

HUMAN
RIGHTS
WATCH



NATION BEHIND BARS

A HUMAN RIGHTS SOLUTION

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(front cover) A guard looks on (right) as prisoners move through Georgia's state prison in Jackson.

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INTRODUCTION

For decades, the United States has passed laws that discount other forms of punishment in favor of incarceration. But in its embrace of confinement as a medicine that cures all social ills, the country seems to have forgotten just how severe a punishment it is.

Almost 30 years of harsh sentencing laws have left the US with over 2.2 million men and women behind bars, most for nonviolent crimes. As the nation finally confronts the myriad impacts of such widespread incarceration, there is growing support for criminal law reform. Lawmakers across the political spectrum are rethinking criminal sanctions in light of the damage that long sentences inflict on individuals, families, and communities; the marked racial disparities in incarceration; the burden on taxpayers; and the viability of alternatives to incarceration to protect public safety.

The momentum for sentencing reform is welcome for all who care about the fair use of government's power to determine what conduct to criminalize and what sanctions to impose on those who break the law.

KEY FACTS

- Between 1979 and 2009, the number of prisoners in state and federal facilities increased almost 430 percent;
- Since 1980, the federal prison population has grown 721 percent;
- In the last 29 years, the state prison population has grown over 240 percent;
- One of every nine people in prison—159,000 people—is serving a life sentence;
- As of 2009, some 2,500 people were serving life without parole sentences for crimes committed before age 18;
- In 2011, more than 95,000 youth under the age of 18 were held in adult prisons and jails across the United States;
- Over half (53.4 percent) of prisoners in state prisons with a sentence of a year or longer are serving time for a non-violent offense;
- For every 100,000 Americans in each race or gender group, there are 478 white males, 3,023 black males, 51 white females, and 129 black females incarcerated in state or federal prison;
- Almost one-third of those serving life sentences—49,081 as of 2012—have been sentenced to life without the possibility of parole (LWOP);
- In 2010, 26,200 state and federal prisoners were 65 or older, up 63 percent from 16,100 in 2007;
- Today, immigration offenses account for over 40 percent of all federal criminal prosecutions and almost 30 percent of new admissions to the federal prison system.

Criminal law reform in the US will be strengthened if it incorporates the human rights principles that require prudent use of criminal sanctions, fair punishment, and equal protection of the laws. These are not only core human rights principles applicable to sentencing, but core principles of American justice that have been neglected for far too long. Drawing on them, we urge legislators, at the very least to:

- Ensure proportionality in punishment;
- Reform or eliminate mandatory minimum sentences;
- Treat youthful offenders differently from adults;
- Ensure criminal laws do not needlessly restrict autonomy and privacy;
- Reduce criminal sanctions for immigration offenders;
- Ensure criminal laws do not yield unwarranted racial disparities.

BACKGROUND: Rates of Incarceration and Basic Criminal Justice Considerations

Why are US Incarceration Rates so High?

In the 1980s, state and federal legislators began to adopt “tough-on-crime” laws in response to rising crime rates, racial tensions, the emergence of crack cocaine, supposed threats to “traditional values” from counter-culture movements, and fears of perceived increases in numbers of immigrants and youth offenders. Many of the harsh laws adopted decades ago remain on the books, supplemented by newer ones, because “tough-on-crime” has remained a default approach for all too many politicians.

Law-makers have criminalized minor misconduct, instituted mandatory prison sentences even for low-level crimes, and established “three-strikes-and-you’re-out” laws for recidivists. They have focused more on restricting judicial discretion by enacting mandatory minimum sentences and on increasing the length of sentences than on ensuring that the sentences judges impose are fair and proportionate to the offense and the offender’s circumstances. They have assumed longer sentences were necessary to promote public safety, rather than drawing on empirical evidence to determine how best to protect the public. They have not only increased the length of sentences applicable to crimes, they have increased the amount of time served by reducing or eliminating parole. The results are well known: the US has the largest reported incarcerated population in the world, and by far the highest rate of imprisonment.¹ As of year-end 2012, despite slight recent declines in new admissions, 2.2 million persons were held in adult prisons or jails in the United States.² Between 1979 and 2009, the number of prisoners in state and federal facilities increased almost 430 percent.³

The federal prison population—now larger than that of any individual US state’s—has grown an astonishing 721 percent since 1980.⁴ In the last 29 years, the state prison population has also grown dramatically, increasing over 240 percent.⁵ In 2012, almost half a million (444,591) men and women entered state and federal prisons with new convictions.⁶

According to US Attorney General Eric Holder, US prisons are crammed with men and women serving “too long for too little.” Former speaker of the US House of Representa-

tatives, Newt Gingrich, has stated: “There is an urgent need to address the astronomical growth in the prison population, with its huge costs in dollars and lost human potential....The criminal justice system is broken.”⁷

Even as crime rates declined, the numbers of Americans in prison continued to skyrocket because of harsh sentencing laws. One national study found that 88 percent of the increase in incarceration rates between 1980 and 1996 was due to policymakers’ decisions to lengthen sentences, impose incarceration (rather than, say, probation) for an ever-increasing number of offenses, and ensure offenders spend an increased amount of their sentence in prison (for example by reducing parole, “good time,” and indeterminate sentencing).⁸

An extreme illustration of the ballooning of sentence lengths is the large number of people serving life sentences. According to a report by the Sentencing Project—a non-governmental sentencing reform research and advocacy group—159,000 people (one of every nine individuals in prison) are serving a life sentence, including 49,081 who are serving life without the possibility of parole, i.e. they have been sentenced to die behind bars.⁹ As of 2009, approximately 2,500 people were serving life without parole sentences for crimes committed before age 18.¹⁰

High incarceration rates might not be so troubling if they reflected high rates of serious crime. Over half (53.4 percent) of prisoners in state and federal prisons with a sentence of a year or more are serving time for a non-violent offense.¹¹ Life sentences are not reserved for violent crimes, but are often imposed on recidivists for non-violent property or drug crimes.¹²

The ratcheting up of sentences for drug offenders and increased drug law enforcement has had a particularly dramatic effect on incarceration. Though new court commitments to state prisons for drug offenders decreased 22% between 2006 and 2011,¹³ drug offenders still represent 50.6 percent of federal prisoners and an estimated 21.3 percent of all prisoners in the United States (state and federal).¹⁴ The Urban Institute—a non-partisan public policy think tank—has calculated that the increase in sentence length for federal drug offenders “was the single greatest contributor to growth in the federal prison population between 1998 and 2010.”¹⁵

Racial disparities in imprisonment rates are striking. For every 100,000 Americans in each race or gender group, there are 478 white males, 3,023 black males, 51 white females, and 129 black females incarcerated in state or federal prison.¹⁶ Drug sentences have contributed

markedly to racial disparities in prison populations. African Americans represented 42 percent of all persons entering state prison with new sentences for drug offenses in 2011, and whites represented 38 percent.¹⁷ According to the US Sentencing Commission, in 2013, African Americans comprised 26.5 percent of newly-sentenced federal drug offenders, Hispanics comprised 47.9 percent, and whites were 22.4 percent.¹⁸

When is Criminalization Warranted?

Government's extraordinary power to criminalize and punish should be used sparingly, and with due considerations for the principles of proportionality and respect for human dignity that human rights law requires.

Nevertheless, governments have considerable latitude in deciding what kind of conduct is sufficiently harmful to others or to the community at large to warrant criminalization and post-conviction consequences. The outer boundaries are relatively easy to discern: few people think that the act of lying to one's spouse about whose dirty plate is in the sink should be criminalized and surely everyone believes it should be a crime to deliberately kill a spouse because they failed to wash the dishes.

The public morality and common sense reflected in this example is consistent with the strong and long standing argument that criminalization should be a last resort and only for "significantly reprehensible" conduct.¹⁹ Typically and historically, criminalization is reserved for conduct that directly harms someone against their will; offenses like homicide, theft, rape. Criminalization is also used to address certain conduct that can cause widespread collective harms, such as harms to the environment, food safety, and national security.

Whether conduct that does not cause or risk unwanted harm to another person or the community should ever be criminalized has proved a vexing question in constitutional democracies. Such countries often place high value on individual liberty and human rights and are wary of the undue exercise of government power.

In the particularly contentious areas of consensual adult sexual behavior and of adult drug use, there is growing recognition by public officials, the courts, and the public that the government should not restrict the liberty and autonomy of individuals simply because some or even many members of the public find their choices offensive or immoral. Not only are these areas in which individuals exercise their autonomy, they are areas of conduct (free expression and privacy) protected by international human rights law.

Under international human rights law, using penal law to restrict the exercise of the rights of expression and privacy cannot be justified unless the restrictions meet the criteria of legitimate purpose, necessity, proportionality, and non-discrimination. In short, criminal law can play an important role in safeguarding the interests of individuals and the community writ large, but it should be wielded carefully and according to limiting criteria to protect individuals from the abuse of government power.

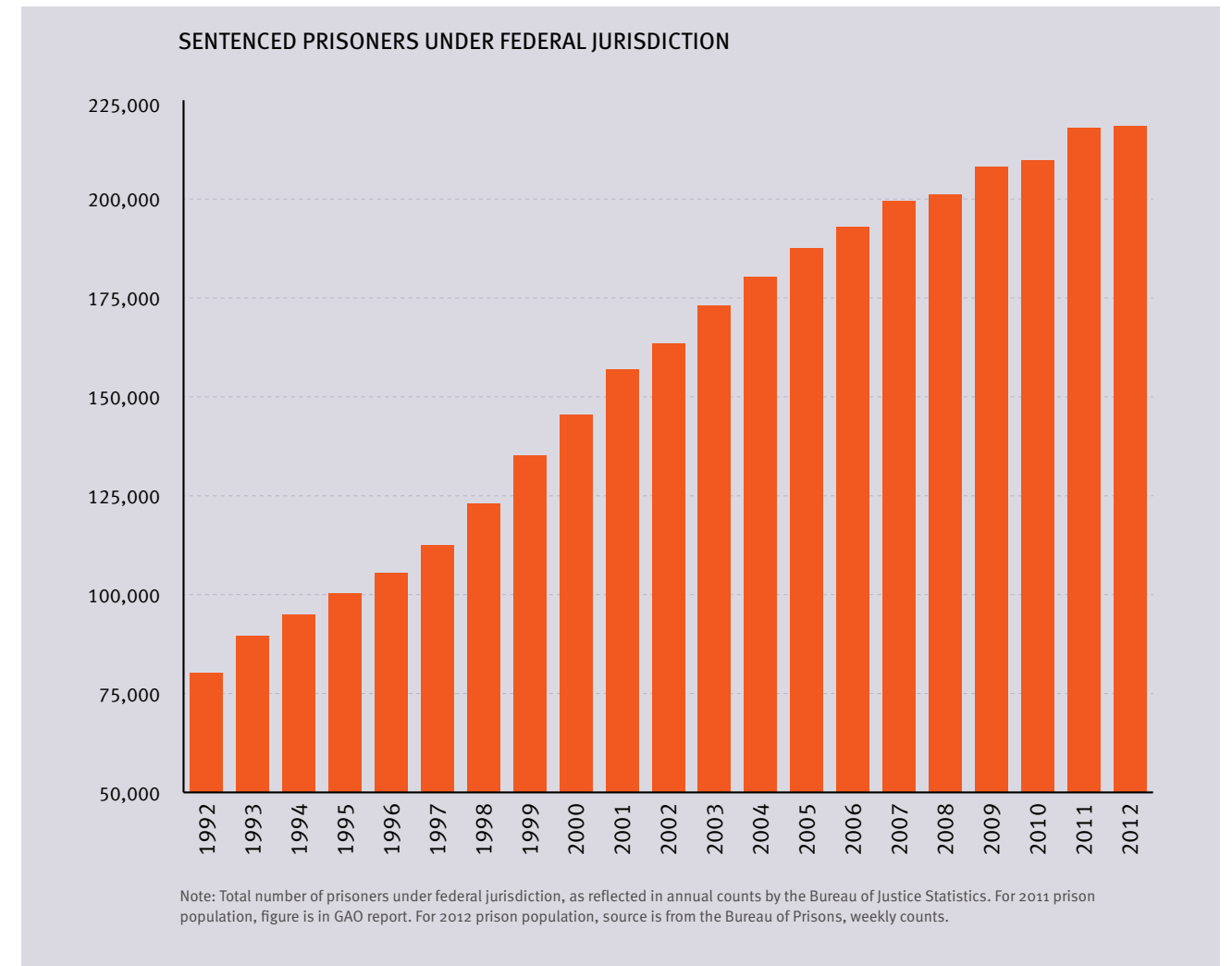
Because criminalizing conduct has serious consequences for individuals and their communities, law-enforcement and public trust in the criminal justice system, governments should consider in each case whether it is the best form of social control. Will criminalization have the sought-for impact, will it be cost-effective, will it have unintended adverse side effects, will it have public support?

It is important to keep in mind that the use of criminal sanctions is not the only way to promote public welfare. First, there are non-governmental forces with the capacity to promote good conduct, such as families, communities, religions, and other social institutions. Second, the government has a wide range of tools at its disposal other than the criminal law to prevent misconduct: positive social investments to strengthen families, communities, enhance public education, and create jobs; investments in public infrastructure such as public health education, sufficient substance abuse and mental health treatment for those who want it; promotion of systems of positive reinforcement and reward; and civil regulation are all steps government can use wholly apart from—or as complements to—criminalization and criminal law enforcement.

The consequences of criminalization—arrest, conviction, and punishment including incarceration—can continue long after an arrest or a sentence has been served. In many states, persons with criminal convictions or even simple arrest records are barred from pursuing certain professions.²⁰ Many people with convictions throughout the country lose the right to vote.²¹ They carry the stigma of being an "ex-con," and routinely have difficulty finding a job, obtaining food assistance and public housing,²² and establishing or reestablishing family and community connections.

When and How to Punish

Punishment should be proportionate to the offense and the individual's blameworthiness and no greater than necessary. Penal sanctions can take different forms such as fines, community service, probation, electronic mon-



itoring, evening-only confinement, or full incarceration.²³ The choice of sanctions should reflect how serious the conduct is compared with other crimes. Obviously, all crimes are not equal: the relative gravity of shoplifting a loaf of bread is quite different from armed robbery.

In the United States, it is generally accepted that the legitimate purposes of punishment for crime include retribution, incapacitation, deterrence, and rehabilitation, although the mix and weight given to these at different periods of history have varied. Retribution is generally understood as holding offenders accountable (giving them their "just deserts") for having harmed or risked harm to someone else or the community at large. It reflects social condemnation of the crime, thereby strengthening public understanding of the boundaries of permissible behavior.

Punishment can also advance public safety in important ways. It may deter future crime, both by the formerly-incarcerated individual once released back to the commu-

nity and by others who know what punishment may follow. Moreover, incarceration and other restraints on liberty "incapacitate" dangerous individuals by removing them from the community or otherwise limiting their movements and privacy. Incarceration and other forms of punishment also promote public safety if time on probation or behind bars is used to give offenders the skills and abilities necessary to lead a productive, law-abiding life when they reenter the community. Indeed, the rehabilitation and reintegration of offenders into society is not just good penal policy; the fundamental human right to respect for human dignity mandates that it be the primary aim of a prison regime.²⁴

To be consistent with international human rights, punishment must be no more severe than needed to accomplish its ends. For example, consider the punishment for taking a life. A very long prison sentence might be proportionate to, and justified by, the goals of retribution, deterrence, and incapacitation if the offender deliber-

ately committed murder and had a long record of violence. But what if the death was the result of a car accident negligently caused by someone who was sober at the time? Such a crime generally carries a lower sentence than first degree murder, because the purposes of retribution, deterrence, and incapacitation can be satisfied with a lower sanction.

Imprisonment is the most drastic punishment, short of the death penalty, that a government can lawfully impose on an individual. It should be imposed only as a last resort – that is, it should be used only when no lesser sanction could be justified given the nature of the crime, and even then it only should be imposed for as long as necessary to further the purposes of punishment.

In the United States, prison is not a last resort, but all too often the first and only resort which lawmakers have required judges to impose for a vast number of crimes. It is imposed on 69 percent of state felony defendants and 87.6 percent of federal defendants.²⁵ For decades the United States has passed laws that discount other forms of punishment in favor of incarceration—it has been treated as the medicine that cures all ills. But in its embrace of incarceration, the country seems to have forgotten just how severe a punishment it is.

Prisoners lose their liberty, autonomy, and the freedom to exercise fully most rights. They are cut off from families, friends, and communities. Children lose their parents to prison, and parents lose their children. In prison, a person’s ability to work, express themselves, and engage in activities that promote what human rights law calls the “free and full development of the personality,”²⁶ is severely restricted. In many prisons, the health and safety of prisoners, as well as their dignity and privacy, are threatened by overcrowding, harsh measures such as solitary confinement, and poor physical conditions and sanitation, not to mention rape and other forms of violence.

Since many US prisons have moved away from providing educational or rehabilitative programs due to fiscal constraints and some policymakers’ rejection of rehabilitation as a legitimate aim of punishment, many prisoners emerge from prison with few tools to reintegrate into society, although many do still struggle against the odds to learn and transform themselves, and to contribute to their communities once released.

RECOMMENDATION 1: Ensure Proportional Sentences

Lawmakers should take steps to ensure that criminal laws permit judges to impose proportionate sentences.

Responsible policymakers should not simply denounce certain crimes and call for severe punishment: they must carefully consider—or create sentencing commissions to consider—the nature of the offense, how it compares to others, whether criminal sanctions are appropriate, and if a sentence to incarceration is required, what maximum length should be set in order to ensure that it will not be longer than proportionate or necessary.

This recommendation is urgent because the US criminal justice system is rife with disproportionately long sentences. Legislators have been more concerned with enhancing their tough-on-crime credentials than with creating sensible and fair sentencing parameters within which judges could tailor sentences proportionate to an individual’s wrongdoing. There are promising signs, however, that the tide may be turning. For example, the National Conference of State Legislatures—a bipartisan organization providing research and support to all state lawmakers and their staff—recently embraced the requirement of proportionality in its 2011 roadmap for criminal sentencing reform.²⁷

Proportionality between a crime and its sentence is a thorny subject that criminologists, legal academics, and philosophers have analyzed and debated extensively. We make no attempt to reprise that debate here, nor to assess what sanctions might be proportionate for which crimes. Our goal is to press legislators and the public to focus on the importance of proportionality, and to take steps to ensure proportionality is considered when enacting new laws or considering reform of existing laws.

Sandra Avery’s case shows how bad laws can lead to unjust sentences. Avery was once a crack user, and had been convicted three times for possessing \$100 worth of the drug for personal use. But she pulled herself together, joined the army, earned an accounting degree, and on leaving the army got a good job. Years later, her life spun out of control. She married a crack dealer and started using again. Then she and her husband were arrested together for selling crack. She was prosecuted under federal law. The prosecutor offered her a plea deal that could have brought a 10-year sentence, but when she refused, he sought a mandatory sentencing en-

hancement based on her drug possession cases. Convicted after trial, she received a sentence of life without parole. It is hard to envision any theory of proportionality under which her life sentence is proportionate to her crime—even allowing for her prior history.²⁸

Her case is, unfortunately, one of many egregiously long federal sentences that Human Rights Watch has recently documented.²⁹ Recent reports by the American Civil Liberties Union (ACLU) and by the Sentencing Project also document cases in which life sentences have been imposed for non-violent crimes by both state and federal courts.³⁰

By way of comparison, legislators might consider the International Criminal Court (ICC) and the sentences it can impose for the most serious of all crimes, such as genocide, crimes against humanity, and war crimes.³¹ For the crimes under its jurisdiction, the ICC may impose sentences of “imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.”³² These punishments were established to reflect human rights principles on proportionality. Many US state and federal sentences are much longer, and for far less serious crimes.

In theory, the Eighth Amendment to the US Constitution prohibits grossly disproportionate sentences as “cruel and unusual punishment.”³³ But in practice, while there has been some progress in setting limits on the sentencing of youth, US courts have been reluctant to set limits on the length of adult prison sentences. In 2003, the Supreme Court refused to rule life sentences as being cruel and unusual when they were imposed under California law on two defendants whose “third strikes” consisted of stealing three golf clubs in one case and nine video tapes in the other.³⁴ In its 1991 ruling in *Harmelin v. Michigan*, the Supreme Court rejected an Eighth Amendment challenge to a sentence of life without the possibility of parole for a 42-year-old first-time offender convicted of transporting 672 grams of cocaine in his car.³⁵ Given these precedents, it is not surprising that US courts rarely, if ever, decide that a prison sentence is unconstitutionally long.

The Supreme Court’s reluctance to establish constitutional constraints on prison sentences partly reflects concerns that, in a democracy, sentencing laws fall under the prerogative of legislators.³⁶ But its refusal to strike down egregious sentences should not be taken as a green light to legislators to ignore basic tenets of crim-

inal justice and human rights. On the contrary, the Supreme Court’s deference to the legislative branch highlights how important it is that lawmakers exercise their responsibilities with the utmost care to ensure that punishments are not unduly harsh.

Reform or Eliminate Mandatory Minimum Sentences

Mandatory minimum sentencing laws preclude judges from exercising their traditional role of individually tailoring a sentence to the crime and the defendant’s culpability, taking all relevant factors into account. They require prison sentences of a minimum specified length, even when they may be grossly disproportionate to the defendant’s actual conduct.

All jurisdictions across the US have established some form of mandatory minimum prison sentences for a variety of crimes.³⁷ Criticisms of mandatory minimum sentencing laws are legion and, in our judgment, well-founded. All too often the sentences required under such laws violate the principle of proportionality because even the minimum sentence required by legislators far exceeds what is reasonable for the crime and the offender’s culpability.³⁸

The problem is particularly acute when it comes to drug crimes, which often carry long mandatory minimum sentences keyed solely to the weight and type of the drug.³⁹ For example, because the offender’s role is not a factor that determines the applicable minimum, federal prosecutors can—and often do—levy the charges carrying the same mandatory minimum sentence against a courier who delivers a package of cocaine across town as against the drug boss who received it. Mandatory minimums also provide prosecutors with a strong weapon to coerce pleas from defendants. Faced with the possibility of harsh mandatory sentences or sentencing enhancements that judges must impose if the defendant is convicted, most defendants have no choice but to plead guilty rather than risk going to trial.⁴⁰

In fiscal year 2013, 62 percent of federal drug defendants, or 14,212 individuals, were convicted of an offense carrying a drug mandatory minimum penalty.⁴¹ More than a quarter of federal drug offenders (27.8 percent) received five-year mandatory minimum sentences and almost one third (34.4 percent) received ten-year mandatory minimum sentences.⁴²



An older man sits in his cell
in a Colorado prison.
© 2011 Jamie Fellner/Human Rights Watch

Federal mandatory minimum sentences can lead to grotesquely long sentences for minor conduct.⁴³ For example:

According to government evidence, Tyquan Midyett was part of group that sold crack at different buildings in a New York City public housing complex; the total amount sold during the conspiracy period was approximately 843 grams of crack. The judge found that Midyett could have foreseen and/or participated personally in the sale of 97 grams of crack. Midyett was sentenced to 20 years in prison in 2010 for distributing crack cocaine. At sentencing, the judge said she found 20 years “quite more than necessary, but I do not have discretion under the law to consider a lesser sentence.”⁴³ The 20-year-sentence was based on a mandatory minimum sentence of 10 years “enhanced” another 10 years because Midyett had previously been convicted of possessing a controlled substance.⁴⁴

Federal laws also empower prosecutors to ratchet up drug sentences way above the (already high) five or ten-year minimum baselines based on drug quantity. For example, prosecutors can require judges to impose far higher sentences if the defendant has a criminal history, however minor, or owns a gun which prosecutors frequently argue is in furtherance of a drug business. The sentencing results can be staggering. For example:

Rick Barton sold oxycontin and cocaine in rural Virginia and West Virginia, and at least four times accepted guns as payment for drugs. There was no evidence that he carried or fired the guns unlawfully. He was convicted after trial and sentenced to 1020 months (85 years) in prison: 60 months (5 years) for his conviction of possession with intent to distribute the drugs and 960 months (80 years) for his conviction on four counts for possessing guns in furtherance of his drug business.⁴⁵

Harsh firearm enhancements also exist at the state level. For example, Florida imposes a minimum 10-year prison term for possession of a firearm during commission or attempted commission of certain felonies, increased to 20 years when the firearm is discharged. These mandatory minimums must be served consecutively to the sentence imposed for the underlying offense.⁴⁶

In August 2013, Attorney General Eric Holder instructed federal prosecutors to avoid charging certain low-level nonviolent offenders with offenses carrying mandatory minimum sentences and to avoid seeking mandatory

sentencing enhancements based on prior convictions unless the defendant’s conduct warranted such severe sanctions. It is too soon to tell how prosecutors will carry out the policies, but they contain easily exploited loopholes. At time of writing, Congress is considering legislation that reduces five and ten-year mandatory minimums related to drug offenses by half and also slightly expands the safety valve that allows for judges to sentence below a mandatory minimum.

Some states have been taking steps towards reforming mandatory minimums. For example, in 2012, Massachusetts Governor Deval Patrick signed into law a sentencing reform bill that shortened mandatory minimum sentences for a number of drug offenses.⁴⁷ In California, an overwhelming majority of voters in November 2012 approved Proposition 36, a ballot initiative limiting the reach of the state’s draconian “three-strikes” law; while Proposition 36 retained a sentencing enhancement for a third nonviolent felony conviction, it ended the previously mandatory 25-year-to-life sentences in these cases.⁴⁸ In April 2013, Georgia Governor Nathan Deal signed into law HB 349, a bill that broadened the state’s “safety valve” allowing certain low-level offenders to avoid enhancements.⁴⁹

Eliminate or Narrow the Use of Life without Parole, Other Severe Sentences

Life sentences may be appropriate in certain cases of horrific and deliberate unlawful violence. But in the United States, people guilty of far less serious crimes, including nonviolent drug and property crimes, have received life sentences, including life without the possibility of parole (which means the individual is sentenced to die in prison).⁵⁰

About two-thirds of individuals serving life sentences have the theoretical possibility of being released via parole before they die.⁵¹ But almost a third of those serving life sentences—49,081 as of 2012—have been sentenced to life *without* the possibility of parole (LWOP).⁵² In many states, sentencing options include life or life without parole. But in some places, all life sentences are without parole. With the exception of those prisoners sentenced before 1987, there is no parole for federal prisoners, including those with life sentences. There is also no possibility of parole for persons sentenced to life in six states.⁵³

In state and federal courts, life sentences can be imposed for a single crime or as a result of mandatory sentencing based on prior convictions. For example:

In 2013, Roy Lee Clay, a 48-year-old part-time home remodeler, was sentenced to life without possibility of parole after conviction for conspiring to distribute one kilogram or more of heroin—a crime that normally carries a 10-year sentence. However, Clay had two prior drug convictions. At his sentencing, Judge Catherine Blake called the life without parole sentence “extremely severe and harsh” but federal legislators had given her no other options.⁵⁴

Alexander Surry, a 50-year-old with three children and five grandchildren, who consistently worked as a professional painter, roofer, and asphalt paver, is serving a life without parole sentence imposed in 2002 by the state of Louisiana. Though he had never been a smoker or a drinker, “he became addicted to crack and gradually progressed from using the drug to selling it in order to support his own habit, leading to two convictions for cocaine distribution.”⁵⁵ When Surry was on parole for his second drug charge, his parole officer discovered him at home with a bottle containing a small crack cocaine rock, for which he was convicted of cocaine possession. Although the offense ordinarily carries a maximum sentence of five years, he was adjudicated as a third-strike felony offender and sentenced to a mandatory term of life in prison without parole.⁵⁶

Defendants may end up serving functional life sentences—that is, they end up spending the rest of their lives in prison due to the cumulative effect of multiple consecutive sentences that add up to long terms, as in the case of Rick Barton, noted above, now serving 85 years.

Increase Use of Compassionate and Geriatric Release of Prisoners

The number and proportion of older prisoners in the US has grown markedly. In 2007, 16,100 state and federal prisoners were 65 or older; by 2010, the number had shot to 26,200, a 63 percent increase, while the overall sentenced population grew only 0.7 percent.⁵⁷ Absent compassionate or geriatric release, many prisoners will grow old and die behind bars.

A prison sentence that constituted a just and proportionate punishment when imposed may become disproportionately severe in light of changed circumstances, such as advanced age or grave illness. Aging and dying prisoners often develop medical and mental health conditions that make them unlikely to pose a public safety risk if released to their families or to nursing homes. Even

younger prisoners can become bedridden because of illness or accidents. In such situations, the wisdom of keeping an individual in prison can diminish; indeed, continued incarceration can become senseless or cruel, especially if the offender has already served a significant portion of their sentence.

Dozens of states and the federal government have policies that permit early release for prisoners, most typically for medical reasons, but few prisoners benefit.⁵⁸ Dying, desperately ill, and permanently incapacitated prisoners are often denied early release solely because of the nature of the crime they committed—even if it was long ago and even if they are no longer physically or mentally capable of committing such crimes again. In some cases the laws themselves preclude early release for prisoners convicted of violent or sex crimes. But even when such releases are permitted by law, officials often refuse to order such releases because they are concerned about public opposition.

In 2012, Human Rights Watch and Families Against Mandatory Minimums jointly published a report regarding “compassionate release” in the federal prison system.⁵⁹ We found an essentially dysfunctional program that lacked basic procedures to ensure fair and reasoned decision-making, inadequate program supervision, arbitrary and unfounded rejections of prisoner requests for release, and a lack of understanding at all levels of the system of the importance of compassionate release.

Many of our findings were echoed by a subsequent review of the program by the Inspector General’s Office in 2013.⁶⁰ We have little doubt that in-depth studies of state early release systems would reveal similar problems. US Attorney General Eric Holder announced in August 2013 that he was directing the Bureau of Prisons to expand its use of, and the criteria for, compassionate release.

As mentioned above, the ICC, which has jurisdiction over gravely serious crimes such as genocide, may impose up to 30 years or a life sentence on convicted offenders. However, the governing statute of the ICC requires that “when the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced.”⁶¹ Although many US state and federal sentences are far longer than these, the criminal justice systems often lack any effective mechanisms by which individuals can obtain periodic and meaningful opportunities for release.



Jimmy Merjil, 70, serving life under the three strikes law for petty theft, sits in his cell at San Quentin state prison in San Quentin, California, June 8, 2012.

© 2012 Lucy Nicholson/Reuters

Keeping a prisoner behind bars when it no longer meaningfully serves any legitimate purpose of punishment cannot be squared with human rights. It is also expensive, and increasingly so as the number of older prisoners continues to soar, keeping prisons overcrowded and requiring ever larger prison medical budgets.⁶²

RECOMMENDATION 2: Treat Youth and Adult Offenders Differently

Tailor Prosecution, Sentencing, Custody of Youth to Their Needs and Potential

Youth under the age of 18 can commit serious offenses, but they should not be subject to adult criminal justice procedures that fail to take their needs, vulnerabilities, and inherent capacity to grow and change into account.

Unfortunately, more than two decades ago, fear of adolescent “super-predators” swept the nation and many states and the federal government enacted laws that subjected youth to the same processes and sanctions as adult offenders. Super-predators proved to be a myth (in fact, juvenile crime rates plummeted⁶³ and one of the principal researchers who coined the phrase has since admitted his dire predictions were wrong);⁶⁴ but the laws remained on the books.

In some states, there is no minimum age of adult jurisdiction, meaning that even very young children can be tried in adult court.⁶⁵ Some states use hearings to determine which youth should be tried in adult court. In other states, youth of certain classes (such as all 16 and 17-year-olds, or all who are charged with certain crimes) are automatically tried in the adult system without any judicial analysis as to whether they belong there.⁶⁶ Seventeen jurisdictions have statutes that allow prosecutors broad discretion to decide which children to charge as adults.⁶⁷

When convicted in the adult system, children typically receive the same sentences, are incarcerated in the same prisons, and in some states in the same cells, as much older prisoners.⁶⁸ Human Rights Watch estimates based on Bureau of Justice Statistics data that in 2011, more than 95,000 youth under the age of 18 were held in adult prisons and jails across the United States.⁶⁹

Children convicted as adults also endure all the same potentially life-long collateral consequences originally intended for adult offenders: loss of the right to vote, disqualification from employment or government aid, student loans, public housing, and other benefits.⁷⁰

The International Covenant on Civil and Political Rights (ICCPR), to which the United States became a party in 1992, specifically acknowledges the need for special

treatment of children in the criminal justice system and emphasizes the importance of their rehabilitation.⁷¹ Article 10(3) requires the separation of youth offenders from adults and the provision of treatment appropriate to their age and legal status. Article 14(4), which was co-sponsored by the United States,⁷² mandates that criminal procedures for children “take account of the age and the desirability of promoting their rehabilitation.”⁷³ With regard to sentencing, the ICCPR requires states to respond to the offenses children commit by focusing on positive measures and education rather than punishment.⁷⁴

In violation of these norms, many youth tried as adults in the United States are sentenced to very harsh adult sentences—including mandatory minimums; and in some cases, receive sentences that are even harsher than their adult co-defendants. For example:

J.R. was 16 when he participated in a robbery that ended with the victim being killed. J.R. was not the shooter and had several co-defendants, including two adults. All were charged under the felony murder rule. Neither adult was sentenced to life without parole, but J.R. and another minor codefendant were sentenced to life without parole.⁷⁵

Recent cases in the US Supreme Court raise serious questions under US constitutional law about any sentencing scheme in which the differences between youth and adults are not taken into account. In a case abolishing the death penalty for juveniles, the court stated, “From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”⁷⁶ Similarly, the court has given weight to:

Developments in psychology and brain science [that] continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of “irretrievably depraved character” than are the actions of adults.⁷⁷

In a recent opinion outside of the sentencing realm, the Supreme Court stated, “[o]ur history is replete with laws and judicial recognition’ that children cannot be viewed simply as miniature adults. We see no justification for taking a different course here.”⁷⁸



Youth who were sentenced to life in prison without parole.
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We cannot predict whether or to what extent the US Supreme Court—or state supreme courts—will continue to expand the range of sanctions that cannot constitutionally be applied to persons who committed their crimes as children. But legislators should not wait for courts to declare laws unconstitutional. They should begin a careful review to ensure their laws and procedures acknowledge the differences between children and adults and protect children’s unique vulnerabilities and capacity for rehabilitation.

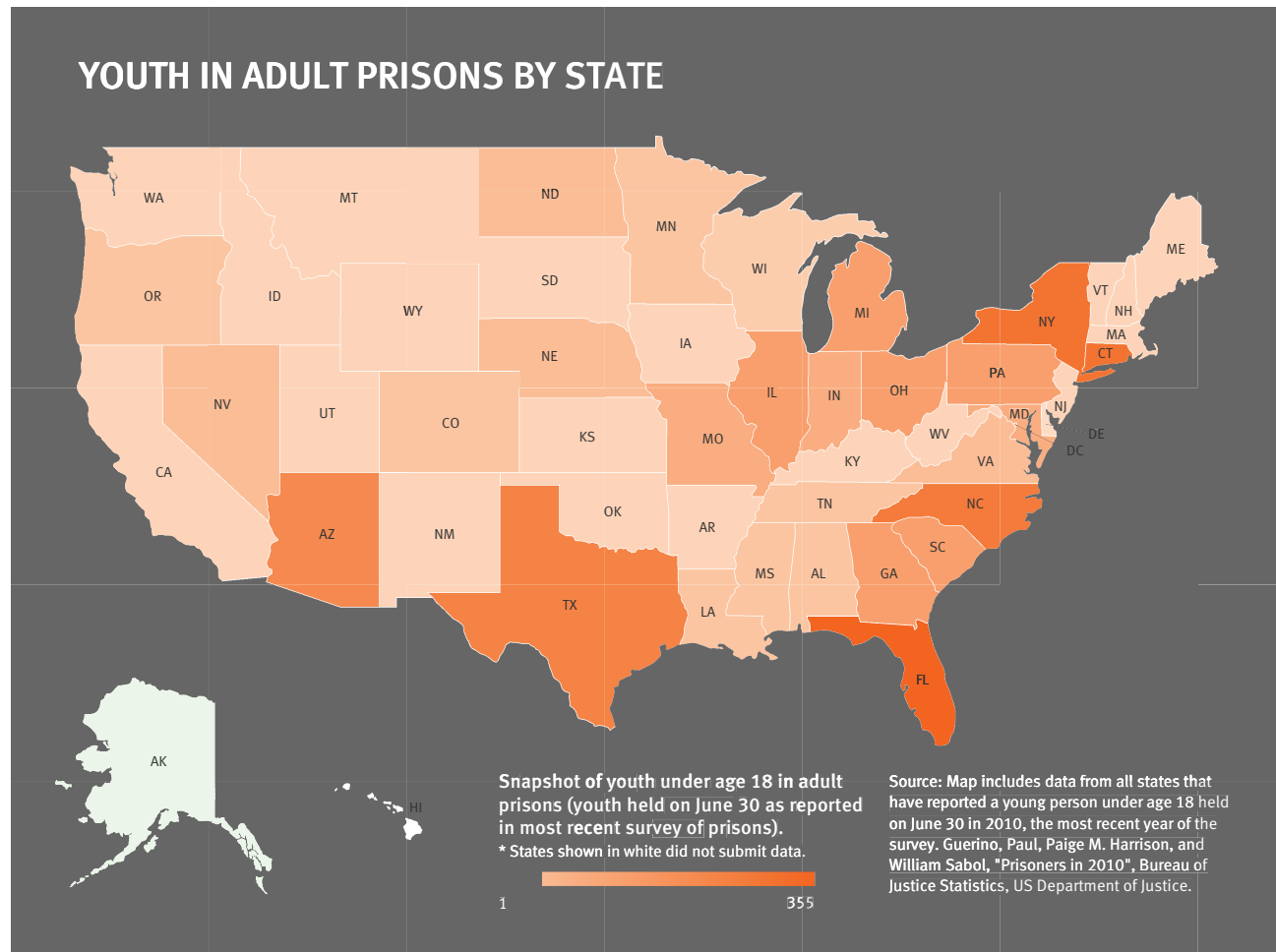
Provide all Youth with Periodic Meaningful Opportunities for Release

If legislators retain the possibility of incarceration for youth, they should rewrite laws to ensure periodic review of continued incarceration and whether it is necessary in light of the youth’s evolving maturity and capacity to return to society.

International human rights law emphasizes the need to periodically assess young people for release because children are especially capable of growth and change.⁷⁹

The need to provide youth with a meaningful opportunity for release is also consonant with the requirement in human rights law that imprisonment should be imposed on youth “only as a measure of last resort and for the shortest appropriate period of time.”⁸⁰

The sentence of life without parole is the most egregious example of a sentence that denies youth an opportunity for release, and so violates fundamental human rights.⁸¹ While no known youth offenders are serving the sentence elsewhere in the world,⁸² the United States is only slowly coming into conformity with this prohibition. Despite Supreme Court cases prohibiting its use for youth convicted of nonhomicide crimes (*Graham*),⁸³ as well as the imposition of *mandatory* sentences of life without parole (*Miller*),⁸⁴ the sentence remains in place for youth convicted of homicide offenses in many states and under federal law.



Some states have struggled to legislate in light of *Miller* and *Graham*, with some prosecutors and law enforcement lobbying for bills that abolish life without parole in name only, but keep the functional equivalent to life sentences on the books. In 2013 Iowa's Supreme Court examined the governor's decision to commute a 17-year-old's sentence of life without parole to one providing a chance at parole only after 60 years. The court held that the *Miller* decision applied retroactively, and rejected the 60 year sentence, stating that:

...much more is at stake in the sentencing of juveniles than merely making sure that parole is possible.... At the core of all of this also lies the profound sense of what a person loses by beginning to serve a lifetime of incarceration as a youth.⁸⁵

In Florida, an appellate court ordered the sentencing court to replace a life without parole sentence with the previous statute on the books—a possibility of release after 25 years for youth offenders, very different from the 50 years-to-life without parole proposed during the 2013 legislative session. In late 2013, the Massachusetts

Supreme Court abolished the life without parole sentence for any offense committed by a person under the age of 18. In March 2014, West Virginia also abolished the sentence and established that every child convicted in adult court will be eligible for parole after serving 15 years.

And in California, the state has instituted two new laws creating periodic review of youth sentences. The first, California Penal Code 1170(d)(2), allows a judge to review the case of someone who was under 18 the time of a crime and sentenced to life without parole. Under the new law, the court may impose a sentence of 25-to-life instead, offering youth the possibility of parole. The second, California Penal Code 3051, creates a new parole process for youth convicted as adults and sentenced to adult prison terms. The "Youth Offender Parole" process takes into account the age of an offender at the time of the crime and provides the possibility of early release from prison based on growth and maturity. The new law requires the board of parole hearings to give a "meaningful opportunity" of release to youth sentenced to adult prison terms.



The Ryan Correctional Facility in Detroit, Michigan is among the states that sentence offenders under age 18 to life without the possibility of parole.

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Regina Vega gets a hug from Gerard Jackson after completing a drug treatment program in Sacramento, California. Under Proposition 36, which voters passed in 2000, Vega and Jackson were among those low-level drug offenders who were sent to treatment programs instead of jail. The program once served 36,000 offenders each year. Counties are scrambling to provide treatment programs after former Gov. Arnold Schwarzenegger cut the last \$18 million in state funding in 2010. © 2010 Rich Pedroncelli/Associated Press

RECOMMENDATION 3: **Promote Drug Policies that Respect Liberty, Autonomy, and Privacy**

US laws have long criminalized conduct that does not impose unwanted harm on others but which the majority has condemned as immoral or inconsistent with public welfare. Although these laws—for example, the criminal-

ization of sex between consenting adults of the same gender—flatly contradict the nation’s commitment to individual “liberty and the pursuit of happiness” and the notion of limited government, they remained on the books for decades. Laws discriminating on the basis of sexual orientation continue to crumble rapidly because the courts and ever growing numbers of people—including political leaders—recognize such laws are inconsistent with respect for fundamental rights and freedoms.

There are also signs that the public is beginning to rethink a similar type of criminal law based primarily on notions of social morality, health, and “traditional val-

ues.” We do not expect many lawmakers to endorse recreational drug use; indeed, we assume most will continue to oppose it. But we hope more and more will come to realize that criminalizing it contravenes fundamental rights.

Subjecting individuals to criminal sanctions for personal drug use or possessing drugs for personal use infringes on their autonomy and right to privacy. Limitations on autonomy and privacy cannot be justified unless they meet the criteria of legitimate purpose, proportionality, and necessity. A legitimate purpose of punishment is that of protecting others from harm—for example, harms from violent acts or theft or harm from the release of toxic substances. Promoting particular visions of proper private behavior, in the absence of harm to oth-

ers, is not a legitimate purpose for criminalization. Even if a credible case could be made that the government has a legitimate public health interest in curtailing the use of certain currently illegal substances, penal laws punishing private drug use fail the tests of proportionality and necessity.

Governments have many non-penal measures to encourage people to make good choices around drugs and to protect drug users from harming their own health, including offering substance abuse treatment and social support. It is not necessary for government to resort to

punishing the person whose health it seeks to protect. And arrest, incarceration, and a criminal record with possibly life-long consequences amount to an inherently disproportionate government response to someone who has done no more than use drugs.

In fact, criminal sanctions for drug possession and personal use are in many respects counterproductive to the purpose of furthering public health, as Human Rights Watch has repeatedly documented in the past.⁸⁶ They deter individuals who use drugs from accessing health services and treatment, subject them to stigma and discrimination, and increase the risk of infection (for example, with HIV and other blood-borne infections such as hepatitis). Criminalization can also disrupt the ability of individuals to secure their right to livelihood and housing, and it can separate families and parents from their children.

Certainly, drug use in some situations causes or threatens to cause serious harm to others, and states have a legitimate interest in protecting third parties from such harms. But to deal with this threat, states may impose proportionate penal sanctions on harmful behavior that takes place in conjunction with drug use. Thus, a state might choose to criminalize driving a car while under the influence of drugs. It might choose to arrest a person who seriously neglects or abuses a child, where drug dependence is a factor in the neglect or abuse. It might make drug use an aggravating factor in an assault. But in such cases the conduct or offense being punished with criminal sanctions is not using drugs, but directly causing or risking harm to others while using drugs.



Men recently deported from the United States wait in line to be registered with Mexican authorities at the border in Nogales, Mexico.
© 2010 Associated Press

RECOMMENDATION 4: Reduce Criminal Sanctions for Immigration Offenses

Reform Illegal Entry and Re-Entry Prosecutions

Congress should more closely examine the language and application of criminal laws addressing unlawful entry or re-entry into the United States to make sure that criminal prosecution is reserved for the most serious cases and that persons seeking to enter or re-enter the country illegally in order to be with their families or to seek asylum from persecution are not subject to criminal sanctions. When such individuals are already subject to deportation, it is questionable why they should be sent to prison first.

All nations have a legitimate interest in regulating the entry of non-citizens into their territories. While the US has many civil laws regulating immigration, it has since at least the 1950s also authorized increased criminal prosecution of non-citizens seeking to unlawfully enter into or remain in the country. Such criminalization is troubling, since, as the UN special rapporteur on the human rights of migrants has stated, “[I]rregular entry or stay should never be considered criminal offences: they are not per se crimes against persons, property, or national security.”⁸⁷

For many years, there were few criminal prosecutions of persons who crossed the border without permission. Today, such immigration offenses account for over 40 percent of all federal criminal prosecutions and constitute almost 30 percent of new admissions to the federal prison system.⁸⁸ As documented by Human Rights Watch, illegal entry and reentry are the most prosecuted federal crimes in the country today, outnumbering prosecutions for drug offenses, white-collar crime, firearms offenses, and other commonly prosecuted federal crimes.⁸⁹

In the past, many of these cases would have been handled through the civil immigration system, as prosecution was generally reserved for those with serious prior criminal convictions. Over the past decade, however, an increasing proportion of defendants for illegal entry and reentry have minor or no criminal history.⁹⁰ Indeed, many of the persons convicted of entry or reentry offenses were migrating across the border to reunite with US-based family members or to flee persecution. For example,

Robert Lopez, an unauthorized immigrant who had lived in the US since he was a child, was deported after a 2003 assault conviction stemming from a fight. Married to a US citizen with four US citizen children, he applied to return legally and was waiting in Mexico for a decision on his application when his mother told him that his wife was addicted to drugs. Concerned for his children's safety, Robert returned to the US illegally. When he tried to obtain custody of his children, his wife reported him to immigration authorities. Robert was convicted of illegal re-entry and sentenced to prison for four-and-a-half years, over four times as long as the sentence he served for assault ten years earlier.⁹¹

Brenda R., a 45-year-old former long-term resident of Dallas, Texas, has tried three times to return to the United States because she feared remaining in Mexico. Each time she tried to re-enter, she says, she was criminally prosecuted and given no chance to apply for asylum. In April 2012, her two adult sons were gunned-down in the parking lot of a bar in Chihuahua, Mexico, the site of well-known drug violence. Brenda traveled to Chihuahua to bury her sons. She said, "I [also] went to investigate.... When I got [to the crime scene], there were still blood stains and bone fragments of my sons." She started to ask questions about the investigation and filed a formal complaint with the Chihuahua state human rights commission. She hoped it would help bring some attention to the case, even though local residents and the police warned her to stop her inquiries. She became fearful of remaining in Mexico, and wanted to return to the US to join her husband and two US-citizen children. For each of three attempts to re-enter the US, she was convicted of illegal entry or reentry crimes and sentenced to serve 5, 9, and 60 days in prison, respectively.⁹²

Congress could mitigate the current harshness of the law by reducing the current 20-year maximum for illegal reentry to the pre-1988 two-year maximum sentence and limiting prosecutions to people with convictions for serious, violent felonies. Prosecuting asylum-seekers should cease altogether as a violation of international law. As noted by an assistant federal defender in Los Angeles, "The motivations for committing [illegal reentry] are not the motivations for committing most other crimes. [I]t's basically your desire to be with your family."⁹³ Congress can regulate immigration and protect public safety without sending people to prison solely for trying to join their families or seek refuge.



Mario Chavez shares a moment with his wife, Lizeth Chavez, through the border fence at Playas de Tijuana during a weekend family visit. Mario, a US citizen, cannot leave the US because of parole restrictions, and Lizeth, a Mexican citizen, does not have a visa to go to the United States. The couple, which has two children, had been meeting every Saturday since December 2007. Family visits and picnics held on the beach at the border wall were once common for people with family on both sides of the border, but have since been severely restricted by the US Border Patrol.

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RECOMMENDATION 5: Ensure Drug Laws and Drug Law Enforcement are not Discriminatory

Criminal laws in the United States are race-neutral on their face—that is, they do not explicitly discriminate by race. But even race-neutral laws can be discriminatory if they are applied by law enforcement in ways that lead to unwarranted racial disparities. The vastly different rates at which racial groups are arrested and imprisoned for drug crimes are unwarranted and hence constitute prohibited discrimination under human rights law.

End Unwarranted Racial Disparities Due To Drug Law Enforcement Practices

US courts require clear evidence of malign intent, in other words racism, before they will hold a law or practice unconstitutional in equal protection cases. But public officials and legislators should be guided by the broader understanding of discrimination reflected in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), to which the United States is a party.

ICERD prohibits all policies and practices that have the purpose *or effect* (emphasis added) of restricting rights on the basis of race.⁹⁴ If policing practices create or exacerbate unwarranted racial disparities, then governments must act affirmatively to end the discrimination.⁹⁵ When laws have an unintended racially disparate impact, ensuring equal protection of the laws requires consideration of whether the law's legitimate purposes could be furthered through different means.

Racial disparities in drug law enforcement are longstanding, stark, and unjustifiable. US criminal laws governing the possession, manufacture, and sale of “recreational” drugs have been enforced much more aggressively in minority communities than elsewhere. As a result, although whites and blacks use and sell drugs at comparable rates, blacks are arrested and incarcerated on drug charges that greatly exceed their proportion of the general population and among drug offenders (both users and sellers).

African Americans are arrested for drug offenses, including possession, at three times the rate of white men.⁹⁶ On average, an African American person is 3.73 times



Inmates at Chino State Prison sit inside a metal cage in the hallway on December 10, 2010, in Chino, California.
© 2010 Kevork Djansezian/Getty Images

more likely to be arrested for marijuana possession than a white person, even though African Americans and whites use marijuana at similar rates.⁹⁷ Although they are only 13 percent of the US population,⁹⁸ African Americans represent 31.7 percent of drug arrests,⁹⁹ 40.7 percent of state prisoners serving time for drug offenses¹⁰⁰ and 43.7 percent of federal defendants serving time for drug offenses.¹⁰¹

These racial disparities are primarily rooted in choices that law enforcement agents make about the communities in which they search for drugs, and the drugs that

they will prioritize for enforcement. Race influences the public's and law enforcement's perceptions of the danger posed by those who use and sell illegal drugs, the choice of drugs that warrant most public attention, and the choice of communities in which to concentrate drug law enforcement.¹⁰²

Eliminate Crack/Powder Cocaine Sentencing Disparities

Federal sentencing laws that impose higher sentences for crack cocaine offenses than for powder cocaine of-

fenses may not appear to be racially biased, but there is little doubt that racial concerns largely fueled their adoption in 1986.¹⁰³

Crack was associated with poor young blacks, a group considered "dangerous, offensive and undesirable."¹⁰⁴ The justly infamous federal sentencing differential of 100 to 1 for crack and powder cocaine offenses—wherein it took 100 times more powder cocaine than crack cocaine to trigger the same mandatory minimum sentence¹⁰⁵—has been reduced to 18 to 1 pursuant to the Fair Sentencing Act of 2010.¹⁰⁶

The United States Sentencing Commission has exhaustively catalogued the many reasons why this sentencing differential has no grounding in science and is not necessary to protect low income neighborhoods. Thus, the fact that there remains a differential between the two forms of cocaine reflects a political compromise, not empirical evidence, about the nature and consequences of crack compared to powder.¹⁰⁷

In fiscal year 2012, blacks constituted 82.6 percent of federal crack defendants, even though in absolute numbers there are many more white crack users than black.¹⁰⁸ The median federal crack sentence was six-and-a-half years (78 months), compared to five years (60 months) for powder cocaine offenses.¹⁰⁹ African Americans thus disproportionately bear the brunt of federal crack sentencing. There is no way to square this fact with the human rights prohibition on laws that have racially discriminatory effects.

Federal legislators are directly responsible for the federal crack/powder sentencing differential embodied in federal law. But state and federal legislators are also responsible, albeit indirectly, for the dramatically different rates of arrest that fuel racial disparities in incarceration for drug offenses. Legislators could direct law enforcement agents to ensure they refrain from racial profiling and, using the power of the purse, could press them to stop concentrating drug law enforcement in minority communities. They could require law enforcement officials to document racial disparities in drug law enforcement in their jurisdictions and to develop plans to remedy those disparities.

The overarching point is that legislators cannot hide from the facts on the ground. Drug law enforcement in the United States continues to violate basic principles of equal justice. If legislators wish to continue to use penal laws to pursue anti-drug objectives, they must find feasible, cost-effective ways to end the sorry legacy of racial discrimination those laws have yielded to date.

CONCLUSION

Opinions may differ as what criminal justice reforms are needed in the United States, but the beginning of a robust debate is encouraging. We hope it will be shaped by facts and principles. In this briefing paper, we have offered a summary of some key human rights principles that lawmakers and others could use to craft fair and effective reforms. As the growing bipartisan embrace of criminal justice reform indicates, protecting public safety, enhancing human dignity, and promoting the human right to liberty are mutually achievable goals.

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²⁸ Human Rights Watch, *An Offer You Can’t Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, December 2013, <http://www.hrw.org/reports/2013/12/05/offer-you-can-t-refuse>, p. 9.

²⁹ Ibid.

³⁰ Nellis, “Life Goes On: The Historic Rise in Life Sentences in America,” http://www.sentencingproject.org/detail/news.cfm?news_id=1636&id=167; ACLU, “A Living Death: Life Without Parole for Nonviolent Offenses,” <https://www.aclu.org/criminal-law-reform/living-death-life-without-parole-nonviolent-offenses-o>).

³¹ When sentencing, the ICC must “take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.” Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2013, article 78.

³² Ibid., article 77.

³³ In *Solem v. Helm*, the US Supreme Court held that the Eighth Amendment “prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.” *Solem v. Helm*, 463 U.S. 277, 6 (1983).

³⁴ *Ewing v. California*, 538 U.S. 11 (2003). (the first offenses, for which Ewing had already served his punishment were first-degree robbery and three counts of residential burglary); and *Lockyer v. Andrade*, 538 U.S. 63 (2003). (Andrade had already served his punishment for two counts of theft).

³⁵ *Harmelin v. Michigan*, 501 U.S. 957, (1991). The Michigan State Supreme Court later struck down a provision in the 1978 Michigan antidrug law which mandated a life sentence without parole for possession of more than a pound and a half of cocaine. The Michigan Supreme Court held that this provision was “unduly disproportionate” to the crime and violated the Michigan Constitution. “Court Overturns a Tough Drug Law,” *New York Times*, June 17, 1992,

<http://www.nytimes.com/1992/06/17/us/court-overturns-a-tough-drug-law.html> (accessed September 6, 2013).

³⁶ In *Harmelin*, the court stated that: “[T]he fixing of prison terms for specific crimes involves a substantial penological judgment that, as a general matter, is properly within the province of the legislature, and reviewing courts should grant substantial deference to legislative determinations.” *Harmelin v. Michigan*, 501 U.S. 957, 998(1991).

³⁷ See for example, Families Against Mandatory Minimums, States Map, <http://famm.org/states-map/> (accessed April 8, 2014).

³⁸ United States Sentencing Commission, “Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System,” October 2011, http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/2011031_RtC_Mandatory_Minimum.cfm (accessed February 14, 2014), p. 90-102 (“2011 Mandatory Minimum Report”).

³⁹ Human Rights Watch, *Cruel and Usual: Disproportionate Sentences for New York Drug Offenders*, March 1997, <http://www.hrw.org/reports/1997/usny/>.

⁴⁰ Human Rights Watch, *An Offer You Can’t Refuse*.

⁴¹ United States Sentencing Commission, 2013 Sourcebook of Federal Sentencing Statistics, <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013> (accessed April 22, 2014), Table 43.

⁴² Ibid.

⁴³ “With the Anti-Drug Abuse Act of 1986, Congress introduced a mandatory minimum sentencing scheme for federal drug crimes keyed to the weight and type of the drug involved, apparently believing that weight would be a reasonable proxy for the trafficking role. However, Congress got the numbers wrong: even low-level offenders distribute the quantities that garner the minimum sentences Congress intended for more serious traffickers.” Human Rights Watch, *An Offer You Can’t Refuse*, p. 25.

⁴⁴ Human Rights Watch, *An Offer You Can’t Refuse*, p. 48.

⁴⁵ Opinion Setting Forth Reasons for Sentence at 303, *United States v. Barton*, 442 F. Supp. 2d 301 (W.D. Va. Aug. 14, 2006).

⁴⁶ Ibid.

⁴⁷ An Act Reforming the Administrative Procedures Relative to Criminal Offender Record Information and Pre- and Post-Trial Supervised Release, The Commonwealth of Massachusetts, Senate No. 2583, 2010. <http://www.mass.gov/legis/bills/senate/186/sto2pdf/sto2583.pdf>. See an explanation of the law: Barb Dougan, “Drug Sentencing Reforms,” National Lawyers Guild Massachusetts Chapter, December 2012, <http://www.nlgmass.org/2012/12/drug-sentencing-reforms/> (accessed February 14, 2014).

⁴⁸ “US/California: ‘Three-Strikes’ Vote a Humane Step,” Human Rights Watch, November 7, 2012, <http://www.hrw.org/news/2012/11/07/uscalifornia-three-strikes-vote-humane-step>.

⁴⁹ Act to Amend Chapter 7 of Title 5 of the O.C.G.A., Relating to Appeal or Certiorari by the State in Criminal Cases, so as to Provide the State with More Direct Appeal Rights; to Amend Part 1 of Article 2 of Chapter 13 of Title 16, Title 17, Article 3A of Chapter 5 of Title 40,

and Title 42 of the O.C.G.A., Relating to Schedules, Offenses, and Penalties for Controlled Substances, Criminal Procedure, Suspension of Driver's License for Certain Drug Offenses, and Penal Institutions, Respectively, so as to Enact Provisions Recommended by the Governor's Special Council on Criminal Justice Reform in Georgia; to Amend Article 2 of Chapter 8 of Title 24 of the O.C.G.A., Relating to Admissions and Confessions; to Provide for Related Matters; to Repeal Conflicting Laws; and for Other Purposes, Georgia General Assembly, HB 349, July 1, 2013. See Families Against Mandatory Minimums, "New GA Safety Valve Continues Common Sense Trend," April 25, 2013, <http://www.famm.org/newsandinformation/PressReleases/NewGASafetyValveContinuesCommonSenseTrend.aspx> (accessed February 14, 2014).

⁵⁰ Christina Sterbenz, "5 People Sentenced to Life in Prison Over Nonviolent Drug Offenses," *Business Insider*, August 14, 2013, <http://www.businessinsider.com/life-sentences-from-mandatory-minimums-2013-8> (accessed April 22, 2014);

Matt Eloffson, "Ashford man gets life sentence for drug distribution," *Dothan Eagle*, September 17, 2013, http://www.dothaneagle.com/news/crime_court/article_obb98686-1fc5-11e3-9871-0019bb30f31a.html (accessed February 14, 2014).

⁵¹ In fact, many offenders are not released until long after they become eligible for parole; some may never be paroled. Human Rights Watch, *Old Behind Bars*, p. 35.

⁵² Nellis, "Life Goes On: The Historic Rise in Life Sentences in America," http://www.sentencingproject.org/detail/news.cfm?news_id=1636&id=167.

⁵³ Illinois, Iowa, Louisiana, Maine, Pennsylvania, and South Dakota. Ashley Nellis and Ryan S. King, "No Exit: The Expanding Use of Life Sentences in America," The Sentencing Project, July 2009, http://www.sentencingproject.org/doc/publications/publications/in_c_NoExitSept2009.pdf (accessed August 29, 2013), p. 4. In Louisiana, one in every nine people in prison (10.9 percent) was serving an LWOP sentence in 2009, and nationally, there were nine states in which more than five percent of persons in prison were serving an LWOP sentence. *Ibid*

⁵⁴ Human Rights Watch, *An Offer You Can't Refuse*, p. 11.

⁵⁵ ACLU, "A Living Death: Life Without Parole for Nonviolent Offenses," <https://www.aclu.org/criminal-law-reform/living-death-life-without-parole-nonviolent-offenses-0>, p. 142.

⁵⁶ ACLU, "A Living Death: Life Without Parole for Nonviolent Offenses," <https://www.aclu.org/criminal-law-reform/living-death-life-without-parole-nonviolent-offenses-0>, p. 142.

⁵⁷ Human Rights Watch, *Old Behind Bars*, p. 18.

⁵⁸ There are no national figures, but data obtained by Human Rights Watch from different sources suggests state and federal laws permitting the early release of prisoners who are terminally ill, permanently incapacitated, or simply too old to get out of bed are greatly underutilized. In California, 37 prisoners secured early release on medical grounds in 2011, and the Bureau of Prisons granted a similar number of prisoner compassionate release in 2012. Texas released 100 prisoners. New York has never had more than 10 medical parolees in a year. See Tina Chiu, "It's About Time: Aging Prisoners, Increasing Costs, and Geriatric Release," Vera Institute of Justice, April 2010, [\[about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf\]\(#\) \(accessed February 14, 2014\), p. 6.](http://www.vera.org/sites/default/files/resources/downloads/lts-</p></div><div data-bbox=)

⁵⁹ Human Rights Watch and Families Against Mandatory Minimums, *The Answer is No*, November 30, 2012, <http://www.hrw.org/reports/2012/11/30/answer-no>.

⁶⁰ US Department of Justice, Office of the Inspector General, "The Federal Bureau of Prisons' Compassionate Release Program," April 2013, <http://www.justice.gov/oig/reports/2013/e1306.pdf> (accessed February 14, 2014).

⁶¹ Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2013, article 110.

⁶² Human Rights Watch, *Old Behind Bars*, p. 72-79.

⁶³ In 1994, juvenile crime had increased over 68 percent from its 1980 level. Office of Juvenile Justice and Delinquency Prevention, US Department of Justice, "Statistical Briefing Book," December 17, 2012, http://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05201 (accessed November 25, 2013). In 2010, the juvenile violent crime arrest rate had plummeted almost 55 percent, to well below the 1980 level. *Ibid*. By 2012, the juvenile violent crime arrest rate hit a 32-year low. See Jeffrey Butts, John Jay College of Criminal Justice Research and Evaluation Center, "Violent Youth Crime in U.S. Falls to New 32-Year Low," October 4, 2013, <http://johnjayresearch.org/rec/files/2013/10/databit201304.pdf> (accessed December 5, 2013).

⁶⁴ John J. Dilulio has acknowledged that his dire predictions were wrong, and now advocates for programs and prevention over incarceration. See Elizabeth Becker, "As Ex-Theorist on Young 'Super-predators,' Bush Aide Has Regrets," *New York Times*, February 9, 2001, <http://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html> (accessed December 5, 2013).

⁶⁵ In 14 states there is no minimum age of adult jurisdiction. David Tannenhaus and Steven Drizin, "Owing to the Extreme Youth of the Accused: The Changing Legal Response to Juvenile Homicide," *J. Crim L. & Criminology*, vol. 92 (2002), p. 641.

⁶⁶ See US Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, Juvenile Offenders and Victims: National Report Series, Trying Juveniles as Adults, September 2011, <https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf> (February 14, 2014).

⁶⁷ Arizona Rev. Statutes Sec. 13-501(B); Ark. Code, Sec. 9-27-318; Cal. Welf. & Inst. Code Sec. 707(d); Colo. Rev. Stat. Sec. 19-2-517; D.C. ST Sec. 16-2301(3); Fla. Stat. Sec. 985.557; Code of Georgia, Sec. 15-11-560; La. Children's Code, Tit. III, Ch. 4, Art. 305; Mass. Gen. Laws, Ch. 119, Sec. 54; MCL Secs. 712A.2, 600.606; Montana Code Sec. 41-5-206; Neb. Rev. Stat. Secs. 43-276, 43-247; NHS Tit. XII, Sec. 169-B:25; Okla. Stat., Tit. 10A, Secs. 2-5-204, 2-5-206; Vermont Stat., Tit. 33, Sec. 5203; Virginia Code Sec. 16.1-269.1(C); Wyoming Statutes Sec. 14-6-203.

⁶⁸ See, for example, , *Hill vs. The United States of America*, Inter-American Commission on Human Rights, Case No. 12.866, Final Observations Regarding the Merits of the Case, September 4, 2012, [\[rights-institute/files/Case%20No%2012866%20Final%20Observations%20Regarding%20the%20Merits%20of%20the%20Case.pdf">rights-institute/files/Case%20No%2012866%20Final%20Observations%20Regarding%20the%20Merits%20of%20the%20Case.pdf\]\(#\) \(accessed February 14, 2014\) \(discussing several cases of individuals below the age of 18 incarcerated in adult prisons in Michigan\). Youth offenders in adult jails and prisons are among the inmates most susceptible to physical and sexual assault during their incarceration. Many young inmates are placed in isolated segregation, often constituting solitary confinement, some spending years without any but the most fleeting human contact. Many youth offenders are denied access to adequate educational and vocational programs. Finally, facing violence, stultifying conditions, and separation from family and friends, many youth offenders sentenced to adult prison terms experience psychological harm, including deep depression and intense loneliness. Failed by prison mental health services, many contemplate and attempt suicide; some succeed. Human Rights Watch, *Against All Odds*, January 4, 2012, <http://www.hrw.org/reports/2012/01/03/against-all-odds-0>.](http://web.law.columbia.edu/sites/default/files/microsites/human-</p></div><div data-bbox=)

⁶⁹ Human Rights Watch, *Growing Up Locked Down*, p. 2.

⁷⁰ While this document focuses exclusively on the topic of sentencing, Human Rights Watch has published extensively on broader issues surrounding the criminal justice system's treatment of juveniles as adults. See, e.g., Human Rights Watch, *Growing Up Locked Down*; Human Rights Watch, *Against All Odds*; Human Rights Watch, *The Rest of Their Lives*, October 12, 2005, <http://www.hrw.org/reports/2005/10/11/rest-their-lives-0>.

⁷¹ The Human Rights Committee has interpreted the ICCPR's provisions on youth offenders to apply to all persons under the age of 18. Human Rights Committee, General Comment no. 1, Forty-fourth Session (1992), para. 13, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.7, p. 155.

⁷² The United States co-sponsored this provision together with Great Britain and India, and it was adopted unanimously. See Marc Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (The Netherlands: Martinus Nijhoff Publishers, 1987), p. 307.

⁷³ The ICCPR contains three additional provisions related to juvenile justice. Article 6(5) prohibits imposing the death penalty on persons who committed crimes while under the age of 18. Article 10(2), subparagraph b, mandates the separation of accused children from adults and the swift adjudication of their cases. Article 14(1) provides an exception for cases involving children to the general requirement that judgments be made public. International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976.

⁷⁴ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: N.P. Engel, 1993), p. 266.

⁷⁵ Human Rights Watch, *When I Die They'll Send Me Home*, October 17, 2008, <http://www.hrw.org/node/75357/section/7>.

⁷⁶ *Roper v. Simmons*, 543 U.S. 551, 570, (2005).

⁷⁷ *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010).

⁷⁸ *JDB v. North Carolina*, 131 S. Ct. 2394, 2404 (2011) (internal citations omitted).

⁷⁹ Article 40 of the CRC recognizes, for child offenders, "the desirability of promoting the child's reintegration and the child's assuming a constructive role in society." Rule 28 of United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("the Beijing Rules"), titled "Frequent and early recourse to conditional release," specifies that "[c]onditional release from an institution shall be used by the appropriate authority to the greatest possible extent, and shall be granted at the earliest possible time." The commentary to rule 28 further states, "[c]ircumstances permitting, conditional release shall be preferred to serving a full sentence. Upon evidence of satisfactory progress towards rehabilitation, even offenders who had been deemed dangerous at the time of their institutionalization can be conditionally released whenever feasible." Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990.

⁸⁰ Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, Article 37.

⁸¹ Human Rights Watch, *Thrown Away: Children Sentenced to Life without Parole in Colorado*, February 1, 2005, <http://www.hrw.org/sites/default/files/reports/us0205.pdf>; Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States*; Human Rights Watch, *Life without Parole for Child Offenders in the United States 2008*, May 2008, <http://www.hrw.org/sites/default/files/reports/us1005execsum.pdf>; *State Distribution of Children Serving Life Without Parole in the United States 2009*, October 2, 2009, <http://www.hrw.org/news/2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-life-without-parole>; Human Rights Watch, "When I Die, They'll Send Me Home,"; Human Rights Watch, *Update: When I Die, They'll Send Me Home*, March 1, 2012, <http://www.hrw.org/reports/2012/03/01/when-i-die-they-ll-send-me-home>; Human Rights Watch, *Against All Odds*.

⁸² M. Leighton & C. de la Vega, *Sentencing Our Children to Die in Prison: Global Law and Practice*, UNIV. OF SAN FRANCISCO L.J., 983, 985-86 (2008). See also Brief for Amnesty International, et al., as Amici Curiae in Support of Petitioner at 15-17, *Graham v. Florida*, 130 S.Ct. 2011 (2010) (Nos. 08-7412, 08-7621).

⁸³ *Graham v. Florida*, 560 U.S. 48, (2010).

⁸⁴ *Miller v. Alabama*, 132 S. Ct. 2455, 2466 (2012).

⁸⁵ *State v. Ragland*, 836 N.W.2d 107, 121 (Iowa 2013).

⁸⁶ Human Rights Watch, *In Harm's Way*, December 11, 2013, <http://www.hrw.org/reports/2013/12/11/harms-way>; Human Rights Watch, *Abusing the User*, May 6, 2003, <http://www.hrw.org/en/reports/2003/05/06/abusing-user-0>; Human Rights Watch, *Injecting Reason*, September 8, 2003, <http://www.hrw.org/en/reports/2003/09/08/injecting-reason-0>; Human Rights Watch, *Lessons Not Learned*, April 27, 2004, <http://www.hrw.org/en/reports/2004/04/27/lessons-not-learned-0>

⁸⁷ UN Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, Francois Crepeau, UN Doc. A/HRC/20/24, April 2, 2012, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf (accessed May 10, 2013), para. 13.

⁸⁸ Nathan James, “The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options,” *Service*, January 22, 2013, <http://fas.org/sgp/crs/misc/R42937.pdf> (accessed August 26, 2013) and Executive Office of the United States Attorneys, “Annual Statistical Reports: Fiscal Year 2012,” http://www.justice.gov/usao/reading_room/reports/asr2012/12statrpt.pdf (accessed October 1, 2013). The total number of immigration offenders in the Bureau of Prisons has more than doubled from just over 10,000 in 1999 to 22,500 in 2013. US Department of Justice, Bureau of Justice Statistics, “Prisoners in 2000,” <http://www.bjs.gov/content/pub/pdf/poo.pdf> (accessed August 26, 2013); Bureau of Prisons, “Quick Facts About the Bureau of Prisons,” last updated July 27, 2013, <http://www.bop.gov/news/quick.jsp> (accessed August 26, 2013).

⁸⁹ Human Rights Watch, *Turning Migrants into Criminals*, May 22, 2013, <http://www.hrw.org/reports/2013/05/22/turning-migrants-criminals>.

⁹⁰ Human Rights Watch, *Turning Migrants into Criminals*.

⁹¹ Human Rights Watch interview with Robert Lopez Francisco, Los Angeles, California, October 11, 2012.

⁹² Human Rights Watch, *Turning Migrants into Criminals*, p. 77.

⁹³ Human Rights Watch interviews with Firdaus Dordi, assistant federal defender, Los Angeles, California, August 30, 2012, and January 24, 2013.

⁹⁴ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969, ratified by the United States on November 20, 1994. Under ICERD, racial discrimination is defined as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.” ICERD, Part I, article 1(1).

⁹⁵ “States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms.... Each State Party undertakes to engage in no act or practice of racial discrimination... and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation...” ICERD, Part I, article 2(1)(a). For a more detailed analysis, see Jamie Fellner, “Race, Drugs and Law Enforcement in the United States,” *Stanford Law and Policy Review*, vol. 20 (2009).

⁹⁶ See Fellner, “Race, Drugs and Law Enforcement in the United States,” *Stanford Law and Policy Review*). Human Rights Watch, *Targeting Blacks*, May 4, 2008, <http://www.hrw.org/reports/2008/05/04/targeting-blacks-o>; Human Rights Watch, *Decades of Disparity*, March 2, 2009, <http://www.hrw.org/reports/2009/03/02/decades-disparity-o>.

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⁹⁸ US Census Bureau, “State and County Quickfacts, USA (Black or African American Alone, 2012),” last revised January 7, 2014, <http://quickfacts.census.gov/qfd/states/00000.html>

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¹⁰⁰ Carson and Golinelli, “Prisoners in 2012 – Advance Counts,” *Bureau of Justice Statistics Bulletin*, July 2013, Table 10, <http://www.bjs.gov/content/pub/pdf/p12ac.pdf> (accessed April 22, 2014), p. 11.

¹⁰¹ “Federal Justice Statistics Resource Center,” Bureau of Justice Statistics, <http://bjs.ojp.usdoj.gov/fjsrc/> (accessed February 14, 2014).

¹⁰² See Fellner, “Race, Drugs and Law Enforcement in the United States,” *Stanford Law and Policy Review*, p. 261; Human Rights Watch, *Targeting Blacks*, p. 4-5; Human Rights Watch, *Decades of Disparity*, p. 16.

¹⁰³ Fellner, “Race, Drugs and Law Enforcement in the United States,” *Stanford Law and Policy Review*, p. 263-265.

¹⁰⁴ *Ibid.*, p. 265, n. 39.

¹⁰⁵ United States Sentencing Commission, “Report to the Congress: Cocaine and Federal Sentencing Policy,” 2002; United States Sentencing Commission, “Report to the Congress: Cocaine and Federal Sentencing Policy,” p. 3 (on the 100 to 1 sentencing differential).

¹⁰⁶ Fair Sentencing Act, Public Law 111-220 (2010).

¹⁰⁷ For a general discussion about the effects of crack versus powder cocaine, see US Sentencing Commission, Report to the Congress: Cocaine and Federal Sentencing Policy, Chapter 3: Forms of Cocaine, Methods of Use, Effects, Dependency, Prenatal Effects, and Prevalence, 2007, http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RTC_Cocaine_Sentencing_Policy.pdf (accessed October 1, 2013), p. 64.

¹⁰⁸ The percentages of blacks reporting crack use exceeds those for whites but the much greater number of whites in the national population means that in absolute numbers far more whites than blacks have used and use crack. For example, in 2011, 0.2 percent of whites and 0.7 percent of blacks reported using crack in the past year but these percentages translate into 333,000 whites, compared to 197,000 blacks. See Substance Abuse and Mental Health Services Administration, “Results from the 2011 National Survey on Drug Use and Health: Detailed Tables,” Tables 1.34(A) and 1.34(B) <http://www.samhsa.gov/data/NSDUH/2011SummNatFindDetTables/NSDUH-DetTabsPDFHTML2011/2k11DetailedTabs/Web/PDFW/NSDUH-DetTabsSect1peTabs34to38-2011.pdf> (accessed September 5, 2013), Tables 1.34(A) and 1.34(B).

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