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Human Rights Violations in the United States

CRUEL AND USUAL
Disproportionate Sentences for New York Drug Offenders

...Are we really accomplishing the ends of justice when we mete out the same kind of punishment to the insignificant street pusher as we would to the heavy dealer of drugs?
Judge Ernest Signorelli, Suffolk County Court

New York has completely lost sight of the true nature of the crimes involved....It is difficult to believe that the possession of an ounce of cocaine or a..."street sale" is a more dangerous or serious offense than the rape of a ten-year-old, the burning down of a building occupied by people, or the killing of another human being while intending to cause him serious injury.
Judge James L. Oakes, United States Court of Appeals for the Second Circuit

I. SUMMARY AND RECOMMENDATIONS

In the past decade, the U.S. Congress and many state legislatures have established harsh criminal penalties for a wide range of drug offenses, often using the vehicle of mandatory minimum prison sentences. As a consequence, drug offenders in the United States face sentences that are uniquely severe among constitutional democracies. Supporters insist that severe mandatory sentences guarantee serious drug offenders are put behind bars, offer prosecutors leverage for securing cooperation from drug traffickers, deter prospective offenders, and enhance community safety and well-being. Opponents point to data showing the laws have had little impact on the demand for or the availability of drugs. Instead, they have resulted in the unnecessary confinement of low-level nonviolent offenders (most of whom are poor African-Americans and Hispanics), a staggering growth in prison populations, and a waste of public resources. Judges decry the excessive and unfair sanctions that mandatory sentencing laws can require in individual cases. Missing from the debate over drug sentencing laws, however, has been a critique of their human rights impact.

Sentences for drug offenders in New York state are among the most punitive in the country. A person convicted of a single sale of two ounces of cocaine faces the same mandatory prison term as a murderer—fifteen years to life. Long prison sentences may be proportionate for traffickers who run large and violent drug distribution enterprises. But in New York, the vast majority of drug offenders sentenced to prison are nonviolent minor drug dealers or persons only marginally involved in drug transactions—people who make $20 sales on the streets, one-time couriers carrying drugs for a small fee, addicts who sell to finance their own habits. For these people, even a few years of imprisonment can be disproportionately severe punishment that violates the inherent dignity of persons, the right to be free of cruel and degrading punishment, and the right to liberty. Such sentences contravene the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.

In this report, Human Rights Watch criticizes the human rights impact of drug sentences in New York for low-level or marginal drug offenders. We do not challenge the state's decision to use criminal sanctions in its effort to curtail drug abuse and drug trafficking. To an extent far greater than other drug control policies, however, the use of the criminal law is subject to important human rights constraints. Of particular significance are the constraints on criminal sanctions. To be consistent with internationally recognized human rights standards, criminal sanctions must be both humane and proportional to the gravity of the offense. Conviction of a crime is not license for the imposition of arbitrarily severe punishment.

Unfortunately, drug sentences in New York, as throughout the United States, have been shaped by public concerns and political pressures that have been indifferent to the need for proportionality. Many factors—the persistence of drug use and abuse, the deterioration of inner cities, the rise of symbolic politics, racial undercurrents, a fear of crime, and an unwillingness to tackle social inequalities, among others—have encouraged politicians and public officials to embrace inordinately tough sentences for drug felonies. Those who question such sentences risk political ridicule and ostracism.

In New York state, almost 30,000 people a year are indicted for drug felonies, and 10,000 are sent to prison; approximately 90 percent of them are blacks and Hispanics. In New York, as throughout the United States, drug felonies are the single most significant factor underlying the remarkable growth of the prison populations.[1]

[1]In 1994, 59.5 percent of federal prisoners were drug offenders, as were 22.3 percent of inmates in state prisons. See The White House, Executive Office of the President of the United States, *The National Drug Control Strategy 1997*, (Washington, D.C.: Office of National Drug Control Policy, 1997), Chapter II for a summary of drug-related data.

So many people are sent to prison in the United States that public officials and the public have lost sight of just how serious a punishment imprisonment is.[2] Imprisoned individuals lose their liberty, autonomy and the free exercise of most rights. They are deprived of their families, friends and communities; their ability to work, play and express themselves is severely restricted. In many prisons, the health and safety, as well as the dignity and privacy, of prisoners are threatened by overcrowding, deteriorating physical conditions and sanitation, and violence. Children lose their parents to prison; family emotional and financial stability is threatened. This is not a sanction that should be imposed intemperately or needlessly.

In New York state, disproportionate sentences for minor drug offenders arise from the severity and rigidity of the penal laws. In most cases, New York drug felons sentenced to prison receive an indeterminate term which includes a minimum and a maximum period of imprisonment. For each felony class, the legislature has set the range of possible sentences. A judge cannot impose a minimum sentence lower than that specified by statute, regardless of the prior history, character and circumstances of the individual offender, the nature of his or her role in the offense or the threat posed to society. For example, a court must give any adult convicted of possessing as little as four ounces or selling two ounces of cocaine a minimum sentence of fifteen years; the maximum must be life. For a single $10 sale of cocaine, the lowest sentence a court can impose is a term of one to three years; higher sentences are permitted, up to eight and one-third to twenty-five years. The sentences of drug felons who have prior felony convictions are substantially increased by the mandatory sentencing requirements under the second felony offender law. If, for example, conviction of a $10 sale is a second felony, the lowest sentence the defendant could receive is a term of four-and-one-half to nine years in prison.

New York's laws are constructed in such a way as to almost guarantee disproportionate sentences for many low-level or minor drug offenders. The following aspects of the laws have a particularly egregious impact:

> 1) The classification of drug felonies is based solely on the amount of the drug possessed or sold. People of vastly different roles and culpability are thus swept together in the same felony class. For example, the most serious felony class, Class A, can include the one-time courier carrying drugs for a small fee as well as managers of major drug distribution networks. Offenders who differ dramatically in terms of the wrong they have done, their danger to the community and other relevant characteristics are punished identically.
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> 2) The possession or sale of relatively small amounts of controlled substances is classified as a felony of equal gravity as murder or rape and is subject to the same sentences. We find no argument persuasive by which every adult selling a couple of ounces of cocaine to other adults has engaged in conduct as harmful or reprehensible, for sentencing purposes, as taking the life or violating the physical integrity of another. Contrary to the distorted image of drugs in the media, there is no inevitable, causal relationship between drug use and serious harm to self or others. Most drug users do not become addicts or act in ways that threaten themselves or others. Most drug users do not engage in non-drug crimes. Individuals who use violence to control drug markets or who do engage in non-drug crimes to finance their drug purchases should receive criminal sanctions commensurate with that conduct.
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> 3) Neither the drug nor second-felony-offender laws permit judges to exercise their traditional function of ensuring fair sentences tailored to the specific conduct and culpability of each defendant. Unable to evaluate each case on its merits, judges are placed in a legal

[2]"At mid-year 1996, there were 93,167 inmates in federal prisons and 1,019,281 in state prisons." Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 1996* (Washington, D.C.: U.S. Department of Justice, January 1997).

straitjacket, forced to impose sentences they know to be unjust. The courts are also restricted in their ability to divert nonviolent offenders to substance abuse treatment programs, or to impose constructive intermediate sanctions that are fair, safe, and effective alternatives to prison.

4) Although one rationale for reducing judicial discretion is to minimize sentencing disparities (different sanctions for the same offenses), close disparities continue through the exercise of prosecutorial discretion. Prosecutors' charging and plea bargaining decisions now set sentences. Unlike sentences set by judges, however, prosecutors' decisions are unreviewable, and the criminal justice system lacks mechanisms to hold prosecutors accountable for their choices. In a regime of harsh mandatory sentences, moreover, prosecutors have even greater leverage in plea bargaining than in most criminal cases: the stark disparity between harsh mandatory sentences and the terms prosecutors can offer in plea bargaining leaves defendants little choice but to give up their right to trial and to plead guilty.

In applying the principle of proportionality to drug offenses, it is important to remember that it is not the seriousness of drug abuse and drug trafficking which is at issue. Rather the sanction for a drug offense must be commensurate with the conduct of the individual defendant before the court. The severity of the punishment must be tailored to the actions—and their consequences—for which the individual is personally responsible. Imprisonment is an inherently severe sentence; indeed, it is the most coercive and drastic non-capital sanction imposed by constitutional democracies. Prison sentences are, accordingly, best reserved for people who seriously and wrongfully have injured or sought to injure the legally recognized interests of others through unlawful violence.

Ignored in New York's drug sentences is the fact that the harm caused by the average minor drug offender (such as the street seller of cocaine) is minimal. The social and public health consequences of drugs are the result of an incalculable number of actions over the years by hundreds of thousands of individuals. The contribution of any single minor offender to the overall harm arising from this complex social phenomenon is necessarily negligible. It is unjust to penalize any individual severely for public harms to which his or her individual contribution is so slight. Yet that is what happens in all too many cases.

Some supporters of harsh drug laws argue that severe punishment is justified to deter drug offenses. They believe long prison sentences benefit society because (in theory) they create a disincentive for other potential offenders to break the law. In fact, the laws have had little deterrent impact.[3] But even if they had been effective, the goal of deterrence cannot override the imperative of proportionality between offending conduct and punishment. Absent the restraint of proportionality, egregiously punitive sanctions could be placed on trivial offenses, such as overtime parking, and justified as effective deterrents. In short, whatever the purpose of a criminal sanction—to serve as retribution for the wrong the defendant has done, for example, or to serve as a warning to others—its severity must bear a reasonable relationship with what the defendant actually did.

[3]The failure of the drug laws to deter drug offenders was evident within a few years of their enactment. See, Association of the Bar of the City of New York/The Drug Abuse Council, Inc., *The Nation's Toughest Drug Law: Evaluating the New York Experience*, (Final Report of the Joint Committee on New York Drug Law Evaluation), (New York: Association of the Bar of the City of New York/The Drug Abuse Council, 1977).

It may be that disproportionate sentences for drug crimes have been tolerated because convicted drug felons are primarily members of racial and ethnic minorities. As throughout the United States, most of the people arrested, prosecuted and convicted of drug crimes in New York are non-white. Blacks and Hispanics represent over 85 percent of people indicted for drug felonies and 94 percent of drug felons sent to prison.[4] Whites constitute only 5.3 percent of the total population of drug felons currently in prison in New York; blacks and Hispanics constitute 94.2 percent.[5] A predominantly white state legislature has been insensitive to the rights and needs of people from communities different from their own. While asserting concern for the harm drugs cause in poor communities, public officials have ignored the hardship to individuals and their families from unnecessary years of imprisonment. This lack of identification with the vast majority of those sentenced as drug offenders also contributes to the legislature's failure to provide anywhere near the funding required to meet the demand for drug treatment programs, despite the greater expense of incarceration. There are only 71,000 publicly funded drug treatment slots; estimates of the number of people in New York needing drug treatment range from 246,000[6] to 860,000.[7]

Egregious drug sentences have also persisted because the courts have not upheld federal and state constitutional prohibitions on cruel and unusual punishment. Although these prohibitions extend to excessive sentences, few drug offenders have succeeded in having disproportionately harsh sentences overturned as unconstitutional. The courts have failed to exercise their role of safeguarding individuals from abuses decreed by political majorities. Instead, they have deferred to legislatively dictated sentences, however draconian. New York's highest court, for example, recently upheld

[4]Data provided to Human Rights Watch by the Bureau of Statistical Services of the New York State Division of Criminal Justice Services (hereinafter, DCJS).

[5]Data on the characteristics of persons in prison in 1996 from worksheets provided by the research group of the New York State Department of Correctional Services (hereinafter, DOCS).

[6]Substance Abuse and Mental Health Services Administration (SAMHSA), *Substance Abuse in States and Metropolitan Areas: Model Based Estimates from the 1991-1993 National Household Surveys on Drug Abuse Summary Report*, (Rockville, MD: U.S. Department of Health and Human Services, 1996), Exh. 3.3, p. 36.

[7]The Correctional Association of New York, *Background Paper on Rockefeller Drug Law Reform* (New York: mimeo., 1997). The Correctional Association calculates a cost in New York of $648 million a year in operating expenses to confine drug offenders in prison. It points out that the cost of most outpatient drug programs averages $2,700-$3,600 per person per year, and for residential drug programs the cost is $17,000-$20,000 per year. The cost of keeping an inmate in prison in New York is about $30,000 per year.

against constitutional challenge a sentence of fifteen years to life imposed on a seventeen-year-old girl convicted of a single sale of two ounces of cocaine.[8]

[8]*People v. Thompson*, 83 N.Y. 2d 477 (1994).

Such astonishingly punitive sentences have imposed a high cost in human suffering, but have accomplished little. Recognition is widespread that mandatory sentencing laws have failed to achieve their drug control objectives. New York's highest court has pointed out that the "harsh mandatory treatment of drug offenders...has failed to deter drug trafficking or to control the epidemic of drug abuse in society, and has resulted in the incarceration of many offenders whose crimes arose out of their own addiction and for whom the costs of imprisonment would have been better spent on treatment and rehabilitation."[9] Throughout the criminal justice system, articulate voices are raised calling for the state to make substance abuse treatment available for all who need it. As Paul Shechtman, former Commissioner of the Division of Criminal Justice Services and former Director of Criminal Justice, has stated, many nonviolent offenders "need treatment more than lengthy incarceration."[10] We note that a key objective of the just released *The National Drug Control Strategy* is to "[d]evelop, refine, and implement effective rehabilitation programs—including graduated sanctions, supervised release and treatment for drug-abusing offenders and accused persons at all stages within the criminal justice system."[11]

Recommendations

Human Rights Watch does not minimize the challenges posed to the people of New York by drug abuse and drug trafficking. But concern about drugs cannot excuse the need for scrupulous adherence to fundamental rights. Drug control strategies, including the nature and enforcement of criminal laws, should not sacrifice the rights of individual offenders in an effort to protect the interests of society at large. Severe sanctions such as years in prison should be reserved for serious criminals, not minor nonviolent drug law offenders We urge New York to reform the state's laws to ensure proportionate sentences in drug cases. We recommend that the state:

- Limit lengthy penalties to cases in which specific, serious harm is caused or threatened, e.g., in the case of drug sales to children, or in which the defendants have upper-level roles in drug distribution organizations.

- Eliminate mandatory minimum sentences for nonviolent drug offenders who do not have major roles in drug distribution operations. Offenders who differ in terms of conduct, danger to the community, culpability and other ways relevant to the purposes of sentencing should not be treated identically.

- Revise the classification of drug offenses to correct the current exclusive reliance on the amount of the drug involved; other relevant factors should be reflected in sentencing calculations.

- Grant the judiciary the authority to depart from statutory sentencing ranges when necessary to serve the interests of justice.

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[9]Ibid, 83 N.Y. 2d at 487.

[10]Interview with Paul Shechtman, former commissioner, New York State Division of Criminal Justice Services (DCJS), and director, Criminal Justice, New York City, December 17, 1996.

[11]*The National Drug Control Strategy 1997*, Chapter III Strategic Goals and Objectives.

- Increase the availability and use of alternative sanctions for nonviolent drug offenders who are not significant figures in a drug distribution business, and increase the availability of substance abuse treatment on demand.

II. MANDATORY SENTENCING FOR DRUG OFFENSES AND SECOND FELONY OFFENDERS

Drug Offenses

In 1973, New York enacted harsh mandatory sentencing laws for drug offenses and for second felony offenders. The purpose of the drug laws was to deter people from using or selling drugs and to isolate from society those who were not deterred. "It was thought that rehabilitation efforts had failed; that the epidemic of drug abuse could be quelled only by the threat of inflexible, and therefore certain, exceptionally severe punishment."[12] Strongly supported by Governor Nelson Rockefeller, the new drug laws (commonly referred to as the Rockefeller laws) established a scale of extraordinarily punitive mandatory sentences for the unlawful possession and sale of controlled substances[13] keyed to the weight of the drug involved. By 1979, in response to extensive criticism, the legislature had made a few changes in the laws, including an increase in the amount of drugs required for conviction on the most serious charges.[14] In the mid-1980s, crack—a potent form of smokable cocaine—became widely available in small quantities at relatively low unit costs. Responding to the dramatic rise in the use of crack and the violence that accompanied its marketing, the state legislature in 1988 lowered the weight threshold for cocaine possession to enable the arrest and prosecution of people possessing a few vials of crack.[15] The sentencing framework for drug offenders has remained essentially unchanged since then.

Controlled substance felonies in New York are classified in degrees, or levels of seriousness, according to the type and weight of the drug possessed or sold.[16] These offenses are then categorized for sentencing purposes in felony classes. A wide range of crimes—drug and non-drug—are grouped within each felony class, the legislature having judged them to be roughly commensurate in degree. Class A felonies are the most serious and receive the most severe penalties. Class E felonies are the least serious.[17]

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[12] *People v. Broadie*, 37 N.Y. 2d 100, 115 (1975) (citations omitted), *cert. denied*, 423 U.S. 950 (1975).

[13] Marijuana is not a "controlled substance" for purposes of New York's penal laws. In 1977, New York enacted the Marijuana Reform Act creating a separate article in the penal laws for this drug. The legislators believed that criminal prosecution and felony penalties were inappropriate for people who possess small quantities of marijuana for their own personal use. Most marijuana offenses are misdemeanors. Possession of more than eight ounces or sale of more than seven-eighths of an ounce are felonies. N.Y. Penal Law § 221. Prosecution of marijuana offenders continues. Between 1993 and 1995, 134 marijuana offenders were sentenced to prison, 3,950 received jail sentences of less than one year.

[14] The quantity of drugs required for conviction of Class A drug felonies was increased from one to two ounces of narcotic substances for conviction of criminal sale and from two to four ounces for criminal possession. Conduct that was formerly classified as an A-III felony was reclassified to a B felony.

[15] N.Y. Penal Law § 220.06(5) makes possession of 500 milligrams of cocaine criminal possession of a controlled substance in the fifth degree, a Class D felony. New York law, unlike U.S. federal law, does not distinguish between powder and crack cocaine. Crack is generally sold to users in vials containing a small quantity of the drug, and customers typically purchase a small number of vials at a time. Prior to the 1988 amendments, possession of one-eighth of an ounce of cocaine was the minimum threshold for liability for a felony violation. One-eighth of an ounce of crack would be the equivalent of between 25 and 40 vials—more than a mere user would be likely to possess at one time. To be able to reach people possessing or selling a few vials of crack, the 500 milligram threshold was added.

[16] N.Y. Penal Law, Art. 220.

[17] Less serious violations of the criminal law are misdemeanors, which are also classified by degrees. Sanctions for misdemeanor drug offenses range from fines to short jail terms.

For each felony class, the legislature has established the possible sentences. In general, persons convicted of a felony receive an indeterminate sentence which is composed of a minimum and maximum period of imprisonment.[18] The minimum sentence reflects the shortest period of time to which a person can be sentenced for the specified crime. A judge cannot impose a sentence lower than the statutorily mandated minimum, regardless of the prior history, character and circumstances of the individual, his or her role in the offense, or the threat posed to society. The legislature has only granted judges discretion to increase the sentence above the specified minimum. The maximum sentence reflects the longest possible period an individual can be held in custody for the offense.

[18]N.Y. Penal Law § 70.00.

Table 1, below, indicates the felony classification of and sentencing ranges for controlled substance offenses involving "narcotic drugs," a category which includes cocaine and heroin, the drugs most commonly involved in drug felonies in New York.[19]

Table 1: Mandatory Sentences for Unlawful Sale and Possession of Narcotic Drugs

Felony Class	Minimum	Maximum
A-I: Possession: 4 oz. Sale: 2 oz.	 15 - 25 years 15 - 25 years	 life life
A-II: Possession: 2 oz. Sale: ½ oz.	 3 - 8 1/3 years 3 - 8 1/3 years	 life life
B: Possession: any amount w/intent to sell; ½ oz. simple possession Sale: Any amount	1 year - up to 1/3 of max 1 year - up to 1/3 of max	3 - 25 years 3 - 25 years
C: Possession: 1/8 oz. Sale: n/a	 1 year - up to 1/3 of max** 1 year - up to 1/3 of max	 3 - 15 years 3 - 15 years
D: Possession: 500 mg* Sale: any amount	 1 year - up to 1/3 of max** 1 year - up to 1/3 of max	 3 - 7 years 3 - 7 years

Source: N.Y. Penal Law, Controlled Substance Offenses, Art. 20 and N.Y. Penal Law § 70.00, Sentence of Imprisonment for Felony.
* Pure weight. Other weights are aggregate, including any mixture containing drug.
**In certain cases the court may impose a determinate sentence of one year or less for Class C and D drug felonies. N.Y. Penal Law § 70.00 (4).

As Table 1 indicates, the possession of four ounces of a narcotic drug or the sale of two ounces is a Class A felony. The mandatory minimum for conviction of a Class A-I felony is fifteen years in prison, although the court is given the power to impose up to twenty-five years as a minimum; the maximum must be life. Possession of two ounces or sale of one-half ounce is a Class A-II felony subject to a minimum term of between three and eight-and-one-third years; the maximum term is life. Sale of smaller amounts of narcotic drugs, however minute, is a Class B felony: the minimum time in prison must be set between one and eight-and-one-third years; the maximum is twenty-five years.

For Class C and D drug felonies, imprisonment is also required. A person convicted of possessing one-eighth ounce of cocaine, a Class C felony, can receive an indeterminate term of as high as five to fifteen years. The court, however, may impose a definite term of imprisonment of one year or less when the court is of the opinion that an indeterminate sentence would be "unduly harsh."[20] Sentence of as little as one day or "time served" plus a period of probation satisfy the prison requirement.

[19]N.Y. Penal Law, Controlled Substance Offenses, Art. 220. Other controlled substances include hallucinogens, stimulants, and metamphetamines. The weight determining the felony class for possession or sale varies according to the drug involved.

[20]N.Y. Penal Law § 70.00 (4).

Table 2 shows the average sentences imposed between 1991-1995 on first offenders convicted of drug felonies in recent years. For Classes B through E, the minimum sentences have ranged from thirteen months to nineteen months, with slight fluctuations from year to year within each class. The maximum sentences have varied from one-and-one-half to five years. For Class A-II felonies, the average minimum sentence has been slightly more than four years.

Table 2: Average Minimum Sentence and Maximum Sentence (In Months) for First Felony Offenders

Felony Class	1991		1992		1993		1994		1995	
	Min	Max	Min	Max	Min	Max	Min	Max	Min	Max
A-I	178.7		172.84		178.3		176.3		150.1	
A-II	51.2		49.3		52.1		51.6		51.1	
B	18.2	63.4	18.4	64.5	18.1	63.5	18.8	62.5	17.6	62.9
C	16.0	38.5	15.7	38.4	16.2	38.5	16.3	39.1	17.2	38.9
D	15.5	26.6	15.6	26.8	16.1	26.8	17.2	26.7	17.1	26.1
E	12.8	18.6	12.7	18.8	13.8	18.9	12.8	18.6	13.5	18.5

Source: DCJS

Drug felonies "are punished more severely and inflexibly than almost any other offense" in New York.[21] Persons convicted of Class A drug felonies, regardless of the nature or degree of their involvement in the drug trade, receive the same maximum sentence as people convicted of murder, arson, and kidnapping. They are punished more severely than felons convicted of such violent crimes as rape, manslaughter, and robbery. A person convicted of possessing one-half ounce of cocaine or trying to sell one rock of crack, Class B felonies, faces similar sentences as rapists and kidnappers. As one federal judge commented trenchantly:

> New York has completely lost sight of the true nature of the crimes involved....It is difficult to believe that the possession of an ounce of cocaine or a $20 "street sale" is a more dangerous or serious offense than the rape of a ten-year-old, the burning down of a building occupied by people, or the killing of another human being while intending to cause him serious injury.[22]

[21] *People v. Broadie*, 37 N.Y. 2d at 115.

[22] *Carmona v. Ward*, 576 F. 2d, 405 423 (2d Cir. 1978), *cert. denied*, 439 U.S. 1091 (1979) (Oakes, J., dissenting) (citations omitted).

The treatment of drug offenders in New York charged with the highest levels of felony is also uniquely severe compared to sanctions for drug offenses elsewhere in the United States. In most states, for example, possession of narcotics is typically punished with sentences that range from no time in prison to five years for first offenders.[23] No other state in the nation requires a court to impose a minimum of fifteen years and a maximum of life sentence for possession or sale of the amounts of cocaine or heroin which suffice for Class A-I felony treatment in New York. In at least twenty-eight states, the courts may impose sentences of less than one year on persons convicted of selling cocaine.[24] Even under the notoriously tough federal laws, the mandatory minimum for the first offense sale of 500 grams (nearly eighteen ounces) of cocaine is five years; and for the sale of 5,000 grams it is ten years.[25]

Second Felony Offenders

The severity of the drug laws is aggravated substantially by the Second Felony Offender laws, enacted the same year as the Rockefeller drug laws. The law mandates increased prison sentences for all repeat ("predicate") felons, including those convicted of the lowest level of felony (Class E), as shown in Table 3.[26] Predicate offenders face significantly increased prison sentences even if both felonies are nonviolent minor drug offenses, even if the prior felony was many years prior to the current one, and even if they have led an exemplary life between commission of the two crimes.

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[23]Cathy Shine and Marc Mauer, *Does the Punishment Fit the Crime? Drug Users and Drunk Drivers, Questions of Race and Class*, (Washington, D.C.: The Sentencing Project, 1993).

[24]National Criminal Justice Association, *A Guide to State Controlled Substances Acts*, (Washington, D.C.:National Criminal Justice Association, January 1991).

[25]The 1986 Anti-Drug Abuse Act set up a regime of non-parolable mandatory minimum sentences for drug trafficking offenses based on the amounts of drugs involved in the offense. Pub. L. No. 99-570, 100 Stat. 3207 (1986). In the Omnibus Anti-Drug Abuse Act of 1988, Congress established a mandatory minimum of five years for simple possession of more than five grams of "crack" cocaine. See 21 U.S.C. § 841 (covering manufacture and distribution of controlled substances) and 21 U.S.C. § 844 (covering possession of controlled substances).

[26]See N.Y. Penal Law § 70.06. The law applies to felons with one or more prior felony convictions. The prior felony conviction must be within ten years of the current conviction to trigger the enhanced sentencing. The ten-year limit does not include any time spent incarcerated or imprisoned, so the actual time between one conviction and the commission of the second felony can be more than ten years. § 70.06.1(b)(v). Persons convicted of Class A-I felonies are excluded from the second felony offender law because they have already received the maximum sentence of life. The law prescribes even higher sentences for persons whose current and/or prior conviction is for a violent felony.

Table 3: Mandatory Sentence for Nonviolent Second Felony Offender

Felony Class	Minimum	Maximum
A-II	6 - 12 ½ years	life imprisonment
B	4 ½ - 12 ½ years	9 - 25 years
C	3 - 7 ½ years	6 - 15 years
D	2 - 3 ½ years	4 - 7 years
E	1 ½ - 2 years	3 - 4 years

Source: N.Y. Penal Law § 70.06.

As Table 3 indicates, a person convicted of selling a tiny amount of cocaine, a Class B felony, who has a prior conviction five years earlier for possessing one-eighth ounce of cocaine, a Class C felony, must be sentenced to a minimum term of anywhere between four-and-one-half and twelve-and-one-half years in prison; the maximum term must be between nine and twenty-five years. A second conviction for possessing a few vials of crack, a Class D felony, must be sentenced with a minimum term of two to three-and-one-half years; the maximum must be four to seven years.

Under New York state law, a defendant can appeal to have a sentence reduced in the interest of justice. In some instances, drug sentences that were substantially higher than the mandatory minimums have been reduced by the appellate division. Thus for example, in one case, the appellate division found a "sentence of twelve-and-one-half to twenty-five years for a $10 sale of cocaine to be unduly harsh" and reduced it in the interest of justice to a sentence of seven-and-one-half to fifteen years.[27] In another case, the court found a sentence of twelve-and-one-half to twenty-five years for a single $10 sale to be "excessive" and reduced it to five to ten years.[28] Although the appellate division can thus ameliorate to some extent disproportionate sentences, the law does not permit it to set sentences below the mandatory minimums. The defendant in the latter case, for example, still faced a minimum of five years of imprisonment for a $10 sale.[29]

[27] *People v. Morales*, 581 N.Y.S. 2d 60 (1992).

[28] *People v. Acosta*, 549 N.Y.S. 2d 672 (1990).

[29] The minimum sentence possible for a second felony cocaine sale conviction is four-and-one-half years. The first department of the appellate division, which is the division which has most utilized the "interests of justice" provision to reduce drug sentences, typically reduces a second felony sentence to a five-year minimum.

State officials attempt to minimize the harshness of the drug and second felony offender laws by pointing out that most offenders do not serve their maximum sentences.[30] Inmates with an indeterminate sentence are eligible for release to parole after having served the minimum sentence and over one-half of those eligible for parole are in fact released at their first parole hearing.[31] Many of those released upon completion of their minimum sentence have benefited from the legislatively established "earned eligibility" program.[32] In addition, several thousand inmates, including drug offenders, have been released on parole even prior to the end of their minimum term by virtue of their having participated in a six-month boot camp style "shock incarceration" program.[33] Other programs enable nonviolent drug offenders to participate in work or substance abuse treatment program outside the prison walls, such as work release[34] and CASAT.[35]

We believe that the impact of a maximum sentence cannot be glossed over because inmates may be given permission to participate in programs that reduce the time spent behind bars. All of the programs are discretionary; prisoners have no right or guarantee that even if eligible they will be taken into the programs. Moreover, the size and very existence of these programs are subject to change according to legislative and agency priorities. Moreover, release to parole is a matter of grace not right; there is no guarantee that the parole board will grant it upon the expiration of the minimum term. Finally, a prisoner on parole release is still in the legal custody of the state: any violation of the terms of parole subjects the felon to the full remaining maximum term. "[T]he possibility of serving the full term exists, and it

[30]Interview, Paul Shechtman, December 17, 1996. See also "Capacity Options Plan," submitted by Paul Shechtman to the State Legislature on January 14, 1997 (pursuant to legislation requiring the Department of Correctional Services to present a plan to accommodate projected populations of convicted juvenile and adult offenders.

[31]Ibid. Of those drug offenders released on parole in 1994, the average time served for Class A-I felony offender was approximately 130 months; for Class A-II , the average was forty-three months; for Classes B through E, the total ranged from seventeen to fourteen months (for first offenders). See Department of Correctional Services, *Characteristics of Inmates Discharged 1994*, (Albany: New York State Department of Correctional Services, 1996), p.45.

[32]Inmates with indeterminate sentences of not more than six-year minimums who have earned "certificates of eligibility" for completion of certain educational, training or work programs in prison ordinarily are released upon completion of their minimum sentence. But the granting of certificates of earned eligibility is wholly discretionary. N.Y. Correct. Law § 805. Prisoners who do not have maximum life sentences may also receive allowances against the maximum sentence for good behavior. N.Y. Correct. Law § 803.

[33]An inmate who successfully completes the special six-month "shock incarceration" program is immediately eligible for release on parole even prior to the expiration of the minimum term. The shock program emphasizes physical work and exercise, self-discipline and intensive drug rehabilitation therapy. Between the program's creation in 1987 and September 30, 1995, 22,225 inmates had been sent to shock programs and 13,360 (including only 971 women) were released to parole supervision following successful completion of the program. See Department of Correctional Services, *The Eighth Annual Shock Legislative Report 1996*, (Albany: New York State Department of Correctional Services, 1996). See also, The Correctional Association of New York, *Rehabilitation That Works: Improving and Expanding Shock Incarceration and Similar Programs in New York State*, (New York: The Correctional Association of New York, April 1996).

[34]Under the work release program, an inmate can work outside a prison facility; some are given permission to live at home and report regularly to the facility. To be eligible for the program, the inmate must be within two years of his or her parole eligibility data, not have a history of absconding; and not be convicted of a violent felony offense involving the use or threatened use of deadly weapon or dangerous instrument. In December 1996, a total of 3,812 inmates in New York were on work release.

[35]The Comprehensive Alcohol and Substance Abuse Treatment Program (CASAT) has three phases providing a continuum of treatment services. In the second phase, the CASAT program moves offenders from in-prison treatment to out-patient services in which the participant is moved to a work release facility or to an appropriate community placement. CASAT primarily services offenders convicted of drug crimes. The current number of inmates in the CASAT program is 1,815.

is 'the threat [that] makes the punishment obnoxious.'"[36] The burden of life sentences obviously falls mostly heavily on the young: a twenty-one-year-old receiving a maximum life term faces the possibility of decades on parole.

III. IMPACT OF MANDATORY SENTENCES FOR DRUG OFFENDERS

The number of people imprisoned for drug offenses in New York has increased steadily since 1973, but at a dramatically steeper rate since the 1980s. An aggressive law enforcement response to the spread of crack cocaine, particularly in New York City, has been directed at street-level drug transactions, bringing thousands of people into the criminal justice system charged with felony conduct.[37] Mandatory sentencing laws for drug felonies and predicate offenders have increased the percentage of convicted offenders who receive prison sentences. As a consequence, the prison population has changed from one in which 9 percent were serving time for drug felonies (in 1980) to one today in which 34 percent are drug felons.[38]

[36] *Carmona v. Ward*, 576 F. 2d. at 419 (citations omitted). The parole board also has the discretion to grant an absolute discharge from parole.

[37] See e.g., Steven Belenko, Jeffrey Fagan and Ko-Lin Chin, "Criminal Justice Responses to Crack," 1 *Journal of Research in Crime and Delinquency* 28, (February 1991); Vera Institute of Justice Systems, *The Neighborhood Effects of Street-Level Drug Enforcement*, (New York: Vera Institute of Justice Systems, 1992). See Steven Belenko, Gary Nickerson, Tina Rubenstein, *Crack and the New York Courts: A Study of Judicial Responses and Attitudes*, (New York: New York City Criminal Justice Agency, December 1990) for an analysis of how the judiciary in New York City responded to the quantitative and qualitative pressures from the influx of thousands of crack cocaine cases.

[38] Figures obtained from DOCS and from the "Capacity Options Plan".

During the 1990s, an average of 28,000 people annually have been indicted[39] for drug felonies in New York. Approximately 10,000 annually are sentenced to prison. In 1996, 9,841 men and women entered prison for drug offenses**,** one-quarter of them for drug possession and the remainder for drug sales. At the end of 1996, a total of 21,170 people were serving prison sentences for drug offenses, 2,229 of whom were women.[40] Drug offenses account for the imprisonment of most women: 60.4 percent of women in prison were sentenced for drug crimes (compared to 32.5 percent of the men).[41] Approximately 66 percent of the total inmate population are identified as substance (drugs and alcohol) abusers.[42]

Many of the people convicted of drug felonies and sent to prison have prior criminal records, but relatively few have records suggesting great danger to society. Of the current population of drug offenders in prison sentenced for drug possession, 44.2 percent had never been in jail or prison before; indeed, 16.9 percent had never even been previously arrested. Of those convicted of drug sales, 26.9 percent had never been in jail or prison before. Approximately 72.8 percent of the drug felons currently in prison were sentenced as repeat offenders subject to enhanced mandatory prison terms under the second felony offender law.[43] The percentage of repeat offenders varies

[39]Felony charges may be brought either through indictment or on information. For the purposes of this report, the technical difference between the two is not relevant and we will use indictment to refer to both.

[40]Data on characteristics of current prison population obtained by Human Rights Watch from DOCS.

[41]Ibid.

[42]Department of Correctional Services, *Identified Substance Abusers*, (Albany: New York State Department of Correctional Services, December 1995), Table 2, p. 2.

[43]Data obtained from DOCS worksheets. (According to data provided to Human Rights Watch by DCJS, between 1990 and 1995, over 47,907 people convicted of drug felonies were sentenced as repeat offenders subject to the enhanced mandatory prison term established by the second felony offender law.)

with felony classes. For example, only 3.4 percent of persons convicted in 1995 of Class A-I felonies were sentenced as second felony offenders, compared to 23.4 percent of the Class B, 22.6 percent of Class C, 64.6 percent of Class D, and 61.1 percent of Class E.[44] Of those drug felons sentenced as repeat felons, most have prior convictions only for drug or other nonviolent offenses.[45] For example, of persons admitted to prison in 1995 for drug offenses and sentenced as second felony offenders, 72 percent had no prior violent felony convictions, and 57.7 percent had never even been arrested for a violent felony.[46] Only 7.6 percent of all those admitted to prison in 1995 for drug felonies had prior convictions for violent offenses.[47]

[44]Data provided by DCJS.

[45] Data provided by DOCS and DCJS. In 1995, for example, the prior conviction of 55 percent of those sentenced to prison for drug offenses as predicate felons was for drug offenses. Only 20 percent had prior felony conviction for a crime of violence. These data do not include information on misdemeanor convictions as well as any convictions in which youthful offender status was granted.

[46]"Capacity Options Plan," Table 4.2, p. 58.

[47]Human Rights Watch calculated the percentage of new drug offender inmates with prior violent felony convictions on the basis of prior records data provided in the "Capacity Options Plan," Table 4.2, and from data obtained from DOCS on annual felony drug commitments to prison.

The impact of the drug laws is felt most profoundly by people of color.[48] Blacks and Hispanics account for 86 percent of all felony drug arrests, a similar percentage of persons indicted for drug felonies, and they constitute approximately 94 percent of persons sent to prison for drug crimes.[49] Of the total population of drug felons currently in prison, whites constitute 5.3 percent, blacks 47.6 percent and Hispanics 46.6 percent.[50] The proportion of inmates convicted of drug offenses also varies markedly by race. "Among whites committed to prison in 1994, 16% were convicted of a drug offense, among blacks 45% were committed for a drug offense, and among Hispanics 59% were committed for a drug offense."[51] The ethnic differences are particularly startling within the population of female

[48]The racially disparate impact of drug law enforcement and prosecution and the disproportionate number of minority drug offenders in prison throughout the United States have received much recent attention. See, e.g., Marc Mauer, *Intended and Unintended Consequences: State Racial Disparities in Imprisonment*, (Washington, D.C.:The Sentencing Project, January 1997); Marc Mauer and Tracy Huling, *Young Black Americans and the Criminal Justice System: Five Years Later*, (Washington, D.C.: The Sentencing Project, October 1995); Michael Tonry, *Malign Neglect: Race, Crime, and Punishment in America* (New York: Oxford University Press, 1995); Human Rights Watch, "Race and Drug Law Enforcement in the State of Georgia," A Human Rights Watch Short Report, vol. 8, no. 4, July 1996.

[49]Data on arrests and indictments for 1996 provided to Human Rights Watch by DCJS. Data on new court commitments to prison provided by DOCS.

[50]Racial percentages within population of drug felons under custody in state prisons closely matches racial proportions among people indicted for drug offenses, which closely matches new drug felons court commitments to prison. For example, between 1990 and 1995, whites accounted for approximately 7 percent of those indicted for drug offenses, blacks for approximately 45 percent and Hispanics for approximately 46 percent. Figures calculated from data provided to Human Rights Watch by DCJS.

[51]Department of Correctional Services, *Characteristics of New Commitments 1994*, (Albany: New York State Department of Correctional Services, 1994), p.55.

inmates: 82 percent of Hispanic females and 71 percent of black females were committed for drug offenses, in contrast to only 41 percent of white females.[52]

There are numerous possible reasons for the racial composition of the prison population of drug felons, ranging from offending rates, to law enforcement strategies and arrest practices, to the impact of different factors—race-neutral and otherwise—that affect case processing decisions. Some analysts have raised the possibility of racially skewed sentencing. One study found that in New York, blacks and Hispanics were three times as likely as non-Hispanic whites to receive a prison sentence for drug possession. Blacks and non-white Hispanics were also far more likely than non-Hispanic whites to be sentenced to incarceration in either jail or prison.[53] That study, however, was not able to take into account predicate felony status, a variable which markedly influences sentencing outcomes in New York because of the second felony offender laws.

[52]DOCS, *Characteristics of New Commitments 1994*, p.70 and Table 9.11. In contrast, 14 percent of the white males committed to state prison in 1994, 42.8 percent of black males and 57.1 percent of Hispanic males were sentenced for drug offenses. Table 9.9.

[53]Shine and Mauer, *Does the Punishment Fit the Crime?*

Human Rights Watch has not attempted to determine the extent to which race influences sentences in drug cases. We note, however, that white drug felons are more likely than blacks or Hispanics to be convicted as first offenders; and blacks and Hispanics are almost three times as likely as whites to be convicted as repeat offenders.[54] When felony status is taken into account, data on the average minimum prison terms show little variance by race in the length of sentence. As Table 4 shows, the average minimum terms in most felony classes vary little between the races, with the exception of sentences for repeat offenders convicted of A-II drug felonies.

Table 4: Average Minimum Prison Terms for Drug Convictions by Felony Class, Race, and Offender Status

Felony Class	Whites	Blacks	Hispanics
A-I First Felony	177.3	180.1	168.4
A-II First Felony	50.1	49.9	52.0
Second Felony	82.7	91.8	89.5
B First Felony	20.3	19.2	17.0
Second Felony	63.6	66.1	60.9
C First Felony	19.6	16.5	15.6
Second Felony	39.0	38.8	38.6
D First Felony	17.1	15.9	15.6
Second Felony	26.5	26.7	26.7
E First Felony	12.9	13.1	13.2
Second Felony	18.6	18.8	18.6

Source: DCJS. Data compiled from sentences imposed between 1990 and 1995.

Even if the sentences that minorities and whites receive for drug offenses are equivalent in length, given the far greater number of minorities imprisoned for drug offenses, the personal and social costs of imprisonment are felt most acutely in minority communities. These costs include the destruction of family cohesion, the increase in fatherless and motherless homes to the detriment of children, financial instability, and the stigmatization of many young men and women affecting their future employability.[55]

Low-level Offenders

[54]For example, between 1993 and 1995 approximately 87.5 percent of whites convicted of drug felonies were sentenced as first offenders, compared to an average of 66 percent of the minorities. Only 12 to 13 percent of the whites were sentenced as repeat offenders, compared to 33 to 35 percent of the blacks and Hispanics. Figures calculated from data provided to Human Rights Watch by DCJS.

[55]See generally, New York County Lawyers' Association, *Report and Recommendations of the Drug Policy Task Force*, (New York: New York County Lawyers' Association, October 1996).

The vast majority of drug offenders processed under New York state law are not "kingpins," high-level dealers, managers of drug distribution operations or people who otherwise have significant roles within drug trafficking enterprises. Instead, they are people who possess drugs for their own use, small-scale street-level dealers, or people who occupy low positions in drug operations, such as lookouts, steerers, or couriers.[56] Many street-level dealers sell drugs to finance their own drug habits. They are most frequently arrested as a result of an officer having observed them engage in a drug transaction or because they sold drugs to an undercover officer in a "buy and bust" operation. The quantities of drugs involved are often minuscule—a couple of rocks of crack, a small "glassine" (containing one to three grains) of heroin.

Most low-level first offenders will enter into a plea bargain with the prosecutor by which they will plead guilty to a lesser charge carrying lower sentences than that for which they would otherwise have been tried. Between 1990 and 1995, 98.5 percent of all first offenders indicted for drug felonies were convicted by a plea.[57] For example, most of those indicted for B felonies plead to Class C or D felonies.[58] Indeed, in New York City at least, most first offenders who plead to Class C, D or E felonies will be sentenced to time served plus probation or perhaps at most a few months in jail. Some first-time defendants charged with Class B or lower felonies nonetheless insist on going to trial. They risk disproportionately harsh sentences if convicted. For example:

> Jesus Portilla participated in the sale of one tinfoil packet of cocaine in exchange for $30. He had no prior convictions, was employed as an asbestos remover, and had a wife and small child. Upon conviction, the court imposed a sentence of an indeterminate term of eight-and-one-third to twenty-five years imprisonment. (On appeal his sentence was reduced to one-and-one-half to four-and-one-half years.)[59]

> Virgil Davis, fifty-three years old, with no prior convictions, was convicted of selling two vials of crack cocaine to an undercover officer. He was sentenced by the trial court to eight-and-one-third to twenty-five years. His sentence was reduced on appeal to five to ten years.[60]

Because most first-time offenders plead guilty to reduced charges, egregious sentences for low-level felons are more frequent for repeat offenders. Judge Alvin Schlesinger of the New York Supreme Court characterizes the criminal system for drug offenders as a turnstile operation with a "draconian" effect on street level sellers.[61] He points out that first offenders who receive probation or a short term in jail are ordinarily not provided any assistance or

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[56]Drug law critics have pointed out for years. See e.g., The Correctional Association of New York, *Do They Belong in Prison? The Impact of New York's Mandatory Sentencing Laws in the Administration of Justice* (New York: The Correctional Association of New York, 1985). Slightly over one-third of federal drug felons serving time in federal prisons are also low-level offenders. United States Department of Justice, "An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories," (unpublished report, Feb. 4, 1994). For a discussion of DoJ's findings, see Marc Miller and Daniel Freed, "Editors Observations on the Disproportionate Imprisonment of Low-Level Drug Offenders," 7 *Federal Sentencing Reporter* 3 (New York: Vera Institute of Justice, July 1994).

[57]Data provided to Human Rights Watch by DCJS. Prior to indictment, there are no restrictions on plea bargaining; after indictment, prosecutors cannot accept a plea to a felony more than two classes below that for which the defendant is indicted.

[58]In 1995, for example, 48.8 percent of people indicated with a B felony pled guilty to a C felony; and 21.1 pled to a D felony. Data provided to Human Rights Watch by DCJS.

[59]*People v. Portilla*, 593 N.Y.S. 2d 831 (1993).

[60]*People v. Davis*, 602 N.Y.S. 2d 8 (1993).

[61]Interview, Alvin Schlesinger, judge, New York Supreme Court, New York City, November 12, 1996.

substance abuse treatment; they are just turned back onto the street. Sooner or later, many end up back in court, but this time as second felony offenders facing stiff prison sentences.[62] In 1995, for example, 64.6 percent of those convicted of Class D and 61.1 percent of those convicted of Class E drug felonies were second felony offenders.[63] Table 5 indicates the impact of the second felony offender law on drug sentencing. It compares the average minimum sentence by felony class for drug offender convicted as first and second felony offenders from 1990-1995. The length of sentence is tripled for persons convicted of Class B offense as second felony offender, and doubled for Class C convictions.

Table 5: Average of Minimum Prison Sentences for Felony Drug Convictions by Offender Status

Status	A-II	B	C	D	E
First Felony	51.5	18.2	16.2	15.16	13.1
Repeat Felony	89.2	63.8	38.07	26.7	18.7

Source: DCJS. Average sentences compiled from sentences between 1990 and 1995.

Behind these statistics are individual cases of excessively harsh sentences. For example:

[62]Even the terms of plea bargains are high: In Manhattan, for example, the lowest sentence which prosecutors will agree to grant in a plea bargain to the predicate street seller is three years. Interview, Steven M. Fishner, executive assistant to the New York County District Attorney, New York City, November 18, 1996.

[63]Data provided to Human Rights Watch by DCJS.

Priscilla Byrd, a woman with a history of drug and alcohol abuse, was arrested after an officer observed her exchange a few small bags of what he correctly suspected was cocaine for $35. Byrd had a decade-old prior felony conviction for a narcotics offense. For the $35 sale she was sentenced to an indeterminate prison term of seven-and-one-half to fifteen years. [64]

Constance Tention became a heavy crack user after her boyfriend introduced her to the drug when she was twenty-seven. In April 1996, at age thirty-four, she was arrested after she served as the intermediary between her drug dealer boyfriend and a stranger who wanted to buy some drugs, a stranger who turned out to be an undercover agent. Ms. Tention's assistance was motivated by the hope that she would be given some crack to smoke as a "reward" for her services. This was the second time she had been arrested for exactly the same role in a drug transaction. She had been convicted and given five years probation, successfully completed, for the first offense. She refused to plead guilty for the new offense because she did not consider herself a drug seller. After trial, she was convicted and sentenced to a five- to ten-year prison term.[65]

Joshua Acosta was a repeat offender who sold an undercover officer two vials of crack cocaine for $20.[66] After arrest, police found twenty-one more vials of crack in Acosta's pockets. Convicted after trial of unlawful sale and possession in the third degree, Class B felonies, Acosta was sentenced to two concurrent prison terms of ten to twenty years. On appeal his sentence was reduced to five to ten years.[67]

Roberta Fowler, a twenty-year-old repeat offender with two children at the time of sentencing, received a term of four years to life imprisonment for providing $20 worth of cocaine to an undercover agent.[68]

[64]Brief for Defendant-Appellant, *People v. Byrd* (N.Y. App. Div.), appealing judgment of the Supreme Court, New York County, rendered January 24, 1994.

[65]Telephone interview, Elise Flamholtz, attorney, Legal Aid Society-Queens Office, New York City, January 22, 1996.

[66]Crack is frequently sold on the streets in "vials". A vial contains one or two rocks of cocaine, perhaps weighting only one-half a grain.

[67]*People v. Acosta*, 580 N.Y.S. 2d 927 (1992).

[68]*Carmona v. Ward*. Ms. Fowler was charged with a Class A-III felony, a category which no longer exists.

> John Gamble was indicted for selling a $10 vial of crack cocaine to an undercover police officer. He had one prior felony, for possessing a car four days after it was stolen. He had never been imprisoned. Gamble was convicted after trial and received a ten- to-twenty year sentence for the cocaine sale.[69]

New York's highest court, the Court of Appeals, has pointed out that the operation of the state's sentencing laws "has resulted in the incarceration of many offenders whose crimes arose out of their own addiction and for whom the costs of imprisonment would have been better spent on treatment and rehabilitation."[70] Judges interviewed by Human Rights Watch expressed similar viewpoints. Judge Leslie Snyder, for example, who has a reputation as a "tough sentencer" in cases involving drug traffickers, told Human Rights Watch that she believes the "junkie and junkie sellers" should be receiving treatment for substance abuse, not years of imprisonment.[71] That view is also shared within the law enforcement community. Former New York State Commissioner for Criminal Justice Paul Shechtman and New York City's Special Prosecutor for Narcotics Robert Silbering, for example, concur that many street-level sellers need substance abuse treatment, not long periods of incarceration.[72] Indeed, every judge, defense attorney and prosecutor interviewed by Human Rights Watch for this report agreed that more alternatives to prison should be available within the criminal justice system for drug offenders, particularly those who are addicted to illegal substances.

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[69]Brief for Defendant-Appellant, appeal to the Appellate Division: Second Department, Appeal DKT No. 90-00950; from decision of Supreme Court, Queens County rendered July 26, 1989.

[70]*People v. Thompson*, 83 N.Y. 2d at 487. Similar views are expressed in other court opinions. For example, *People v. Perez*, 194 A.D. 2d 455, 456 (1st Depart. 1993) (Carro and Kupferman concurring)(Drug laws had "increas[ed] inordinately the length of prison terms for low-level drug offenders." In the case of low-level street dealers, taxpayer funds would "be more productively and humanely directed toward prevention, through education, and treatment of drug addiction.")

[71]Interview, Leslie Snyder, judge, New York Supreme Court, New York City, November 12, 1996.

[72]Interview, Robert Silbering, special narcotics prosecutor, New York City, November 18, 1996; Interview, Paul Shechtman, December 17, 1996.

There are only 71,000 publicly funded drug treatment slots; estimates of the number of people in New York needing drug treatment range from 246,000[73] to 860,000.[74]

[73]SAMHSA, *Substance Abuse in States and Metropolitan Areas*, Exh. 3.3, p. 36.

[74]The Correctional Association of New York, *Background Paper on Rockefeller Drug Law Reform*. Throughout the United States there is a scarcity of publicly funded substance abuse programs; the demand exceeds the supply by half. See The White House, Executive Office of the President of the United States, *The National Drug Control Strategy 1996*, (Washington, D.C.: Office of National Drug Control Policy, 1996). See also, Drug Strategies, *Keeping Score: What We Are Getting for Our Federal Drug Control Dollars 1995*, (Washington, D.C.: Drug Strategies, 1995), p. 29. The National Academy of Sciences' Institute of Medicine estimates that drug treatment is available for only one quarter of the almost six million people who need it unless they can pay for private care.

A step to provide alternatives to prison for certain nonviolent offenders whose crimes resulted from substance abuse problems was taken as part of New York's Sentencing Reform Act of 1995. The Act created a new sentencing option of "parole supervision" for nonviolent, addicted second felony offenders. An eligible defendant is sentenced to an indeterminate prison term but at the court's direction is immediately placed on parole and sent to the Willard Drug Treatment facility for a ninety-day intensive drug treatment program.[75] The legislation was in part motivated by budgetary demands to reduce prison overcrowding; first offenders were therefore excluded from eligibility, even if they would benefit from treatment, because they are rarely sent to prison. In most cases, the prosecutor's consent is a precondition to parole supervision.[76] Prosecutors have been reluctant to give that consent because of doubts about the efficacy of the Willard treatment program.[77] As a consequence, the courts have sent only 193 individuals to Willard instead of prison.[78]

Other diversion programs have been established, although they also reach only a tiny proportion of the offenders who might benefit. Several district attorneys have established Drug Treatment Alternative to Prison programs, commonly known as "DTAP". For example, under DTAP operated by the Office of the Special Narcotics Prosecutor for the City of New York, selected nonviolent offenders with a substance abuse problem who have been charged with a second felony agree to participate in a residential drug treatment program lasting between fourteen and twenty-four months. If the program is successfully completed, the prosecutor will consent to have the pending felony charges dismissed. However, there have never been enough beds available for treating all potentially eligible offenders.[79]

In Brooklyn, a special "drug court" was initiated in mid-1996 that offers treatment to drug offenders as an alternative to prison. The court, backed by $6 million in federal, state, and city grants "follows the promising example of similar courts in some 200 jurisdictions around the country."[80] Carefully screened nonviolent first-time offenders who are drug addicted are placed in drug treatment programs lasting, on average, twelve to eighteen months. If the offender successfully completes the program, pending criminal charges are dropped. Approximately 300 people to date have been sent to treatment programs by the court.[81]

Class A Felonies

[75] N.Y. Criminal Procedure Law § 410.91. A defendant is eligible if he or she is a predicate felon whose second offense is a Class D or E drug felony, or other enumerated nonviolent petty crimes caused in great part because of the defendant's drug dependence, and if there are no prior serious or violent felony convictions.

[76] Prosecutor consent is required for offenders convicted of specified Class D felonies; it is not required if the conviction is for a Class E felony. N.Y. Penal Law § 410.91(4).

[77] Interview Robert Silbering, November 18, 1996.

[78] Data provided to Human Rights Watch by DOCS.

[79] Interview, Rhonda Ferdinand, deputy chief assistant district attorney of the Office of the Special Narcotics Prosecutor for the City of New York, New York City, December 3, 1996. Since the Office of the Special Narcotics Prosecutor initiated its DTAP program in 1992, 1,035 people—almost all drug offenders—have participated. Other programs have been operating in Brooklyn, Queens, and Onondaga counties. The federal funding that sustained DTAP has ended, and the program's prospects are uncertain as of this writing.

[80] Editorial, "A Court for Addicts," *The New York Times*, February 19, 1997, p. A20.

[81] Telephone interview, Erica Perel, assistant district attorney and unit chief of the Brooklyn Drug Court, New York City, January 16, 1997.

The most serious felony classification in New York is Class A, a category which includes murder, kidnapping, rape and arson. It also includes anyone convicted of possessing four ounces or selling two ounces of a narcotic drug (Class A-I) or anyone convicted of possessing two ounces or selling one-half ounce of such a drug (Class A-II.) Anyone convicted of a Class A-I felony must be given an indefinite prison term with a fifteen year minimum and a life maximum. For Class A-II, the mandatory minimum for a first offender must be set within the range of three to eight-and-one-third years; the maximum, again, must be life.

Between 1990 and 1995, 4,276 people were convicted and sentenced to prison for Class A drug felonies.[82] In 1996, sixty-three people entered prison as Class A-I and 632 as Class A-II drug felons.[83] Of the total current state prison inmates in New York with convictions for Class A drug felonies, 25.9 percent are black, 59.5 percent are Hispanic and 12.7 percent are white. Ninety-two percent are male, and 7.8 percent are female. Fifty-five percent of all Class A felons have no known prior convictions; indeed, 41.6 percent have no prior arrests. The lack of criminal records is particularly pronounced for women convicted of Class A felonies: 65 percent of the women (compared to 39.6 percent of the men) have no known prior arrests for any crime; 84.3 percent of the women (compared to 65.8 percent of the men) had no known prior felony convictions.[84]

Long sentences may not be disproportionate in the case of large-scale traffickers, or gang members with records of violence. But because drug sentences are triggered simply by the weight of the drug involved, far less culpable people are also swept within the Class A category. The law does not distinguish between persons whose criminal conduct is limited to a single incident or who are marginal participants in drug transactions and those who are career criminals or manage large criminal enterprises. As one court noted, "Punishments provided by the State of New York for Class A felony drug offenders are quite extraordinary in their failure to differentiate between minor offenders and major drug dealers."[85] For example:

> Angela Thompson, a seventeen-year-old with no prior criminal record, lived with an uncle who was running a drug operation in Harlem. She participated in a single sale of two ounces and thirty-three grains of crack cocaine to an undercover officer, for which she received a fifteen-year-to-life sentence.
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> Winnie Jones, a thirty-seven-year-old with no prior convictions, was a minor functionary in a heroin distribution operation; she was one of several "mill-hands" hired to package the drugs. She was arrested in a police raid and convicted after trial of constructive possession of the several pounds of heroin found on the premises. "[T]he sentencing court, against its conscience and judgment, but because it was mandated by statute, sentenced [her] to life imprisonment, with a minimum of fifteen years."[86]
>
> Alfredo Castillo was a thirty-seven-year-old man with a wife and three children, who had an established business and had never been arrested before. After being convicted of a single sale of three-and-five-eighth ounces of cocaine to an undercover police officer, he was

[82] 440 persons were sentenced for A-I felonies; 3,836 for A-II felonies. DCJS.

[83] Data obtained from DOCS.

[84] Information on drug offenders with life sentences compiled by a consultant for Human Rights Watch from DOCS data.

[85] *Carmona v. Ward*, 436 F. Supp. at 1169.

[86] *People v. Jones*, 39 N.Y. 2d 394, 697(1976) (Breitel, J. dissenting). In response to recommendations from the trial court, the District Attorney and the Appellate Division, the Governor commuted her sentence to a minimum term of a little more than three years; the maximum remained life.

sentenced to an indeterminate term of fifteen years to life. The court upholding his sentence pointed out that it was "difficult to perceive what justice there can be" in sending him to prison for so many years.[87]

[87] *Castillo v. Harris,* 491 F. Supp. 33 (1980).

> Daniel Mammarello, a thirty-four-year-old heavy cocaine user, introduced a friend of his brother to his dealer so that the friend could buy some drugs. Daniel was present when the friend purchased seven ounces of cocaine from the dealer. The friend turned out to be an undercover agent and Daniel was convicted of the criminal sale of more than four ounces of cocaine. He received a sentence of fifteen years to life.[88]
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> Luis Villegas, a twenty-seven-year-old who had served in the U.S. military and whose prior criminal record consisted of a misdemeanor assault, was married with a five-year-old son. He helped a friend get two-and-one-half ounces of cocaine by making a phone call for him. The friend then sold the drugs to an undercover police officer. When the friend was arrested for the drug sale he agreed to cooperate with the authorities and became a state witness against Villegas. The friend received a three-year-to-life prison sentence; Villegas, who took his case to trial, was sentenced to a fifteen-year-to-life prison term.[89]
>
> Anthony Papas owned a small car-radio and alarm installation business in the Bronx. To earn some extra money, Papas agreed to deliver an envelope filled with four-and-one-half ounces of cocaine in exchange for $500. He was arrested when he handed the envelope to an undercover officer. At trial he was convicted and sentenced to a term of fifteen years to life.[90]

Some of those convicted of Class A drug felonies are "mules" or couriers who have smuggled drugs into the United States. According to a study of women arrested at John F. Kennedy Airport for smuggling drugs, most were low-income women who claimed they had been tricked by people who planted drugs in their belongings or that they had been coerced by threats of violence and death to either themselves or loved ones. Others had agreed to carry drugs on a one-time basis to earn extra money. None were career criminals or drug "queen-pins". None had a financial stake in the drugs they were carrying or were part of an ongoing criminal enterprise.[91] Typical "mule" cases include:

> Kathryn Strickle, in her late twenties with three children, lived in New Jersey. A new boyfriend offered her a vacation in Aruba. After a few days on the island, the boyfriend left, leaving her without any funds to pay the pending hotel bill. Men who were friends of the

[88]Details on this case were provided by Families Against Mandatory Minimums (hereinafter, FAMM) in Washington, D.C.

[89]Ibid.

[90]Ibid.

[91]See Tracy Huling, *Injustice Will Be Done: Women Drug Couriers and the Rockefeller Drug Laws* (New York: Correctional Association of New York, 1992).

boyfriend and also in Aruba told Ms. Strickle she would be imprisoned if she did not pay the hotel bill. They offered to take care of the hotel bill, but in return she had to carry some drugs into the states. Arrested at Kennedy Airport with 942 grams of cocaine and told that she faced a prison sentence of fifteen years to life if she went to trial, Ms. Strickle accepted a plea offer of a four-to-twelve-year prison sentence.[92]

[92]Telephone interview, Sister Marion Defeis, chaplain, Rose M. Singer Center Department of Corrections, New York City, November 12, 1996.

> Adequimbia Awosika, a seventeen-year-old from a destitute family, worked in Nigeria cleaning houses and as a beautician. A male friend arranged a trip for her to New York to look for a better job. The man asked her to bring a package to the U.S. for him; Ms. Awosika claims she did not know it contained drugs. She pled guilty in exchange for a four-year-to-life term.[93]
>
> Verne Garner, a customer service supervisor at a New York City bank, had no previous encounter with the law and had never used drugs. Ms. Garner went with her "erstwhile" boyfriend to Jamaica to meet his family. Packing for the return trip, her boyfriend gave her a long-line brassiere padded with drugs to wear back on the plane. When she tried to resist, her boyfriend threatened her with a gun.[94] At the airport, she was stopped, searched and arrested. She ultimately pled guilty in exchange for a four-year-to-life term.[95]

Few of the drug couriers are convicted at trial. Even if innocent or convinced they have valid defenses such as duress, most couriers plead guilty to reduced charges because they are not willing to risk fifteen years in a prison that is, for many, thousands of miles from home. The pressure to plead is particularly intense for the many women who have children and are desperate to return to them as quickly as possible.

Prosecutors, judges and defense attorneys acknowledge the injustice of the sentences in the typical drug mule case.[96] Prosecutors insist they have no choice, however, because the law defines drug felonies solely by the weight of the drug. On January 8, 1997, legislation was introduced in the New York Assembly and Senate to amend the penal law to reduce harsh sentences in drug mule cases.[97] In the memorandum offered in support of the legislation, Assemblyman Joseph Lentol and Sen. Dale Volker explain:

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[93]Ibid.

[94]Tracy Huling, "Women Drug Couriers: Sentencing Reform Needed for Prisoners of War," *Criminal Justice*, (Winter 1995), pp. 15-19, 58-61. See also, Jack B. Weinstein, "The Effect of Sentencing on Women, Men, the Family, and the Community," 5 *Columbia Journal Gender & Law* 169 (1996).

[95]Testimony of Verne Garner, New York State Assembly Standing Committee on Codes, Public Hearings: The Rockefeller Drug Laws—20 Years Later (June 1993).

[96]Testimony during hearings in 1993 on the Rockefeller drug laws reveals considerable consensus within the criminal justice community that the laws, as applied to drug mules, accomplish little. See transcipt of public hearings, ibid.

[97]S. 271-A and A.188-A. Similar legislation has been introduced unsuccessfully in prior years, e.g. A.537 and S.4462 in

> Some offenders who acted as "drug mules" are involved in a single smuggling transaction, are not participants in or beneficiaries of a broader drug transaction, conspiracy or enterprise and are often tricked or coerced into transporting drugs. Under these limited circumstances, the application of the statutes requiring mandatory life sentences may be unduly harsh, and fails to distinguish between major and minor participants in the drug trade.[98]

The proposed legislation would permit a court, in the interest of justice, to sentence certain individuals convicted of criminal possession of controlled substances in the first or second degree (Class A felonies), as if the defendant had been convicted of a Class B felony offense. Some of the factors the court could consider include: the seriousness and circumstances of the offense, the extent of harm caused, the history, character and condition of the defendant, whether the defendant's conduct was limited to a single incident; whether the defendant had no relation to the drug trade aside from being solicited, tricked or coerced into transporting or delivering the controlled substance. The legislation by its terms does not limit the "interest of justice" exception only to the courier who brings drugs into the United States from another country. If the legislation is enacted, it could benefit numerous other defendants whose connection with the drug trade is so marginal or happenstance as to make a sentence of life imprisonment unjust.

The Cooperation Paradox

1995-96 legislative session.

[98] Joseph R. Lentol and Dale Volker, Memorandum in Support of A.188-A and S.271-A.

Some drug offenders are able to escape imprisonment by cooperating with the authorities. A provision in the drug laws allows prosecutors to recommend lifetime probation for defendants who provide information that can help lead to the apprehension of other drug criminals.[99] This provision applies only to persons convicted of Class A-II or Class B felonies; it is not available to offenders guilty of less serious drug offenses. In practice, the provision rarely benefits people with marginal roles in drug distribution operations because they have little or no information of interest to the district attorney. In effect, the provision for probation in return for cooperation creates inverted sentencing: the "big fish", i.e., the more serious criminals, have more information and thus are in a better position to receive a reduced sentence than much less culpable offenders.[100]

> For example, Dolores Donovan, a thirty-two-year-old divorced mother of three small children with no prior record, was dating a heavy drug user and narcotics dealer. Donovan claims that she had no prior involvement with drug dealing but that at her boyfriend's insistence, she located four ounces of cocaine for him to sell to a buyer (who turned out to be an undercover officer). She insisted she had no information to offer the police because she had no other involvement with drug dealing other than the event in question. Donovan refused to plead guilty to a lesser felony and was convicted after trial of first degree criminal sale and possession of a controlled substance. She received a fifteen-year-to-life minimum sentence. Her boyfriend "who, deeply involved in drug traffic, was able to provide information" received a sentence of lifetime probation.[101]
>
> Martha Carmona, a forty-one-year-old with no prior convictions (and only one arrest twenty years earlier) was charged with possession of cocaine with intent to distribute it. She offered to cooperate with the authorities with the hopes of becoming eligible for a recommendation of lifetime probation. "However, all the information which she provided the authorities was already known to them and, therefore, of little utility. When she was asked to introduce an undercover agent to her source of narcotic supply, she declined to do so on the ground that she feared for the physical safety of herself and her daughter."[102] Ms. Carmona was not considered eligible for a probation recommendation and ultimately pled guilty to a charge of criminal possession and received a sentence of six years to life.

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[99]Persons convicted of Class A-II or Class B felonies may be sentenced to lifetime probation if the prosecutor so recommends on the grounds that the person has provided material assistance in the investigation, apprehension or prosecution of other drug felons. See N.Y. Penal Law § 65.00.

[100]Stephen J. Schulhofer, "Rethinking Mandatory Minimums," 28 *Wake Forest L. Rev.* 207 (1993) calls this the "cooperation paradox."

[101]*People v. Donovan*, 454 N.Y.S. 2d 118, 122 (1982) (Mollen, J., dissenting), *aff'd*, 59 N.Y. 2d 834 (1983).

[102]*Carmona v. Ward*.

Plea Bargaining in a Mandatory Sentencing System

Few drug offenders are convicted after trial; about 98 percent of all drug convictions are the result of plea bargains.[103] Plea bargaining, of course, is indispensable to the criminal justice system in the United States. Without it, given the resources currently allocated to that system, the wheels of justice would grind to a halt under the crush of cases. The consequences of plea bargaining within a framework of mandatory sentences nonetheless raises some troubling questions.

Through plea bargaining, prosecutors determine sentences for most drug offenders. The role of judges is for all practical purposes reduced to rubber stamping the agreement worked out between the prosecutor and the defendant. The prosector's almost unfettered discretion in plea bargaining, particularly pre-indictment, does provide a measure of flexibility and the tailoring of punishment to crime that is otherwise not possible within a mandatory sentencing framework.[104] On the other hand, the harshness of the mandatory sentences, and the inability of a defendant to prevail on judges to exercise clemency and to lower them, dramatically increase the pressure on defendants to waive their right to trial and to accept a guilty plea.

In a non-mandatory sentencing system, a defendant who is deciding whether to exercise the right to stand trial or to plead guilty would consider the likelihood of conviction at trial as well as the prospects that information produced at a sentencing hearing would secure a low sentence from the judge. Where judicial discretion is restricted through mandatory sentencing laws, the stakes are much higher.[105] A drug mule, for example, if convicted after trial, will be given a minimum prison term of at least fifteen years to life. In most cases, she will be offered a plea to an A-II felony, with a minimum prison term of three years. The possibility of a 500 percent longer prison term if she goes to trial puts

[103]Statistics on case dispositions by plea bargains provided to Human Rights Watch by DCJS.

[104]Cf. *Harmelin v. Michigan*, 501 U.S. 957, 1006 (1991) (Kennedy, J. concurring) (prosecutorial discretion is a means to avert unjust sentences under mandatory sentencing schemes.)

[105]Stephen J. Schulhofer, "Plea Bargaining as Disaster," 101 *Yale Law Journal* 1979, 2009 fn.49 (1992): "Without mandatory minimums, when an innocent defendant rejected a prosecutor's initial plea offer, the prosecutor would no longer be able to respond with the 'bump-up' strategy of threatening a severe posttrial sentence pegged to an unjust mandatory minimum. The prosecutor could instead respond with the "bump-down" strategy (reducing the guilty plea sentence rather than raising the posttrial sentence) to produce a comparable sentence differential between the plea and trial alternatives."

enormous pressure on such a defendant to plead guilty. "The mandatory sentencing consequences of a guilty verdict pressure a defendant, who otherwise might test the state's evidence, into accepting guilty pleas."[106]

Many observers of the criminal justice system are concerned that the highly punitive mandatory sentencing laws in effect coerce guilty pleas and threaten the continuing vitality of the constitutional right to force the state to prove its charges.[107] Prosecutors dismiss these constitutional concerns. In their view, defendants are not penalized for going to trial; if they choose to go to trial they face the sentences set by the legislature if convicted. As an alternative, they have the option of freely negotiating a bargain which, for the defendant, reflects a rational calculation of risks of trial.

It is difficult to credit the notion that individuals facing great disparities in sentencing outcomes and consequent impact on their lives are able to "freely" negotiate plea bargains. Human Rights Watch finds more persuasive the concern that in a mandatory sentencing system the "cost" of going to trial can be excessively high. For example, a police raid on a heroin packaging factory resulted in the arrest of a dozen people, including four "millhands" who put the heroin into packages for retail sales. Facing charges of criminal possession in the first degree (a Class A-I felony), three of the millhands pled guilty to lesser offenses and received indeterminate sentences of three years to life. One of the millhands, however, exercised her right to go to trial; she was convicted and sentenced to a prison term of fifteen years to life. Former Chief Judge Breitel of the New York Court of Appeals pointed out in his dissent:

[106]Gary T. Lowenthal, "Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform" 81 *Calif. L. Rev.* 61, 77 (1993). Most defendants who plead guilty were convicted of lesser felonies than those for which they had been indicted. Thus, according to data for 1995 provided to Human Rights Watch by the DCJS, of defendants indicted on A-I charges: 74 percent of those convicted after trial were convicted of A-I felonies, whereas 68 percent of those who plead guilty were convicted of A-II felonies. Similarly, of those indicted for B felonies who pled guilty, 22 percent were convicted of B felonies, 45 percent of C felonies, and 21 percent of D felonies.

[107]The Sixth Amendment to the U.S. Constitution provides a right to trial.

> The only fact which distinguishes defendant from her fellow "millhands" is that she chose to stand trial. For this she undoubtedly merited a more severe sentence, but not one with a discrepancy as great as that imposed by command of the statute. Apart from a gross violation of the principle of equality, such a discrepancy could serve the purpose of discouraging an innocent person from standing trial.[108]

In another case, a woman charged with participants in the sale of four ounces of cocaine was offered a term of one to three years as part of a plea bargain. She went to trial, was convicted, and received a fifteen-year-to-life sentence. Dissenting from the court decision, upholding the constitutionality of the sentence, Judge Mollen noted: "[A]ny large disparity between the sentence offered the defendant as part of a plea bargain and the sentence mandated after a jury conviction [suggests] the imposition of a severe penalty for insisting upon the right to trial. [In this case, the defendant] was plainly penalized for insisting on her right to trial..."[109] Through determining charges and plea bargaining, prosecutors in effect "set" sentences in drug cases.[110] Although laws on mandatory minimum sentencing in theory ensure the same sentence for the same offense, in practice the same conduct can receive very different sentences, depending on prosecutorial decisions. Unlike judicial decisions, however, the decisions that a prosecutor makes are essentially unreviewable. Judge Yates of the Supreme Court in Manhattan succinctly explains the problem:

[108]*People v. Jones*, 39 N.Y. 2d 694, 699 (1976) (Breitel, J., dissenting).

[109]*People v. Donovan*, 454 N.Y.S. 2d 118, 120-22 (1982), *aff'd*, 59 N.Y. 2d 834 (1987). [A]ny large disparity between the sentence offered the defendant as part of a plea bargain and the sentence mandated after a jury conviction [suggests] he imposition of a severe penalty for insisting upon the right to trial...." See also, Barbara S. Vincent and Paul J. Hofer, eds., *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*, (Washington, D.C.: Federal Judicial Center, 1994).

[110]See United States Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, (Washington, D.C.: United States Sentencing Commission, August 1991) for a succinct review of some of the implications of mandatory minimums and the exercise of prosecutorial charging and plea bargaining discretion.

> If some defendants are to receive lesser sentences than others for the same crime, the question becomes how do you decide who will receive the benefits of a reduction. Under current law, that determination is made by an assistant district attorney who is not bound by written public guidelines or standards, is not compelled to hear arguments in favor of reduction, is not required to explain or justify the decision, is not held accountable by the public or through judicial processes and the decision is not reviewable by any court...[In contrast] in a system where a judge has authority to set sentences, there are proceedings on a record in public, with advocacy on both sides and a decision by a neutral party who must explain his or her decision and can be held accountable.[111]

Sentencing Cliffs

Mandatory minimum sentencing keyed to a single factor such as the concept of the drug create the anomaly in sentencing known as "sentencing cliffs." These "cliffs arise when small differences in facts mean large differences in sentences."[112] As the United States Sentencing Commission has noted, "[J]ust as mandatory minimums fail to distinguish among defendants whose conduct and prior records in fact differ markedly, they distinguish far too greatly among defendants who have committed offense conduct of highly comparable seriousness."[113] In a penalty scheme based simply on the weight of the substance involved, an extra fraction of a gram can increase a sentence by years. The lowest minimum penalty for possessing four ounces of cocaine is fifteen years. For possessing a dusting less than four ounces, a defendant faces a minimum that can be as low as three years.[114] In other words, a grain or two of narcotics can lead to a 500 percent increase in the length of the sentence. The discrepancy in imprisonment cannot be justified on the basis of comparable seriousness of the offenses or culpability of the offender.[115]

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[111]Interview, James A. Yates, judge, New York Supreme Court, New York City, November 21,1996.

[112]Vincent and Hofer, eds., *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*.

[113]United States Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System*.

[114]Selling two ounces or more of cocaine is a Class A-I felony punishable by a minimum period of imprisonment that shall not be less than 15 years nor more than 25 years. Selling less than two ounces (but more than one-half ounce) is a Class A-II felony, punishable by a period of imprisonment that shall not be less than three years nor more than eight years and four months. N.Y. Penal Law § 70.00 (3).

[115]The weight-based cliffs also encourage police efforts to bump up the amount in undercover sales. For example, in *People v. Thompson*, the sale was one-tenth of an ounce over the level for a Class A-II felony. According to the dissent, "[t]he weight in this case was bumped up to A-I level by specific importuning from the undercover buyer-officer. 83 N.Y. 2d at 491 (Bellacosa, J. dissenting).

IV. CONSTITUTIONAL PROHIBITION AGAINST DISPROPORTIONATE SENTENCES

The principle that punishment should fit the crime has been a constant in theories of criminal justice since ancient times and is deeply rooted in common law jurisprudence. Its corollary—that disproportionately severe sentences are wrong—is embedded in the Eighth Amendment to the U.S. constitution as well as in analogous provisions, in state constitutions, including that of New York.

The Eighth Amendment to the U.S. Constitution prohibits "cruel and unusual punishment." It demands that states treat convicted individuals "with respect for their intrinsic worth as human beings."[116] The interpretation of the amendment has developed in light of "evolving standards of decency"[117] so that it embraces not only punishments that are barbarous or painful in their own right, but also punishments that are grossly disproportionate to the crime for which they are exacted.[118] The Supreme Court has ruled, "[A]s a matter of principle...a criminal sentence must be proportionate to the crime for which the defendant has been convicted."[119] Through judicial review of the constitutionality of sentencing laws and their application, the courts can protect individuals from "unduly harsh, oppressive or arbitrary punishments decreed by a majoritarian political system."[120] The role of the Eighth Amendment as a check on legislative powers is most important to protect members of despised and politically weak minorities, i.e., to protect those who cannot protect themselves through the political process. In the contemporary United States, drug offenders constitute just such a vulnerable and disfavored group. The courts have, nonetheless, been extremely reluctant to strike down disproportionate drug sentences.

Judicial reluctance to use the Eighth Amendment to invalidate excessive sentences arises primarily out of concern for the separation of powers in the U.S. political system. "Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes...."[121] As New York's highest court has ruled, "The Legislature may distinguish among the ills of society which require a criminal sanction, and prescribe as it reasonably views them, punishments appropriate to each. Thus, while the courts possess the power to strike down punishments as violative of constitutional limitations, the power must be exercised with special restraint."[122] The courts have also found it difficult to settle on objective tests by which they could scrutinize the proportionality of legislatively mandated sentences.[123] Excessive judicial deference to the

[116]*Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J. concurring).

[117]*Trop v. Dulles,* 356 U.S. 86, 101 (1958). The Supreme Court also insisted, "The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights....The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital living principles that authorize and limit governmental powers in our Nation." 356 U.S. at 103.

[118]*Harmelin v. Michigan*, 501 U.S. 957 (1991); *Solem v. Helm*, 463 U.S. 277 (1983); *Weems v. United States*, 217 U.S. 349 (1910). The Eighth Amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[119]*Solem v. Helm*, 463 U.S. at 290.

[120]*Carmona v. Ward*, 436 F. Supp. at 1163.

[121]*Solem v. Helm*, 463 U.S. 277 (1983).

[122]*People v. Broadie*.

[123]In *Solem v. Helm*, the Supreme Court established a three-part proportionality analysis consisting of an assessment of 1) the gravity of the offense and the harshness of the penalty; 2) the sentences imposed on other criminals in the same jurisdiction; and 3) the sentences imposed for commission of the same crime in other jurisdictions. The *Solem* test has been called into

legislature, however, leaves the Eighth Amendment without practical effect. "Although the courts are properly wary of infringing on legislative prerogatives, the Cruel and Unusual Punishments clause 'cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes. That is precisely the reason the Clause appears in the Bill of Rights.'"[124]

question by the most recent Supreme Court decision on the application of the Eighth Amendment in non-capital mandatory sentence case, *Harmelin v. Michigan*, 501 U.S. 957 (1991). See opinion of Justice Scalia, advocating overruling *Solem* outright; the concurring opinion of Justice Kennedy, purporting to affirm *Solem* but applying only the first prong of the analysis, and the dissent by Justice White, asserting that Justice Kennedy's analysis would eviscerate [*Solem*], leaving only an empty shell. See generally, Steven Grossman, "Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment," 84 *Kentucky Law Journal* 107 (1995).

[124]Allyn G. Heald, "United States v. Gonzalez: In Search of a Meaningful Proportionality Principle," 58 *Brooklyn Law Review* 478 (Spring 1992), (citations omitted).

Others have observed that excessive judicial deference to legislative choices is particularly striking when drug sentences are challenged. In those cases, general concerns over the proper scope of judicial review are supplemented by a judicial tradition of acquiescing to most incursions on civil liberties that are made in the effort to combat drug trafficking. Indeed, the tenor of many court opinions suggests judicial partisanship on drug issues rather than a neutral adjudication of constitutional principles.[125]

Cases in which a defendant successfully presses an Eighth Amendment challenge to a drug sentence are, therefore, notoriously few. Abdicating their role of protecting the rights of disfavored individuals from the "tyranny of the majority," the courts have upheld patently cruel sentences. For example, the U.S. Supreme Court has upheld a forty-year prison sentence for the possession of nine ounces of marijuana.[126] In 1991, the U.S. Supreme Court decided that life imprisonment without parole was not cruel and unusual punishment for a nonviolent first-time offender, in his early twenties, convicted of possession of 650 grams of cocaine.[127] Sentences under New York's drug laws have also

[125]"Rather than deciding drug law issues based upon the actual effects of drugs and drug control laws, [the] court has in the main substituted rhetoric for reason and parroted the 'party line' on drugs..."Few opinions combine careful reasoning and attention to evidence or empirical knowledge; we are left instead with drug law decisions based mainly on metaphors of outrage at drug users and sellers...[decisions] are filled with emotionally charged claims mimicking the political rhetoric that has dominated drug control in the United States since its inception." Steven Wisotsky, "Not Thinking Like a Lawyer: The Case of Drugs in the Courts," *5 Notre Dame Journal of Law, Ethics and Public Policy*, 651, 652 (1991). See also Steven Wisotsky, "Crackdown, The Emerging 'Drug Exception' to the Bill of Rights," 38 *Hastings Law Journal* 889 (July 1987); David Rudovsky, "The Impact of the War on Drugs on Procedural Fairness and Racial Equality," 1994 *The University of Chicago Legal Forum*, 237 (1994); The Committee on Drugs and the Laws, " A Wiser Course; Ending Drug Prohibition," 5 *49th Record of the Association of the Bar of the City of New York* 521 (June 1994).

[126]*Hutto v. Davis*, 454 U.S. 370 (1982).

[127]*Harmelin v. Michigan*; Following the lead of the Supreme Court, courts of appeal have all too frequently upheld the constitutionality of egregious drug sentences. See, e.g. *United States v. McKneely*, 69 F.3d 1067 (10th Cir. 1995) (upholding life

consistently been upheld against constitutional challenge. New York's highest court has ruled that maximum life sentences imposed for Class A drug felonies involving small amounts of drugs were not so grossly disproportionate as to be unconstitutional.[128] The federal court of appeals for the second circuit also upheld the constitutionality of life sentences for the sale of minute amounts of cocaine.[129]

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without parole for twenty-year-old first offender convicted of possession with intent to distribute fifty grams or more of cocaine base); *Terrebonne v. Butler*, 848 F.2d 500 (5th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989) (upholding life without parole for delivery of 22 individual doses of heroin).

[128]*People v. Broadie*.

[129]*Carmona v. Ward,* 576 F. 2d 405. Dissenting from this judgment, the judge stated, "I recognize fully, of course, the deference that must be paid to legislative determinations of sentences. Such deference is not unlimited, however. Otherwise the Eighth Amendment would be the deadest of letters. 576 F. 2d at 424. Justice Marshall, dissenting from the denial of certiorari stated, "[T]he Court [should not] abdicate the function conferred by the Eighth Amendment to determine whether application of a given legislative judgment results in punishment grossly out of proportion to specific offenses."

The New York state constitution's prohibition of cruel and unusual punishments has also been interpreted as prohibiting disproportionate sentences.[130] Like the Eighth Amendment to the U.S. Constitution, the state's cruel and unusual punishments clause "encompasses a cardinal principle of 'humane justice,' namely, that punishment should be proportionate to the offense for which it is exacted."[131] Sentences that are "cruelly excessive" transgress the constitutional prohibition.[132] As with the Eighth Amendment, application of the state constitution's cruel and unusual punishments clause has been eviscerated by the courts' excessive deference to the legislature in penal policy. The barriers to finding drug sentences unconstitutional have proven nearly insurmountable.[133] For example, New York's

[130]N .Y. Const. Art. I, § 5.

[131]An appendix to the decision provides a succinct outline of the development and application of both state and federal cruel and unusual punishment clauses.

[132]*People v. Broadie*, 37 N.Y. 2d at 124-25, (citation omitted).

[133]Challenges to drug sentences under other state constitutions also rarely prevail. See, e.g., *Stromas v. Mississippi*, 618 So. 2d 116 (1993) (Sixty-year prison sentence for a forty-six-year-old convicted of selling $70 of cocaine who had previously been convicted of possession of marijuana). *North Carolina v. O'Neal*, 108 N.C. App. 661 (1993)(20-year prison sentence for sale of less than one gram of cocaine); *People v. Patton*, 40 Cal. App. 4th 413 (1995)(25-year-to-life prison term for a recidivist convicted of possessing 1.82 grams of crack); *Hernerson v. Arkansas* , 322 Ark. 402 (1995) (life prison sentence for sale of $20 worth of crack cocaine); *Swinney v. Texas*, 828 S.W. 2d 254 (1992) (35 years in prison for delivery of $20 worth of crack cocaine). There are exceptions, however, e.g., *Louisiana v. Merrill*, 650 So.2d 793 (1995) (twenty-year prison term unconstitutional for selling one rock of crack cocaine). *People v. Lorentzen*, 387 Mich. 167 (1972) (20-year prison term for sale of any amount of marijuana is cruel and unusual). Indeed, the same statute that the U.S. Supreme court upheld in *Harmelin v. Michigan* against challenge under the Eighth Amendment was struck down by the Michigan Supreme Court as cruel and unusual under the state constitution. *Michigan v. Bullock*, 440 Mich. 15 (1992).

highest court upheld the constitutionality of a fifteen-year-to-life sentence for a seventeen-year-old girl with no prior criminal record who had sold a few grains more than two ounces of cocaine to an undercover officer.[134] The dissenting judge (as well as the trial court and the appellate division), found the sentence to be so cruel and unusual as to "shock the conscience." "Notwithstanding the Legislative desire to create mandatory minimum sentencing guidelines for the State of New York, I think it's still the law of this country that the punishment must fit the crime....The question is whether or not the defendant is the type of person, by the facts presented in this case, such that, constitutionally, this would be inappropriate, to serve fifteen years to life."[135]

[134]*People v. Thompson*, 83 N.Y. 2d 477 (1994). There are, nonetheless, a few cases in which a drug sentence in New York is ruled unconstitutional. See, e.g. *New York v. Easton*, 216 A.D. 2d 220 (1995) (prison term of fifteen years to life found unconstitutional and reduced to three years to life where the defendant, convicted of criminal possession of a controlled substance had no prior criminal record, worked steadily and supported a family); *People v. Skeffery*, 591 N.Y.S. 2d 1012 (1992) (term of fifteen years to life reduced to five years to life in light of defendant's lack of prior record, age, poor health and family circumstances).

[135]*People v. Thompson*, 83 N.Y. 2d at 490 (Bellacosa, J., dissenting)[quoting from the trial court decision].

Although most courts refrain from overturning drug sentences on constitutional grounds, judicial criticism of the mandatory sentencing schemes which compel such sentences has been vociferous.[136] The extensive criticism directed at federal mandatory sentencing laws for drug offenses (which in many cases mandate shorter terms than New York laws) is relevant to New York. A federal district court imposing a mandatory minimum sentence on a defendant convicted of growing marijuana plants commented: "This type of statute denies the judges of this court, and of all courts, the right to bring their conscience, experience, discretion, and sense of what is just into the sentencing procedure, and it, in effect, makes a judge a computer, automatically imposing sentences without regard to what is right and just."[137] In sentencing a homeless single mother to prison another federal judge stated, "In this case, and unfortunately in too many others, the government seeks to justify a severe and disproportionate sentence by pointing to the need to fight the drug war.[138]

Yet another federal judge, concurring with a harsh mandatory drug sentence, nonetheless noted,

> I write separately to comment about the cruel sentences imposed on [the defendant] and to observe that, although not illegal, these sentences emanate from a law gone awry...In my judgment, this sort of massively heavy punishment [twenty-year prison terms] cannot be justified in a civilized society...As our federal prisons...[fill with] nonviolent first-time offenders, many serving near-life sentences, they begin to resemble the barbaric Turkish prisons depicted in [Midnight Express]. That film shocked the public....The public should be similarly shocked if it knew of the excessive sentences that can be and are imposed on first-time offenders.[139]

Protesting the sentence of ten years without parole he was compelled to impose on a first offender who agreed to mail a package containing drugs to earn $500, another judge wrote:

> Since the days when amputation of the offending hand was routinely used as the punishment for stealing a loaf of bread, however, one of the basic precepts of criminal justice has been that the punishment fit the crime. This is the principle which, as a matter of law, I must violate in this case...It is hard to imagine that there is any other country in western civilization in which a crime such as this one—simply picking up an unknown quantity of an unknown illegal substance—is treated as the legal equivalent of the conscious commission of a capital offense.[140]

Justice Anthony Kennedy of the United States Supreme Court has concluded, "I think I'm in agreement with most judges in the Federal system that mandatory minimums are an imprudent, unwise and often unjust mechanism for

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[136] It is well settled that in non-capital cases defendants do not have a constitutional due process right to individualized sentencing. Challenges to mandatory minimum penalties on the ground that they deny the defendant the right to individualized sentencing have not succeeded. See e.g., *Harmelin v. Michigan*, *People v. Thompson*. In capital cases, however, the Supreme Court has held that the Eighth Amendment requires an individualized determination of the appropriateness of the death penalty. "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

[137] *United States v. Madkour*, 930 F.2d 234, 236 (2d Cir. 1991) (quoting from the district court decision).

[138] *U.S. v. Jackson*, 756 F. Supp. 23, 26-27 (D.D.C. 1991).

[139] *U.S. v. Stockton*, 968 F.2d 715, 721 (9th Cir. 1992).

[140] *U.S. v. Patillo*, 817 F. Supp. 839 (C.D. Cal. 1993).

sentencing."[141] The Judicial Conference of the United States and the judges of the twelve federal circuit courts of appeals that hear criminal cases have all adopted resolutions that oppose mandatory minimum sentencing statutes.[142]

Unlike federal judges, New York state judges are not appointed for life; political prudence and professional pragmatism caution against speaking publicly against current drug policies. Glimpses of judicial consternation and anger at being compelled to hand down or uphold cruelly long sentences nonetheless sometimes surface in published decisions. For example, one judge complained eloquently:

[141]Anthony Kennedy, Testimony before U.S. House Appropriations Subcommittee, quoted in "Mandatory Sentencing Is Criticized by Justice, " *New York Times*, March 10, 1994.

[142]Strong and carefully reasoned critiques of mandatory minimums abound. See, e.g., Vincent and Hofer, eds., *The Consequences of Mandatory Prison Terms*; Stephen J. Schulhofer, "Rethinking Mandatory Minimums," 28 *Wake Forest Law Review* 199 (Summer 1993); United States Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, (Washington, D.C.: August 1991); Gary Lowenthal, "Mandatory Sentencing Laws". See also, Campaign for an Effective Crime Policy, *Evaluating Mandatory Minimum Sentences* (Washington, D.C.: Campaign for an Effective Crime Policy, October 1993) for a succinct summary of problems associated with mandatory minimums.

> These biographical sketches [of the defendants] graphically demonstrate the basic inequality and patent unfairness of these laws...Notwithstanding their sharply contrasting backgrounds, the instant drug laws mandate that all of these defendants be dealt with and sentenced in the same precise manner....An inherent potential for injustice is built into these laws by placing the judge in a straitjacket where he is deprived of sentencing alternatives and is precluded from evaluating each case on its own merits, to be merciful or harsh as the particular case may warrant. Are we really accomplishing the ends of justice when we mete out the same kind of punishment to the insignificant street pusher as we would to the heavy dealer of drugs?[143]

One court noted in affirming a drug sentence, "Once again we are confronted with a situation where the statutorily mandated sentence far exceeds the punishment which is appropriate for the acts performed."[144] New York state's highest court, while upholding the drug laws, has nonetheless also characterized them as "draconian" and has made clear that a decision on their constitutionality is not an endorsement of their wisdom.[145]

In conversations with Human Rights Watch, some judges forthrightly criticized the laws. They were troubled because of the disproportion between the criminal conduct and role of the defendant and the magnitude of the punishment the law obliged them to impose. Locked into a sentencing framework keyed exclusively to the weight of the drug at issue, judges are not able to tailor more appropriate sentences. As one trial court judge in Manhattan told Human Rights Watch, "We know [many drug sentences] are wrong, but the law gives us no choice."[146]

V. RELEVANT INTERNATIONAL HUMAN RIGHTS PRINCIPLES

Emerging from the horrors of the Holocaust, the international community recognized the need to affirm the rights of all people to humane and just treatment at the hands of their governments. A primary goal of the Universal Declaration of Human Rights and subsequent international human rights instruments has been "to define rights protecting the individual citizen against the coercive and penal power of the State."[147]

[143]*People. v. Donigan*, No. 417-74 (unpublished decision, Suffolk County Court, June 12, 1975) (per Signorelli, J.).

[144]*People v. Ramirez*, 63 A.D.2d 687 (1978) (citation omitted).

[145]*People v. Thompson*.

[146]Name reserved upon request.

[147]Norval Morris and Colin Howard, *Studies in Criminal Law*, (Oxford, England: Clarendon Press, 1964), p.148.

Imprisonment is the most coercive and drastic non-capital sanction lawfully imposed by criminal justice systems in constitutional democracies. Putting a person behind bars is such a common sanction in the United States, however, that public officials and the public at large seem to have lost sight of just how serious a punishment it is. Imprisoned individuals lose their liberty, autonomy and the free exercise of most other rights. They are deprived of their families, friends and communities; their ability to work, play and express themselves is severely restricted. In many prisons, the health and safety, as well as dignity and privacy, of prisoners is threatened by overcrowding, deteriorating physical conditions and sanitation, and violence.[148] People emerging from prison are stigmatized and have difficulty finding jobs and establishing or reestablishing family and community connections.

It is precisely because imprisonment is such an inherently severe sanction that governmental decisions to impose it are subject to human rights constraints. Conviction of a crime does not extinguish a person's claim to just treatment at the hands of the government, nor does it free a government to ignore that person's fundamental rights in its choice of criminal sanctions. A governmental decision to deprive a person of liberty by confining him or her to prison for years raises serious human rights considerations. Human Rights Watch agrees with the proposition advanced over thirty years ago at a U.N.-sponsored conference on human rights and the criminal law that punishments "prescribed by law and applied in fact should be humane and proportionate to the gravity of the offence."[149] We believe three inter-related human rights principles compel some measure of proportionality between the length of sentence imposed and the crime for which the offender was convicted: the inherent dignity of the individual, the prohibition on inhuman or degrading punishment, and the right to liberty. All are affirmed in international instruments which the United States has signed or ratified, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other, Cruel, Inhuman or Degrading Treatment or Punishment.

1) Recognition of the inherent dignity of all persons is at the core of all international human rights standards[150] and is the touchstone for assessing criminal justice systems. The intrinsic value of the human person imposes

[148]See Women's Rights Project of Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State* Prisons (New York: Human Rights Watch, December 1996); Human Rights Watch, *Prison Conditions in the U.S. (*New York: Human Rights Watch: November 1991).

[149]"Report on the 1960 Seminar on the Role of Substantive Criminal Law in the Protection of Human Rights and the Purpose and Legitimate Limits of Penal Sanctions," organized by the United Nations in Tokyo, Japan, 1960. See also Morris and Howard, *Studies in Criminal Law*, p.153, fn.2.

[150]Universal Declaration of Human Rights, Preamble, 1948: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,..."; International Covenant on Civil and Political Rights (hereinafter, ICCPR),Preamble, 1966: "Recognizing that these [inalienable] rights derive from the inherent dignity of the human person,..."

fundamental limits on the quality and quantity of punishment.[151] One of those limits, long reflected in criminal law in diverse societies, is that the punishment must fit the crime. We know of no constitutional government purporting to respect human dignity that does not include principles of proportionality in their legal frameworks.

[151]See e.g., Luigi Ferrajoli, *Derecho y razón: Teoria del garantismo penal*, (Madrid, 1995)(translation from 1989 edition in Italian).

2) International human rights instruments expressly proscribe "cruel, inhuman or degrading treatment or punishment."[152] Disproportionate or cruelly excessive punishment falls within this proscription. Otherwise legitimate punishment, such as imprisonment, can constitute cruel, inhuman or degrading punishment if its severity (i.e. length) is disproportionate to the crime for which it has been imposed. That is, prison sentences must bear "reasonable relationship of proportionality with what actually happened."[153] Conviction of a crime is not license for the imposition of arbitrarily severe punishment.

3) The right to liberty and security of person also limits the length of sentences.[154] Most of the jurisprudence on protecting the international right to liberty has focused on procedural safeguards against arbitrary detention. But even if all the requisite legal procedures are followed, any deprivation of liberty must nonetheless still conform to principles of equity and justice.[155] Violation of a legitimate criminal law does not itself necessarily justify the significant deprivation of liberty. Rather, imprisonment is justifiable only when it serves compelling state interests.[156] Heeding this injunction, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders urged U.N. member states to ensure that "action taken by the criminal justice system and its intrusion into the lives of members of society is proportionate to the seriousness of the crime and the extent of danger to the public."[157]

The international consensus on the importance of proportionality between punishment and crime is reflected in current draft proposals for the International Criminal Court. Article 46 of the draft statute states: "In imposing sentence, the Trial Chambre should take into account such factors as the gravity of the crime and the individual circumstances of the convicted person."[158] In the commentary to Article 46, the Preparatory Committee on the Establishment of the International Criminal Court noted that the court should determine sentences, "having regard to such factors as the degree of punishment commensurate with the crime in accordance with the general principle of proportionality."[159]

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[152]Universal Declaration of Human Rights, Art. 5. "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."; ICCPR, Art. 7. "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The Torture Convention was created to"make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world. Preamble, Torture Convention. The prohibition on cruel punishment is premised on the inherent dignity of each person. Respect for human dignity also underlies the Eighth Amendment of the U.S. Constitution: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 99, (1958).

[153]*Weeks v. United Kingdom,*10 EHRR 293 (1988), par. 47 (opinion of Judge de Meyer).

[154]ICCPR, Art. 9.

[155]In essence, international human rights include what in U.S. constitutional terms would be considered substantive due process. "[T]he Due Process Clause contains a substention component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (citations omitted).

[156]For a discussion of the need for strict scrutiny of legislation that restricts the fundamental right of liberty under U.S. law, see Sherry F. Colb, "Freedom from Incarceration: Why is this Right Different from All Other Rights?," 69 *New York University Law Review* 781 (October/November 1994). See also *Coker v. Georgia*, 433 U.S. 584 (1977).

[157]Report of the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/Conf.144/28/Rev.1 (91.IV.2), Res. 1(a), 5(c) (1990).

[158]The International Law Commission's 1994 Draft Statute for an International Criminal Court (hereinafter, ILC's Draft Statute), Art. 46 (2), p. 123.

[159]ILC's Draft Statute, Commentary to Art. 46 (2), p. 123.

VI. APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY

In applying the principle of proportionality to criminal drug offenses, it is important to remember that it is not the seriousness of drug abuse and drug trafficking which is at issue nor the legitimacy of society's interests in curtailing the sale, purchase and consumption of illicit drugs.[160] Extremely important social goals may be promoted by New York's drug laws, but that does not mean the mandated punishment is proportional. Proportionality is established when the punishment is commensurate to the gravity of the specific conduct of the individual who has broken the law. "Punishment must be tailored to a defendant's personal responsibility and moral guilt."[161] Mandatory sentences applied to broad classes of criminal conduct can satisfy the principle of proportionality only if the prescribed punishment is proportional to the conduct of every individual falling within the class.

In assessing the gravity of criminal conduct, "the primary consideration is the harm it causes to society."[162] In many areas of the criminal law, there is an intuitively appropriate correlation between criminal sanctions and the harm caused by the defendant. A severe punishment such as imprisonment is generally appropriate for conduct that seriously harms or has threatened to harm important legally protected interests or rights. Few would question, for example, the proportionality of imprisonment as a sanction for murder.[163] In the case of most low-level drug offenses, however, it is surprisingly difficult to identify the harm for which imprisonment would be proportionate.[164] Three kinds of harm are usually asserted: physical or psychological injury to the drug user or others; crime and violence; and moral harm. Individually and collectively these harms warrant public efforts to curtail drug abuse and dangerous patterns of drug distribution. They do not, however, justify long sentences of imprisonment for any single low-level nonviolent drug offense.

An unexamined popular assumption in the United States is that drug use is inherently or necessarily harmful. That assumption does not withstand scrutiny.[165] "Despite a widespread perception that drug use is dangerous and harmful, there are ample data supporting a conclusion that...most drug use is transient, noncompulsive, and innocuous."[166] In many, if not most, cases, no serious injury or harm flows from any given individual's use of illicit drugs.[167]

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[160]In *Carmona v. Ward*, the dissent criticizes the majority for fail[ing] to focus on the actual crimes of the [appellees], emphasizing instead the general evils of drugs and drug trafficking." 576 F. 2d at 421 (Oakes, J. dissenting).

[161]*Harmelin v. Michigan*, 501 U.S. at 1021 (White, J. dissenting).

[162]*People v. Broadie*, 37 N.Y. 2d at 112.

[163]Cf. "Tradition, custom and common sense reserve [life imprisonment] for those violent persons who are dangerous to others. It is not a practical solution to petty crime in America." *Hart v. Coiner*, 483 F. 2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974).

[164]Professor Douglas Husak has analyzed the unique difficulties of identifying the specific harms that flow from drug use which, under ordinary principles of criminal justice, warrant criminal sanctions. See, Douglas N. Husak, *Drugs and Rights* (New York: Cambridge University Press, 1992); Douglas Husak, "Desert, Proportionality, and the Seriousness of Drug Offenses," in Andrew Ashworth and Martin Wasik, eds., *Fundamentals of Sentencing Theory* (Oxford University Press, forthcoming).

[165]Generalizations about the harm caused by drugs should not be derived from atypical scenarios, e.g., drug use by airline pilots, brain surgeons, pregnant women or the like. See Husak, "Desert, Proportionality and the Seriousness of Drug Offenses," pp. 27-28.

[166]Norbert Gilmore, "Drug Use and Human Rights: Privacy, Vulnerability, Disability, and Human Rights Infringements," 12 *The Journal of Contemporary Health Law and Policy* 412 (Spring 1996).

[167]It is also important to distinguish the harms attendant to drug use and those that flow from its illegal status. For

example, the violence, public disorder, nuisance and erosion of quality of life in communities that surrounds drug selling are caused primarily by the fact that the drug market is illegal.

It is common knowledge that drugs play a role in blighting some lives. But there is no empirical data establishing that most adults who use drugs, even "hard" drugs such as cocaine and heroin, cause substantial physical or psychological injury to themselves or others. Only a small percentage of those who use drugs become heavy drug abusers or addicts.[168] For example, of the 21.7 million Americans, twelve years or older, who have ever used cocaine, only 582,000 (.3 percent of the population) use it on a frequent basis (i.e., 51 or more days a year). Of the 2.4 million who have ever used heroin, only 428,000 have used it at least once during the past year.[169] As a leading critic of current drug laws has pointed out, "So much of the media attention has focused on the relatively small percentage of cocaine users who become addicted that the popular perception of how most people use cocaine has become badly distorted."[170]

In the case of a complex widespread phenomenon such as drug use and distribution, adverse social and public health consequences are the result of hundreds of thousands of individual actions. The contribution of any individual low-level offender to those social harms is necessarily negligible. The street seller who engages in $20 sales of crack cocaine has, quite obviously, not caused the harm that arises from the multi-billion-dollar drug business as a whole. In determining the punishment that is proportional for his conduct, the harm the individual drug offender has caused should not be conflated with the cumulative impact of countless other people.

If most instances of drug use or sale result in only minimal harm, but in some instances serious injury may result, the issue that confronts those who craft the laws is how to establish proportionate sentences for acts (such as the sale of drugs) that risk but do not necessarily cause harm. Prison is ordinarily not imposed as a sentence for conduct that risked but did not in fact harm anyone—driving without a seatbelt on, for example, or even driving while

[168]According to Steven Duke, "250 million Americans are imprisoning themselves through fear of crime, wrecking their Constitution, their courts, their economy, their cities, their health and their safety in a failed effort to deter fewer than one-fourth of one percent [of the total population] from damaging themselves from drug abuse." Steven Duke, "Drug Prohibition: An Unnatural Disaster," 27 *Connecticut Law Review* 571, 596 (Winter 1995). See generally, Steven B. Duke and Albert C. Gross, *Americas Longest War: Rethinking Our Tragic Crusade Against Drugs*, (New York: G.P. Putnam's Sons, 1993).

[169]Substance Abuse and Mental Health Services Administration, *National Household Survey on Drug Abuse: Population Estimates 1995*, (Rockville, MD: U.S. Department of Health and Human Services, 1996), Tables 4A and 21A (cocaine); Table 18 (heroin).

[170]Ethan Nadelmann, "Drug Prohibition in the United States: Costs, Consequences, and Alternatives," 248 *Science* 939, 944 (1989) and Douglas N. Husak, "The Nature and Justifiability of Nonconsummate Offenses," 37 *Arizona Law Review* 151 (Spring 1995).

intoxicated. Prison is also generally not the sanction given to individuals whose conduct in and of itself causes negligible harm but which when undertaken by a sufficient number of other individuals results in an accumulated public harm, such as violations of environmental laws.[171] While the acts may be criminal, the sanctions are usually limited to fines, community service, house arrest, suspension of state-granted privileges or licenses or other non-custodial measures.

[171]See Joel Feinberg, *Harm to Others* (New York: Oxford University Press, 1984) for a cogent and careful discussion of criminal sanctions in such situations.

A justification frequently offered for severe drug penalties is that drugs encourage violence and crime. Identifying and measuring the linkage between drugs and crime is not an easy matter. It is well known, however, that relatively few crimes actually arise from the pharmacological effects of drugs such as cocaine or heroin. Most crime that is labeled drug-related is either "systemic," (such as violence used to achieve control in an illegal market), or it is "economically compulsive," (such as theft undertaken to acquire the funds to support a drug habit.)[172] While some drug users and sellers employ violence in connection with their drug activities or engage in non-drug crimes, there are no data suggesting that most do.[173] To the contrary, most drug offenders appear to be otherwise law-abiding individuals.

[172]This tripartite framework for analyzing drug-related crime is increasingly used to understand the nature of drug/crime associations. It was first developed in P. Goldstein, "The Drugs/Violence Nexus: A Tripartite Conceptual Framework," 15 *Journal of Drug Issues* 493 (1985). For a recent, authoritative overview of research on drugs and crime in the cocaine context using this tripartite framework, see United States Sentencing Commission, *Cocaine and Federal Sentencing Policy* (Washington, D.C.: United States Sentencing Commission, February 1995), pp. 93-108.

[173]A high percentage of persons convicted of criminal conduct use drugs, but there is no evidence suggesting most drug users commit (non-drug) offenses. See generally U.S. Department of Justice, *Drugs, Crime, and the Justice System*, (Washington, D.C.: U.S. Department of Justice, Dec. 1992); New York City Criminal Justice Agency, *Summary Final Report: Changing Patterns of Drug Abuse and Criminality Among Crack Cocaine Users*, (New York: New York City Criminal Justice Agency, January 1990). Mario De La Rosa, et. al., eds., *Drugs and Violence: Causes, Correlates, and Consequences*, (Washington, D.C.: National Institute on Drug Abuse, U.S. Department of Health and Human Services, 1990); Thomas Mieczkowski, ed., *Drugs, Crime and Social Policy: Research, Issues and Concerns* (Boston: Allyn and Bacon, 1992). Drug law critics argue that certain amount of drug-related crimes is in fact caused by the drug prohibition policies and that alternative drug sanction mechanisms would reduce drug-related crime. E.g., Ethan Nadelmann, "Drug Prohibition in the United States: Costs, Consequences, and Alternatives."

The question thus arises as to whether individual drug offenders who have not engaged in non-drug crimes should suffer a punishment whose severity reflects the unlawful conduct of other people. We think not.

The collateral crimes that inhere in the illegal world of drugs justify public concern and vigorous public policies. But it is necessary to judge the proportionality of a punishment with relation to the actual offense committed.[174] Fundamental principles of criminal justice preclude imposing criminal responsibility on one person for the independent acts of another absent a legally recognized relationship, such as membership in a joint criminal conspiracy. Consistent with those principles, it is unjust to tailor the punishment of drug offenders who are innocent of non-drug crimes to the criminal conduct of others.[175]

[174]In his dissenting opinion in *Harmelin v. Michigan*, Justice White criticized the concurring justices for justifying the harsh penalty at issue in that case on the basis of the harmful subsidiary and collateral effects of drug use. He insisted, "To be constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt." *Harmelin v. Michigan*, 501 U.S. at 1021 (White, J. dissenting).

[175]*In Carmona* v. Ward, the trial court noted, "There are limits to the extent to which statistical or assumed connections between a particular offense and collateral crimes may be used to justify a particularly harsh penalty for the commission of the acts in question." 436 F. Supp at 1168. Cf. *Harmelin v. Michigan*, 501 U.S. at 1023-24 in which Justice White in his dissent noted, "[I]t is inconceivable that a State could rationally choose to penalize one who possesses large quantities of alcohol [as is done in the case of drugs]...because of the tangential effects which might ultimately be traced to the alcohol at issue." One commentator has noted, "The use of a collateral or secondary effects analysis in gauging the severity of a crime...risks making a defendant bear the burden for an ever-widening circle of activities with which she will have increasingly attenuated ties..." Heald, "In Search of a Meaningful Proportionality Principle," *Brooklyn Law Review*, p. 490.

Many proponents of harsh drug sanctions assert that the use of illicit drugs causes moral injury—a weakening of moral fibre, diminished interest in the pursuit of excellence,[176] "the slow undermining of societal values and rules,"[177] "a poison[ing] of the spirit."[178] They believe that it is legitimate to criminalize conduct that is morally illicit even if it does not adversely affect anyone's legally protected interests. Even if we assume the legitimacy of the decision to criminalize drug sale and possession on grounds of morality, a state must nonetheless still establish the legitimacy of the sanction imposed on those who engage in that conduct. We do not believe the putative moral injury caused by drugs, absent more, justifies sentences of years of imprisonment. If having a weak character, or being disinterested in excellence or being lazy is not a crime, how can an act which contributes to such attributes be punished as a serious felony?[179]

We note, finally, that the oft-cited goal of deterrence does not justify extraordinarily lengthy sentences for minor drug offenses.[180] Deterrence is a utilitarian objective: punishment is imposed on a convicted offender not (just) because such punishment is deserved, but because it is hoped the punishment will benefit society by creating a disincentive to other potential offenders from engaging in similar criminal activity in the future. Left unrestrained by the moral and human rights considerations reflected in the principle of proportionality, the logic of deterrence is boundless: governments could place behind bars those who engage in the most trivial but nonetheless bothersome illegal behavior on the theory that the punishment would deter others. As has often been pointed out, life sentences could be imposed for overtime parking.[181] The requirement of proportionality in punishment ensures respect for the dignity of the individual by limiting the state's ability to abuse one person because of the purported good that would flow to the community.[182] In short, grossly disproportionate sentences violate human rights even if they otherwise advance the common good by deterring the sanctioned conduct. Even staunch proponents of utilitarian theories of punishment acknowledge that punishment should not exceed that which is "deserved" by the individual on the basis of his or her particular conduct and culpability.[183]

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[176]John Kaplan, *Heroin: The Hardest Drug* (Chicago: University of Chicago Press, 1983).

[177]*Carmona v. Ward*, 576 F.2d at 411-12.

[178]The White House,Executive Office of the President of the United States, *The National Drug Control Strategy 1995*, (Washington, D.C.: Office of National Drug Control Policy, 1995), p. 29.

[179]As Husak points out, since laziness is not nor ought to be a crime, "it is hard to see how an act that merely risks that state of affairs can be a crime, let alone a serious crime." Husak, "Desert, Proportionality, and the Seriousness of Drug Offenses," p. 44.

[180]Ironically, harsh mandatory minimums have had little deterring effect. Professor Michael Tonry, for example, has concluded that "the weight of the evidence clearly shows that enactment of mandatory penalties has either no demonstrable marginal deterrent effects or short-term effects that rapidly waste away." Michael Tonry, "Mandatory Penalties" in Michael Tonry, ed., *Crime & Justice: A Review of Research* 16: 243-44 (Chicago: University of Chicago Press, 1990).

[181]*Rummel v. Estelle*, 445 U.S. 263, 2741 fn.11, (1980) (The court upheld a life sentence for a recidivist who fraudulently obtained a total of less than $250, but noted that the proportionality principle might require a different result in the "extreme case" of legislation imposing life sentences for overtime parking.)

[182]Kant's view that "one man ought never to be dealt with as a means subservient to the purpose of another" has greatly influenced the international human rights understanding of the dignity of each individual. Immanuel Kant, The Philosophy of Law, Part II (1887), reprinted in Gertrude Exorksy, ed., *Philosophical Perspectives on Punishment* 103 (1972), cited in *Brooklyn Law Review*.

[183]A helpful discussion of utilitarian and retribution theories of punishment and their influence on proportionality in Steven Grossman, "Proportionality in Non-Capital Sentencing."

VII. CONCLUSION

Human Rights Watch does not question New York's determination that drug abuse and drug trafficking threaten public health and well-being. Nor do we challenge the decision to criminalize the possession and sale of recreational drugs. Our concern is that in its zeal to tackle a tough social problem, the government has lost sight of fundamental principles that must govern criminal justice.

Sentences that send a young woman to prison for a fifteen-year-to-life term for selling two ounces of drugs or a street dealer to prison for at least four-and-a-half years for $20 drug transactions cannot be squared with respect for human dignity, the right to be free of cruel punishments, and the right to liberty. We recognize that "application of either the concept of disproportionality or the more nebulous...test of whether a challenged punishment comports with the 'dignity of man,'...obviously presents difficulties of interpretation upon which reasonable persons can and do differ,"[184] and we do not claim all drug law offenders receive unjust sentences. But such sentences are by no means infrequent.

The issue is not whether one year or five years or ten years is inherently excessive—but whether such sentences are proportionate to particular offenses. As the United States Supreme Court has noted, "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." [185]

Disproportionate sentences are inevitable in a system of harsh mandatory sentences keyed solely to two facts: the weight of the drug involved and whether there are prior felony convictions. As currently structured, the laws lump together individuals of vastly different culpability and dangerousness. Reform is needed to permit sentences based on such relevant factors as the gravity and nature of the offense, the relative culpability of the defendant, the defendant's role in the offense, and the degree of sophistication and control exercised by the defendant with regard to a criminal conspiracy or enterprise. Where courts can consider such relevant facts, they can exercise their traditional role of crafting proportional sentences consistent with respect for society's legitimate penal goals as well as human rights. The awesome responsibility of sentencing has traditionally been given to judges in the U.S. civil law system precisely because they are neutral arbiters charged with balancing the multiple factors needed to ensure justice in individual cases. However fallible individual judges may be, it is ultimately the judiciary's proper role to ensure that penal sanctions comport with the human dignity of those who are subject to them. The legislature can provide guidance and standards, but it should not tie the hands of judges so tightly that they cannot lift them to do justice.

We also believe New York must reconsider the length of sentences for drug offenses. The current sentencing structure improperly imposes severe penalties on individuals who may not have harmed or threatened anybody. No one should be imprisoned for years absent compelling reasons, such as specific serious injury that one individual has caused another. We find no argument persuasive by which the simple act of selling cocaine or heroin to an adult has caused a specific harm commensurate for sentencing purposes with murder, rape or assault. It is unjust to penalize severely each individual participant in low-level drug transactions for broader social harms to which his or her individual contribution is negligible.

As Justice Black of the U.S. Supreme Court cautioned: "Grave evils such as the narcotics traffic can too easily cause threats to our basic liberties by making attractive the adoption of... forbidden shortcuts that might suppress and

[184] *Carmona v. Ward*, 436 F. Supp. at 1153 (date).

[185] *Robinson v. California*, 370 U.S. 660,667 (1962). In this case, the Supreme Court ruled unconstitutional a state law making drug addiction a crime receiving a 90-day sentence.

blot out more quickly the unpopular and dangerous conduct."[186] We urge New York to revise the state's sentencing laws to eliminate the rigidity and severity that have wrongfully penalized too many drug offenders for too long.

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[186] *Turner v. United States*, 396 U.S. 398, 427 (1970) (Black, J., dissenting), quoted in *Harmelin v. Michigan*, 501 U.S. 1024 (White, J., dissenting).