

# INDIGENOUS RIGHTS CENTER

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## Racial Discrimination by the Criminal Justice System Against Indigenous Peoples in the United States

### Executive Summary

There are more than 560 federally-recognized American Indian tribes in the United States comprising an American Indian/Alaska Native population of approximately 4 million individuals. About half of this population lives on reservations and the others live off-reservation, primarily in urban communities.

This report documents that Indigenous Peoples in the United States (American Indians/Native Americas, Hawaiian Natives and Alaska Natives) endure the highest incarceration rate of any racial or ethnic group, at 38 percent higher than the national rate. Available statistics indicate that rates for youth are even higher. In addition, American Indians/Native Americas, Hawaiian Natives and Alaska Natives receive proportionately higher sentences for the same crimes, and are consistently denied equality of freedom of religious and spiritual practice while incarcerated.

### Examples of Racial Discrimination Against Indigenous Peoples (American Indians/Native Americans, Hawaiian Natives and Alaska Natives) by the Criminal Justice System in the United States

#### A. Victimization

Indian reservations across the United States have grappled for years with chronic rates of crime higher than all but a handful of the most violent cities in the U.S. The country's 310 Indian reservations have violent crime rates that are more than two and a half times higher than the national average, according to data compiled by the U.S. Justice Department.

**TABLE 7**  
Rate of violent victimization, by demographic characteristics of victims, 2003, 2011, and 2012

Demographic characteristics of victims	Violent crime <sup>a</sup>			Serious violent crime <sup>b</sup>		
	2003	2011	2012	2003	2011	2012
Total	32.1	22.6	26.1	10.0	7.2	8.0
Sex						
Male	34.6	25.5	29.1	10.2	7.7	9.4
Female	29.7	19.8	23.3	9.9	6.7	6.6
Race/Hispanic origin						
White <sup>c</sup>	32.3	21.6	25.2	9.4	6.5	6.8
Black/African American <sup>c</sup>	35.9	26.4	34.2 <sup>‡</sup>	12.8	10.8	11.3
Hispanic/Latino	26.6	23.9	24.5	9.7	7.2	9.3
American Indian/Alaska Native <sup>c</sup>	85.2	45.4	46.9	35.2	12.6 <sup>!</sup>	26.2 <sup>!</sup>
Asian/Native Hawaiian/other Pacific Islander <sup>c</sup>	9.9	11.2	16.4	5.1	2.5 <sup>!</sup>	9.1 <sup>†</sup>
Two or more races <sup>c</sup>	140.7	65.0	42.8	47.8	26.2	9.5 <sup>!†</sup>
Age						
12-17	78.3	37.7	48.4 <sup>‡</sup>	22.7	8.8	9.9
18-24	63.8	49.1	41.0	23.7	16.3	14.7
25-34	39.0	26.5	34.2 <sup>‡</sup>	11.9	9.6	10.9
35-49	23.1	21.9	29.1 <sup>†</sup>	7.1	7.0	9.5
50-64	16.3	13.1	15.0	4.2	4.3	4.6
65 or older	3.1	4.4	5.7	0.9	1.7	1.6
Marital status						
Never married	57.7	35.5	40.7	18.2	11.7	11.9
Married	14.2	11.0	13.5	3.2	3.7	3.9
Widowed	7.8	3.8	8.3 <sup>†</sup>	1.2	0.7 <sup>!</sup>	2.6 <sup>‡</sup>
Divorced	44.6	37.8	37.0	17.0	9.2	10.9
Separated	100.9	73.0	83.1	47.8	26.4	39.5

Note: Victimization rates per 1,000 persons age 12 or older. See appendix table 11 for standard errors.

<sup>†</sup> Significant change from 2011 to 2012 at the 95% confidence level.

<sup>‡</sup> Significant change from 2011 to 2012 at the 90% confidence level.

<sup>!</sup> Interpret with caution. Estimate based on 10 or fewer sample cases, or coefficient of variation is greater than 50%.

<sup>a</sup>Includes rape or sexual assault, robbery, aggravated assault, and simple assault.

<sup>b</sup>Includes rape or sexual assault, robbery, and aggravated assault.

<sup>c</sup>Excludes persons of Hispanic or Latino origin.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 2003, 2011, and 2012.

According to the Bureau of Justice Statistics (BJS), U.S. Justice Department, rates of violent victimization for both males and females are higher for Native Americans than for all races.

The root cause of this violent crime rate is a justice system that forces tribal governments to rely on distant federal — and in some cases, state — officials to investigate and prosecute serious crimes, in general, and most of those committed by non-Indians, in particular. Outside law enforcement has simply proven ineffective and in many cases discriminatory and racist.

## ***B. Hate Crimes***

It is difficult to determine whether the actual number of hate crimes is increasing or decreasing in the United States. According to FBI statistics for 2009, the most recent year for which full data have been released, the number of hate crimes reported by state and local law enforcement agencies to the FBI was down slightly in 2009 from 2008. However, hate crimes are notoriously under-reported, which makes small changes in statistics a less than reliable indicator.

In addition to reluctance by many victims to report hate crimes, some law enforcement agencies do not report crime data at all to the FBI, or do not effectively report separately on hate crimes. Hate crimes are defined differently from state to state, which also affects reporting to the FBI. Finally, because a hate crime by definition involves a conclusion as to the motive of the perpetrator, many crimes in which the perpetrator cannot be found, or his motive cannot be established based on the facts of the incident itself, are not reported as hate crimes. What is certain is that assaults motivated by hatred are often more violent and more likely to result in serious injury to the victim than other types of assaults.

During his six-year term on the U.S. Civil Rights Commission, Chairman Arlan Melendez of the Reno Sparks Indian Colony saw more than his share of racism, discrimination and hate crimes against Native Americans. “We know from hearings in Montana, New Mexico and South Dakota that hate crimes are continuing to happen against Native Americans, mostly in border towns near our reservations,” he said.

Melendez cited a report developed by the U.S. Civil Rights Commission that compiled testimony in 2009 about hate crimes from hundreds of American Indians.<sup>1</sup> The report followed up on the 2005 U.S. Department of Justice report that showed the overall violent crime rate among American Indians and Alaska Natives was 100 per 1,000 persons, meaning that one out of 10 American Indians has been a victim of violence. The study also found that 'American Indians are more likely than people of other races to experience violence at the hands of someone of a different race,' with 70 percent of reported violent attacks committed by non-Indians.

A recent large-scaled study of hate crimes conducted by Barbara Perry, University of Ontario, indicated that only 10 percent of hate crimes against Natives are reported to law enforcement authorities. According to interviews of nearly 300 American Indians in border towns, the low reporting rate was largely due to 'historical and contemporary experience with the police, and the perception they do not take Native American victimization seriously.'

Native American Studies professor, in her 2007 book "Anti-Indianism in Modern America," Native American Studies professor Elizabeth Cook-Lynn said, "There has been little attempt by legal authorities or anyone else to understand the phenomenon of racially motivated violence in

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<sup>1</sup> "Discrimination Against Native Americans in Border Towns," U.S. Commission on Civil Rights. 22 March 2011. [http://www.usccr.gov/pubs/BorderTowns\\_03-22-11.pdf](http://www.usccr.gov/pubs/BorderTowns_03-22-11.pdf).

these communities. The first step is to acknowledge that anti-Indian hate crime is America's essential cancer and that it is a mortal illness, as devastating as anti-Semitism has been to other parts of the world."<sup>2</sup>

### ***C. Racial Profiling***

The U.S. Supreme Court has held that racial profiling violates the constitutional requirement that all persons be accorded equal protection of the law. "Racial Profiling" refers to the discriminatory practice by law enforcement officials of targeting individuals for suspicion of crime based on the individual's race, ethnicity, religion or national origin. Criminal profiling, generally, as practiced by police, is the reliance on a group of characteristics they believe to be associated with crime. Examples of racial profiling are the use of race to determine which drivers to stop for minor traffic violations or the use of race to determine which pedestrians to search for illegal contraband.

Any definition of racial profiling must include, in addition to racially or ethnically discriminatory acts, "discriminatory omissions" on the part of law enforcement as well, i.e., failure to enforce laws and to protect and serve Indigenous Peoples.

Empirical evidence confirms the existence of racial profiling on America's roadways. At the national level, the U.S. Department of Justice's BJS reports that for the year 2005, the most recent data available, "[p]olice actions taken during a traffic stops were not uniform across racial and ethnic categories."<sup>3</sup>

Quantitative evidence reported in several states confirms this nationwide data:

- A study in Arizona shows that during 2006-2007, Native Americans and persons of Middle Eastern descent were more likely to be stopped on nearly all the highways studied. The highway patrol was 3.5 times more likely to search a stopped Native American than a White.<sup>4</sup>
- In Minnesota, a statewide study of racial profiling during 2002 found that Native American drivers were stopped and searched more often than Whites.<sup>5</sup>

Indigenous Peoples call this "DWI," or "Driving While Indian." Indians often complain about stops and searches by local police and sheriffs on roads leading to and from reservations.

In South Dakota, widespread reports of racial profiling led to hearings before the state legislature, where Indians testified about their being stopped and searched not only based on race, but also on religious articles hanging from rearview mirrors and regional license plates that identified them as living on reservations.

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<sup>2</sup> Taliman, Valerie. "Natives Targeted Most for Hate Crimes," Indian Country Today. 27 June 2011.

<sup>3</sup> "Contacts Between Police and the Public, 2005," U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Special Report, <http://bjs.ojp.usdoj.gov/content/pub/ascii/cpp05.txt>.

<sup>4</sup> "Driving While Black or Brown," American Civil Liberties Union of Arizona, 2008. <http://www.acluaz.org/DrivingWhileBlackorBrown.pdf>.

<sup>5</sup> "The Persistence of Racial and Ethnic Profiling in the United States," American Civil Liberties Union Rights Working Group. Aug. 2009 [http://www.aclu.org/pdfs/humanrights/cerd\\_finalreport.pdf](http://www.aclu.org/pdfs/humanrights/cerd_finalreport.pdf).

In June 2002 scores of Indians in the state's Bennett County complained to Department of Justice attorneys, alleging racial profiling at the hands of sheriffs there, including vehicular stops in the absence of reasonable suspicion, the administration of breathalyzer tests without reasonable suspicion, warrantless searches of homes and vehicles, and demanding to see drivers licenses and vehicle registrations while inside bars. <sup>6</sup>

***D. Violence Against Indigenous Women***

Violence against Native women has reached epidemic proportions in the U.S. Indigenous women are 10 times more likely to be murdered than other Americans, for example. They are raped or sexually assaulted at a rate four times the national average, with more than one in three having either been raped or experienced an attempted rape. <sup>7</sup>

Reauthorization of the Violence Against Women Act in 2013 recognized that the U.S. has a federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women. While the legislation broadened Nation's jurisdiction as regards non-Indian offenders, it only permits tribal jurisdiction over non-Indians with significant connections to the tribal community and only over a tightly defined set of crimes: domestic violence, dating violence, and violations of enforceable protection orders.

<b>Key Statistics on Victimization: Indigenous Women <sup>8</sup></b>
<ul style="list-style-type: none"> <li>• 61% of American Indian and Alaska Native women (or 3 out of 5) have been assaulted in their lifetimes *</li> <li>• 34% of American Indian and Alaska Native women will be raped in their lifetimes *</li> <li>• 39% of American Indian and Alaska Native women will be subjected to violence by an intimate partner in their lifetimes **</li> <li>• 59% of assaults against Native women occur at or near a private residence ***</li> <li>• 59% of American Indian women in 2010 were married to non-Native men ****</li> <li>• 46% of people living on reservations in 2010 were non-Natives (single race) *****</li> <li>• U.S. Attorneys declined to prosecute nearly 52% of violent crimes that occur in Indian country; and 67% of cases declined were sexual abuse related cases *****</li> <li>• On some reservations, Native women are murdered at more than ten times the national average *****</li> </ul>
<p>* Tjaden, P., &amp; Thoennes, N. (2000). Findings from the National Violence against Women Survey.            ** Centers for Disease Control. (2008). Adverse health conditions and health risk behaviors associated with intimate partner violence.            *** Bachman, R., et al. (2008). Violence against American Indian and Alaska Native women and the criminal justice response: What is known.            **** U.S. Census Bureau, Census 2010.            ***** U.S. Government Accountability Office. (2010). U.S. Department of Justice Declinations of Indian Country Criminal Matters.            ***** Statement of Associate Attorney General Perrelli before the Committee on Indian Affairs on Violence Against Native American Women citing a National Institute of Justice Funded Analysis of Death Certificates. (July 14, 2011).</p>

<sup>6</sup> Racial Profiling: Definition. American Civil Liberties Union. <https://www.aclu.org/racial-justice/racial-profiling-definition>.

<sup>7</sup> National Congress of American Indians Policy Research Center. Policy Insights Brief: Statistics on Violence Against Native Women. February 2013.

<sup>8</sup> Ibid.

### ***E. Discrimination in Prosecutions on Behalf of Indigenous Victims***

According to a 2003 study commissioned by the U.S. Sentencing Commission, Indian offenses amount to less than 5 percent of the overall federal caseload, but constitute a significant portion of the violent crime in federal court. "Over 80 percent of manslaughter cases and over 60 percent of sexual abuse cases arise from Indian jurisdiction and nearly half of all the murders and assaults arise from Indian jurisdiction," said the report.

The question of whether or not to charge individuals who commit violent crimes against Indigenous Peoples is left to the discretion of prosecutors. Federal data show an alarming pattern of "discriminatory omission" on the part of U.S. Attorneys:

- The U.S. Justice Department, which along with agents of the FBI generally have jurisdiction for the most serious crimes on reservations, files charges in only about half of Indian Country murder investigations.
- Federal data also show that U.S. Attorneys turn down nearly two-thirds of sexual assault cases on reservations.
- In 2011, federal prosecutors in the U.S. declined to file charges in 52 percent of cases involving the most serious crimes committed on Indian reservations.<sup>9</sup>

In another example of blatant discrimination under U.S. federal law, Alaska, with an official 16 percent Native population was alone among the U.S. states to be exempted from the provisions of the Tribal Law and Order Act as well as the Violence Against Women Reauthorization Act of 2013. (Although Alaska has 229 of the Nation's federally recognized 566 tribes, the state of Alaska in 1971 established a system of Native corporations to own villages and other lands, as opposed to federally recognized Indian reservations or nations.) But according to a survey by the Alaska Federation of Native the rate of sexual violence in rural villages in Alaska is as much as 12 times the national rate.<sup>10</sup>

### ***F. Lack of Equal Access to Justice Indigenous Defendants***

In 1883, the U.S. Supreme Court ruled that the Dakota Territory court had no jurisdiction in a case in which a member of the Lakota nation killed a fellow member on tribal land. The decision overturned a death sentence and effectively gave exclusive jurisdiction for crimes to tribes. Congress, uncomfortable with the decision, passed the Major Crimes Act in 1885, taking away the tribes' authority; serious crimes committed by Indians on reservations could be prosecuted only by the federal government.

Today, criminal jurisdiction on Indian reservations is allocated among federal, state and tribal courts. Jurisdiction over particular cases depends in general upon three factors: the nature of the offense, whether any jurisdiction has been conferred on the state, and whether the perpetrator or victim is an Indian.

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<sup>9</sup> Williams, Timothy. "Higher Crime, Fewer Charges on Indian Land" New York Times, 20 Feb 2012. [http://www.nytimes.com/2012/02/21/us/on-indian-reservations-higher-crime-and-fewer-prosecutions.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/02/21/us/on-indian-reservations-higher-crime-and-fewer-prosecutions.html?pagewanted=all&_r=0).

<sup>10</sup> "For Native American Women, Scourge of Rape, Rare Justice" New York Times, May 22, 2012.

The right of defendants to legal counsel is guaranteed by the U.S. Constitution. But due to a little-known quirk in federal law, Native Americans aren't assured this protection. That's because under U.S. law, tribes are considered sovereign nations and are not subject to all privileges afforded by the Bill of Rights.

In creating the Indian Civil Rights Act of 1968, Congress gave individual tribal members some protections, such as the right to a speedy trial and the right to a trial by jury. But it didn't provide the right to counsel for defendants too poor to hire attorneys. Under the recently signed Tribal Law and Order Act, the right to counsel is largely left to the discretion of tribes.

Without an absolute right to legal counsel, the likelihood that accused persons prosecuted in tribal court will represent themselves is increased and many defendants may plead guilty and thereby unknowingly risk exposure to additional charges at the federal and state levels. In some instances, they may be subject to two trials, sentences and punishments for the same crime. Unlike elsewhere in the U.S., in Indian Country, charging a defendant in both federal and tribal court is not a violation of Double Jeopardy. The U.S. Supreme Court has held that the source of the power to punish offenders is an inherent part of tribal sovereignty and not a grant of federal power. Consequently, when two prosecutions are by separate sovereigns (the Navajo Nation and the United States, for example), the subsequent federal prosecution does not violate the defendant's right against double jeopardy (United States v. Wheeler, 435 U.S. 313. 1978).<sup>11</sup>

This current jurisdiction scheme makes distinctions based on the race of the defendant and is in fact a form of racial discrimination.

### ***G. Racial Disparities in Sentencing***

Due to the criminal jurisdictional scheme in Indian country, Indian offenders of major crimes are prosecuted in federal court, under the Major Crimes Act, and subject to the federal Sentencing Guidelines. If non-Indian offenders commit the same crime they are typically subject to prosecution and sentencing by the state authorities in state court. This differing sentencing scheme for Indians versus non-Indians has a disparate impact on Native American defendants, as state criminal sentences are typically lower than federal criminal sentences.<sup>12</sup>

In 2002, the United States Sentencing Commission created an Ad Hoc Advisory Group on Native American Sentencing Issues in response to concerns that Federal Sentencing Guidelines had a discriminatory impact on Indian offenders in Indian country. The Advisory Group noted, "there is a significant negative disparity in sentencing of Native American people ...."<sup>13</sup> For example, the Advisory Group found that for sex offenders prosecuted in New Mexico state courts, the average sentence is 43 months compared to 86 months in federal court.<sup>14</sup> For crimes of assault, the average sentence in New Mexico state court is 6 months, compare to 54 months in federal court.<sup>15</sup>

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<sup>11</sup> Tribal Law and Policy Institute. General Guide to Criminal Jurisdiction in Indian Country. <http://www.tribal-institute.org/lists/jurisdiction.htm>

<sup>12</sup> United States v. Jerry Paul, 929 F. Supp. 1406, 1407-1408 (D.N.M. 1996).

<sup>13</sup> "Report of the Native American Advisory Group," Ad Hoc Advisory Group on Native American Sentencing Issues, U.S. Sentencing Commission. 04 November 2003. p. 17.

<sup>14</sup> Hamline L. Rev. 483, 487, citing Advisory Group Report at 16-17.

<sup>15</sup> Id. at note 7, p. 487, citing Advisory Group Report at 27.

A study by the Office of Hawaiian Affairs commissioned by the Hawaiian Legislature in 2008 showed "the disproportionate representation of Native Hawaiians in the criminal justice system accumulates at each stage...[and] that Native Hawaiians are sentenced to more days in prison and received a longer term of probation than most other racial or ethnic groups." <sup>16</sup>

These incarceration and sentencing disparities violate Indian defendants "right to equal treatment before the tribunals and all other organs administering justice of the laws because Indian defendants typically receive longer sentences under the Federal Sentencing Guidelines than a non-Indian would receive in state court for the same crimes. Although the Advisory Group acknowledged this disparity, it concluded that this negative disparity in sentencing of Native Americans was a jurisdictional matter, not necessarily a racial matter. <sup>17</sup> As stated previously, a jurisdictional scheme that makes distinctions based on the race of the defendant is in fact a form of racial discrimination.

### ***E. Racial Disparities in Rates of Imprisonment***

Native Americans who end up being prosecuted for serious crimes face a federal system that has become tougher in recent years. Since the 1980s, Congress has been toughening federal penalties by adding mandatory minimum sentences — often more severe than those handed out by states. As a result American Indians, especially the million or so living on tribal land, can face harsher punishments than non-Indians for what are effectively local crimes. And there is no parole in the federal system, so defendants there must serve a minimum of 85 percent of a sentence. The result is there are situations where tribal members have served life sentences in the federal system when the crimes they committed would have resulted in as little as two-and-a half-years served had they occurred in state jurisdiction.

Native peoples in the United States endure the highest incarceration rate of any racial or ethnic group, at 38 percent higher than the national rate.

Currently, there are over 4,000 American Indians serving time in the federal prison system. That is more, proportionately, than any other racial group. According to census and Federal Bureau of Prisons (BOP) data, tribal members living on reservations are incarcerated at a rate of more than 249 per 100,000 residents. The next group is African-Americans, who are imprisoned at a rate of 198 per 100,000.

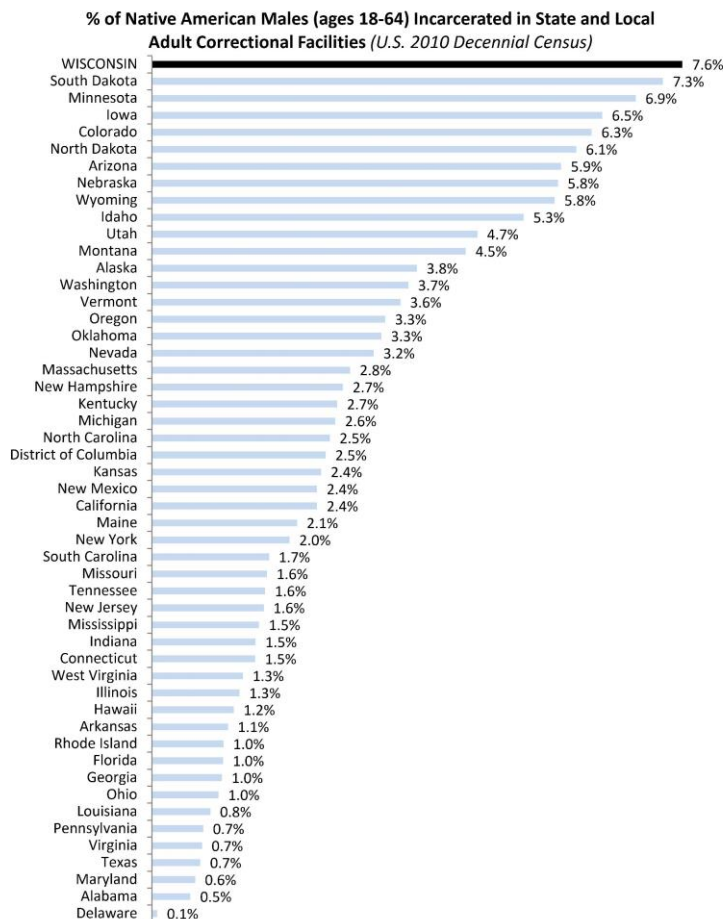
The national average for incarceration in state and local institutions of Native American men aged 18 to 64 is 3.1 percent. <sup>18</sup>

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<sup>16</sup> S.B. 986 26<sup>th</sup> Legis. 2011, Regs. Sess. Haw. 2011.

<sup>17</sup> Hamline L. Rev. 483, 485.

<sup>18</sup> "Incarceration Rates High for Native American and Hispanic Men in South Dakota". <http://ksoo.com/incarceration-rates-high-for-native-american-and-hispanic-men-in-south-dakota/?trackback=tsmclip>.



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Available data show that in U.S. states with relatively large Indian populations, American Indians, Alaska Natives and Hawaiian Natives are incarcerated disproportionately to their numbers.

- Alaska Natives are incarcerated at levels very disproportionate to their percentages in the general population of the state. Alaska Natives comprise about 15 percent of the state's population (according to the 2010 U.S. Census). However, 36 percent of the offender population in 2011 was Alaska Native.<sup>20</sup>
- A report by the Hawaii Advisory Committee to the United States Commission on Civil Rights, based on information and testimony received from numerous sources including officials of the state criminal justice system, concluded that although Native Hawaiians are approximately 20 percent of the state's population, they comprise more than 40 percent of the state's prison population.<sup>21</sup>
- Native Americans comprise 7 percent of the total population in Oklahoma (according to the 2010 U.S. Census). At calendar yearend 2012, there were 24,546 adult offenders who were

<sup>19</sup> Ibid.

<sup>20</sup> "Alaska Correctional Populations 2011," Alaska Justice Forum 29(3-4), Fall 2012/Winter 2013.

<sup>21</sup> "Is There an Uneven Administration of Justice of Native Hawaiians in Hawai'i?," A report of the Hawaii Advisory Committee to the United States Commission on Civil Rights, September, 2011



incarcerated that state. Native Americans accounted for nearly 10 percent of the total prison population.<sup>22</sup>

### ***F. Disproportionate Rates of Juvenile Confinement***

Native American juveniles represent 2 to 3 percent of youth arrests in categories such as theft and alcohol possession. Similarly, they are committed to adult incarceration at a rate 1.84 times that of whites and are placed under the jurisdiction of the criminal justice system at a rate 2.4 times that of whites. In four states with substantial Native American populations, they represent from 29 to 42 percent of juveniles held in secure confinement. While at first glance these numbers are bad enough, what makes them even harsher is the fact that the Native American population is a relatively young one: according to the Indian Health Service, in 2008 the median age of the Native American population was 28.0 years versus 35.3 years for the U.S. population as a whole. This means these issues impact a relatively larger portion of the total Native American population.<sup>23</sup>

American Indian youth are grossly over-represented in state and federal juvenile justice systems and secure confinement. Incarcerated Indian youth are much more likely to be subjected to the harshest treatment in the most restrictive environments and less likely to have received the help they need from other systems. AI/AN youth are 50 percent more likely than whites to receive the most punitive measures. Pepper spray, restraint and isolation appear to be grossly and disproportionately applied to Indian youth, who have no recourse, no alternatives and few advocates.<sup>24</sup>

Once again, challenges in obtaining disaggregated data make accurate assessment of actual disparities difficult. But data that do exist suggest similar, and in some areas, far greater disparities for Native American youth than for adults.

In 26 states, Native American youth are disproportionately placed in secure confinement in comparison to their population. For example, in four states (South Dakota, Alaska, North Dakota, Montana), Native youth account for anywhere from 29 to 42 percent of youth in secure confinement. Nationwide, the average rate of new commitments to adult state prison for Native American youth is almost twice (1.84 times) that of White youth. In the states with enough Native Americans to facilitate comparisons, Native American youth were committed to adult prison from 1.3 to 18.1 times the rate of Whites.<sup>25</sup>

In testimony to the Hawaii Advisory Committee to the United States Commission on Civil Rights in 2011, Meda Chasney-Lind (professor of criminology at the University of Hawaii in Manoa) reported that 58 percent of boys and 49 percent of girls housed at Hawaii's only juvenile justice center are Native Hawaiian (the total Native population of Hawaii is between 6 and 20 percent depending on definition).<sup>26</sup>

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<sup>22</sup> Executive Communications Office. Oklahoma Department of Corrections 2013 Annual Report. 2013.

<sup>23</sup> Winters, Robert. "The Quiet Crisis in Native American Juvenile Justice," The Corrections Connection. June 2014. <http://www.corrections.com/news/article/36513-the-quiet-crisis-in-native-american-juvenile-justice>.

<sup>24</sup> Cross, Terry L. "Native Americans and Juvenile Justice: A Hidden Tragedy," Poverty & Race, November/December 2008.

<sup>25</sup> Ibid.

<sup>26</sup> "Is There an Uneven Administration of Justice of Native Hawaiians in Hawai'i?", A report of the Hawaii Advisory Committee to the United States Commission on Civil Rights, September 2011.

Mr. Leonard Foster (Supervisor for the Navajo Nations Corrections Project, Coordinator of the National Native American Prisoners Rights Coalition, and Board member of the International Indian Treaty Council). He is a Diné (Navajo) spiritual adviser who works with hundreds of prisoners across the country and has testified before Congress and the United Nations on Native rights. He was an invited expert presenter at the United Nations Permanent Forum on Indigenous Issues (UNPFII) “International Expert Group Meeting (EGM) on Indigenous Children and Youth in Detention, Custody, Foster-Care and Adoption” which took place March 4 -5, 2010, in British Columbia, Canada. The report of the EGM [E/C.19/2010/CRP. 8] which was presented to the 9<sup>th</sup> session of the UNPFII in April 2010 contained the following testimony presented by Mr. Foster regarding youth incarceration in the U.S.

"Indigenous youth are disproportionately represented in juvenile detention systems across the U.S., and these numbers are especially high in some states with larger populations of Indigenous Peoples. Our ancestors were free, but colonization in all its forms has made many of us feel ashamed of who we are. This affects many of our youth today. They are angry, act out, and misuse drugs and alcohol. In the U.S., some states like Montana, South Dakota and Alaska have as many as 30 to 40 percent Native Americans in their prison system and perhaps more, since accurate data is not available, especially for youth in prison. We have seen that Native America youth and young adults tend to receive longer sentences for the same offenses and many are held in facilities far away from their families and communities. This breaks their spirits by breaking their cultural ties to their families and Nations. The experience of confining in isolation or “warehousing” of the young Native Americans is a human rights violation and is inhumane. The incarceration of Native young people affects families, clans, and entire communities because of the close knit ties in the Indian world." <sup>27</sup>

### ***G. Racial Discrimination Resulting in Denial of Religious and Cultural Rights of Indigenous Prisoners***

Mr. Foster also has provided extensive documentation and testimony over many years to U.N. and federal processes regarding the denial of Indigenous Peoples' freedom of religious and cultural practice in the United States. His testimony led to former Special Rapporteur on the Question of Religious Intolerance Mr. Abdelfattah Amor's conclusions with regard to the denial of Indigenous prisoners' rights to practice their spirituality in United States prisons in the report to the U.N. Commission on Human Rights on his country visit to the United States in January and February 1999 [E/CN.4/1999/58/Add.18]. His final recommendations to the United States included:

"84. Concerning the religious rights of Native American prisoners, apart from the recommendation made in the section on legal issues, the Special Rapporteur recommends that the positive and practical action taken in many federal prisons (fully compatible with security requirements, e.g. ending the practice of cutting their hair) should become general throughout the United States prison system and that steps should be taken to ensure, particularly through training, and perhaps through penalties for prison officers and

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<sup>27</sup> International Expert Group Meeting (EGM) on Indigenous Children and Youth in Detention, Custody, Foster-Care and Adoption”, March 4 -5, 2010 [E/C.19/2010/CRP. 8, para. 15]

governors, that these rights are not treated as privileges that can be granted or refused at the whim of an authority or official." <sup>28</sup>

Special Rapporteur Amor's recommendations to the United States regarding ways to address ongoing discrimination against Indigenous Peoples in the area of religious and spiritual beliefs and practices (including both with regards to denial of Native American prisoners' religious rights and the desecration of their sacred areas) are addressed in other reports submitted to this session of the CERD and have not yet been implemented. This issue was addressed again when U.N. Special Rapporteur on the Rights of Indigenous Peoples James Anaya visited the United States 14 years later in April-May 2012. During SR Anaya's visit to Tucson, Arizona, on April 26, 2012, Mr. Foster presented testimony addressing the continued discriminatory denials of these rights:

"Over the past 30 years, I have visited 96 state and federal correctional facilities throughout the United States and provided spiritual counseling to approximately 2,000 Indigenous men and women. I have observed the extreme racism and discrimination toward their religious and spiritual beliefs and practices which make it difficult for Native prisoners to participate in traditional ceremonies in a consistent manner, if at all. I have both witnessed and experienced harassment, interference, indifference, intimidation, and discrimination with regard to our Native traditional beliefs and our right to worship in a traditional manner as practiced by our ancestors. Prison officials have refused to allow Native ceremonies to be offered as last rites to death row prisoners, for example. Officials claim that ceremonies will be used as a means for escape or that singing and drumming is disruptive to the security of an institution. Tobacco has been restricted for ceremonies with the assertion that prisons are "smoke free environments."

Mr. Foster provides the following additional observations as to the current state of religious practice of Native Americans in U.S. prisons.

"The extreme racism and blatant discrimination that exists in the U.S. criminal justice system have made it very difficult for the civil rights and human rights of the Native peoples to be recognized or affirmed. Native peoples have been denied their inherent right to practice their traditional native religious and spiritual beliefs; numerous lawsuits have been litigated to resolve these violations. Numerous state legislations have been introduced in Arizona, New Mexico, Colorado, Utah and Minnesota. And federal legislation was introduced in U.S. Congress in 1992 and 1994 to allow Native Americans the right to practice their religion without discrimination. The lack of compliance and enforcement of these statutes continues to result in discrimination and denials of human rights for Native Americans.

"Denial of access to traditional religious and spiritual ceremonies and services is a violation of human and constitutional rights and is tantamount to a denial of opportunity for recovery and spiritual healing. The ICERD must apply equally to Indigenous prisoners. In point of fact, under law, American Indigenous prisoners are entitled to worship using tobacco and other sacred medicines, in sacred spaces within prison walls, and through rites like sweat lodge ceremony."

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<sup>28</sup> Report by Mr. Abdelfattah Amor, Special Rapporteur on the question of religious intolerance, in accordance with Commission on Human Rights resolution 1998/18, Addendum, Visit to the United States of America, Conclusions and Recommendations, para 84, E/CN.4/1999/58/Add.1, 9 December 1998

"In June 2013, the National Congress of American Indians (NCAI) passed a Resolution that 'calls upon the United States, all fifty American states and the District of Columbia . . . to take all reasonable steps to commend, support and facilitate incarcerated American Indigenous Peoples' inherent rights to believe, express, and exercise traditional indigenous religion.'

"In recent years, legal actions have been brought in Federal courts ranging from the U.S. District Court for Hawaii in a case arising in Arizona, to the Fifth Circuit Court of Appeals in Texas, all the way up to the U.S. Supreme Court in a case out of Alabama, in challenge to various states' deprivation of Native prisoners' religious rights. These included denial of the rights to hold ceremonies, possess sacred items used for prayer and purification, and right to wear unshorn hair. One of the most recent examples is the case of Sharp vs GEO, heard in U.S. Federal District Court on January 29, 2014 in which a group of Native American prisoners brought suit against a private prison under contract with the State of Arizona for its confiscation of a ceremonial water drum under the pretext that it "could be used as weapon". Although the Arizona State courts decided in favor of the department of corrections this case was decided in favor of the Native Americans and included reinstatement of the water drum and other sacred ceremonial and prayer items used to pray. However it must be stressed that most Native American prisoners do not have access to resources or legal counsel to be able to fight these kinds of cases to positive resolution as was possible in this case.

"In June 2013, the Special Rapporteur on the Rights of Indigenous Peoples, joined by the U.N. Special Rapporteur on Freedom of Religion or Belief, wrote the U.S. State Department (appended) requesting that within 60 days the federal government respond to the allegations and 'provide any additional information it deems relevant to the situation.' These Special Rapporteurs posed a series of questions, including:

'What measures exist to ensure the protection of the religious freedoms of Native American prisoners in state and local prisons? Specifically, what legal, policy or programmatic actions, if any, have federal and state government authorities taken to ensure that Native American prisoners are able to engage in religious ceremonies and traditional practices as well as have access to religious items in state and local prisons?'

"Now almost a year later, the State Department has yet to respond to the Special Rapporteurs' historic inquiry.

"On April 18, 2014, NCAI President Brian Cladoosby wrote U.S. Secretary of State John Kerry about the 'increasing number of state-level regulations that restrict the religious freedoms of Native American prisoners, including their participation in religious ceremonies and possession of religious items.' Likewise, to date, the U.S. Secretary has failed to respond.

"The United States' continued silence in response to these inquiries from a number of respected sources is indicative of its own and its subsidiary states' disregard for the right of American Indian prisoners to freely exercise their religion, as well their rights to effective remedies when state correctional agencies and officers violate their guaranteed rights." <sup>29</sup>

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<sup>29</sup> Galanda, Gabriel. "Defending the Religious Rights of Native Prisoners," Indian Country Today. 29 May 2014. <http://indiancountrytodaymedianetwork.com/2014/05/29/defending-religious-rights-native-prisoners>.

## **Conclusion**

As a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination, the United States of America must undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, including Indigenous Peoples, to equality before the law. Similar protections against discrimination are provided in the United Nations Declaration on the Rights of Indigenous Peoples and the International Covenant on Civil and Political Rights.

Further, the Fourteenth Amendment to the United States Constitution addresses equal protection of the laws and limits the actions of all state and local officials, including those acting on behalf of such an official. The amendment's first section includes the Due Process Clause and Equal Protection Clause. The Due Process Clause prohibits state and local government officials from depriving persons of life, liberty, or property without legislative authorization. This clause has also been used by the federal judiciary to make most of the Bill of Rights applicable to the states, as well as to recognize substantive and procedural requirements that state laws must satisfy. The Equal Protection Clause requires each state to provide equal protection under the law to all people within its jurisdiction.

Despite such protections, available data on victimization, prosecution, sentencing, imprisonment and other *indicia*, in the U.S. show continuing and intolerably discriminatory disparities between Indigenous Peoples and people of other races, colors, and national or ethnic origins.

These disparities must be addressed without delay and remedies provided to ensure equal rights of Indigenous Peoples.