIVE, *Death Penalty*, <https://eji.org/issues/death-penalty/> (last visited July 12, 2023).

⁶¹ DEATH PENALTY INFO. CTR., *Innocence Database*, <https://deathpenaltyinfo.org/policy-issues/innocence> (last visited July 12, 2023).

24. The death penalty looms large over other wrongful convictions as well. According to a study by the Death Penalty Information Center, focusing on exonerations only in 2021, prosecutors in five states “wrongfully sought the death penalty against seven innocent defendants who were exonerated of capital murder in 2021,” and prosecutors in three states “secured wrongful murder convictions against five innocent defendants by presenting perjured testimony from witness[es] who had been threatened with the death penalty or given undisclosed favorable deals to avoid facing the death penalty themselves.”⁶²
25. Wrongful convictions disproportionately affect members of racial and ethnic minority groups.⁶³ Black people on death row are more likely than their White counterparts to be exonerated and Black exonerees spend, on average, more than four years longer on death row than White exonerees.⁶⁴
26. Of the 375 people in the United States who have been exonerated through DNA testing, 69% of convictions involved eyewitness misidentification, and 42% of those cases involved cross-racial misidentification.⁶⁵ Even though cross-racial identification is particularly unreliable, courts rarely allow jury instructions or expert testimony on the potential unreliability of eyewitness testimony. Only a few states allow such an instruction and then only at the judge’s discretion.⁶⁶
27. In federal courts, the jury must unanimously agree to sentence someone to death.⁶⁷ Individual states differ regarding unanimity of the jury and what happens if the jury is not unanimous.
28. Lack of unanimity heightens the risk of wrongful conviction.⁶⁸ Between 2015 and 2020, six people sentenced to death after non-unanimous verdicts were exonerated.⁶⁹
29. Four states currently allow death sentences to be imposed absent a unanimous verdict. In 2023, Florida Governor Ron DeSantis signed into law a bill that allows a death sentence when the jury recommends death by a vote of at least 8-4.⁷⁰ Florida’s standard is now the lowest

⁶² Death Penalty Information Center, *DPIC Analysis: At Least a Dozen Exonerations in 2021 Involved the Wrongful Threat or Pursuit of the Death Penalty*, Aug. 26, 2022, <https://deathpenaltyinfo.org/news/dpic-analysis-at-least-a-dozen-exonerations-in-2021-involved-the-wrongful-threat-or-pursuit-of-the-death-penalty>.

⁶³ DEATH PENALTY INFO. CTR., *Exonerations by Race*, <https://deathpenaltyinfo.org/policy-issues/innocence/exonerations-by-race> (last visited July 12, 2023).

⁶⁴ DEATH PENALTY INFO. CTR., *Innocence Database*, <https://deathpenaltyinfo.org/policy-issues/innocence> (last visited July 12, 2023).

⁶⁵ THE INNOCENCE PROJECT, *DNA Exonerations in the United States*, <https://innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited July 12, 2023).

⁶⁶ Michael Barbella, *More than meets the eye in cross-racial IDs*, N.J. STATE BAR FOUND. (May 7, 2021), <https://njsbf.org/2021/05/07/more-than-meets-the-eye-in-cross-racial-ids/> (last visited July 12, 2023).

⁶⁷ DEPT. OF JUSTICE, *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review* (June 6, 2001), <https://www.justice.gov/archive/dag/pubdoc/deathpenaltystudy.htm#:~:text=If%20the%20jury%20does%20recomm end,18%20U.S.C.> (last visited July 12, 2023).

⁶⁸ DEATH PENALTY INFO. CTR., *Exoneration Data Suggests Non-Unanimous Death-Sentencing Statutes Heighten Risk of Wrongful Convictions* (Mar. 13, 2020), <https://deathpenaltyinfo.org/news/dpic-analysis-exoneration-data-suggests-non-unanimous-death-sentencing-statutes-heighten-risk-of-wrongful-convictions> (last visited July 12, 2023).

⁶⁹ *Id.*

⁷⁰ Noah Berg & Jasmine Shokoor, *Florida’s Multifaceted Expansion of the Death Penalty Raises Constitutional Concerns*, AM. BAR ASS’N (May 4, 2023),

threshold in the country. Alabama is the only other state to automatically allow a death sentence by a less-than-unanimous vote. In Alabama, however, the jury must vote at least 10-2 in favor of death.⁷¹

30. In Missouri and Indiana, judges can impose a death sentence if the jury cannot reach a unanimous verdict as to the sentence.⁷² In 2017, a Missouri judge overruled an 11-1 vote in favor of life and sentenced Marvin Rice to death for the murder of his ex-girlfriend.⁷³
31. Substandard representation greatly increases the risk of wrongful conviction.⁷⁴ The Sixth Amendment of the U.S. Constitution guarantees the right to an effective attorney for people charged with capital offenses.⁷⁵ Even though indigent defendants are guaranteed the right to an attorney, such defendants often lack redress for ineffective assistance. Proving ineffective assistance of counsel requires showing both that the lawyer’s performance was objectively below accepted professional standards and that it is reasonably probable that the lawyer’s substandard performance influenced the trial outcome.⁷⁶
32. The American Bar Association and the U.S. Department of Justice published standards for appointing counsel in capital cases. These standards include the requirement that the appointed attorney complete a capital defense-specific training program and that the attorney be fully compensated at a rate consistent with high-quality legal representation and the “extraordinary responsibilities inherent in death penalty representation.”⁷⁷ But states are not required to follow these standards and often enact criteria entirely substandard to the ABA and Department of Justice criteria.⁷⁸
33. Many jurisdictions do not provide adequate compensation for appointed counsel. In Alabama, a state that consistently has one of the nation’s highest per capita execution rates, attorneys receive \$70 per hour for trial work.⁷⁹ Attorneys appointed on direct appeal have payments

https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/florida-expands-the-death-penalty/ (last visited July 12, 2023).

⁷¹ *Id.*

⁷² DEATH PENALTY INFO. CTR., *Missouri Supreme Court Hears Case on ‘Hung Jury’ Death Sentence* (Jan. 29, 2019), <https://deathpenaltyinfo.org/news/missouri-supreme-court-hears-case-on-hung-jury-death-sentences> (last visited July 12, 2023).

⁷³ DEATH PENALTY INFO. CTR., *Missouri Judge Sentences Defendant to Death After 11 Jurors Had Voted for Life Sentence* (Oct. 12, 2017), <https://deathpenaltyinfo.org/news/missouri-judge-sentences-defendant-to-death-after-11-jurors-had-voted-for-life-sentence> (last visited July 12, 2023). Rice’s conviction was later overturned by the Missouri Supreme Court and he was resentenced to life without parole. DEATH PENALTY INFO. CTR., *Judge Rejects Missouri’s First Jury Recommendation of Death in Nine Years, Says Mitigating Evidence Requires Life Sentence for Marvin Rice* (May 26, 2022), <https://deathpenaltyinfo.org/news/judge-rejects-missouris-first-jury-recommendation-of-death-in-nine-years-says-mitigating-evidence-requires-life-sentence-for-marvin-rice> (last visited July 12, 2023).

⁷⁴ DEATH PENALTY INFO. CTR., *Death Penalty Representation Background*, <https://deathpenaltyinfo.org/policy-issues/death-penalty-representation/background> (last visited July 12, 2023).

⁷⁵ U.S. CONST. amend. VI.

⁷⁶ *Strickland v. Washington*, 466 U.S. 688 (1984).

⁷⁷ AM. BAR ASS’N, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Feb. 2003), <https://dpic-cdn.org/production/legacy/2003ABAGuidelines.pdf> (last visited July 19, 2023); DEPT. OF JUSTICE, *Compendium of Standards for Indigent Defense Systems* (Dec. 2000), https://dpic-cdn.org/production/legacy/DOJStandards_2000.pdf (last visited July 19, 2023).

⁷⁸ See e.g., ALA. CODE § 13A-5-52 (2022) (requiring only that each person who is unable to afford legal counsel be appointed counsel with “no less than five years prior experience in the active practice of criminal law”).

⁷⁹ EQUAL JUST. INITIATIVE, *Alabama’s Death Penalty*, <https://eji.org/issues/alabama-death-penalty/> (last visited July 12, 2023).

capped at \$2,500.⁸⁰ Lack of adequate resources drastically increases the risk of wrongful conviction and of such a conviction being upheld in post-conviction proceedings.⁸¹

34. Despite the existence of appellate and post-conviction review in the United States, such review is often unavailable or ineffective for wrongfully convicted defendants.
35. The appellate review process in the United States focuses on whether legal errors occurred, rather than whether the defendant is innocent.⁸² Only when a defendant presents a “truly persuasive demonstration of actual innocence,”⁸³ new evidence that was unavailable at the trial level, or DNA evidence excluding the defendant from the crime, can a defendant potentially get a new trial.⁸⁴ Pursuing this relief is exceedingly costly and time-consuming.⁸⁵
36. In 2023 the Alabama Supreme Court eliminated plain error review for death penalty cases.⁸⁶ Under the previous rule, the Alabama Court of Criminal Appeals reviewed all transcripts of cases that resulted in a death sentence for errors that affected the substantial rights of the defendant, even if those errors were not raised at trial.⁸⁷ Nearly 40% of all reversals in Alabama death penalty cases came from plain error review.⁸⁸ Under the current scheme, persons sentenced to death still have the option of seeking post-conviction relief, but a court will not appoint post-conviction counsel until after the person has filed a post-conviction relief petition, and even then, the court will appoint counsel only if the court determines that counsel is necessary.⁸⁹
37. When people are exonerated, authorities do not provide adequate (or in some cases any) compensation. Exonerees face significant challenges in rebuilding their lives. These challenges include financial hardship, problems securing basic necessities like food and housing, obtaining employment (many exonerees did not have access to formal education and vocational training while on death row), and accessing adequate health care, particularly after experiencing many years of sub-standard health care while under sentence of death and facing trauma from living on death row.⁹⁰

⁸⁰ *Id.*

⁸¹ DEATH PENALTY INFO. CTR., *Death Penalty Representation Background*, <https://deathpenaltyinfo.org/policy-issues/death-penalty-representation/background> (last visited July 12, 2023).

⁸² CAPITAL PUNISHMENT IN CONTEXT, *Post-Conviction in Capital Cases*, <https://capitalpunishmentincontext.org/issues/postconviction> (last visited July 12, 2023).

⁸³ *Herrera v. Collins*, 506 U.S. 390 (1993).

⁸⁴ CAPITAL PUNISHMENT IN CONTEXT, *Post-Conviction in Capital Cases*, <https://capitalpunishmentincontext.org/issues/postconviction> (last visited July 12, 2023).

⁸⁵ DEATH PENALTY INFO. CTR., *Costs*, <https://deathpenaltyinfo.org/policy-issues/costs> (last visited July 12, 2023).

⁸⁶ DEATH PENALTY INFO. CTR., *Alabama Court Removes Key Appeal Protection for Death Sentenced Defendants* (Jan. 25, 2023), <https://deathpenaltyinfo.org/news/alabama-court-removes-key-appeal-protection-for-death-sentenced-defendants> (last visited July 12, 2023).

⁸⁷ *Id.*

⁸⁸ EQUAL JUST. INITIATIVE, *Alabama Supreme Court Eliminates Critical Safeguard Against Wrongful Convictions in Death Penalty Cases* (Jan. 17, 2023), <https://eji.org/news/alabama-supreme-court-eliminates-critical-safeguard-against-wrongful-convictions-in-death-penalty-cases/> (last visited July 12, 2023).

⁸⁹ DEATH PENALTY INFO. CTR., *Alabama Court Removes Key Appeal Protection for Death Sentenced Defendants* (Jan. 25, 2023), <https://deathpenaltyinfo.org/news/alabama-court-removes-key-appeal-protection-for-death-sentenced-defendants> (last visited July 12, 2023).

⁹⁰ THE INNOCENCE PROJECT, *Compensating the Wrongly Convicted*, <https://www.innocenceproject.org/compensating-wrongly-convicted/> (last visited July 12, 2023); *see also* THE

38. The federal wrongful conviction statute offers compensation for exonerees up to \$100,000 per year on death row.⁹¹ As of 2022, 38 states had compensation laws, but only seven states provided additional compensation for people who had been on death row prior to exoneration.⁹²
39. Most wrongful conviction statutes fail to provide services critical to a successful return to society, such as housing, food, counseling, health care, psycho-social support, vocational training, and educational assistance.⁹³ Some exonerees are ineligible for services that assist “ex-offenders” because authorities provide such services only to people who committed a crime.⁹⁴
40. Additionally, compensation is not guaranteed. Some states compensate individuals only through private legislation, which requires the state legislature to pass a bill to specifically compensate a particular individual.⁹⁵ Other states require that exonerees affirmatively prove their innocence to be eligible for compensation.⁹⁶
41. Even exonerees who successfully obtain compensation wait years. On average, it takes nearly three years to obtain state compensation.⁹⁷

Consular Notification and Access

42. The Fifth Periodic Report asserted: “The United States takes seriously its international obligations with respect to consular notification and access and continues to take steps to achieve compliance with the International Court of Justice decision in the *Case Concerning Avena and Other Mexican Nationals*”⁹⁸
43. Despite efforts to comply with the decision, the United States has consistently failed to comply with its consular notification obligations in capital cases. The United States has a consular

INNOCENCE PROJECT, *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation* (Dec. 2, 2009), <https://innocenceproject.org/news/executive-summary-making-up-for-lost-time-what-the-wrongfully-convicted-endure-and-how-to-provide-fair-compensation/> (last visited July 19, 2023).

⁹¹ 28 U.S.C. § 2513.

⁹² *Key Provisions in Wrongful Conviction Compensation Laws*, UNIV. OF MICH. (May 27, 2022), <https://www.law.umich.edu/special/exoneration/Documents/IP%20-%20Key%20Provisions.pdf> (last visited July 26, 2023).

⁹³ THE INNOCENCE PROJECT, *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation* (Dec. 2, 2009), <https://innocenceproject.org/news/executive-summary-making-up-for-lost-time-what-the-wrongfully-convicted-endure-and-how-to-provide-fair-compensation/> (last visited July 19, 2023).

⁹⁴ *Id.*

⁹⁵ *Compensation for Exonerees*, UNIV. OF MICH. <https://www.law.umich.edu/special/exoneration/Documents/Compensation%20Primer.pdf> (last visited July 19, 2023).

⁹⁶ Matt Schudel, *Glenn Ford, wrongfully convicted in Louisiana murder case, dies at 65*, WASH. POST (July 4, 2015), https://www.washingtonpost.com/national/glenn-ford-wrongfully-convicted-in-louisiana-murder-case-dies-at-65/2015/07/04/0dfa3cec-2266-11e5-84d5-eb37ee8eaa61_story.html (last visited July 12, 2023).

⁹⁷ THE INNOCENCE PROJECT, *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation* (Dec. 2, 2009), <https://innocenceproject.org/news/executive-summary-making-up-for-lost-time-what-the-wrongfully-convicted-endure-and-how-to-provide-fair-compensation/> (last visited July 19, 2023).

⁹⁸ Human Rights Committee, *Fifth periodic report submitted by the United States under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2020*, (Nov. 11, 2021), U.N. Doc. CCPR/C/USA/5, ¶ 41.

notification statute, but this statute pertains only to people in federal custody.⁹⁹ The majority of people at risk of being sentenced to death in the United States are held in state custody.¹⁰⁰

44. California, Florida, Georgia, Illinois, Nevada, North Carolina, Oregon, Washington, and the District of Columbia all have laws that address consular notification.¹⁰¹ But without federal legislation, the International Court of Justice’s *Avena* decision is not binding on the states.¹⁰²
45. The Department of State adopted the 5th Edition of its Consular Notification and Access Manual in 2018.¹⁰³ The Manual mandates that officers should inform a person of his or her consular rights immediately upon arrest. But there are no clear consequences for failure to notify, and officers therefore have little incentive to comply.¹⁰⁴
46. In 2020, the Nevada Supreme Court affirmed the reversal of the death penalty conviction of Carlos Perez Gutierrez due to a violation of his consular rights.¹⁰⁵ Though this decision reflects a positive outcome in one case, there are still 102 active death sentences against foreign nationals, many of whom were not properly informed of their consular rights.¹⁰⁶

II. Non-discrimination and equal rights of men and women (List of Issues, para. 7)

Race and the death penalty

47. In its 2019 List of Issues, the Committee requested information “on the steps taken to address racial disparities in the criminal justice system,” including “the disproportionate length of sentences for racial and ethnic minorities.”¹⁰⁷
48. In its 2021 State Party Report, the United States stated that it “take seriously addressing racial discrimination, including in our criminal justice system, and seeks to ensure that the justice system operates fairly and effectively for all.”¹⁰⁸

⁹⁹ 28 C.F.R. § 50.5.

¹⁰⁰ DEATH PENALTY INFO. CTR., *Prisoners on Death Row as of October 1, 2022 (per Death Row USA)*, <https://deathpenaltyinfo.org/death-row/overview> (last visited July 19, 2023).

¹⁰¹ Cindy G. Buys, *Researching the Vienna Convention on Consular Relations Notification Requirement*, NYU GLOBALLEX (Feb. 2023), https://www.nyulawglobal.org/globalex/Vienna_Convention_Consular_Relations1.html#u.s.-state-statutes-that-address-consular-notification-in-case-of-arrest-or-detention-of-a-foreign-national-1 (last visited July 12, 2023).

¹⁰² *Medellín v. Texas*, 552 U.S. 491 (2008).

¹⁰³ U.S. DEP’T OF STATE, *CONSULAR NOTIFICATION AND ACCESS* (2018), available at https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA%20Manual%205th%20Edition_September%202018.pdf. (last visited July 18, 2023).

¹⁰⁴ *See id.*

¹⁰⁵ DEATH PENALTY INFO. CTR., *Case Outcomes of Foreign Nationals as of January 30, 2022*, <https://deathpenaltyinfo.org/death-row/foreign-nationals/case-outcomes-of-foreign-nationals> (last visited July 18, 2023).

¹⁰⁶ DEATH PENALTY INFO. CTR., *Foreign Nationals Under Sentence of Death in the U.S.*, <https://deathpenaltyinfo.org/death-row/foreign-nationals/foreign-nationals-under-sentence-of-death-in-the-u-s> (last visited July 12, 2023).

¹⁰⁷ Human Rights Committee, *List of Issues prior to submission of the fifth periodic report of the United States*, (Apr. 18, 2019), U.N. Doc. CCPR/C/USA/QPR/5, ¶ 7.

¹⁰⁸ Human Rights Committee, *Fifth periodic report submitted by the United States under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2020*, (Nov. 11, 2021), U.N. Doc. CCPR/C/USA/5, ¶ 17.

49. As discussed in paragraphs 12 and 15 above, members of racial and ethnic minority groups are still disproportionately overrepresented in death row.
50. There is a historical connection between lynching and the death penalty, and the legacy of this connection includes racial disparities in death row populations. 73% of the death row population of Texas consists of Black people and members of other ethnic minority groups.¹⁰⁹ As of October 2022, half of Alabama’s death row population is made up of members of racial or ethnic minority groups; 61% of Mississippi’s death row population is members of racial or ethnic minority groups; and 54% of South Carolina’s death row population made up of members of racial or ethnic minority groups.¹¹⁰
51. While Black people make up approximately 13% of the overall population, they make up 34% of all persons executed since 1976 and 41% of people currently under sentence of death.¹¹¹ According to the NAACP, 19.23% of Black defendants are sentenced to death when the victim is White, compared to 1.3% of White defendants when the victim is Black.¹¹²
52. In its 2021 State Party Report, the United States noted that “the U.S. judicial system provides an exhaustive system of protections at both the federal and state level to ensure that the death penalty is not applied arbitrary or discriminatory mater.”¹¹³ Yet racial discrimination in jury selection is a widespread problem in capital cases. Although the U.S. Supreme Court in *Batson v. Kentucky* prohibited prosecutors from using peremptory challenges to automatically exclude jurors on the basis of race, prosecutors nonetheless deploy creative strategies to justify striking Black jurors.¹¹⁴
53. Some states such as California and Arizona have taken strides to address racial bias in capital cases.¹¹⁵ Blacks make up 6.5% of California’s overall population but make up 34.2% of the 1,076 people under sentence of death in that state.¹¹⁶ In 2020, California lawmakers enacted a Racial Justice Act, and they expanded it in 2022 to provide people on death row with retroactive relief from convictions or death sentences that had been obtained “on the basis of race, ethnicity, or national origin.”¹¹⁷ In 2021, the Arizona Supreme Court became the first jurisdiction in the nation to prohibit the use of peremptory challenges.¹¹⁸

¹⁰⁹ DEATH PENALTY INFORMATION CENTER, *The Death Penalty in 2022: Year End Report* (Dec. 16, 2022), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2022-year-end-report>.

¹¹⁰ *Id.*

¹¹¹ DEATH PENALTY INFORMATION CENTER, *Overview: Racial Demographics*, <https://deathpenaltyinfo.org/death-row/overview/demographics> (last visited July 17, 2023).

¹¹² DEATH PENALTY INFORMATION CENTER, *The Death Penalty in 2022: Year End Report* (Dec. 16, 2022), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2022-year-end-report>.

¹¹³ Human Rights Committee, *Fifth periodic report submitted by the United States under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2020*, (Nov. 11, 2021), U.N. Doc. CCPR/C/USA/5, ¶ 37.

¹¹⁴ EQUAL JUSTICE INITIATIVE, *Race and The Jury*, <https://eji.org/report/race-and-the-jury/a-history-of-discrimination-in-jury-selection/#chapter-1> (last visited July 15, 2023).

¹¹⁵ DEATH PENALTY INFORMATION CENTER, *Prosecutorial Accountability: Discrimination in Jury Selection*, <https://deathpenaltyinfo.org/policy-issues/prosecutorial-accountability/discrimination-in-jury-selection> (last visited July 17, 2023).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

54. The State Party Report also discusses a series of wrongful convictions of Curtis Flowers, a Black man who “had been tried six times in Mississippi state court for the murder of four persons at a furniture store. . . . In at least five of those trials, the prosecution engaged in documented racial discrimination or conduct that strongly suggested racial discrimination by seeking to exclude prospective black jurors from the jury.”¹¹⁹ The State Report notes that the Supreme Court ultimately reversed a decision of the Mississippi Supreme Court affirming his conviction and death sentence, and in 2020 the Mississippi Attorney General dropped all charges against Mr. Flowers.¹²⁰
55. According to the Mississippi Center for Justice, the State of Mississippi will pay Mr. Flowers \$500,000 for his wrongful imprisonment, which amounted to 23 years behind bars, much of which was in solitary confinement.¹²¹ As discussed in paragraphs 37–39 above, such compensation is an inadequate remedy for people wrongfully convicted and sentenced to death.

Gender, race, and the death penalty

56. A groundbreaking forthcoming article by Sandra Babcock and Nathalie Greenfield at the Cornell Center on the Death Penalty Worldwide presents the first “comprehensive analysis of gender-based violence (“GBV”) in the lives of all women currently on death row.”¹²² The following paragraphs provide a summary of this article’s findings.
57. Among the 53 women on death row in the United States, 47 are cisgender women, and 6 are transgender women. One transgender man under sentence of death presented as a woman at trial. Of the 47 ciswomen, 28 (60%) are white; 10 (21%) are Black; 6 (13%) are Latina, 2 (4%) are Asian or Pacific Islander, and one (2%) is Native American. Of the transwomen, 5 (75%) are White and one (25%) is Black. The transgender man is Black. Transgender women account for around 10% of women sentenced to death, while less than 1% of the general population of the United States is transgender.¹²³ All of these women were convicted of murder.¹²⁴
58. Of the 47 cisgender women on death row for murder, 41 had a prior relationship with the victim, and 25 had killed family members.¹²⁵ The article observes that “women are much less likely to kill, but when they do, they tend to kill people with whom they had a prior relationship.”¹²⁶ All of the six cisgender women who killed strangers were prosecuted with male codefendants.¹²⁷ The article explains that “when women commit violent crimes with male co-defendants, they tend to be involved in more serious, ‘gender atypical’ offences.”¹²⁸ Of the cisgender women on death row, 31 were convicted alongside co-defendants (the vast majority

¹¹⁹ Human Rights Committee, *Fifth periodic report submitted by the United States under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2020*, (Nov. 11, 2021), U.N. Doc. CCPR/C/USA/5, ¶ 21.

¹²⁰ *Ibid.*

¹²¹ Mississippi Center for Justice, *Curtis Flowers to Receive \$500,000 for Wrongful Imprisonment*, Mar. 3, 2021, <https://mscenterforjustice.org/curtis-flowers-to-receive-500000-for-wrongful-imprisonment/>.

¹²² Sandra Babcock and Nathalie Greenfield, *Gender, Violence, and the Death Penalty* (April 10, 2023), forthcoming, *California Western International Law Journal*, Vol. 53 (2023), at 1-2. Available at SSRN: <https://ssrn.com/abstract=4416558>.

¹²³ *Id.* at 6.

¹²⁴ *Id.* at 7.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.* (some internal quotation marks omitted).

of whom were male), and more than half of the male co-defendants were intimate partners.¹²⁹ According to the study, “[a]t least seven of the women currently on death row, including three women of color, experienced GBV at the hands of an abuser who later became their co-defendant. All but two of these women experienced multiple and prolonged forms of violence from the co-defendant. Our findings on co-defendant abuse suggest that hierarchies of power and control that underpin all acts of GBV may have played a role in these women’s offenses.”¹³⁰

59. The study found that “at least 96% of all women currently on death row have experienced GBV in their lifetimes, with at least 85% experiencing multiple forms of physical, sexual, psychological, and socioeconomic violence,” and “multiple and repeated experiences of violence are the norm for Black, Latina, Asian, and Native women sentenced to death.”¹³¹ The study also found that over 74% of the documented GBV “events” were categorized as “ongoing,” designated as “violence that occurred continuously over a period of time, such as repeated beatings by a parent throughout childhood.”¹³² The article continues: “Nearly every woman on death row—over 93% of the women in our dataset—has experienced ongoing abuse. This figure is even higher for women of color, with 95% experiencing ongoing abuse, including all Black, Asian, and Native women for whom we have data, and 83% of the Latina women. This means that women’s experiences of violence are rarely one-off events from which they can attempt to move on and heal. Rather, this abuse is recurring and relentless, permeating women’s lives and leaving them in its inescapable shadow.”¹³³
60. Women who are members of racial and ethnic minority groups face intersectional discrimination when charged with capital crimes.¹³⁴ The study reports that “the prevalence of gender-based violence is highest among women of color[,] . . . [and] Black women are particularly vulnerable to violence, especially where that violence comes from an intimate partner.”¹³⁵ Quoting the National Black Women’s Justice Institute, the study observes that “Black women are arrested and incarcerated more often because Black women’s survival strategies are criminalized, including self-defense or being forced to engage in illegal activities by intimate partners or others who have harmed them physically and emotionally.”¹³⁶ Women who are members of racial and ethnic minority groups also face greater hostility from state actors in the criminal legal system, who routinely disbelieve them when they recount experiences of GBV.¹³⁷ Authorities “are less likely to view Black survivors as sympathetic or in need of help,” and Black girls “are . . . criminalized for behaviors for which white girls, in particular would receive leniency.”¹³⁸ The study concludes that “in the cases of women of color, . . . race- and gender-based discrimination are inseparable. Each amplifies the effects of the other to place women of color at a heightened risk of harm, a heightened risk that state

¹²⁹ Ibid.

¹³⁰ *Id.* at 28.

¹³¹ *Id.* at 21.

¹³² Ibid.

¹³³ *Id.* at 23.

¹³⁴ *Id.* at 12.

¹³⁵ Ibid.

¹³⁶ Ibid. (internal quotation marks omitted) (quoting Travariana Mason, *Extreme Sentences Disproportionately Impact and Harm Black Women*, National Black Women’s Justice Institute (Sept. 23, 2021), <https://www.nbwji.org/post/extreme-sentences-disproportionately-impactand-harm-black-women>).

¹³⁷ *Id.* at 13.

¹³⁸ Ibid.

authorities will minimize and disbelieve this harm, and a heightened risk of being criminalized for their response to harm. The result is a system that underprotects Black women as victims and overpenalizes them as perpetrators.”¹³⁹

61. The criminal legal system fails to account for women’s experiences when they come into conflict with the law for allegedly committing capital crimes. The research by Professor Babcock and Ms. Greenfield reveals that prosecutors and defense attorneys routinely misunderstand, minimize, dismiss, or ignore women’s experiences of GBV: “Defense attorneys often fail to uncover and present evidence of their clients’ experiences of gender-based violence. Even when they learn that women have been sexually abused, raped, or beaten, they rarely explain the full extent of their clients’ victimization and its consequences for their mental and physical health. Prosecutors, in turn, frequently rely on long-debunked stereotypes to discredit women’s accounts of childhood sexual abuse, rape, and intimate partner violence.”¹⁴⁰ Only in “the truly exceptional cases” do “defense teams present extensive evidence of women’s experiences of violence, accompanied by thoughtful and nuanced expert testimony.”¹⁴¹ And only “exceptional” capital prosecutors “refrain from invoking harmful stereotypes of women victims of violence.”¹⁴² Judges and jurors similarly hold misconceptions about abused women, and those biases affect how the criminal legal system considers all forms of GBV.¹⁴³ The article concludes that courts “turn a blind eye to the gendered suffering that often shapes women’s pathways to incarceration and execution.”¹⁴⁴ As a result, the juries and judges “who sentence women to die rarely comprehend the extensive trauma that the women have endured throughout their lives, and how that trauma relates to their legal and moral culpability.”¹⁴⁵

III. Suggested recommendations for the Government of the United States

62. The authors of this report suggest the following recommendations to the government of the United States:
- Abolish the federal death penalty and replace it with a sentence that is fair, proportionate, and consistent with international human rights standards.
 - In the meantime:
 - commute the sentences of all persons currently on federal death row.
 - establish a de jure moratorium both on federal executions and on federal death sentences, with a view toward abolition.
 - amend federal law to ensure that the death penalty is an available punishment only for people who killed and intended to kill, as required under Article 6 of the Covenant.
 - publish an executive order prohibiting federal prosecutors from seeking the death penalty and directing the Department of Justice to withdraw support for the death penalty in any post-conviction proceedings.

¹³⁹ *Ibid.* (footnote omitted).

¹⁴⁰ *Id.* at 32 (footnotes omitted).

¹⁴¹ *Id.* at 43

¹⁴² *Ibid.*

¹⁴³ *Id.* at 32.

¹⁴⁴ *Id.* at 48.

¹⁴⁵ *Id.* at 2.

- Create accountability procedures for federal prosecutors who engage in racially discriminatory jury selection.
- Promulgate and endorse science-based model jury instructions regarding the reliability of eyewitness identifications, including cross-racial identifications.
- Provide training and incentives for law enforcement to adopt model practices for eyewitness identification to reduce the risk of erroneous identifications.
- Prohibit states from imposing a sentence of death in the absence of a unanimous verdict.
- Prohibit state and federal authorities from carrying out an execution if the person to be executed is not conscious when the death warrant is read or is otherwise unable to make a final statement prior to the execution.
- Fully implement the recommendations of the Ad Hoc Committee to Review the Criminal Justice Act as they pertain to providing adequate and adequately funded legal counsel in all capital cases, appeals, and habeas corpus proceedings, including the creation of an independent Defender Commission within the judicial branch that would have the sole authority to set policy and practices related to the provision of federal defense in capital cases.
- Expand federal funding and significantly increase caps for capital counsel compensation and fees and expenses in capital cases, ensuring that caps are automatically adjusted for inflation.
- Provide state and federal trial court judges with guidance about the level of experience required for adequate counsel in capital cases, the amount of time required to provide an adequate defense in such cases, the funds counsel needs to provide experts and present a mitigation defense, and the importance of timely appointment of qualified post-conviction counsel.
- Reduce funding disparities across districts and circuits for federal capital cases.
- Develop and offer ongoing, comprehensive training for counsel in capital cases, including post-conviction litigation.
- Require all states that retain the death penalty to fully fund a program to provide competent public defenders in all capital cases and to provide qualified legal assistance to people on death row.
- At the federal level, codify gender-specific defenses and mitigation in capital cases, encompassing women's experiences of trauma, poverty, and gender-based violence. Create incentives for states to do the same.
- Ensure that all judges presiding over sentencing trials in capital cases receive comprehensive training on gender-based discrimination, gender-based violence, and tactics of coercive control that may contribute to women committing death-eligible offenses.
- Provide training to all defense counsel who take on capital cases regarding gender-based violence and gender-specific mitigation.
- Collaborate with civil society organizations to ensure that all federal and state prosecutors and other authorities responsible for making charging decisions and handling capital cases have comprehensive training on gender stereotypes, gender-based violence, tactics of coercive control, and women's experiences of trauma that may place them into conflict with the law.

- On at least an annual basis, publish comprehensive information on the number of persons under sentence of death and executed over the previous year, disaggregated by sex, gender, gender identity or gender expression, sexual orientation, age, age of any dependent children, nationality, race/ethnicity, disability, crime of conviction, date of conviction, court of conviction, relationship to any codefendants or victims, and date of execution (if applicable), to facilitate analysis of how race, sex, gender, disability, migrant status, sexual orientation, and gender identity influence outcomes in capital cases in the criminal legal systems of the United States.
- Adopt legislation and financial incentives for states to implement recommendations promulgated by the Innocence Project regarding compensation and assistance for individuals wrongly sentenced to death: untaxed compensation of at least \$100,000 per year on death row; legal assistance for seeking compensation; and adequate and appropriate services, including housing, transportation, education, physical and mental health care, employment assistance, and other reintegration assistance.
- Make all persons exonerated from death row automatically eligible for Medicare.
- Ensure that there are adequate mechanisms to hold prosecutors, law enforcement, and judges accountable when their conduct leads to wrongful convictions and wrongful death sentences.
- Adopt legislation to mandate state compliance with the *Avena* decision.
- Ensure that all foreign nationals on federal death row receive the review and reconsideration mandated under *Avena*.
- Bar admission of evidence obtained from foreign nationals who had not been informed of their consular notification rights at the time the evidence was obtained.
- Mandate that all states that retain the death penalty adopt statutory schemes to require law enforcement to inform all suspects of their consular notification rights at the time the *Miranda* notification is given and to impose penalties for failure to notify foreign nationals of their rights.
- Expand State Department efforts to train local law enforcement about consular notification requirements, prioritizing jurisdictions where prosecutors have actively sought the death penalty in the last ten years.