

An illustration of a large crowd of people, seen from behind, standing on a yellow background. Many of the individuals have their hands clasped behind their backs, suggesting they are handcuffed. The crowd is diverse in age and appearance, with some wearing casual clothing like t-shirts and jeans, and others in more formal or uniform-like attire. The overall tone is somber and emphasizes the scale of the issue.

# EVERY 25 SECONDS

The Human Toll of Criminalizing Drug Use  
in the United States

HUMAN  
RIGHTS  
WATCH









## **Every 25 Seconds**

**The Human Toll of Criminalizing Drug Use in the United States**

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## Summary

Neal Scott may die in prison. A 49-year-old Black man from New Orleans, Neal had cycled in and out of prison for drug possession over a number of years. He said he was never offered treatment for his drug dependence; instead, the criminal justice system gave him time behind bars and felony convictions—most recently, five years for possessing a small amount of cocaine and a crack pipe. When Neal was arrested in May 2015, he was homeless and could not walk without pain, struggling with a rare autoimmune disease that required routine hospitalizations. Because he could not afford his \$7,500 bond, Neal remained in jail for months, where he did not receive proper medication and his health declined drastically—one day he even passed out in the courtroom. Neal eventually pled guilty because he would face a minimum of 20 years in prison if he took his drug possession case to trial and lost. He told us that he cried the day he pled, because he knew he might not survive his sentence.<sup>1</sup>

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Just short of her 30th birthday, Nicole Bishop spent three months in jail in Houston for heroin residue in an empty baggie and cocaine residue inside a plastic straw. Although the prosecutor could have charged misdemeanor paraphernalia, he sought felony drug possession charges instead. They would be her first felonies.

Nicole was separated from her three young children, including her breastfeeding newborn. When the baby visited Nicole in jail, she could not hear her mother's voice or feel her touch because there was thick glass between them. Nicole finally accepted a deal from the prosecutor: she would do seven months in prison in exchange for a guilty plea for the 0.01 grams of heroin found in the baggie, and he would dismiss the straw charge. She would return to her children later that year, but as a "felon" and "drug offender." As a result, Nicole said she would lose her student financial aid and have to give up pursuit of a degree in business administration. She would have trouble finding a job and would not be able to have her name on the lease for the home she shared with her husband. She would

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<sup>1</sup> "Neal Scott" and "Nicole Bishop" are both pseudonyms, as are all other names used in the summary, with the exception of Corey Ladd.

no longer qualify for the food stamps she had relied on to help feed her children. As she told us, she would end up punished for the rest of her life.

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Every 25 seconds in the United States, someone is arrested for the simple act of possessing drugs for their personal use, just as Neal and Nicole were. Around the country, police make more arrests for drug possession than for any other crime. More than one of every nine arrests by state law enforcement is for drug possession, amounting to more than 1.25 million arrests each year. And despite officials' claims that drug laws are meant to curb drug sales, four times as many people are arrested for possessing drugs as are arrested for selling them.

As a result of these arrests, on any given day at least 137,000 men and women are behind bars in the United States for drug possession, some 48,000 of them in state prisons and 89,000 in jails, most of the latter in pretrial detention. Each day, tens of thousands more are convicted, cycle through jails and prisons, and spend extended periods on probation and parole, often burdened with crippling debt from court-imposed fines and fees. Their criminal records lock them out of jobs, housing, education, welfare assistance, voting, and much more, and subject them to discrimination and stigma. The cost to them and to their families and communities, as well as to the taxpayer, is devastating. Those impacted are disproportionately communities of color and the poor.

This report lays bare the human costs of criminalizing personal drug use and possession in the US, focusing on four states: Texas, Louisiana, Florida, and New York. Drawing from over 365 interviews with people arrested and prosecuted for their drug use, attorneys, officials, activists, and family members, and extensive new analysis of national and state data, the report shows how criminalizing drug possession has caused dramatic and unnecessary harms in these states and around the country, both for individuals and for communities that are subject to discriminatory enforcement.

There are injustices and corresponding harms at every stage of the criminal process, harms that are all the more apparent when, as often happens, police, prosecutors, or judges respond to drug use as aggressively as the law allows. This report covers each stage of that process, beginning with searches, seizures, and the ways that drug possession arrests

shape interactions with and perceptions of the police—including for the family members and friends of individuals who are arrested. We examine the aggressive tactics of many prosecutors, including charging people with felonies for tiny, sometimes even “trace” amounts of drugs, and detail how pretrial detention and long sentences combine to coerce the overwhelming majority of drug possession defendants to plead guilty, including, in some cases, individuals who later prove to be innocent.

The report also shows how probation and criminal justice debt often hang over people’s heads long after their conviction, sometimes making it impossible for them to move on or make ends meet. Finally, through many stories, we recount how harmful the long-term consequences of incarceration and a criminal record that follow a conviction for drug possession can be—separating parents from young children and excluding individuals and sometimes families from welfare assistance, public housing, voting, employment opportunities, and much more.

Families, friends, and neighbors understandably want government to take actions to prevent the potential harms of drug use and drug dependence. Yet the current model of criminalization does little to help people whose drug use has become problematic. Treatment for those who need and want it is often unavailable, and criminalization tends to drive people who use drugs underground, making it less likely that they will access care and more likely that they will engage in unsafe practices that make them vulnerable to disease and overdose.

While governments have a legitimate interest in preventing problematic drug use, the criminal law is not the solution. Criminalizing drug use simply has not worked as a matter of practice. Rates of drug use fluctuate, but they have not declined significantly since the “war on drugs” was declared more than four decades ago. The criminalization of drug use and possession is also inherently problematic because it represents a restriction on individual rights that is neither necessary nor proportionate to the goals it seeks to accomplish. It punishes an activity that does not directly harm others.

Instead, governments should expand public education programs that accurately describe the risks and potential harms of drug use, including the potential to cause drug dependence, and should increase access to voluntary, affordable, and evidence-based

treatment for drug dependence and other medical and social services outside the court and prison system.

After decades of “tough on crime” policies, there is growing recognition in the US that governments need to undertake meaningful criminal justice reform and that the “war on drugs” has failed. This report shows that although taking on parts of the problem—such as police abuse, long sentences, and marijuana reclassification—is critical, it is not enough: Criminalization is simply the wrong response to drug use and needs to be rethought altogether.

Human Rights Watch and the American Civil Liberties Union call on all states and the federal government to decriminalize the use and possession for personal use of all drugs and to focus instead on prevention and harm reduction. Until decriminalization has been achieved, we urge officials to take strong measures to minimize and mitigate the harmful consequences of existing laws and policies. The costs of the status quo, as this report shows, are too great to bear.

## A National Problem

All US states and the federal government criminalize possession of illicit drugs for personal use. While some states have decriminalized possession of small amounts of marijuana, other states still make marijuana possession a misdemeanor or even a felony. In 42 states, possession of small amounts of most illicit drugs other than marijuana is either always or sometimes a felony offense. Only eight states and the District of Columbia make possession of small amounts a misdemeanor.

Not only do all states criminalize drug possession; they also all enforce those laws with high numbers of arrests and in racially discriminatory ways, as evidenced by new analysis of national and state-level data obtained by Human Rights Watch.

### *Aggressive Policing*

More than one of nine arrests by state law enforcement are for drug possession, amounting to more than 1.25 million arrests per year. While the bulk of drug possession arrests are in large states such as California, which made close to 200,000 arrests for drug possession in 2014, Maryland, Nebraska, and Mississippi have the highest per capita drug

possession arrest rates. Nationwide, rates of arrest for drug possession range from 700 per 100,000 people in Maryland to 77 per 100,000 in Vermont.

Despite shifting public opinion, in 2015, nearly half of all drug possession arrests (over 574,000) were for marijuana possession. By comparison, there were 505,681 arrests for violent crimes (which the FBI defines as murder, non-negligent manslaughter, rape, robbery, and aggravated assault). This means that police made more arrests for simple marijuana possession than for all violent crimes combined.

Data presented for the first time in this report shows stark differences in arrest rates for drug possession even within the same state. For example, data provided to us by Texas shows that 53 percent of drug possession arrests in Harris County (in and around Houston) were for marijuana, compared with 39 percent in nearby Dallas County, despite similar drug use rates in the two counties. In New York State, the counties with the highest drug possession arrest rates by a large margin were all in and around urban areas of New York City and Buffalo. In Florida, the highest rates of arrest were spread around the state in rural Bradford County, urban Miami-Dade County, Monroe County (the Keys), rural Okeechobee County, and urban Pinellas County. In Texas, counties with the highest drug possession arrest rates were all small rural counties. Kenedy County, for example, has an adult population of 407 people, yet police there made 329 arrests for drug possession between 2010 and 2015. In each of these states, there is little regional variation in drug use rates.

The sheer magnitude of drug possession arrests means that they are a defining feature of the way certain communities experience police in the United States. For many people, drug laws shape their interactions with and views of the police and contribute to a breakdown of trust and a lack of security. This was particularly true for Black and Latino people we interviewed.

### *Racial Discrimination*

Over the course of their lives, white people are more likely than Black people to use illicit drugs in general, as well as marijuana, cocaine, heroin, methamphetamines, and prescription drugs (for non-medical purposes) specifically. Data on more recent drug use (for example, in the past year) shows that Black and white adults use illicit drugs other than marijuana at the same rates and that they use marijuana at similar rates.



Yet around the country, Black adults are more than two-and-a-half times as likely as white adults to be arrested for drug possession. In 2014, Black adults accounted for just 14 percent of those who used drugs in the previous year but close to a third of those arrested for drug possession. In the 39 states for which we have sufficient police data, Black adults were more than four times as likely to be arrested for marijuana possession than white adults.<sup>2</sup>

In every state for which we have sufficient data, Black adults were arrested for drug possession at higher rates than white adults, and in many states the disparities were substantially higher than the national rate—over 6 to 1 in Montana, Iowa, and Vermont. In Manhattan, Black people are nearly 11 times more likely than white people to be arrested for drug possession.

Darius Mitchell, a Black man in his 30s, was among those targeted in Louisiana. He recounted his story to us as follows: Late one night in Jefferson Parish, Darius was driving home from his child’s mother’s house. An officer pulled him over, claiming he was speeding. When Darius said he was sure he was not, the officer said he smelled marijuana. He asked whether he could search, and Darius said no. Another officer and a canine came and searched his car anyway. They yelled, “Where are the pounds?” suggesting he was a marijuana dealer. The police never found marijuana, but they found a pill bottle in Darius’ glove compartment, with his child’s mother’s name on it. Darius said that he had driven her to the emergency room after an accident, and she had been prescribed hydrocodone, which she forgot in the car. Still, the officers arrested him and he was prosecuted for drug possession, his first felony charge. He faced up to five years in prison. Darius was ultimately acquitted at trial, but months later he remained in financial debt from his legal fees, was behind in rent and utilities bills, and had lost his cable service, television, and furniture. He still had an arrest record, and the trauma and anger of being unfairly targeted.

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<sup>2</sup> Not all states report thoroughly to the FBI, from whom we obtained national arrest data. Because we compared arrest data and US Census data, we could not accurately assess racial disparities where reporting coverage was limited. We therefore included only those states where at least 75 percent of the population was covered in data reported to the FBI. There is no evidence that states that fell below this threshold would have substantially different arrest disparities. Because the FBI does not keep data on Latinos arrested, classifying them instead as white or Black, our racial disparities analysis is limited to those categories.

## Small-Scale Drug Use: Prosecutions for Tiny Amounts

We interviewed over 100 people in Texas, Louisiana, Florida, and New York who were prosecuted for small quantities of drugs—in some cases, fractions of a gram—that were clearly for personal use. Particularly in Texas and Louisiana, prosecutors did more than simply pursue these cases—they often selected the highest charges available and went after people as hard as they could.

In 2015, according to data we analyzed from Texas courts, nearly 16,000 people were sentenced to incarceration for drug possession at the “state jail felony” level—defined as possession of under one gram of substances containing commonly used drugs, including cocaine, heroin, methamphetamine, PCP, oxycodone, MDMA, mescaline, and mushrooms (or between 4 ounces and 5 pounds of marijuana).<sup>3</sup> One gram, the weight of less than one-fourth a sugar packet, is enough for only a handful of doses for new users of many drugs. Data presented here for the first time suggests that in 2015, more than 78 percent of people sentenced to incarceration for felony drug possession in Texas possessed under a gram. Possibly thousands more were prosecuted and put on probation, potentially with felony convictions. In Dallas County, the data suggests that nearly 90 percent of possession defendants sentenced to incarceration were for under a gram.

The majority of the 30 defendants we interviewed in Texas had substantially less than a gram of illicit drugs in their possession when they were arrested: not 0.9 or 0.8 grams, but sometimes 0.2, 0.02, or a result from the lab reading “trace,” meaning that the amount was too small even to be measured. One defense attorney in Dallas told us a client was charged with drug possession in December 2015 for 0.0052 grams of cocaine. The margin of error for the lab that tested it is 0.0038 grams, meaning it could have weighed as little as 0.0014 grams, or 35 hundred-thousandths (0.00035) of a sugar packet.

Bill Moore, a 66-year-old man in Dallas, is serving a three-year prison sentence for 0.0202 grams of methamphetamines. In Fort Worth, Hector Ruiz was offered six years in prison for an empty bag that had heroin residue weighing 0.007 grams. In Granbury, Matthew Russell was charged with possession of methamphetamines for an amount so small that the

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<sup>3</sup> Henceforward, we use “state jail felony” interchangeably with “under a gram.”

laboratory result read only “trace.” The lab technician did not even assign a fraction of a gram to it.

## **A System that Coerces Guilty Pleas**

In 2009 (the most recent year for which national data is available), more than 99 percent of people convicted of drug possession in the 75 largest US counties pled guilty. Our interviews and data analysis suggest that in many cases, high bail—particularly for low-income defendants—and the threat of long sentences render the right to a jury trial effectively meaningless.

Data we obtained from Florida and Alabama reveals that, at least in those two states, the majority of drug possession defendants were poor enough to qualify for court-appointed counsel. Yet in 2009, drug possession defendants in the 75 largest US counties had an average bail of \$24,000 (for those detained, average bail was \$39,900). For lower-income defendants, such high bail often means they must remain in jail until their case is over.

For defendants with little to no criminal history, or in relatively minor cases, prosecutors often offer probation, relatively short sentences, or “time served.” For those who cannot afford bail, this means a choice between fighting their case from jail or taking a conviction and walking out the door. In Galveston, Texas, Breanna Wheeler, a single mother, pled to probation and her first felony conviction against her attorney’s advice. They both said she had a strong case that could be won in pretrial motions, but her attorney had been waiting months for the police records, and Breanna needed to return home to her 9-year-old daughter. In New York City, Deon Charles told us he pled guilty because his daughter had just been born that day and he needed to see her.

For others, the risk of a substantially longer sentence at trial means they plead to avoid the “trial penalty.” In New Orleans, Jerry Bennett pled guilty to possession of half a gram of marijuana and a two-and-a-half-year prison sentence, because he faced 20 years if he lost at trial: “They spooked me out by saying, ‘You gotta take this or you’ll get that.’ I’m just worried about the time. Imagine me in here for 20 years. They got people that kill people. And they put you up here for half a gram of weed.”

For the minority of people we interviewed who exercised their right to trial, the sentences they received in Louisiana and Texas were shocking. In New Orleans, Corey Ladd was sentenced as a habitual offender to 17 years for possessing half an ounce of marijuana. His prior convictions were for possession of small amounts of LSD and hydrocodone, for which he got probation both times. In Granbury, Texas, after waiting 21 months in jail to take his case to trial, Matthew Russell was sentenced to 15 years for a trace amount of methamphetamines. According to him and his attorney, his priors were mostly out-of-state and related to his drug dependence.

## **Incarceration for Drug Possession**

At year-end 2014, over 25,000 people were serving sentences in local jails and another 48,000 were serving sentences in state prisons for drug possession nationwide. The number admitted to jails and prisons at some point over the course of the year was significantly higher. As with arrests, there were sharp racial disparities. In 2002 (the most recent year for which national jail data is available), Black people were over 10 times more likely than white people to be in jail for drug possession. In 2014, Black people were nearly six times more likely than white people to be in prison for drug possession.

Our analysis of data from Florida, Texas, and New York, presented here for the first time, shows that the majority of people convicted of drug possession in these states are sentenced to some form of incarceration. Because each dataset is different, they show us different things. For example, our data suggests that in Florida, 75 percent of people convicted of felony drug possession between 2010 and 2015 had little to no prior criminal history. Yet 84 percent of people convicted of these charges were sentenced to prison or jail. In New York State, between 2010 and 2015, the majority of people convicted of drug possession were sentenced to some period of incarceration. At year-end 2015, one of sixteen people in custody in New York State was incarcerated for drug possession. Of those, 50 percent were Black and 28 percent Latino. In Texas, between 2012 and 2016, approximately one of eleven people in prison had drug possession as their most serious offense; two of every three people serving time for drug charges were there for drug possession; and 116 people had received life sentences for drug possession, at least seven of which were for an amount weighing between one and four grams.

For people we spoke to, the prospect of spending months or years in jail or prison was overwhelming. For most, the well-being of family members in their absence was also a source of constant concern, sometimes more vivid for them than the experience of jail or prison itself. Parents told us they worried about children growing up without them. Some described how they missed seeing their children but did not let them visit jail or prison because they were concerned the experience would be traumatizing. Others described the anguish of no-contact jail visits, where they could see and hear but not reach out and touch their young children's hands. Some worried about partners and spouses, for whom their incarceration meant lost income and lost emotional and physical support.

In Covington, Louisiana, Tyler Marshall's wife has a disability, and he told us his absence took a heavy toll. "My wife, I cook for her, clean for her, bathe her, clothe her.... Now everything is on her, from the rent to the bills, everything.... She's behind [on rent] two months right now. She's disabled and she's doing it all by herself." In New Orleans, Corey Ladd was incarcerated when his girlfriend was eight months pregnant. He saw his infant daughter Charlee for the first time in a courtroom and held her for the first time in the infamous Angola prison. She is four now and thinks she visits her father at work. "She asks when I'm going to get off work and come see her," Corey told us. He is a skilled artist and draws Charlee pictures. In turn, Charlee brings him photos of her dance recitals and in the prison visitation hall shows him new dance steps she has learned. Corey, who is currently serving 17 years for marijuana possession, may never see her onstage.

## **Probation, Criminal Justice Debt, and Collateral Consequences**

Even for those not sentenced to jail or prison, a conviction for drug possession can be devastating, due to onerous probation conditions, massive criminal justice debt, and a wide range of restrictions flowing from the conviction (known in the literature as "collateral consequences").

Many defendants, particularly those with no prior convictions, are offered probation instead of incarceration. Although probation is a lesser penalty, interviewees in Florida, Louisiana, and Texas told us they felt "set up to fail" on probation, due to the enormous challenges involved in satisfying probation conditions (for example, frequent meetings at distant locations that make it impossible for probationers to hold down a job, but require that they earn money to pay for travel and fees). Some defense attorneys told us that



probation conditions were so onerous and unrealistic that they would counsel clients to take a short jail or prison sentence instead. A number of interviewees said if they were offered probation again, they would choose incarceration; others said they knew probation would be too hard and so chose jail time.

At year-end 2014, the US Department of Justice reported that 570,767 people were on probation for drug law violations (the data does not distinguish between possession and sales), accounting for close to 15 percent of the entire state probation population around the country. In some states, drug possession is a major driver of probation. In Missouri, drug possession is by far the single largest category of felony offenses receiving probation, accounting for 9,500 people or roughly 21 percent of the statewide probation total. Simple possession is also the single largest driver in Florida, accounting for nearly 20,000 cases or 14 percent of the statewide probation total. In Georgia, possession offenses accounted for 17 percent of new probation starts in 2015 and roughly 16 percent of the standing probation population statewide at mid-year 2016.

In addition to probation fees (if they are offered probation), people convicted of drug possession are often saddled with crippling court-imposed fines, fees, costs, and assessments that they cannot afford to pay. These can include court costs, public defender application fees, and surcharges on incurred fines, among others. They often come on top of the price of bail (if defendants can afford it), income-earning opportunities lost due to incarceration, and the financial impact of a criminal record. For those who choose to hire an attorney, the costs of defending their case may have already left them in debt or struggling to make ends meet for months or even years to come.

A drug conviction also keeps many people from getting a job, renting a home, and accessing benefits and other programs they may need to support themselves and their families—and to enjoy full civil and social participation. Federal law allows states to lock people out of welfare assistance and public housing for years and sometimes even for life based on a drug conviction. People convicted of drug possession may no longer qualify for educational loans; they may be forced to rely on public transport because their driver's license is automatically suspended; they may be banned from juries and the voting booth; and they may face deportation if they are not US citizens, no matter how many decades they have lived in the US or how many of their family members live in the country. In addition, they must bear the stigma associated with the labels of “felon” and “drug

offender” the state has stamped on them, subjecting them to private discrimination in their daily interactions with landlords, employers, and peers.

## A Call for Decriminalization

As we argue in this report, laws criminalizing drug use are inconsistent with respect for human autonomy and the right to privacy and contravene the human rights principle of proportionality in punishment. In practice, criminalizing drug use also violates the right to health of those who use drugs. The harms experienced by people who use drugs, and by their families and broader communities, as a result of the enforcement of these laws may constitute additional, separate human rights violations.

Criminalization has yielded few, if any, benefits. Criminalizing drugs is not an effective public safety policy. We are aware of no empirical evidence that low-level drug possession defendants would otherwise go on to commit violent crimes. And states have other tools at their disposal—for example, existing laws that criminalize driving under the influence or child endangerment—to address any harmful behaviors that may accompany drug use.

Criminalization is also a counterproductive public health strategy. Rates of drug use across drug types in the US have not decreased over the past decades, despite widespread criminalization. For people who struggle with drug dependence, criminalization often means cycling in and out of jail or prison, with little to no access to voluntary treatment. Criminalization undermines the right to health, as fear of law enforcement can drive people who use drugs underground, deterring them from accessing health services and emergency medicine and leading to illness and sometimes fatal overdose.

It is time to rethink the criminalization paradigm. Although the amount cannot be quantified, the enormous resources spent to identify, arrest, prosecute, sentence, incarcerate, and supervise people whose only offense has been possession of drugs is hardly money well spent, and it has caused far more harm than good. Some state and local officials we interviewed recognized the need to end the criminalization of drug use and to develop a more rights-respecting approach to drugs. Senior US officials have also emphasized the need to move away from approaches that punish people who use drugs.

Fortunately, there are alternatives to criminalization. Other countries—and even some US states with respect to marijuana—are experimenting with models of decriminalization that the US can examine to chart a path forward.

Ending criminalization of simple drug possession does not mean turning a blind eye to the misery that drug dependence can cause in the lives of those who use and of their families. On the contrary, it requires a more direct focus on effective measures to prevent problematic drug use, reduce the harms associated with it, and support those who struggle with dependence. Ultimately, the criminal law does not achieve these important ends, and causes additional harm and loss instead. It is time for the US to rethink its approach to drug use.

## Key Recommendations

Human Rights Watch and the American Civil Liberties Union call on federal and state legislatures to end the criminalization of the personal use of drugs and the possession of drugs for personal use.

In the interim, we urge government officials at the local, state, and federal levels to adopt the recommendations listed below. These are all measures that can be taken within the existing legal framework to minimize the imposition of criminal punishment on people who use drugs, and to mitigate the harmful collateral consequences and social and economic discrimination experienced by those convicted of drug possession and by their families and communities. At the same time, officials should ensure that education on the risks and potential harms of drug use and affordable, evidence-based treatment for drug dependence are available outside of the criminal justice system.

Until full decriminalization is achieved, public officials should pursue the following:

- State legislatures should amend relevant laws so that a drug possession conviction is never a felony and cannot be used as a sentencing enhancement or be enhanced itself by prior convictions, and so that no adverse collateral consequences attach by law for convictions for drug possession.
- Legislatures should allocate funds to improve and expand harm reduction services and prohibit public and private discrimination in housing or employment on the basis of prior drug possession arrests or convictions.
- To the extent permitted by law and by limits on the appropriate exercise of discretion, police should decline to make arrests for drug possession and should not stop, frisk, or search a person simply to find drugs for personal use. Police departments should not measure officer or department performance based on stop or arrest numbers or quotas and should incentivize and reward officer actions that prioritize the health and safety of people who use drugs.
- To the extent permitted by law and by limits on the appropriate exercise of discretion, prosecutors should decline to prosecute drug possession cases, or at a minimum should seek the least serious charge supported by the facts or by

law. Prosecutors should refrain from prosecuting trace or residue cases and should never threaten enhancements or higher charges to pressure drug possession defendants to plead guilty. They should not seek bail in amounts they suspect defendants will be unable to pay.

- To the extent permitted by law and by limits on the appropriate exercise of discretion, judges should sentence drug possession defendants to non-incarceration sentences. Judges should release drug possession defendants on their own recognizance whenever appropriate; if bail is required, it should be set at a level carefully tailored to the economic circumstances of individual defendants.
- To the extent permitted by law and by limits on the appropriate exercise of discretion, probation officers should not charge people on probation for drug offenses with technical violations for behavior that is a result of drug dependence. Where a legal reform has decreased the sentences for certain offenses but has not made the decreases retroactive, parole boards should consider the reform when determining parole eligibility.
- The US Congress should amend federal statutes so that no adverse collateral consequences attach by law to convictions for drug possession, including barriers to welfare assistance and subsidized housing. It should appropriate sufficient funds to support evidence-based, voluntary treatment options and harm reduction services in the community.
- The US Department of Justice should provide training to state law enforcement agencies clarifying that federal funding programs are not intended to and should not be used to encourage or incentivize high numbers of arrests for drug possession, and emphasizing that arrest numbers are not a valid measure of law enforcement performance.



## Methodology

This report is the product of a joint initiative—the Aryeh Neier fellowship—between Human Rights Watch and the American Civil Liberties Union to strengthen respect for human rights in the United States.

The report is based on more than 365 in-person and telephone interviews, as well as data provided to Human Rights Watch in response to public information requests.

Between October 2015 and March 2016, we conducted interviews in Louisiana, Texas, Florida, and New York City with 149 people prosecuted for their drug use. Human Rights Watch and the American Civil Liberties Union identified individuals who had been subjected to prosecution in those jurisdictions through outreach to service providers, defense attorneys, and advocacy networks as well as through observation of courtroom proceedings.

In New York City, the majority of our interviews were conducted at courthouses or at the site of harm reduction and reentry programs. In Florida, Louisiana, and Texas, we met interviewees at detention facilities, drug courts, harm reduction and reentry programs, law offices, and restaurants in multiple counties.

In the three southern states, we conducted 64 interviews with people who were in custody—in local jails, state prisons, department of corrections work release or trustee facilities, and courthouse lock-ups across 13 jurisdictions. Within the jails and prisons, interviews took place in an attorney visit room to ensure confidentiality.

Most interviews were conducted individually and in private. Group interviews were conducted with three families and with participants in drug court programs in New Orleans (in drug court classrooms) and St. Tammany Parish (in a private room in the courthouse). All individuals interviewed about their experience provided informed consent, and no incentive or remuneration was offered to interviewees. For interviewees with pending charges, we interviewed them only with approval from their attorney and did not ask any questions about disputed facts or issues. In those cases, we explained to interviewees that we did not want them to tell us anything that could be used against them in their case.

To protect the privacy and security of these interviewees, a substantial number of whom remain in custody, we decided to use pseudonyms in all but two cases. In many cases, we also withheld certain other identifying information. Upon their urging and because of unique factors in their cases, we have not used pseudonyms for Corey Ladd and Byron Augustine in New Orleans and St. Tammany Parish, Louisiana, respectively.

In addition, we conducted 23 in-person interviews with current or former state government officials, including judges, prosecutors, law enforcement, and corrections officers. We also had phone interviews and/or correspondence with US Department of Justice officials and additional state prosecutors. We interviewed nine family members of people currently in custody, as well as 180 defense attorneys, service providers (including those working for harm reduction programs such as syringe exchanges, voluntary treatment programs, and court-mandated treatment programs), and local and national advocates.

Where attorneys introduced us to clients with open cases, we reviewed court documents wherever possible and corroborated information with the attorney. In other cases, we also reviewed case files provided by defendants or available to the public online. However, because of the sheer number of interviews we conducted, limited public access to case information in some jurisdictions, and respect for individuals' privacy, we did not review case information or contact attorneys for all interviewees. We also could not seek the prosecutor's perspective on specific cases because of confidentiality. We therefore present people's stories mostly as they and their attorneys told them to us.<sup>4</sup>

Human Rights Watch submitted a series of data requests regarding arrests, prosecutions, case outcomes, and correctional population for drug offenses to a number of government bodies, including the Federal Bureau of Investigation (FBI) and various state court administrations, statistical analysis centers, sentencing commissions, departments of correction, clerks of court, and other relevant entities. We chose to make data requests based on which states had centralized systems and/or had statutes or criminal justice trends that were particularly concerning. Attempts to request data were made through

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<sup>4</sup> For most stories in this report, we footnote as a source only our interview with the person directly affected. However, in the majority of interviews in Texas and Louisiana, the person's attorney initially provided or later verified case information (for example, drug quantity, plea offers, prior convictions, and sentencing ranges). In all such cases, we obtained individuals' consent to speak with their attorney about the case. In some cases in Florida, Texas, and Louisiana, information was also verified through publicly available documents.

email, facsimile, and/or phone to one or more entities in the following states: Alabama, California, Florida, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, New York, Oklahoma, Texas, and Wisconsin. Among those, the FBI, Alabama Sentencing Commission, Florida Office of State Court Administrator, New York Division of Criminal Justice Services, New York Department of Corrections and Community Supervision, Texas Department of Criminal Justice, and Texas Office of Court Administration provided data to us.<sup>5</sup> Because of complications with the data file the FBI provided to us, we used the same set of data provided to and organized by the Inter-University Consortium for Political and Social Research.<sup>6</sup> We also analyzed data available online from the US Department of Justice's Bureau of Justice Statistics and some state agencies.

As this report was going to press, the FBI released aggregated 2015 arrest data. We have used this 2015 data to update all nationwide arrest estimates for drug possession and other offenses in this report. However, for all state-by-state arrest and racial disparities analyses, we relied on 2014 data, as these analyses required disaggregated data as well as data from non-FBI sources and 2014 remained the most recent year for which such data was available.

Although the federal government continues to criminalize possession of drugs for personal use, in practice comparatively few federal prosecutions are for possession. This report therefore focuses on state criminalization, although we call for decriminalization at all levels of government.

A note on state selection:

We spent a month at the start of this project defining its scope and selecting states on which we would focus, informed by phone interviews with legal practitioners and state and national advocates, as well as extensive desk research. We chose to highlight Louisiana,

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<sup>5</sup> We also received a partial dataset from Mississippi, but the file was incomplete and we were unable to draw conclusions from it. Although we made multiple attempts to clarify and obtain a representative dataset, it was not possible. Oklahoma provided data to us regarding arrests and prosecution charges. A thorough analysis of that data is beyond the scope of this report.

<sup>6</sup> See United States Department of Justice, Federal Bureau of Investigation, "Uniform Crime Reporting Program Data: Arrests by Age, Sex, and Race, Summarized Yearly, 2014," March 9, 2016, <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/36400/version/1> (accessed September 21, 2016).

Texas, Florida, and New York because of a combination of problematic laws and enforcement policies, availability of data and resources, and positive advocacy opportunities.

This report focuses on Louisiana because it has the highest per capita imprisonment rate in the country and because of its problematic application of the state habitual offender law to drug possession, resulting in extreme sentences for personal drug use. The report focuses on Texas because of extensive concerns around its pretrial detention and jail system, its statutory classification of felony possession by weight, and its relatively softer treatment of marijuana possession as compared to other drugs. We also emphasize the potential for substantial criminal justice reform in both states—which stakeholders and policymakers are already considering—and the opportunity for state officials at all levels to set an example for others around the country.

While this report focuses more heavily on Louisiana and Texas, we draw extensively from data and interviews in Florida and New York. We selected Florida because of its experience with prescription painkiller laws and the codification of drug possession over a certain weight as “trafficking.” We selected New York as an example of a state in which low-level (non-marijuana) drug possession is a misdemeanor and does not result in lengthy incarceration, and yet criminalization continues to be extremely disruptive and harmful to those who use drugs and to their broader communities. New York shows us that reclassification of drug possession from a felony to a misdemeanor, while a positive step, is insufficient to end the harms of criminalization, especially related to policing and arrests.

As described in the Background section, all states criminalize drug possession, and the majority make it a felony offense. As our data shows, most if not all states also arrest in high numbers for drug possession and do so with racial disparities. Thus, although we did not examine the various stages of the criminal process in more than these four states, we do know that the front end (the initial arrest) looks similar in many states. It is likely, as people move through the criminal justice system, that many of the problems that we documented in New York, Florida, Texas, and Louisiana are also experienced to varying degrees in other states. At the same time, there may be additional problems in other states that we have not documented. Wherever possible throughout the report, we draw on data and examples from other states and at the national level.

We are grateful to officials in Texas, Florida, and New York for their transparency in providing us remarkable amounts of data at no cost.<sup>7</sup> We regret our inability to obtain data from Louisiana. For 15 of Louisiana’s 41 judicial districts, plus the Orleans Criminal District Court, we made data requests to the clerk of court by phone, email, and/or facsimile. None was able to provide the requested information, and those who responded said they did not retain such data.

A note on terminology:

Although most states have a range of offenses that criminalize drug use, this report focuses on criminal drug possession and drug paraphernalia as the most common offenses employed to prosecute drug use (other offenses in some states include, for example, ingestion or purchase of a drug). Our position on decriminalization—and the harm wrought by enforcement of drug laws—extends more broadly to all offenses criminalizing drug use.

When we refer to “drug possession” in this report, we mean possession of drugs for personal use, as all state statutes we are aware of do. Like legal practitioners and others, we sometimes refer to it synonymously as “simple possession.” Possession of drugs for purposes other than personal use, such as for distribution, is typically noted as such in laws and conversation (for example, “possession with intent to distribute,” which we discuss in this report as well).

Not all drugs are criminalized: many substances are regulated by the US Food and Drug Administration (FDA), but are not considered “controlled substances” subject to criminalization. This report is about “illicit drugs” as they are understood in public discourse, the so-called “war on drugs,” and state and federal laws such as the Controlled Substances Act.<sup>8</sup> For simplicity, however, when we refer to “drugs” in this report, we mean illicit drugs.

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<sup>7</sup> We received over 6 million entries from Florida state courts alone.

<sup>8</sup> 21 USC sec. 812.

Many people who use drugs told us the language of addiction was stigmatizing to them, whether or not they were dependent on drugs.<sup>9</sup> Because drug dependence is a less stigmatizing term, we used it where appropriate in our interviews and in this report to discuss the right to health implications of governments' response to drug use and interviewees' self-identified conditions. In so doing, we relied upon the definition of substance dependence as laid out in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders (Fourth Edition)* (also known as DSM-IV). Factors for a diagnosis of dependence under DSM-IV focus on individuals' loss of ability to control their drug use.<sup>10</sup>

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<sup>9</sup> The American Society of Addiction Medicine defines addiction as follows: "Addiction is a primary, chronic disease of brain reward, motivation, memory and related circuitry. Dysfunction in these circuits leads to characteristic biological, psychological, social and spiritual manifestations. This is reflected in an individual pathologically pursuing reward and/or relief by substance use and other behaviors." American Society of Addiction Medicine, *Public Policy Statement: Definition of Addiction*, April 19, 2011, <http://www.asam.org/quality-practice/definition-of-addiction> (accessed July 14, 2016)

<sup>10</sup> To have substance dependence, DSM-IV requires a person to have three or more of the following in a 12-month period: tolerance (marked increase in amount; marked decrease in effect); characteristic withdrawal symptoms; substance taken to relieve withdrawal; substance taken in larger amount and for longer period than intended; persistent desire or repeated unsuccessful attempt to quit; much time/activity to obtain, use, recover; important social, occupational, or recreational activities given up or reduced; use continues despite knowledge of adverse consequences (e.g., failure to fulfil role obligation, use when physically hazardous). American Psychiatric Association, ed., *Diagnostic and Statistical Manual of Mental Disorders (Fourth Edition)* (Washington, DC: American Psychiatric Association, 2000). In 2013, DSM-5 was published. The fifth edition combines substance abuse and substance dependence, as defined by DSM-IV, into one category, "substance abuse disorder," which is measured on a continuum. This edition also adds several more symptoms by which to diagnose someone with such a "disorder." Because most interviewees and a number of sources we reference invoked the DSM-IV definition of dependence, we depend on that definition in this report. For an alternative definition of dependence, see World Health Organization, "Management of substance abuse: Dependence syndrome," undated, [http://www.who.int/substance\\_abuse/terminology/definition1/en/](http://www.who.int/substance_abuse/terminology/definition1/en/) (accessed September 12, 2016) ("dependence syndrome [is] a cluster of physiological, behavioural, and cognitive phenomena in which the use of a substance or a class of substances takes on a much higher priority for a given individual than other behaviours that once had greater value. A central descriptive characteristic of the dependence syndrome is the desire (often strong, sometimes overpowering) to take the psychoactive drugs (which may or not have been medically prescribed), alcohol, or tobacco.").

# I. The Human Rights Case for Decriminalization

Human Rights Watch and the American Civil Liberties Union oppose the criminalization of personal use of drugs and possession of drugs for personal use. We recognize that governments have a legitimate interest in preventing societal harms caused by drugs and in criminalizing harmful or dangerous behavior, including where that behavior is linked to drug use. However, governments have other means beyond the criminal law to achieve those ends and need not pursue a criminalization approach, which violates basic human rights and, as this report documents, causes enormous harm to individuals, families, and communities.

On their face, laws criminalizing the simple possession or use of drugs constitute an unjustifiable infringement of individuals' autonomy and right to privacy. The right to privacy is broadly recognized under international law, including in the International Covenant on Civil and Political Rights<sup>11</sup> and the American Convention on Human Rights.<sup>12</sup> Limitations on the right to privacy, and more broadly on an individual's autonomy, are only justifiable if they serve to advance a legitimate purpose; if they are both proportional to and necessary to achieve that purpose; and if they are non-discriminatory. Criminalizing drug use fails this test.

Governments and policymakers have long argued that laws criminalizing drug use are necessary to protect public morals;<sup>13</sup> to deter problematic drug use and its sometimes

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<sup>11</sup> International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, art. 17.

<sup>12</sup> American Convention on Human Rights ("Pact of San José, Costa Rica"), adopted November 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), art. 11.

<sup>13</sup> Peter Wehner, "GOP should stand firm against drug legalization," *Washington Post*, April 2, 2013, [https://www.washingtonpost.com/opinions/gop-should-stand-firm-against-drug-legalization/2013/04/02/32bd5f7a-915c-11e2-bdea-e32ad90da239\\_story.html](https://www.washingtonpost.com/opinions/gop-should-stand-firm-against-drug-legalization/2013/04/02/32bd5f7a-915c-11e2-bdea-e32ad90da239_story.html) (accessed July 20, 2016) ("In taking a strong stand against drug use and legalization, Republicans would align themselves with parents, schools and communities in the great, urgent task of any civilization: protecting children and raising them to become responsible adults.... [D]rug use is wrong because it is morally problematic, because of what it can do to mind and soul.... The shaping of human character is preeminently — overwhelmingly — the task of parents, schools, religious institutions and civic groups. But government can play a role."); Douglas Husak and Peter de Marneffe, *The Legalization of Drugs* (New York: Cambridge University Press, 2005), pp. 77-79.

corrosive effects on families, friends, and communities; to reduce criminal behavior associated with drugs;<sup>14</sup> and to protect drug users from harmful health consequences.<sup>15</sup>

While these are legitimate government concerns, criminalization of drug possession does not meet the other criteria. It is not proportional or necessary to achieve those government goals and is often implemented in discriminatory ways. Indeed, it has not even proven effective: more than four decades of criminalization have apparently had little impact on the demand for drugs or on rates of use in the United States.<sup>16</sup> Criminalization can also undermine the right to health of those who use.<sup>17</sup>

Instead, governments have many non-penal options to reduce harm to people who use drugs, including voluntary drug treatment, social support, and other harm reduction measures. Criminalization of drug use is also not necessary to protect third parties from harmful actions performed under the influence of drugs, and the notion that harmful or criminal conduct is an inevitable result of drug use is a fallacy.<sup>18</sup> Governments can and do criminalize negligent or dangerous behavior (such as driving under the influence or endangering a child through neglect) linked to drug use, without criminalizing drug use itself. This is precisely the approach US laws take with regard to alcohol consumption.

Those who favor criminalization of drug use often emphasize harms to children. While governments have important obligations to take appropriate measures—legislative,

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<sup>14</sup> Drug Enforcement Administration, “Speaking Out Against Drug Legalization,” 2010, [https://www.dea.gov/pr/multimedia-library/publications/speaking\\_out.pdf](https://www.dea.gov/pr/multimedia-library/publications/speaking_out.pdf) (accessed July 20, 2016), p. 14 (“Crime, violence, and drug use go hand-in-hand.”).

<sup>15</sup> Ibid., p. 13 (“Drug use is regulated and access to drugs is controlled because drugs can be harmful. There is a popular misconception that some illegal drugs can be taken safely....”); Peter Wehner, “GOP should stand firm against drug legalization” (“Drug legalization will lead to more cases of addiction, which shatters lives.”).

<sup>16</sup> See section X, How Criminalization Undermines Health.

<sup>17</sup> Ibid.

<sup>18</sup> Human Rights Watch, *A Red Herring: Marijuana Arrestees Do Not Become Violent Felons*, November 2012, <https://www.hrw.org/report/2012/11/23/red-herring/marijuana-arrestees-do-not-become-violent-felons>; Human Rights Watch, *Targeting Blacks: Drug Law Enforcement and Race in the United States*, May 2008, [https://www.hrw.org/sites/default/files/reports/uso508\\_1.pdf](https://www.hrw.org/sites/default/files/reports/uso508_1.pdf), p. 11 (“A federal survey of state prisoners nationwide revealed that among drug offenders, 58 percent had no history of violence or high-level drug activity; 35 percent had criminal histories limited to drug offenses; 21 percent were serving a sentence for a first-time offense; and 43 percent were convicted of drug possession.”). To the extent drug law proponents argue the drug trade is itself violent, much of that violence is a result of criminalization, which dramatically enhances the profitability of illicit drug markets and fuels the growth and operations of groups responsible for large-scale violence and corruption. For the human rights implications of global drug control policies, see Maria McFarland (Human Rights Watch), “The Human Rights Case for Drug Reform,” 2014, <https://www.hrw.org/world-report/2014/essays/human-rights-case-for-drug-reform>.



administrative, social, and educational—to protect children from the harmful effects of drug use,<sup>19</sup> imposing criminal penalties on children for using or possessing drugs is not the answer. States should not criminalize adult drug use on the grounds that it protects children from drugs.

Worldwide, the practical realities of governments' efforts to enforce criminal prohibitions on drug use have greatly compounded the urgent need to end those prohibitions. Criminalization has often gone hand-in-hand with widespread human rights violations and adverse human rights impacts—while largely failing to prevent the possession or use of drugs.<sup>20</sup> And rather than protecting health, criminalization of drug use has in fact undermined it.<sup>21</sup>

These grim realities are on stark display in the United States. This report describes the staggering human rights toll of drug criminalization and enforcement in the US. Not only has the government's "war on drugs" failed on its own terms, but it has needlessly ruined countless lives through the crushing direct and collateral impacts of criminal convictions, while also erecting barriers that stand between people struggling with drug dependence and the treatment they may want and need.

In the United States the inherent disproportionality of criminalizing drug use has been greatly amplified by abusive laws. Sentences imposed across the US for drug possession are often so excessive that they would amount to disproportionate punishment in violation of human rights law even if criminalization were not *per se* a human rights problem.<sup>22</sup> In many US states these excessive sentences take the form of lengthy periods

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<sup>19</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976, signed by the United States October 5, 1977, art. 12(2)(a); Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, art 24.

<sup>20</sup> Maria McFarland (Human Rights Watch), "The Human Rights Case for Drug Reform."

<sup>21</sup> Ibid. In many countries, criminalization also impedes the use of drugs for legitimate medical research and prevents patients from accessing drugs for palliative care and pain treatment. Human Rights Watch, *Abandoned in Agony: Cancer and the Struggle for Pain Treatment in Senegal*, October 2013, <https://www.hrw.org/report/2013/10/24/abandoned-agony/cancer-and-struggle-pain-treatment-senegal>.

<sup>22</sup> Human Rights Watch, *Nation Behind Bars: A Human Rights Solution*, May 2014, [https://www.hrw.org/sites/default/files/related\\_material/2014\\_US\\_Nation\\_Behind\\_Bars\\_o.pdf](https://www.hrw.org/sites/default/files/related_material/2014_US_Nation_Behind_Bars_o.pdf); UN Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation on States Parties to the Covenant (Eightieth session, 2004), U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 6; Inter-American Court of Human Rights, Gangaram-

of incarceration (especially when someone is sentenced as a “habitual offender” for habitual drug use), onerous probation conditions that many interviewees called a set-up for failure, and sometimes crippling fines and fees.<sup>23</sup>

This report also describes a range of other human rights violations and harms experienced by people who use drugs and by entire families and communities as a result of criminalization, in addition to the punishments imposed by law. For instance, enforcement of drug possession laws has a discriminatory racial impact at multiple stages of the criminal justice process, beginning with selective policing and arrests.<sup>24</sup> In addition, enforcement of drug possession laws unfairly burdens the poor at almost every step of the process, from police encounters, to pretrial detention, to criminal justice debt and collateral consequences including exclusion from public benefits, again raising questions about equal protection rights.<sup>25</sup>

Many of the problems described in this report are not unique to drug cases; rather, they reflect the broader human rights failings of the US criminal justice system. That fact serves only to underscore the practical impossibility of addressing these problems through incremental changes to the current criminalization paradigm. It also speaks to the urgency of removing drug users—people who have engaged in no behavior worthy of criminalization—from a system that is plagued with broader and deeply entrenched patterns of human rights abuse and discrimination.

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Panday Case, Judgement of January 21, 1994, Inter-Am Ct. H.R., (Ser. C) No. 16 (1994), paras. 47-48. The European Court of Human Rights has explicitly recognized the principle of proportionality in punishment, as have many common law jurisdictions. See, for example, European Court of Human Rights, *Vinter v. United Kingdom*, judgement of July 9, 2013, nos. 66069/09, 130/10, and 3896/10, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122664>; Canada Criminal Code 718.1 (“A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”); Evelyn Ellis, ed., *The Principle of Proportionality in the Laws of Europe* (Portland: Hart Publishing, 1999). Disproportionately long prison terms may also violate the prohibition on cruel and inhuman punishment, and may constitute arbitrary deprivations of liberty in violation of the right to liberty.

<sup>23</sup> See section VII, Sentencing by the Numbers, and section VIII, Living Under a Dark Cloud: Probation and Criminal Justice Debt.

<sup>24</sup> ICCPR art. 26. See also Racial Disparities in section III, The Size of the Problem: Arrests for Drug Use Nationwide.

<sup>25</sup> For people who use drugs as well as for their families and communities, arrest, prosecution, conviction, and/or incarceration for drug possession impact their enjoyment of many other human rights as well. These rights include but are not limited to the right to family unity; the rights of the child; the right to freedom of movement; the right to work; the right to adequate standard of living, including adequate food, clothing, and housing; the right to social security; the right to education; and the right to vote and take part in the conduct of public affairs.

Rather than criminalizing drug use, governments should invest in harm reduction services and public education programs that accurately convey the risks and potential harms of drug use, including the potential to cause drug dependence. Harm reduction is a way of preventing disease and promoting health that “meets people where they are” rather than making judgments about where they should be in terms of their personal health and lifestyle.<sup>26</sup> Harm reduction programs focus on limiting the risks and potential harms associated with drug use and on providing a gateway to drug treatment for those who seek it.

Implementing harm reduction practices widely is not just sound public health policy; it is a human rights imperative that requires strong federal and state leadership.<sup>27</sup> The federal government has taken some important steps to promote harm reduction,<sup>28</sup> as have some state and local entities.<sup>29</sup>

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<sup>26</sup> Human Rights Watch, *We Know What to Do: Harm Reduction and Human Rights in North Carolina*, September 2011, [https://www.hrw.org/sites/default/files/related\\_material/us0911brochurewebwcover\\_o.pdf](https://www.hrw.org/sites/default/files/related_material/us0911brochurewebwcover_o.pdf); Human Rights Watch, *In Harm's Way: State Response to Sex Workers, Drug Users and HIV in New Orleans*, December 2013, <https://www.hrw.org/report/2013/12/11/harms-way/state-response-sex-workers-drug-users-and-hiv-new-orleans>.

<sup>27</sup> ICESCR, arts. 2 and 12; UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: Article 12: The Right to the Highest Attainable Standard of Health, U.N. Doc. E/C.12/2000/4 (2000). The UN Committee on Economic, Social and Cultural Rights has interpreted the article 12 of the Covenant on Economic, Social and Cultural Rights to require, at a minimum, that states ensure a range of harm reduction interventions, including needle and syringe programs; opioid substitution therapy; overdose prevention; youth focused harm reduction services; and prison harm reduction. Committee on Economic, Social, and Cultural Rights (CESCR), Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant, Concluding Observations: Russian Federation, U.N. Doc. E/C.12/RUS/CO/5 (2011), para. 29; Concluding Observations: Tajikistan, U.N. Doc. E/C.12/TJK/CO/1 (2006), para. 70; Concluding Observations: Ukraine, UN Doc No E/C.12/UKR/CO/5 (2007), paras. 28 and 51; Concluding Observations: Poland, U.N. Doc. E/C.12/POL/CO/5 (2009); Concluding Observations: Kazakhstan, U.N. Doc. E/C.12/KAZ/CO/1 (2010); Concluding Observations: Mauritius, U.N. Doc. E/C.12/MUS/CO/4 (2010). While not binding on the US (which has signed but not ratified the ICESCR), this interpretation should be taken as important interpretive guidance to the general human rights obligation to ensure adequate medical care and social services to protect health.

<sup>28</sup> On December 18, 2015, for example, President Obama signed the 2016 Consolidated Appropriations Act, allowing federal funds to be used for some aspects of syringe exchange programs. AIDS.gov, “Department of Health and Human Services Implementation Guidance to Support Certain Components of Syringe Services Programs, 2016,” March 29, 2016, <https://www.aids.gov/pdf/hhs-ssp-guidance.pdf> (accessed July 20, 2016). See also Office of National Drug Control Policy, “National Drug Control Budget: FY 2017 Funding Highlights,” February 2016, [https://www.whitehouse.gov/sites/default/files/ondcp/press-releases/fy\\_2017\\_budget\\_highlights.pdf](https://www.whitehouse.gov/sites/default/files/ondcp/press-releases/fy_2017_budget_highlights.pdf) (accessed July 20, 2016); The White House, “FACT SHEET: Administration’s Drug Control Budget Represents Balanced Approach to Public Health and Public Safety,” February 9, 2016, <https://www.whitehouse.gov/the-press-office/2016/02/09/fact-sheet-administrations-drug-control-budget-represents-balanced> (accessed July 20, 2016).

<sup>29</sup> David Klepper, “The mayor of Ithaca, NY, wants to make his city the first in the nation to provide a space where heroin addicts can shoot up under a nurse’s care without getting arrested by police,” Associated Press, February 22, 2016, <http://www.usnews.com/news/us/articles/2016-02-22/apnewsbreak-mayor-wants-supervised-heroin-injection-site> (accessed July 20, 2016); in Colorado, Governor John Hickenlooper signed SB15-53 and SB15-116 into law on April 3, 2015; in California, Governor Jerry Brown signed AB 1535 and AB 1743 into law in September 2014.

However, the continued focus on criminalization of drug use—and the aggressiveness with which that is pursued by many public officials—runs counter to harm reduction. This report calls for a radical shift away from criminalization, towards health and social support services. Human rights principles require it.

## II. Background

### The “War on Drugs”

For four decades, federal and state measures to battle the use and sale of drugs in the US have emphasized arrest and incarceration rather than prevention and treatment. Between 1980 and 2015, arrests for drug offenses nearly tripled, rising from 580,900 arrests in 1980 to 1,488,707 in 2015.<sup>30</sup> Of those total arrests, the vast majority (78 percent in 1980 and 84 percent in 2015) have been for possession.<sup>31</sup>

Yet drug possession was not always criminalized. For much of the 19th century, opiates and cocaine were largely unregulated in the US. Regulations began to be passed towards the end of the 19th and at the start of the 20th century—a time when the US also banned alcohol. Early advocates for prohibitionist regimes relied on moralistic arguments against drug and alcohol use, along with concerns over health and crime. But many experts also point to the racist roots of early prohibitionist efforts, as certain drugs were associated in public discourse with particular marginalized races (for example, opium with Chinese immigrants).<sup>32</sup>

The US has also been a major proponent of international prohibition, and helped to push for the passage of the three major international drug control conventions beginning in the 1960s.<sup>33</sup> The purpose of the conventions was to combat drug abuse by limiting possession,

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<sup>30</sup> Tina L. Dorsey and Priscilla Middleton, “Drugs and Crime Facts,” Bureau of Justice Statistics, <http://www.bjs.gov/content/pub/pdf/dcf.pdf> (accessed August 15, 2016), p. 59; Federal Bureau of Investigation, 2015 Crime in the United States, Table 29: Estimated Number of Arrests, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-29> (accessed September 27, 2016).

<sup>31</sup> Howard N. Snyder and Joseph Mulako-Wangota, Bureau of Justice Statistics, National Estimate, Generated using the Arrest Data Analysis Tool at <http://www.bjs.gov/index.cfm?ty=datool&surl=/arrests/index.cfm> (accessed August 15, 2016); Federal Bureau of Investigation, 2015 Crime in the United States, Persons Arrested, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/persons-arrested/persons-arrested> (accessed September 27, 2016).

<sup>32</sup> Michelle Alexander, *The New Jim Crow* (New York: The New Press, 2012); Jamie Fellner, “Race, Drugs, and Law Enforcement in the United States,” *Stanford Law & Policy Review*, vol. 20 (2009), [https://journals.law.stanford.edu/sites/default/files/stanford-law-policy-review/print/2009/06/fellner\\_20\\_stan.\\_l.\\_poly\\_rev.\\_257.pdf](https://journals.law.stanford.edu/sites/default/files/stanford-law-policy-review/print/2009/06/fellner_20_stan._l._poly_rev._257.pdf) (accessed August 1, 2016), pp. 257-292; Fatema Gunja, “Position Paper: Race and the War on Drugs,” ACLU, May 2003, <https://www.aclu.org/files/FilesPDFs/ACF4F34.pdf> (accessed August 1, 2016).

<sup>33</sup> These are comprised of the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol, the Convention on Psychotropic Substances of 1971, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. UNTS vol. 976, No. 14152; UNTS vol. 1019, No. 14956; and UNTS vol. 1582, No. 27627; see

use, and distribution of drugs exclusively to medical and scientific purposes and by implementing measures against drug trafficking through international cooperation.<sup>34</sup>

In 1971, President Richard Nixon announced that he was launching a “war on drugs” in the US, dramatically increasing resources devoted to enforcing prohibitions on drugs, using the criminal law. He proclaimed, “America’s public enemy number one in the United States is drug abuse. In order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive.”<sup>35</sup> There are reasons to believe that the declaration of the “war on drugs” was more political in nature than a genuine response to a public health problem.<sup>36</sup>

Over the next decade, the “war on drugs” combined with a larger “tough on crime” policy approach, whose advocates believed harsh mandatory punishments were needed to restore law and order to the US. New laws increased the likelihood of a prison sentence even for low-level offenses, increased the length of prison sentences, and required prisoners to serve a greater proportion of their sentences before any possibility of review. These trends impacted drug offenses as well as other crimes.<sup>37</sup>

The new drug laws contributed to a dramatic rise in the prison population.<sup>38</sup> Between 1980

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also United Nations Office of Drugs and Crime, *The International Drug Control Conventions*, compiled November 2013, [https://www.unodc.org/documents/commissions/CND/Int\\_Drug\\_Control\\_Conventions/Ebook/The\\_International\\_Drug\\_Control\\_Conventions\\_E.pdf](https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Ebook/The_International_Drug_Control_Conventions_E.pdf) (accessed September 21, 2016).

<sup>34</sup> Ibid. However, the treaties do not require that drug use constitute a criminal offense. The Commentary to the 1988 Convention regarding Article 3 of the Convention on “Offences and Sanctions” makes this explicit: “It will be noted that, as with the 1961 and 1971 Conventions, paragraph 2 does not require drug consumption as such to be established as a punishable offence.” The 1988 Convention does state, however, that a member state should consider possession for personal use as a crime but, even so, this provision is “subject to its constitutional principles and the basic concepts of its legal system.” Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/CN.7/590 (1988), [http://www.unodc.org/documents/treaties/organized\\_crime/Drug%20Convention/Commentary\\_on\\_the\\_united\\_nations\\_convention\\_1988\\_E.pdf](http://www.unodc.org/documents/treaties/organized_crime/Drug%20Convention/Commentary_on_the_united_nations_convention_1988_E.pdf). See also Martin Jelsma and Amira Armenta, “The UN Drug Control Conventions: A Primer,” The Transnational Institute, October 2015, [https://www.tni.org/files/publication-downloads/primer\\_unconventions\\_24102015.pdf](https://www.tni.org/files/publication-downloads/primer_unconventions_24102015.pdf) (accessed July 30, 2016).

<sup>35</sup> Richard Nixon, “Remarks About an Intensified Program for Drug Abuse Prevention and Control,” June 17, 1971, reproduced by Gerhard Peters and John T. Woolley, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=3047> (accessed July 30, 2016).

<sup>36</sup> Dan Baum, “Legalize It All: How to Win the War on Drugs,” *Harper’s Magazine*, April 2016, <http://harpers.org/archive/2016/04/legalize-it-all/> (accessed August 21, 2016).

<sup>37</sup> Human Rights Watch, *Cruel and Usual: Disproportionate Sentences for New York Drug Offenders*, vol. 9, no. 2(B), March 1997, <http://hrw.org/reports/1997/usny/>.

<sup>38</sup> Rob Allen, “Global Prison Trends 2015,” Penal Reform International, 2015, <http://www.penalreform.org/wp-content/uploads/2015/04/PRI-Prisons-global-trends-report-LR.pdf> (accessed July 21, 2016).

and 2003 the number of drug offenders in state prisons grew twelvefold.<sup>39</sup> By 2014, an estimated 208,000 men and women were serving time in state prisons for drug offenses, constituting almost 16 percent of all state prisoners.<sup>40</sup> Few of those entering prison because of drug offenses were kingpins or major traffickers.<sup>41</sup> A substantial number were convicted of no greater offense than personal drug use or possession. In 2014, nearly 23 percent of those in state prisons for drug offenses were incarcerated simply for drug possession.<sup>42</sup> Because prison sentences for drug possession are shorter than for sales, rates of admission are even more telling: in 2009 (the most recent year for which such data is available), about one third of those entering state prisons for drug offenses (for whom the offense was known) were convicted of simple drug possession.<sup>43</sup>

## Drug Use in the United States

More than half of the US adult population report having used illicit drugs at some point in their lifetime, and one in three adults reports having used a drug other than marijuana.<sup>44</sup>

The US Department of Health and Human Services' Substance Abuse and Mental Health Services Administration (SAMHSA) conducts an annual survey of nearly 70,000 Americans over the age of 12 to produce the standard data used to research drug use. According to SAMHSA, 51.8 percent of adults reported lifetime use in 2014.<sup>45</sup> Moreover, 16.6 percent of the adult

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<sup>39</sup> Marc Mauer and Ryan S. King, "A 25-Year Quagmire: The War on Drugs and Its Impact on American Society," The Sentencing Project, September 2007, <http://www.sentencingproject.org/wp-content/uploads/2016/01/A-25-Year-Quagmire-The-War-On-Drugs-and-Its-Impact-on-American-Society.pdf> (accessed September 21, 2016), fig. 2.

<sup>40</sup> E. Ann Carson, Ph.D., "Prisoners in 2014," US Department of Justice, Bureau of Justice Statistics, September 2015, <http://www.bjs.gov/content/pub/pdf/p14.pdf> (accessed September 21, 2016), table 11. Over 50 percent of federal prisoners were incarcerated for drug offenses. *Ibid.*, table 12.

<sup>41</sup> Many are low-level street-level dealers, couriers, and other bit players in the drug trade. See Human Rights Watch, *Targeting Blacks*, p. 12.

<sup>42</sup> E. Ann Carson, Ph.D., "Prisoners in 2014," table 11.

<sup>43</sup> Thomas P. Bonczar et al., "National Corrections Reporting Program: Most Serious Offense Of State Prisoners, By Offense, Admission Type, Age, Sex, Race, And Hispanic Origin," Bureau of Justice Statistics, May 5, 2011, <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2065> (accessed August 15, 2016).

<sup>44</sup> Human Rights Watch analysis of US Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), 2014 National Survey on Drug Use and Health public-use dataset.

<sup>45</sup> Further, 57.9 percent of surveyed persons aged 18-25 reported lifetime use. For persons aged 26 or older, 50.8 percent reported lifetime use. US Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), "Results from the 2014 National Survey on Drug Use and Health: Detailed Tables," September 10, 2015, <http://www.samhsa.gov/data/sites/default/files/NSDUH-DetTabs2014/NSDUH-DetTabs2014.pdf> (accessed September 21, 2016), tables 1.23B and 1.19B.

population had used illicit drugs in the past year, while one in ten had used such drugs in the past month.<sup>46</sup>

Lifetime rates of drug use are highest among white adults for all drugs in total, and for specific drugs such as marijuana, cocaine (including crack), methamphetamine, and non-medical use of prescription drugs. Latino and Asian adults use most drugs at substantially lower rates.<sup>47</sup>

(See Figure 1 on following page)

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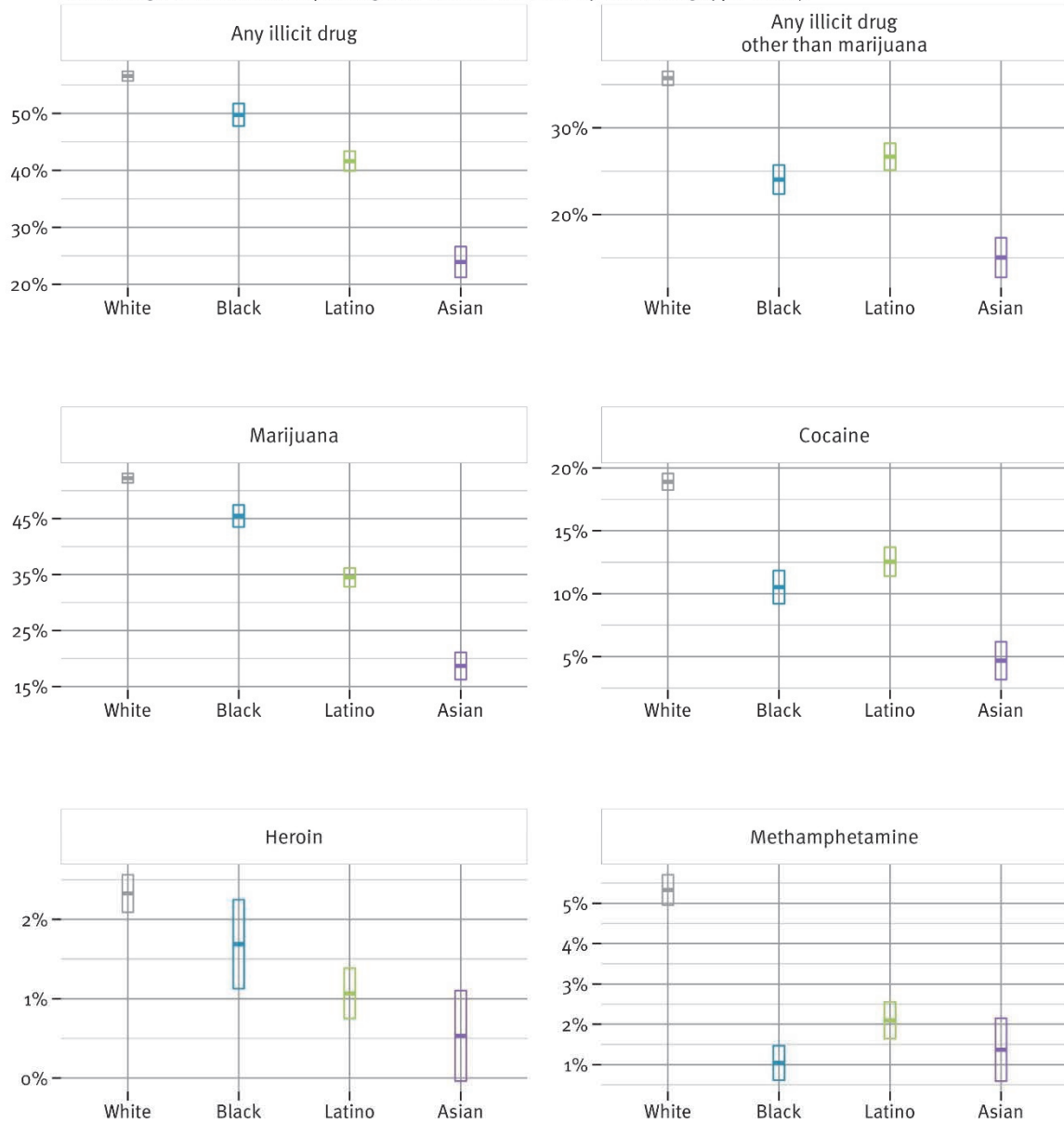
<sup>46</sup> Ibid., table 1.23B. Rates of use are highest for the age range 18-25: 36.1 percent used in the past year, and 22.0 percent used in the past month. Ibid., table 1.21B.

<sup>47</sup> Human Rights Watch analysis of US Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), 2014 National Survey on Drug Use and Health public-use dataset.



**Figure 1: Lifetime Drug Use**

Percentage of US adults reporting use in their lifetime by race/drug type (2014)



Note: The boxes represent the 95 percent confidence intervals. They indicate the amount of uncertainty in an estimate — a smaller box means we are more certain, a larger box means we are less certain. The true percentage likely lies within each box. Where the boxes occupy overlapping spaces or values (i.e. on the same horizontal plane), those estimates are not, statistically, significantly different from each other.

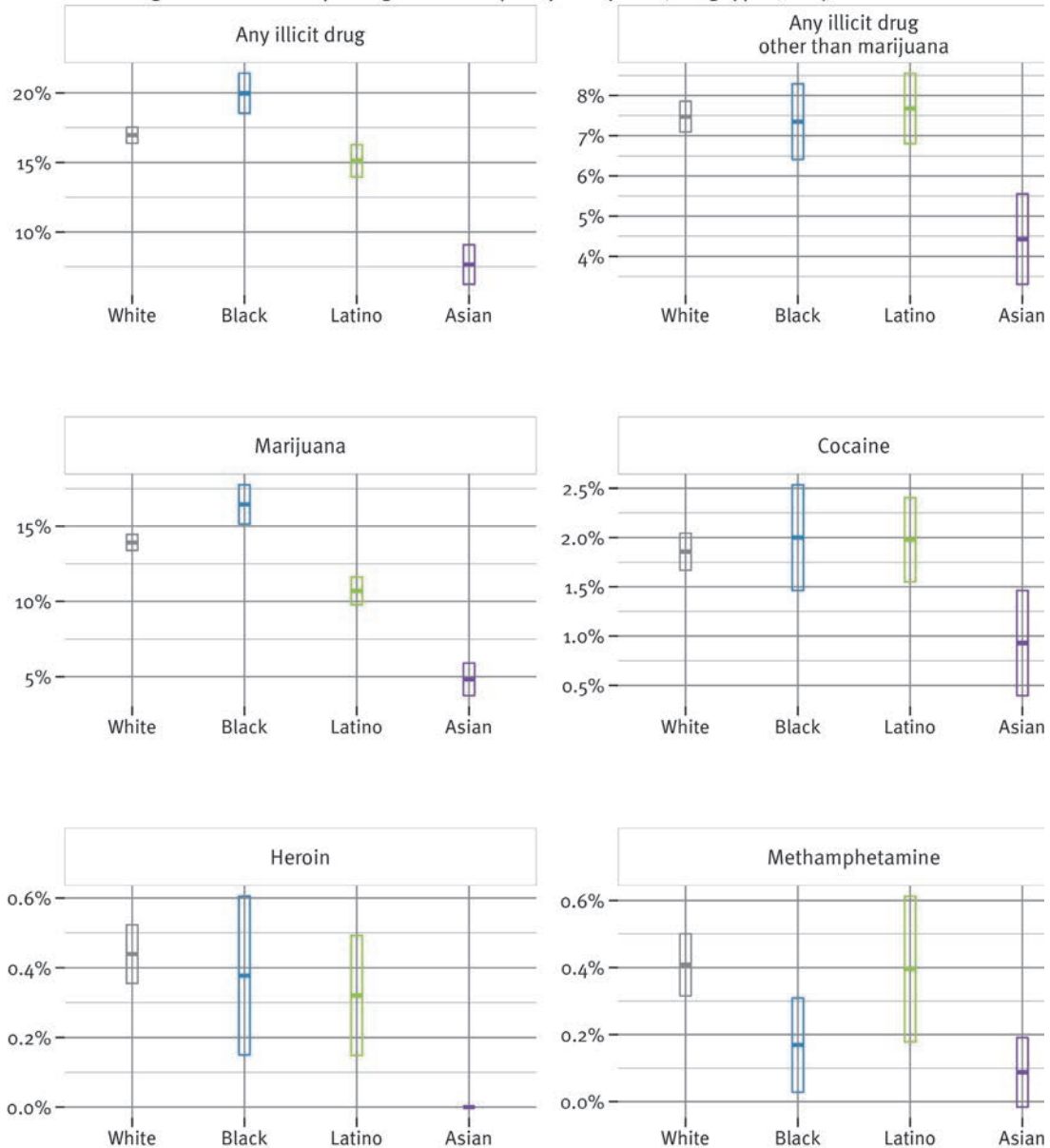
Source: Human Rights Watch analysis of US Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), 2014 National Survey on Drug Use and Health public-use dataset.

For more recent drug use, for example use in the past year, Black, white, and Latino adults use drugs other than marijuana at very similar rates. For marijuana, 16 percent of Black

adults reported using in the past year compared to 14 percent of white adults and about 11 percent of Latino adults:

**Figure 2: Past Year Drug Use**

Percentage of US adults reporting use in the past year by race/drug type (2014)



Note: The boxes represent the 95 percent confidence intervals. They indicate the amount of uncertainty in an estimate — a smaller box means we are more certain, a larger box means we are less certain. The true percentage likely lies within each box. Where the boxes occupy overlapping spaces or values (i.e. on the same horizontal plane), those estimates are not, statistically, significantly different from each other.

Source: Human Rights Watch analysis of US Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), 2014 National Survey on Drug Use and Health public-use dataset.

## State Drug Possession Laws

All US states currently criminalize the possession of illicit drugs.<sup>48</sup> Different states have different statutory schemes, choosing between misdemeanors and felonies, making distinctions based on type and/or quantities of drugs, and sometimes treating second or subsequent offenses more harshly. State sentences range from a fine, probation, or under one year in jail for misdemeanors, up to a lengthy term in prison—for example, 10 or 20 years—for some felony possession offenses or, when someone is sentenced under some states' habitual offender laws, potentially up to life in prison.

While some states have decriminalized possession of small amounts of marijuana, other states still make marijuana possession a misdemeanor or even a felony.<sup>49</sup> No state has decriminalized possession of drugs other than marijuana. As to “schedule I and II” drugs (which include heroin, cocaine, methamphetamines, and most commonly known illicit drugs), eight states and the District of Columbia treat possession of small amounts a misdemeanor, including New York.<sup>50</sup> In the remaining 42 states, possession

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<sup>48</sup> Federal law also criminalizes possession of drugs for personal use, although federal drug enforcement is focused on drug sales. Under the Controlled Substances Act, penalties for possession may be substantially lighter than in many states. Possession of small amounts of drugs (including cocaine, heroin, and methamphetamines) is a misdemeanor on the first offense and may be charged as a felony on the second or subsequent offense. 21 USC sec. 844. In practice for most jurisdictions, comparatively few simple drug possession cases are brought by federal prosecutors. However, according to a new US Sentencing Commission report, between 2008 and 2013, there was a significant rise in federal possession prosecutions. This was caused almost exclusively by large-scale marijuana possession cases near the Mexican border in Arizona. Although the average weight of other federal possession cases was 5 grams of marijuana, in border cases it was 22,000 grams. Melissa K. Reimer, “Weighing the Charges: Simple Possession of Drugs in the Federal Criminal Justice System,” US Sentencing Commission, September 2016, [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/201609\\_Simple-Possession.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/201609_Simple-Possession.pdf) (accessed September 23, 2016). This amount suggests that federal prosecutors in Arizona were using simple possession charges in cases in which they may have suspected distribution was involved.

<sup>49</sup> Colorado, Washington, Alaska, Oregon, and the District of Columbia have legalized possession of marijuana for personal use by persons 21 and older. Sixteen other states treat marijuana possession either as a fine-only misdemeanor or as an administrative or civil infraction, much like a traffic ticket. See section XI, The Way Forward.

<sup>50</sup> However, some provide for relatively low weight thresholds, over which possession becomes a felony. Misdemeanor states include Alaska (as of 2016), California, Delaware (under 1 gram of morphine/heroin/opiates, 5 grams of cocaine/methamphetamine/PCP), Maryland, New York (up to 0.5 grams of cocaine, one-eighth ounce of heroin, or one-half ounce of methamphetamines), Pennsylvania, Vermont (up to 2.5 grams of cocaine or methamphetamines or 0.2 grams of heroin), and West Virginia. In Maryland and Pennsylvania, misdemeanor possession can carry a sentence of over 1 year. AS 11.71.050; CA Health and Safety Code secs. 11350, 11374, 11377; DE Tit. 16 sec. 4763; MD Code Crim. Law sec. 5-601; NY Penal Code secs. 220.03, 220.06, 220.09; 35 PA Stat. sec. 780-113(a), (b); VT Stat. Ann. Tit. 18 secs. 4231, 4233; VT Stat. Ann. Tit. 13 sec. 1; WV Code sec. 60A-4-401. The same is true of the District of Columbia (though possession of PCP is a felony). DC Code sec. 48-904.01. We do not include Mississippi in this count, because it only treats trace cases (possession of under 0.1 gram) as misdemeanors. MS Code sec. 41-29-139(c)(1).

of small amounts of most illicit drugs other than marijuana is either always or sometimes a felony offense.<sup>51</sup>

In addition to the “convicted felon” label, many felony possession laws provide for lengthy sentences. Of the states we visited, Florida, Louisiana, and Texas classify possession of most drugs other than marijuana as a felony, no matter the quantity, and provide for the following sentencing ranges.

In Florida, simple possession of most drugs carries up to five years in prison.<sup>52</sup> Florida drug trafficking offenses are based simply on quantity triggers: simple possession can be enough, without any evidence of trafficking other than the quantity.<sup>53</sup> In Louisiana, possession of most drugs other than heroin carries up to five years in prison, and heroin carries a statutory minimum of four years in prison, up to a possible ten years.<sup>54</sup> In Texas, possession of under a gram of substances containing commonly known drugs including cocaine, heroin, methamphetamine, PCP, oxycodone, MDMA, mescaline, and mushrooms (or between four ounces and five pounds of marijuana) carries six months to two years. One to four grams carries two to ten years.<sup>55</sup> Texas judges may order the sentence to be served in prison or may suspend the sentence and require a term of probation instead.

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<sup>51</sup> In a number of states, possession of a schedule I or II drug is a felony in all circumstances. In the states in which it is sometimes, but not always, a felony, laws vary as follows: Connecticut (third offense is a felony), Iowa (third offense is a felony), Maine (second offense is a felony in certain circumstances), Massachusetts (second offense heroin is a felony), Minnesota (second offense is a felony), South Carolina (second offense is a felony; moreover, simple possession of meth becomes a felony at 1 gram and possession of 2 grams or more of heroin or one gram or more of cocaine establishes prima facie evidence of intent to distribute), Tennessee (third offense is a felony for heroin), Utah (third offense is a felony), Wisconsin (heroin, other opiates, and meth are always a felony; most others (e.g. cocaine) are a misdemeanor on the first offense but a felony thereafter), and Wyoming (third offense is a felony). CT Gen. Stat. sec. 21a-279; IA Stat. sec. 124.401(5); ME Tit. 17-A sec. 1107-A; MA Gen. Laws Ch. 94C sec. 34; MN Stat. sec. 152.025 (effective August 1, 2016); SC Stat. secs. 44-53-370(d), 44-53-375; TN Code Ann. secs. 39-17-418, 39-17-419; UT sec. 58-37-8; WI Code sec. 961.41(3g); WY Stat. sec. 35-7-1031.

<sup>52</sup> Possession of up to 20 grams of marijuana is a misdemeanor. FL Penal Code sec. 893.13; FL Stat. sec. 775.082.

<sup>53</sup> Under the trafficking provisions, simple possession of 1 gram of LSD, 4 grams of heroin, 7 grams of oxycodone, 10 grams of MDMA, 14 grams of hydrocodone or methamphetamines, or 28 grams of cocaine or PCP is a trafficking offense, punished by a mandatory minimum of three years in prison. Penalties increase as the quantity increases above additional thresholds. FL Penal Code sec. 893.135; Families Against Mandatory Minimums, “How the Reforms to Prescription Drug Trafficking Laws Affect Sentencing Policy in Florida,” undated, <http://famm.org/states-map/florida/how-the-reforms-to-prescription-drug-trafficking-laws-affect-sentencing-policy-in-florida> (accessed July 11, 2016).

<sup>54</sup> A third offense for possession of marijuana is a felony punishable by up to two years. LA Rev. Stat. secs. 40:966, 40:967.

<sup>55</sup> TX Health and Safety Code sec. 481.115; TX Penal Code secs. 12.34, 12.35. Possession of marijuana under four ounces is a class A or B misdemeanor, depending on the weight. TX Health and Safety Code sec. 481.121. One ounce equals approximately 28 grams.

On top of these baseline ranges, some states allow prosecutors to enhance the sentence range for drug possession by applying habitual offender laws that treat defendants as more culpable—and therefore deserving of greater punishment—because they have prior convictions. For example, in Louisiana a person charged with drug possession who has one or two prior felony convictions faces up to 10 years in prison. With three prior felony convictions, a person charged with drug possession faces a mandatory minimum of 20 years to life in prison.<sup>56</sup> In Texas, a person with two prior felony convictions who is charged with possession of one to four grams of drugs faces 25 years to life.<sup>57</sup>

In 2009 (the most recent year for which such data is available), 50 percent of people arrested for felony possession offenses in the 75 largest US counties had at least one prior felony conviction, mostly for non-violent offenses.<sup>58</sup> Thus the scope of potential application of the habitual offender laws to drug possession cases is extensive for states that employ them.<sup>59</sup>

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<sup>56</sup> The operation of Louisiana's habitual offender laws plays out largely as a math calculation. Possession of most drugs carries a range of zero to five years in prison. However, if defendants have one prior felony, they face two-and-a-half years under the habitual offender law (one-half the original statutory maximum of five) up to a maximum of ten (twice the statutory maximum of five). If defendants have two priors, they face a minimum of three years and four months (one-third the original statutory maximum of five) up to ten (again twice the statutory maximum). If they have three priors, on their fourth conviction they immediately face a mandatory 20 years to life in prison. Heroin possession is even harsher. A defendant who is convicted of heroin possession and has two prior heroin possession convictions (or two other "serious" felonies that carry up to ten years or more, for example burglary) faces automatic life in prison. Moreover, while people convicted of first-time non-violent offenses have to serve only 40 percent of their sentence (because of earned credits), people sentenced under the habitual offender law must serve every day of the sentence. LA Rev. Stat. 15:529.1.

<sup>57</sup> In Texas, persons charged with a state jail felony, the lowest category of felony class, face six months to two years. However, if they have two prior state jail felonies, they face two to ten years. With a state jail felony charge and two prior (regular) felony convictions, a defendant faces two to twenty years. With a felony charge and one prior felony, the person is sentenced one felony class higher, meaning the range goes from two to ten years to two to twenty years, or from two to twenty years to five to life. TX Penal Code sec. 12.42 et seq.

<sup>58</sup> For 76 percent, the prior offense was non-violent. Brian A. Reaves, Ph.D., "Felony Defendants in Large Urban Counties, 2009 - Statistical Tables," US Department of Justice, Bureau of Justice Statistics, December 2013, <http://www.bjs.gov/content/pub/pdf/fdluc09.pdf> (accessed September 22, 2016), tables 10-11.

<sup>59</sup> Some states limit their most severe enhancements to more serious violent crimes, meaning that drug possession does not figure into their enhancement scheme in any way. For example, before Colorado passed SB 96 in 2011, Class 6 felony drug possession quadrupled an offender's base sentence; these offenses no longer trigger any habitual offender enhancements. In 2011, Kentucky eliminated automatic enhancements for a number of subsequent drug offenses—including possession and several prescription drug offenses. Additionally, first degree possession convictions no longer result in a second degree habitual offender status after a subsequent non-drug conviction. Kentucky HB 463; Ram Subramanian and Rebecka Moreno, "Drug War Détente? A Review of State-level Drug Law Reform, 2009-2013," Vera Institute of Justice, April 2014, <http://archive.vera.org/sites/default/files/resources/downloads/state-drug-law-reform-review-2009-2013.pdf> (accessed August 1, 2016).

### III. The Size of the Problem: Arrests for Drug Use Nationwide

#### Possession Arrests by the Numbers

Across the United States, police make more arrests for drug possession than for any other crime. Drug possession accounts for more than one of every nine arrests by state law enforcement agencies around the country.<sup>60</sup>

Although all states arrest a significant number of people for drug possession each year, police focus on it more or less heavily in different states. For example, in California, one of every six arrests in 2014 was for drug possession, while in Alaska the rate was one of every 27.<sup>61</sup>

In 2015, state law enforcement agencies made more than 1.25 million arrests for drug possession—and because not all agencies report data, the true number of arrests is higher.<sup>62</sup> Even this estimate reveals a massive problem: 1.25 million arrests translates into an arrest for drug possession every 25 seconds of each day.<sup>63</sup>

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<sup>60</sup> As this report was going to press, the FBI released aggregated 2015 arrest data. We have used this 2015 data to update all nationwide arrest estimates for drug possession and other offenses in this report. However, for all state-by-state arrest and racial disparities analyses we relied on 2014 data, as these analyses required disaggregated data as well as data from non-FBI sources and 2014 remained the most recent year for which such data was available. Federal Bureau of Investigation, 2015 Crime in the United States, Table 29: Estimated Number of Arrests, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-29> (accessed September 27, 2016). In 2015, there were 1,250,514 drug possession arrests. The next closest offenses were larceny-theft (excluding car theft) (1,160,390 arrests), DUIs (1,089,171 arrests), and non-aggravated assaults (1,081,019 arrests). These are the reported figures, not estimates, and because some agencies failed to report, the true numbers are higher.

<sup>61</sup> United States Department of Justice, Federal Bureau of Investigation, “Uniform Crime Reporting Program Data: Arrests by Age, Sex, and Race, Summarized Yearly, 2014,” March 9, 2016, <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/36400/version/1> (accessed September 21, 2016). In using the terms “police” and “policing,” we refer broadly to state and local law enforcement, including state sheriffs, state police, and city or other local police.

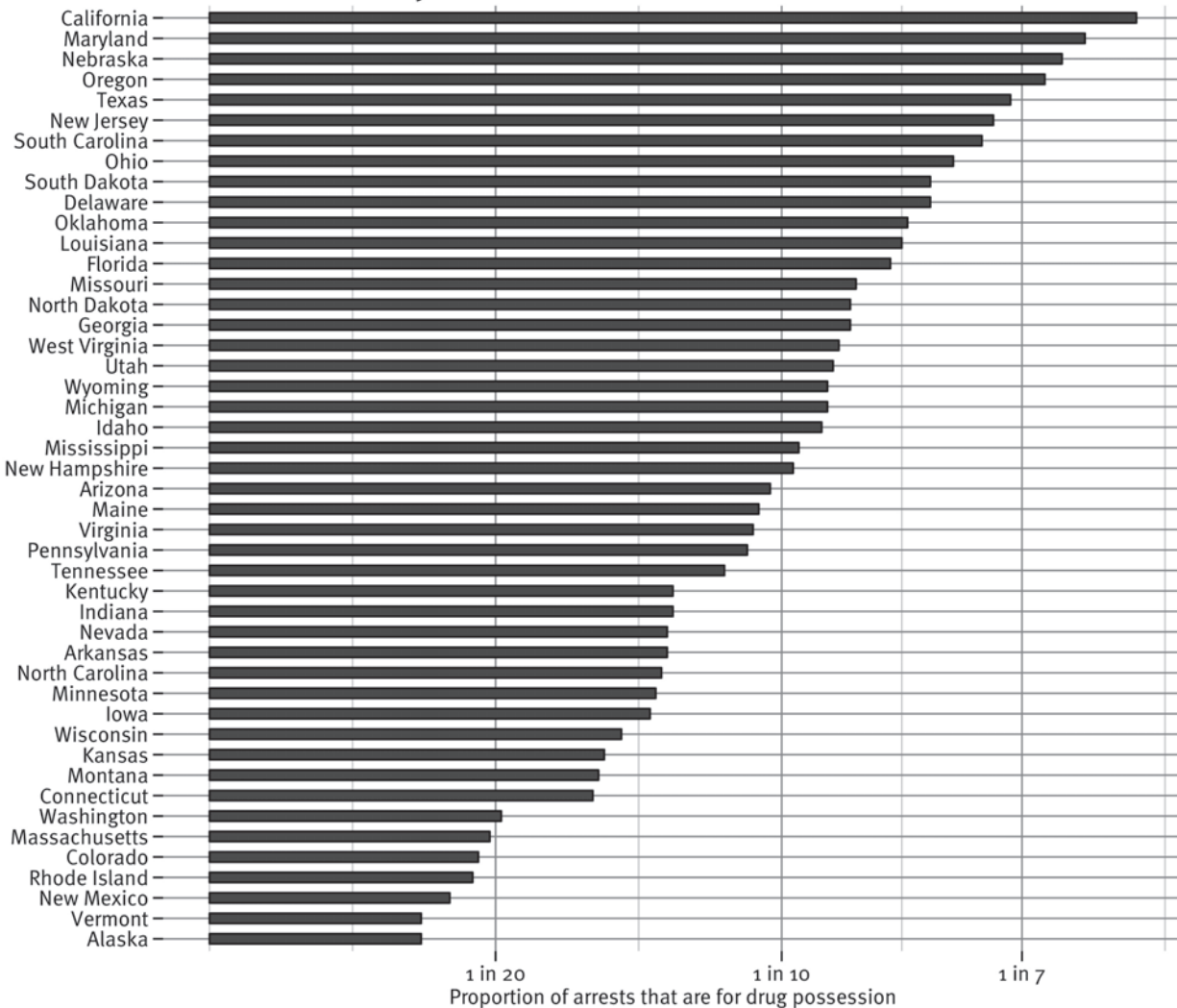
<sup>62</sup> Many law enforcement agencies under-report or do not report data regularly to the FBI. For example, the New York City Police Department and almost all agencies in Illinois and Alabama did not report in 2014. There was also under-reporting in Hawaii and Washington, DC. The total number of 1.25 million arrests is an estimate that the FBI generates from the reported data; however, the FBI does not impute arrests for non-reporting or under-reporting agencies. Federal Bureau of Investigation, 2015 Crime in the United States, Table 29: Estimated Number of Arrests, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-29> (accessed September 27, 2016). For the FBI’s note on methodology, see Federal Bureau of Investigation, “Table 69 Data Declaration,” 2016, [https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-69/tab69datadec\\_final.pdf](https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-69/tab69datadec_final.pdf) (accessed September 27, 2016).

<sup>63</sup> Ibid.

**Figure 3: Drug possession is the most common arrest offense in the US**

Proportion of total arrests that are for drug possession by state (2014)

The national rate is 1 in 9



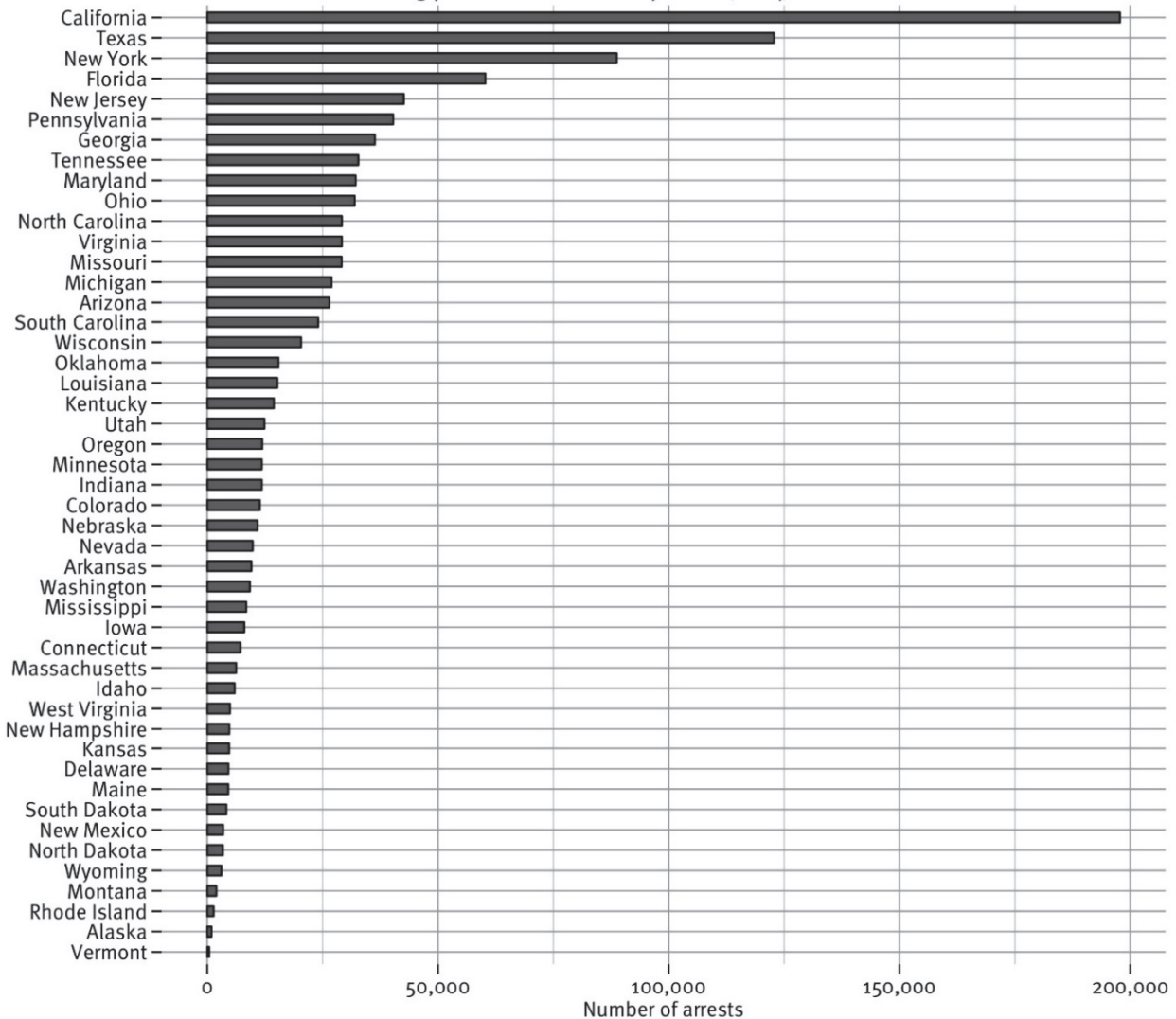
Note: Excludes states where less than 45 percent of the population was covered by reporting agencies.

Source: Human Rights Watch analysis of United States Department of Justice, Federal Bureau of Investigation, Uniform Crime Reporting (UCR) Program Data: Arrests by Age, Sex, Race, Summarized Yearly, 2014; Florida Office of the State Courts Administrator Offender Based Transaction System data; and New York Division of Criminal Justice Services data.

Some states arrest significantly more people for drug possession than other states:

**Figure 4: Over 1 million drug possession arrests in the US per year**

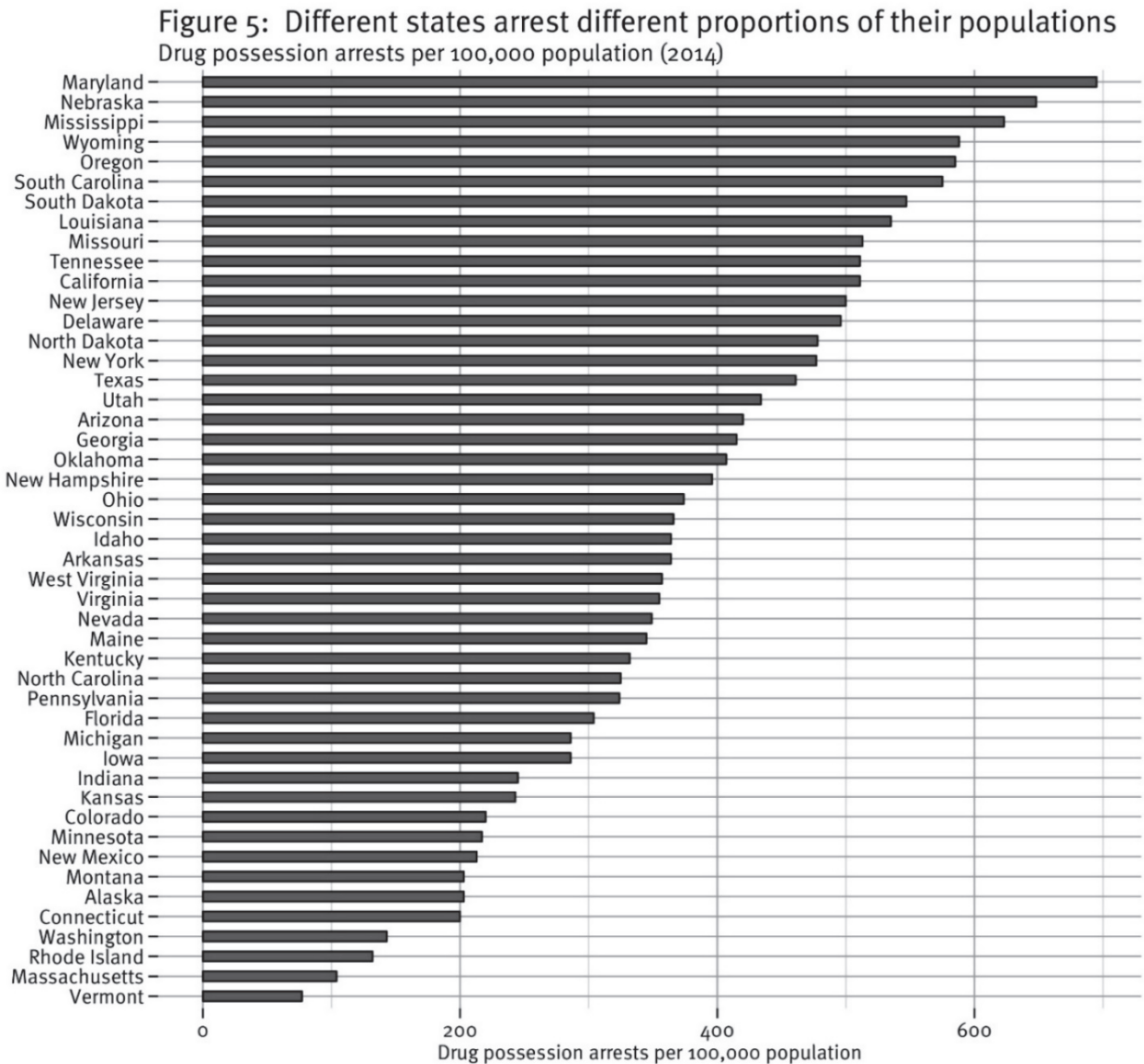
Minimum number of drug possession arrests by state (2014)



Note: Excludes states where less than 45 percent of the population was covered by reporting agencies.  
Source: Human Rights Watch analysis of United States Department of Justice, Federal Bureau of Investigation, Uniform Crime Reporting (UCR) Program Data: Arrests by Age, Sex, Race, Summarized Yearly, 2014;  
Florida Office of the State Courts Administrator Offender Based Transaction System data;  
and New York Division of Criminal Justice Services data.



While the bulk of drug possession arrests are in large states such as California, Texas, and New York, the list of hardest-hitting states looks different when mapped onto population size. Maryland, Nebraska, and Mississippi have the highest per capita drug possession arrest rates. For comparison, the rate of arrest for drug possession ranged from 700 per 100,000 people in Maryland to 77 per 100,000 in Vermont:



Note: Excludes states where less than 45 percent of the population was covered by reporting agencies.  
Source: Human Rights Watch analysis of United States Department of Justice, Federal Bureau of Investigation, Uniform Crime Reporting (UCR) Program Data: Arrests by Age, Sex, Race, Summarized Yearly, 2014; Florida Office of the State Courts Administrator Offender Based Transaction System data; and New York Division of Criminal Justice Services data.

The differences in drug arrest rates at the state level are all the more striking because drug use rates are fairly consistent across the country. SAMHSA data shows that about 3 percent of US adults used an illicit drug other than marijuana in the past month.<sup>64</sup> There is little variation at the state level, where past month use ranges from about 2 percent in Wyoming to a little over 4 percent in Colorado. For marijuana, there is slightly greater variation. About 8 percent of US adults used marijuana in the past month, but this ranged from about 5 percent in South Dakota to 15 percent in Colorado.<sup>65</sup>

While many public officials told us drug law enforcement is meant to get dealers off the streets, the vast majority of people arrested for drug offenses are charged with nothing more than possessing a drug for their personal use.<sup>66</sup> For every person arrested for selling drugs in 2015, four were arrested for possessing or using drugs—and two of those four were for marijuana possession.<sup>67</sup>

Despite shifting public opinion on marijuana, about half of all drug possession arrests are for marijuana.<sup>68</sup> In 2015, there were over 574,640 arrests just for marijuana possession.<sup>69</sup> By comparison, there were 505,681 arrests for violent crimes (which the FBI defines as murder, non-negligent manslaughter, rape, robbery, and aggravated assault). This means

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<sup>64</sup> Substance Abuse and Mental Health Services Administration, “2013-2014 National Survey on Drug Use and Health: Model-Based Prevalence Estimates (50 States and the District of Columbia),” 2014, <http://www.samhsa.gov/data/sites/default/files/NSDUHsaePercents2014.pdf> (accessed September 22, 2016), table 6.

<sup>65</sup> Ibid., table 3.

<sup>66</sup> The FBI considers possession with intent to distribute (PWID) to be a sales/manufacturing offense rather than a possession offense. Although it is up to the state agencies to classify drug arrests as either possession or sales/manufacturing in reporting to the FBI, an FBI staff person told us she believed all state agencies reporting also treat PWID as a sales rather than a possession offense. “Possession” in the FBI data thus refers to simple possession only, i.e. possession for personal use. Human Rights Watch phone call with Criminal Justice Information Services staff, FBI, October 20, 2015. All public officials we interviewed also considered PWID a sales offense, and some state statutes lump them together. The fact that the UCR does not distinguish between PWID and other sales arrests is unfortunate, because our research suggests PWID may be improperly charged in simple possession cases.

<sup>67</sup> The FBI codes arrest offenses by the most serious charge, so if a person were arrested for marijuana possession and cocaine possession, the marijuana possession charge would not be included in this number. Federal Bureau of Investigation, 2015 Crime in the United States, Persons Arrested, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/persons-arrested/persons-arrested> (accessed September 27, 2016).

<sup>68</sup> Federal Bureau of Investigation, 2014 Crime in the United States, Persons Arrested. Additionally, 20 percent of possession arrests are for opiates or cocaine, and the remaining 30 percent are for other drug types. United States Department of Justice, Federal Bureau of Investigation, “Uniform Crime Reporting Program Data: Arrests by Age, Sex, and Race, Summarized Yearly, 2014,” March 9, 2016, <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/36400/version/1> (accessed September 21, 2016).

<sup>69</sup> Federal Bureau of Investigation, 2015 Crime in the United States, Persons Arrested, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/persons-arrested/persons-arrested> (accessed September 27, 2016).

that police made almost 14 percent more arrests for simple marijuana possession than for all violent crimes combined.<sup>70</sup>

Some police told us that they have to make an arrest if they see unlawful conduct, but this glosses over the key question of where and upon whom the police are focusing their attention to begin with. Differences in arrest rates for drug possession within a state reveal that individual police departments have substantial discretion in how they enforce the law, resulting in stark contrasts. For example, data provided to us by Texas shows that 53 percent of drug possession arrests in Harris County (in and around Houston) were for marijuana, compared with 39 percent in nearby Dallas County.<sup>71</sup> Yet a nearly identical proportion of both counties' populations used drugs in the past year.<sup>72</sup>

Additionally, certain jurisdictions within a state place a stronger focus on policing drug possession. In New York State, the counties with the highest drug possession arrest rates by a large margin were all in and around urban areas of New York City and Buffalo.<sup>73</sup> In Florida, the highest rates of arrest were spread around the state in rural Bradford County, urban Miami-Dade County, Monroe County (the Keys), rural Okeechobee County, and urban Pinellas County.<sup>74</sup> Within both states, drug use rates vary little between regions.<sup>75</sup>

In Texas, the counties with the highest drug possession arrest rates are all small rural counties. Kenedy County, for example, has an adult population of 407 people, yet police there made 329 arrests for drug possession between 2010 and 2015.<sup>76</sup>

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<sup>70</sup> Federal Bureau of Investigation, 2015 Crime in the United States, Table 29: Estimated Number of Arrests, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-29> (accessed September 27, 2016).

<sup>71</sup> Human Rights Watch analysis of data provided by the Texas Office of Court Administration. Our data used cases rather than arrests as the unit of analysis, but because prosecutors did not deviate from arrest charges in the vast majority of cases, types of cases provide a proxy for types of arrests.

<sup>72</sup> About 5 percent of the populations (over age 12) of both the Dallas and Houston regions reported using marijuana in the past month. About 2.5 percent (Dallas) and 2.9 percent (Harris) used non-marijuana illicit drugs in the past month. Substance Abuse and Mental Health Services Administration, "2012-2014 NSDUH Substate Region Estimates," September 12, 2014, <http://www.samhsa.gov/data/population-data-nsduh/reports?tab=38> (accessed September 26, 2016), table 2. Sub-state usage rates are not available for adults only; therefore, we use the over age 12 rate.

<sup>73</sup> Human Rights Watch analysis of New York State Division of Criminal Justice Services data.

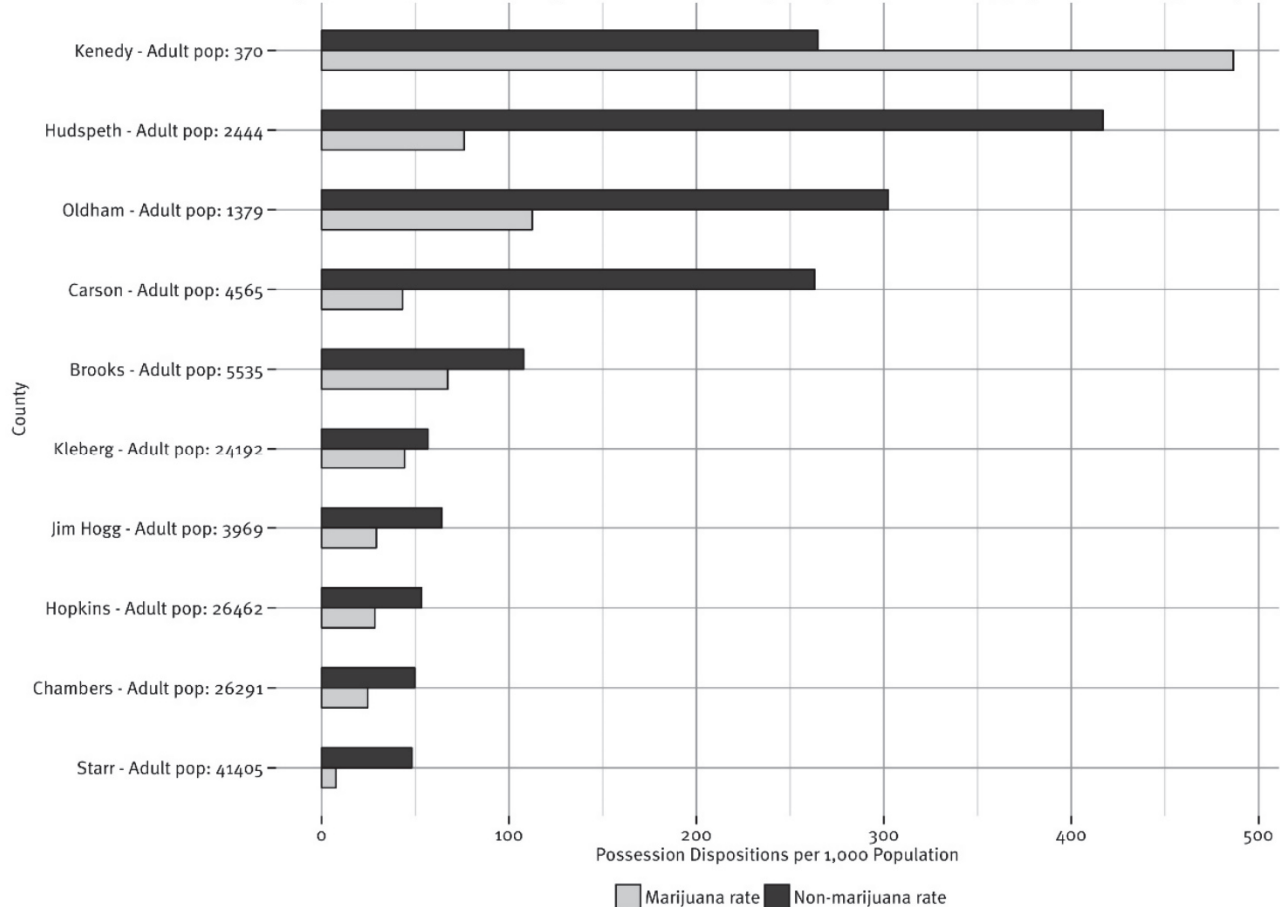
<sup>74</sup> Human Rights Watch analysis of Florida Offender Based Transaction System data.

<sup>75</sup> Past-month marijuana use among people over age 12 ranged from 8.4 to 9.2 percent among all New York regions and 5.2 to 9 percent among Florida regions. Rates of past-month non-marijuana use ranged from 3 to 3.5 percent in New York and 2.6 to 3.4 percent in Florida regions. Substance Abuse and Mental Health Services Administration, "2012-2014 NSDUH Substate Region Estimates," tables 3, 6.

<sup>76</sup> Human Rights Watch analysis of data provided by the Texas Office of Court Administration.

**Figure 6: Texas drug possession arrest rates highest in smaller counties**

Top ten Texas counties with highest rates of non-marijuana possession cases, (September 2010 - January 2016)



Sources: Human Rights Watch analysis of Texas Office of Courts Administration data. Population data from US Census Bureau 5-year ACS.

## Racial Disparities

Rather than stumbling upon unlawful conduct, when it comes to drug use and possession, police often aggressively search it out—and they do so selectively, targeting low-income neighborhoods and communities of color. As criminal justice practitioners, social science experts, and the US public now recognize all too well, racially disparate policing has had devastating consequences.<sup>77</sup>

<sup>77</sup> Jonathan Blanks, “The War on Drugs Has Made Policing More Violent,” *Democracy Journal*, July 19, 2016, <http://democracyjournal.org/arguments/the-war-on-drugs-has-made-policing-more-violent/> (accessed July 21, 2016).

Research has consistently shown that police target certain neighborhoods for drug law enforcement because drug use and drug sales occur on streets and in public view. Making arrests in these neighborhoods is therefore easier and less resource-intensive.

Comparably few of the people arrested in these areas are white.<sup>78</sup> Harrison Davis, a young Black man who was charged with possession of cocaine in Shreveport, Louisiana, recalled how the arresting officer had defended what Harrison considered racial profiling<sup>79</sup> during a preliminary examination: “‘I pulled him over because he was in a well-known drug area,’ the police officer says to the judge. But I’ve been living there for 27 years. It’s nothing but my family.”<sup>80</sup>

Black adults are more than two-and-a-half times as likely as white adults to be arrested for drug possession in the US.<sup>81</sup> In 2014, Black people accounted for just 14 percent of people who used drugs in the previous year, but close to a third of those arrested for drug possession.<sup>82</sup> In the 39 states for which we have sufficient police data, Black adults were more than four times as likely to be arrested for marijuana possession as white adults.<sup>83</sup>

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<sup>78</sup> Ezekiel Edwards, Will Bunting, and Lynda Garcia, “The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests,” American Civil Liberties Union, June 2013, [https://www.aclu.org/sites/default/files/field\\_document/1114413-mj-report-rfs-rel1.pdf](https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf) (accessed September 22, 2016); Jamie Fellner, “Race, Drugs, and Law Enforcement in the United States,” *Stanford Law & Policy Review*, vol. 20 (2009), [https://journals.law.stanford.edu/sites/default/files/stanford-law-policy-review/print/2009/06/fellner\\_20\\_stan.\\_l.\\_poly\\_rev.\\_257.pdf](https://journals.law.stanford.edu/sites/default/files/stanford-law-policy-review/print/2009/06/fellner_20_stan._l._poly_rev._257.pdf) (accessed August 1, 2016), pp. 257-292.

<sup>79</sup> “Racial profiling” refers to the selection or targeting of people for law enforcement contact based on their real or perceived race, ethnicity, or national origin, rather than, as required by law, upon reasonable suspicion that they have engaged in criminal activity. Racial profiling includes policies or practices that unjustifiably have a disparate impact on certain communities. Ezekiel Edwards, Will Bunting, and Lynda Garcia, “The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests,” p. 116.

<sup>80</sup> Human Rights Watch interview with Harrison Davis (pseudonym), Shreveport, February 5, 2016.

<sup>81</sup> Human Rights Watch analysis of United States Department of Justice, Federal Bureau of Investigation, “Uniform Crime Reporting Program Data: Arrests by Age, Sex, and Race, Summarized Yearly, 2014;” New York Division of Criminal Justice Services data; and Florida Office of the State Courts Administrator Offender Based Transaction System data. The rate only includes data from 39 states that provide data from enough law enforcement agencies to cover at least 75 percent of the state’s population. In collecting state arrest data, the FBI does not use Latino/Hispanic groupings in its coding of race, only white, Black, Asian or “Indian” (Native American).

<sup>82</sup> Human Rights Watch analysis of US Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), 2014 National Survey on Drug Use and Health public-use dataset and of United States Department of Justice, Federal Bureau of Investigation, “Uniform Crime Reporting Program Data: Arrests by Age, Sex, and Race, Summarized Yearly, 2014.” There is no publicly released data on drug use rates disaggregated by race at the state and sub-state levels.

<sup>83</sup> Not all states report thoroughly to the FBI, from whom we obtained arrest data. Because we compared arrest data and US Census data, we could not accurately assess racial disparities where reporting coverage was limited. We therefore included only those states where at least 75 percent of the population was covered in data reported to the FBI. There is no evidence that states that fell below this threshold would have substantially different arrest national disparities. Because the FBI does not

The disparities in absolute numbers or rates of arrests cannot be blamed on a few states or jurisdictions. While numerous studies have found racial disparities in marijuana arrests,<sup>84</sup> analyses of state- and local-level data provided to Human Rights Watch show consistent disparities across the country for all drugs, not just marijuana.

In every state for which we have sufficient police data, Black adults were arrested for drug possession at higher rates than white adults, and in many states the disparities were substantially higher than the national rate—over 6 to 1 in Montana, Iowa, and Vermont.<sup>85</sup>

(See Figure 7 on following page)

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keep data on Latinos arrested, classifying them instead as white or Black, our racial disparities analysis is limited to those categories.

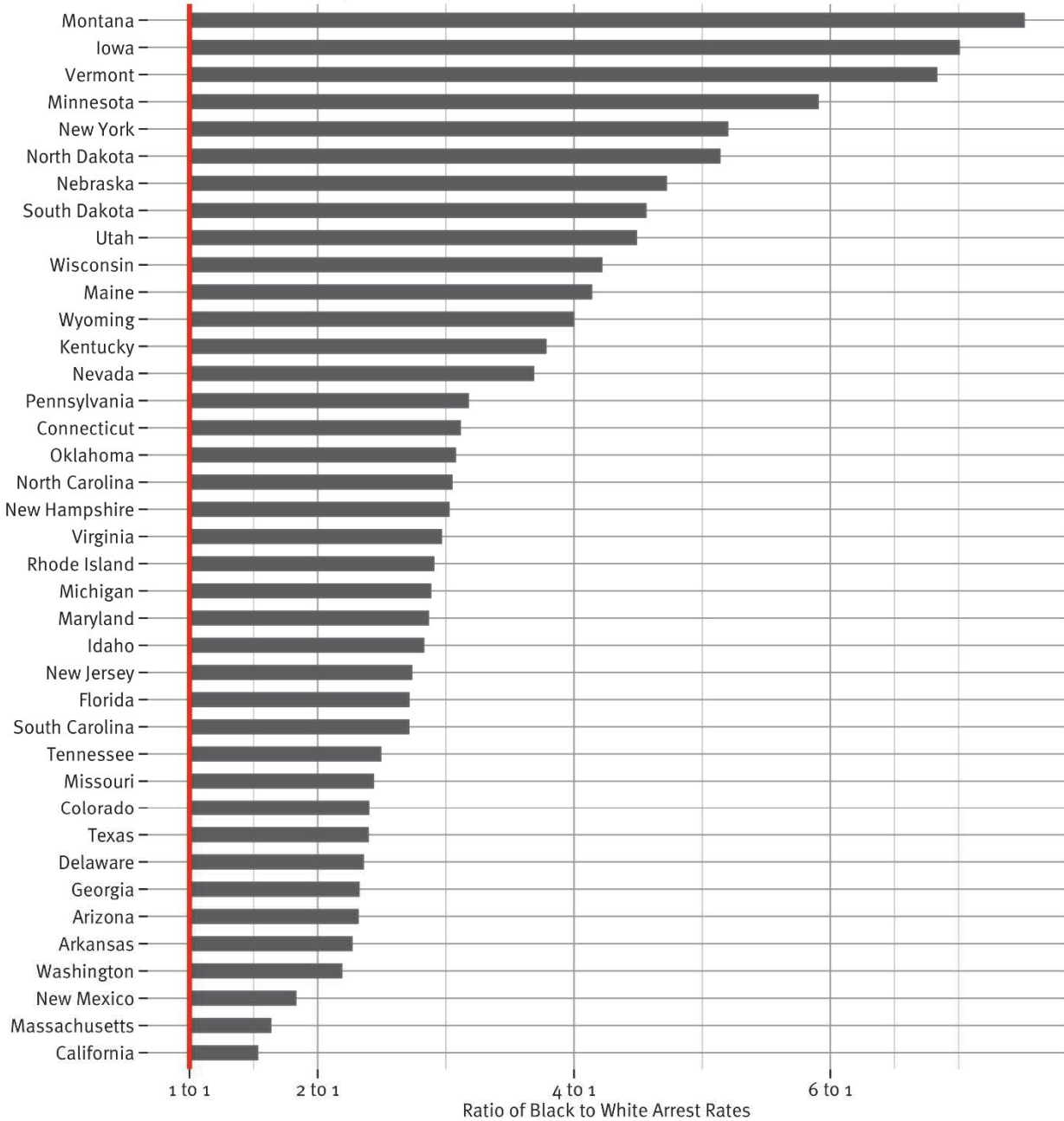
<sup>84</sup> Meghan Ragany, Rose Wilson, and Jon Wool, “Racial Disparity in Marijuana Policing in New Orleans,” Vera Institute New Orleans, July 2016, <http://archive.vera.org/sites/default/files/resources/downloads/racial-disparity-marijuana-policing-new-orleans.pdf>; Ezekiel Edwards, Will Bunting, and Lynda Garcia, “The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests.”

<sup>85</sup> Drug use data is not available disaggregated by race at the state level so we cannot examine arrests taking state-specific Black and white drug use rates into account. However, overall, there is very little geographic variation in drug use and, nationally, adults of different races use drugs at similar rates. See Drug Use in the United States in Section II.

**Figure 7: Race disparities in US drug possession arrests**

Ratios of arrest rates per race disaggregated 100,000 adult population by state (2014)

Red line indicates equal Black and white arrest rates



Note: Excludes states where less than 75 percent of the population was covered by reporting agencies. This is reported data only and does not estimate arrests from non-reporting agencies.

Source: Human Rights Watch analysis of United States Department of Justice, Federal Bureau of Investigation, Uniform Crime Reporting (UCR) Program Data: Arrests by Age, Sex, Race, Summarized Yearly, 2014; Florida Office of the State Courts Administrator Offender Based Transaction System data; New York Division of Criminal Justice Services data; and US Census Bureau 2014 ACS 5-year estimate.

These figures likely underestimate the racial disparity nationally, because in three states with large Black populations—Mississippi, Louisiana, and Alabama—an insufficient proportion of law enforcement agencies reported data and thus we could not include them in our analysis.

Our in-depth analysis of Florida and New York data show that disparities are not isolated to a few municipalities or urban centers, though they are considerably starker in some localities than in others.

In Florida, 60 of 67 counties arrested Black people for drug possession at higher rates than white people.<sup>86</sup> In Sarasota County, the ratio of Black to white defendants facing drug possession charges was nearly 8 to 1 when controlling for population size. Down the coast in comparably sized Collier County, the ratio, while still showing a disparity, was less than 3 to 1.

In New York, 60 of 62 counties arrested Black people for drug possession at higher rates than white people.<sup>87</sup> In Manhattan (New York County), there were 3,309 arrests per 100,000 Black people compared to 306 per 100,000 white people between 2010 and 2015. In other words, Black people in Manhattan were nearly 11 times more likely than white people to be arrested for drug possession.

(See Figures 8 and 9 on following pages)

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<sup>86</sup> Human Rights Watch analysis of Florida Office of the State Courts Administrator Offender Based Transaction System data and US Census Bureau ACS 5-year estimate. The seven counties in Florida and the two counties in New York where white adults were arrested at higher rates than Black adults all had very low overall numbers of drug possession arrests.

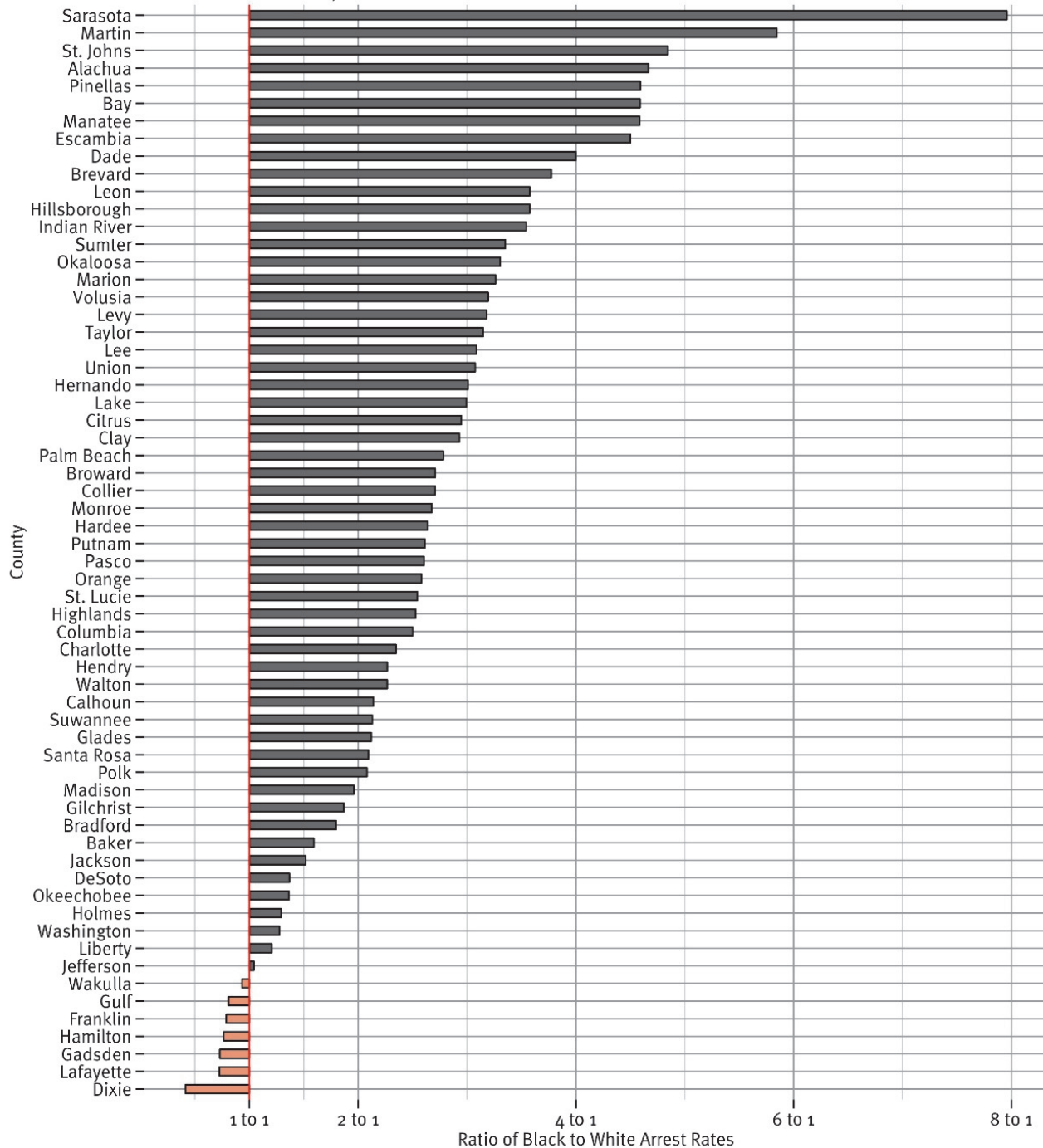
<sup>87</sup> Human Rights Watch analysis of New York Division of Criminal Justice Services data and US Census Bureau 2014 ACS 5-year estimate.



**Figure 8: Race disparities in drug possession arrests, Florida**

Ratios of arrest rates per race disaggregated 100,000 adult population by county (2010-2015)

Red line indicates equal black and white arrest rates

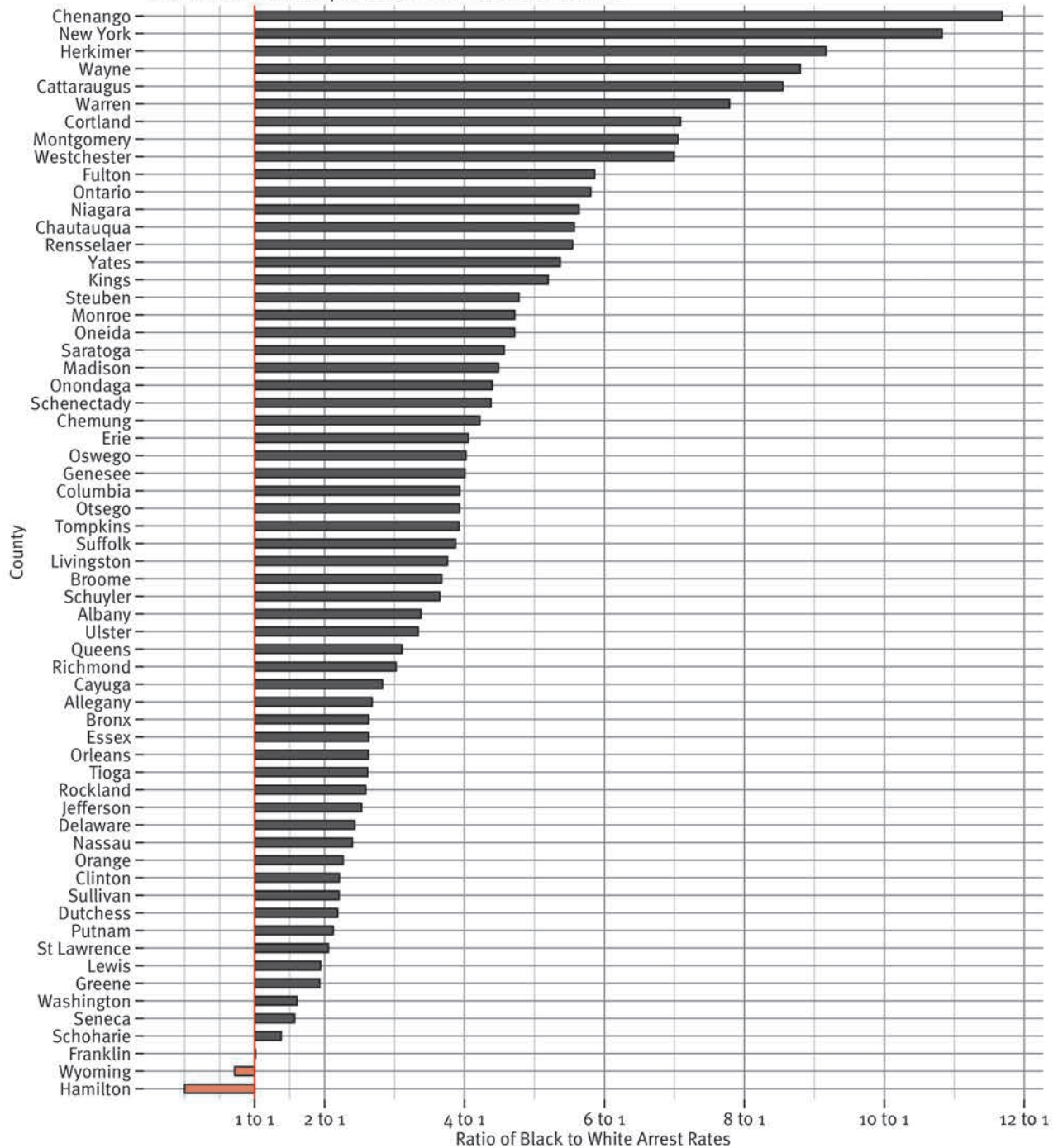


Sources: Human Rights Watch analysis of Florida Office of the State Courts Administrator Offender Based Transaction System (OBTS) data. Population data from US Census 2014 ACS 5-year estimate.

**Figure 9: Race disparities in drug possession arrests, New York**

Ratios of arrest rates per 100,000 adult population by county (2010-2015)

Red line indicates equal Black and white arrest rates



Sources: Human Rights Watch analysis of New York Division of Criminal Justice Services data. Population data from US Census 2014 ACS 5-year estimate.

Under international human rights law, prohibited racial discrimination occurs where there is an unjustifiable disparate impact on a racial or ethnic group, regardless of whether there is any intent to discriminate against that group.<sup>88</sup> Enforcement of drug possession laws in the US reveals stark racial disparities that cannot be justified by disparities in rates of use.

## Incentives for Drug Arrests

Department cultures and performance metrics that incentivize high numbers of arrests may drive up the numbers of unnecessary drug arrests and unjustifiable searches in some jurisdictions.

In some cases, department culture may suggest to individual officers that the way to be successful and productive, and earn promotions, is to have high arrest numbers. In turn, a focus on arrest numbers may translate into an emphasis on drug arrests, because drug arrests are often easier to obtain than arrests for any other type of offense, especially if certain neighborhoods are targeted. As Randy Smith, former Slidell Chief of Police and current Sheriff for St. Tammany Parish, Louisiana, told us:

[Suppose I say,] “I want you to go out there and bring me in [more arrests]. Your numbers are down, last month you only had 10 arrests, you better pick that up or else I’m going put you in another unit.” You’re going to go out there and do what? You’re going [to go] out there to make drug arrests.<sup>89</sup>

Although the practice is outlawed in several states, some police departments operate a system of explicit or implicit arrest quotas.<sup>90</sup> Whether arrest numbers are formalized into

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<sup>88</sup> International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969, ratified by the United States November 20, 1994, art. 1. The Committee on the Elimination of Racial Discrimination has explained that “the definition of racial discrimination in article 1 expressly extends beyond measures which are explicitly discriminatory to encompass measures which are discriminatory in fact and effect.” *L. R. et al. v. Slovakia*, Communication No. 31/2003, U.N. Doc. CERD/C/66/D/31/2003 (2005). For further analysis, see generally, Jamie Fellner, “Race, Drugs, and Law Enforcement in the United States,” *Stanford Law & Policy Review*, vol. 20 (2009), [https://journals.law.stanford.edu/sites/default/files/stanford-law-policy-review/print/2009/06/fellner\\_20\\_stan.\\_l.\\_poly\\_rev.\\_257.pdf](https://journals.law.stanford.edu/sites/default/files/stanford-law-policy-review/print/2009/06/fellner_20_stan._l._poly_rev._257.pdf) (accessed August 1, 2016), pp. 257-292.

<sup>89</sup> Human Rights Watch interview with Police Chief Randy Smith, Slidell, February 3, 2016. Randy Smith was elected sheriff in fall 2015. He took office on July 1, 2016.

<sup>90</sup> Police Reform Organizing Project, “Working Towards a More Safe and Fair City: Abolishing Quotas and Involving Communities,” September 2014, <http://www.policereformorganizingproject.org/wp->

quotas or understood as cultural expectations of a department, they may put some officers under immense pressure not only to make regular stops and arrests but to match or increase their previous numbers, in order to be seen as adequately “productive.”<sup>91</sup> In August 2015, twelve New York Police Department officers filed a class-action lawsuit against the department for requiring officers to meet monthly arrest and summons quotas, with one plaintiff noting that after being told he was “dragging down the district’s overall arrest rate,” he was given more undesirable job assignments.<sup>92</sup> In an Alabama town, an officer claimed in 2013 to have been fired after publicly criticizing the police department’s new ticket quota directives, which included making roughly 72,000 contacts (including arrests, tickets, warnings, and field interviews) per year in a town of 50,000 people.<sup>93</sup>

Such departmental pressure to meet arrest quotas can easily lead to more arbitrary stops and searches. In the aftermath of Michael Brown’s death in Ferguson, Missouri, the US Department of Justice’s Civil Rights Division recommended that the Ferguson Police Department change its stop and search policies in part by prohibiting “the use of ticketing and arrest quotas, whether formal or informal,” and focus instead on community protection.<sup>94</sup>

Randy Smith told us he opposes putting “expectations” or quotas on officers. “It kills you,” he explained:

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content/uploads/2012/09/Working\_Towards\_a\_More\_Safe\_and\_Fair\_City.pdf (accessed July 7, 2016) (“Promotion or job security in the Department largely depends on the number of arrests made and tickets issued. To meet their quota requirement, officers resort to ineffective and confrontational policing methods, which erode the NYPD’s relationship with many communities. The Department’s quota system, in effect, creates an incentive for harmful and counterproductive police practices.”); John Simerman, “Internal memo reveals apparently illegal quota system for St. John Parish Sheriff Mike Tregre’s office,” *The Advocate*, December 20, 2015, [http://www.theadvocate.com/new\\_orleans/news/article\\_d2odf80c-4e54-598e-be93-4d0d2c784b6f.html](http://www.theadvocate.com/new_orleans/news/article_d2odf80c-4e54-598e-be93-4d0d2c784b6f.html) (accessed July 7, 2016).

<sup>91</sup> John Eterno, who served with the NYPD for over 20 years, claims that words like “productivity” are euphemisms for quotas. One current officer he spoke to said he was “given strict daily quotas and asked at the end of his tour about his numbers. An officer who fails to meet the required number for the day is berated ... not allowed time off and given unpalatable work assignments.” John A. Eterno, “Policing by the Numbers,” *New York Times*, June 17, 2012, <http://www.nytimes.com/2012/06/18/opinion/the-nypds-obsession-with-numbers.html> (accessed July 8, 2016).

<sup>92</sup> Saki Knafo, “A Black Police Officer’s Fight Against the N.Y.P.D.,” *New York Times*, February 18, 2016, <http://www.nytimes.com/2016/02/21/magazine/a-black-police-officers-fight-against-the-nypd.html> (accessed July 8, 2016).

<sup>93</sup> Tracy Oppenheimer, “Cop Fired for Speaking Out Against Ticket and Arrest Quotas,” *Reason*, July 24, 2013, <http://reason.com/reasontv/2013/07/24/how-quotas-pervert-police-priorities-fir> (accessed July 8, 2016).

<sup>94</sup> US Department of Justice, Civil Rights Division, “Investigation of the Ferguson Police Department,” March 4, 2015, [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) (accessed July 8, 2016), p. 91.

I think sometimes you start building numbers and stats, and you kind of lose the ability to make better decisions on getting someone help, [when] getting a stat is putting them in jail. I've been there, and I've seen. You start having some serious problems.<sup>95</sup>

He said when officers understand that they are expected to make high arrest numbers, they often focus on drug possession:

So you're going to stop 10 cars in maybe a not so good neighborhood. Out of 10 cars, you might get one out of those 10 that you get some dope or marijuana or a joint in the ash tray, or a Xanax in your purse.... If you dump [any] purse out, there's probably some kind of anti-depression medicine in there, which is a felony [potentially]. And we know it, we've seen it, where those street crime guys will get out there and bring you to jail on a felony for a schedule four without a prescription, just because they got a stat. They're tying up the jail. It's ridiculous. That shit has got to stop....

You've got to look at the big picture. If you put quotas—which is a bad word—[officers] are going to start bum rapping people. The guy we got with the one pill, the one stop out of 10, what did I do with those other nine people that weren't doing nothing? I stopped them. I harassed them. I asked them if they had guns in their car. I asked them if they had any illegal contraband. I'm asking them to search their car. What am I doing to the general citizen?<sup>96</sup>

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<sup>95</sup> Human Rights Watch interview with Police Chief Randy Smith, Slidell, February 3, 2016.

<sup>96</sup> Ibid.

## Federal Funding, an Opportunity for Leadership

In recent years, many advocates have expressed concern that high arrest numbers were incentivized by federal grant monies to state and local law enforcement through the Edward Byrne Memorial Justice Assistance Grant (JAG) program, administered by the Department of Justice's Bureau of Justice Assistance (BJA).<sup>97</sup> Although funding is allocated based on a non-discretionary formula,<sup>98</sup> grant recipients must report back to BJA on how they use the funds, including—historically—reporting as a “performance measure” the number of individuals arrested.<sup>99</sup> Many groups were concerned that this sent a message to state and local law enforcement agencies that high arrests numbers meant more federal funds, and that it in turn incentivized drug arrests.<sup>100</sup>

Recognizing that arrest numbers are not meaningful measures of law enforcement performance, BJA undertook a thorough revision of JAG performance measures, now called “accountability measures.”<sup>101</sup> As of fiscal year 2015, law enforcement agencies receiving JAG funds no longer must report on arrest numbers as a measure of performance or as accountability for funds received. BJA Director Denise O'Donnell told us, “Arrests can easily misrepresent what is really going on in criminal justice practice, and be misleading as to what we are really interested in seeing supported with JAG funds, namely evidence-based practices. So BJA has moved away from arrests as a

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<sup>97</sup> See generally US Department of Justice, Bureau of Justice Assistance, “Edward Byrne Memorial Justice Assistance Grant (JAG) Program,” undated, [https://www.bja.gov/ProgramDetails.aspx?Program\\_ID=59](https://www.bja.gov/ProgramDetails.aspx?Program_ID=59) (accessed September 22, 2016).

<sup>98</sup> Alexia D. Cooper, Ph.D. and Shelley S. Hyland, Ph.D., “Justice Assistance Grant (JAG) Program, 2015: Technical Report,” US Department of Justice, Bureau of Justice Statistics, October 2015, <http://www.bjs.gov/content/pub/pdf/jagp15.pdf> (accessed July 26, 2016). The JAG website now announces, “Note: Although JAG grantees and subgrantees are required to report on quarterly accountability measures through BJA’s Performance Measurement Tool (PMT), those reports are intended to promote greater transparency about the use of JAG funds and do not determine the amount of JAG funds allocated to a state and/or localities.”

<sup>99</sup> For a legacy reporting questionnaire, see, for example, Bureau of Justice Assistance, “Program Performance Measures for Justice Assistance Grant (JAG) Programs,” January 20, 2012 draft, [https://www.bja.gov/Programs/JAG\\_Questionnaire\\_PA1\\_Law%20Enforcement.pdf](https://www.bja.gov/Programs/JAG_Questionnaire_PA1_Law%20Enforcement.pdf) (accessed July 31, 2016).

<sup>100</sup> Inimai Chettiar et al., “Reforming Funding to Reduce Mass Incarceration,” Brennan Center for Justice, November 22, 2013, [http://www.brennancenter.org/sites/default/files/publications/REFORM\\_FUND\\_MASS\\_INCARC\\_web\\_o.pdf](http://www.brennancenter.org/sites/default/files/publications/REFORM_FUND_MASS_INCARC_web_o.pdf) (accessed June 9, 2016), p. 4; Ezekiel Edwards, Will Bunting, and Lynda Garcia, “The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests,” pp. 100-104. See also Radley Balko, “Driven By Drug War Incentives, Cops Target Pot Smokers, Brush Off Victims Of Violent Crime,” *Huffington Post*, November 25, 2011, [http://www.huffingtonpost.com/2011/11/21/drug-war-incentives-police-violent-crime\\_n\\_1105701.html](http://www.huffingtonpost.com/2011/11/21/drug-war-incentives-police-violent-crime_n_1105701.html) (accessed June 9, 2016).

<sup>101</sup> Bureau of Justice Assistance, “Justice Assistance Grant (JAG) Program Accountability Measures,” June 2014, <https://www.bjaperformancetools.org/help/JAGMeasuresQuestionnaire.pdf> (accessed July 26, 2016).

metric, instead focusing on evidence-based practices, such as community collaboration, prevention, and problem-solving activities.”<sup>102</sup>

This move is commendable. In the extensive training and technical assistance BJA provides to state law enforcement agencies, through JAG and other funding streams, BJA should reiterate that arrest numbers are not a sound measure of police performance. BJA should also encourage state agencies to pass the message along to local law enforcement agencies, which must still apply to the state agency for their share of the federal fund allocations. In many cases, that process continues to be discretionary and application-based and, in at least one recent call for applications, may still improperly emphasize drug arrests.<sup>103</sup>

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<sup>102</sup> Human Rights Watch phone interview with Denise O'Donnell, July 28, 2016, and email correspondence August 19, 2016.

<sup>103</sup> For FY 2017, North Dakota's application form—by which local agencies apply to the state agency for federal funds—provides as an example for “Objectives (Activities directed at achieving goals)” to “Increase the number of drug-related arrests by 10 percent.” As an example for “Performance Measures (How you measure your project's success),” it suggests “Number of drug-related arrests.” North Dakota Attorney General, “Program and Application Information: Justice Assistance Grant (JAG) Program and Lottery Funding,” undated, <https://www.ag.nd.gov/bci/Grants/JAG/ApplicationForm.pdf> (accessed September 22, 2016).

## IV. The Experience of Being Policed

They disrupt, disrupt, disrupt our lives.... From the time the cuffs are put on you, from the time you're confronted, you feel subhuman. You're treated like garbage, talked to unprofessionally. Just the arrest is aggressive to subdue you as a person, to break you as a man.<sup>104</sup>

—Cameron Barnes, arrested repeatedly for drug possession by New York City police from the 1980s until 2012

The sheer magnitude of drug possession arrests means that they are a defining feature of the way people experience police in the United States. For people we interviewed, drug laws shaped their interactions with and views of the police and contributed to a breakdown of trust.

Instead of experiencing police as protectors, arrestees in all four states we visited described experiences in which police officers intimidated and humiliated them. They described having their pockets searched, their cars ransacked, being subjected to drug-sniffing dogs, and being overwhelmed by several officers at once. This led some people to feel under attack and “out of a movie.”<sup>105</sup> Prosecutor Melba Pearson in the Miami-Dade State Attorney’s office said, “The way we treat citizens when we encounter them is wrong. If they expect to have their rights violated, of course there’s going to be hatred of the police.... You can’t take an invading-a-foreign-country mentality into the neighborhood.”<sup>106</sup>

### Pretextual Stops and Searches without Consent

Many people we interviewed said police used pretextual reasons to stop and search them, told them to take things out of their pockets, otherwise threatened or intimidated them to obtain “consent” to search, and sometimes physically manhandled them. These stories are consistent with analyses by the American Civil Liberties Union and other groups that have extensively documented the failures of police in many jurisdictions to follow legal requirements for stops and searches.

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<sup>104</sup> Human Rights Watch interview with Cameron Barnes (pseudonym), New York, October 29, 2015.

<sup>105</sup> Human Rights Watch interviews with Thomas Burwell (pseudonym), New Orleans, January 27, 2016, and Paul Roberts (pseudonym), Orlando, December 8, 2015.

<sup>106</sup> Human Rights Watch interview with Melba Pearson, Miami, December 18, 2015.



US Supreme Court Justice Sonia Sotomayor has argued in dissent that the Court’s interpretation of US law “allow[s] an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact.... When we condone officers’ use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner.”<sup>107</sup>

These fears certainly accord with the realities facing many heavily policed communities.<sup>108</sup> Defendants and attorneys we interviewed described a litany of explanations offered by the police to justify stopping a person on the street or in a car, many of which appeared to them to be pretextual: failure to signal, driving in the left lane on an interstate, driving with a license plate improperly illuminated or with a window tint that is too dark, walking in the opposite direction of traffic, failing to cross the street at the crosswalk or a right angle, or walking in the street when a sidewalk is provided.<sup>109</sup> In many jurisdictions, these reasons are not sufficient in themselves to allow the officer to search the person or vehicle.<sup>110</sup> Yet in police reports we reviewed for several cases in Texas and Florida, officers stopped the defendant for a traffic violation, did not arrest for that violation, but conducted a search anyway. They cited as justification that they smelled marijuana, that consent to search was provided, or that the person voluntarily produced drugs from their pockets for the officer to seize.<sup>111</sup> These justifications often stand in stark contradiction to the accounts of the people who were searched.

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<sup>107</sup> *Utah v. Strieff*, 579 U. S. \_\_ (2016) (J. Sotomayor, dissenting), Slip Op. p. 10.

<sup>108</sup> Ken Armstrong, “How the Supreme Court Made It Legal for Cops to Pull You Over for Just About Anything,” *The Marshall Project*, August 3, 2015, <https://www.themarshallproject.org/2015/08/03/how-the-supreme-court-made-it-legal-for-cops-to-pull-you-over-for-just-about-anything#.mMcsFrntc> (accessed July 6, 2015).

<sup>109</sup> FL Stat. secs. 316.155, 316.081, 316.605, 316.2953, 316.130; NY VAT secs. 1163, 1120(6)(c), 402(1)(b), 375(12-a)(b), 1156(b), 1151, 1156(a); LA Rev. Stat. secs. 32:104(b), 71(B)(1)(a), 333(A), 361.1(B), 216(B), 216(A); TX Transportation Code secs. 545.104(a), 545.051(a), 547.322(f(1)), 547.613(2), 547.613(2 a-1), 552.003(a), 552.006(a).

<sup>110</sup> If a jurisdiction gives police authority to arrest people for certain traffic violations, it is then permissible to conduct a search incident to arrest. However, none of the people we interviewed was arrested for one of these traffic violations.

<sup>111</sup> Human Rights Watch review of arrest reports in Orlando, Florida and Dallas, Texas.

## The Smell of Marijuana

The criminalization of marijuana in many states has given officers a powerful and widely-used pretext for searching people's cars. Will Pryor, the prosecutor responsible for screening cases in Caddo Parish, Louisiana, told us that most drug possession cases he sees result from traffic stops where the officer allegedly smells marijuana.<sup>112</sup> Where the possession of marijuana is criminal—as it remains in most states—the odor of marijuana often gives law enforcement probable cause to search a car, typically anywhere that marijuana could be found (including car doors, consoles, glove compartments, trunks, and containers and bags inside the car). People within the car can then be charged for possessing anything illegal found as a result of the search, even when no marijuana is discovered. A number of interviewees in Florida, Louisiana, and Texas described arrests that followed this pattern, and we reviewed other police reports that cited the odor of marijuana.

Miami prosecutor Melba Pearson told us:

If I hear one more time, “I smelled marijuana,” and the subsequent search revealed no marijuana! ... I work with police officers every day. A large majority are wonderful, fair people. However, there is a mentality in certain departments that tends to draw individuals who are action junkies, the “jump out boys.”... Some officers believe the ends justify the means [and don't] consider it a problem because their job is to get drugs off the street without worrying about whether or not the case is prosecutable, or if there is a long term positive effect on the community.<sup>113</sup>

Miami Judge Dennis Murphy told us, “Easily one out of four [police] stops, [I see] ‘defendant ran a stop sign, [officer] approached, there was a distinct odor of marijuana, so I searched and arrested for [other] drugs.’”<sup>114</sup>

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<sup>112</sup> Human Rights Watch interview with William Pryor, Shreveport, February 8, 2016.

<sup>113</sup> Human Rights Watch interview with Melba Pearson, Miami, December 18, 2015, and email correspondence August 24, 2016.

<sup>114</sup> Human Rights Watch interview with Judge Dennis Murphy, Miami, December 21, 2015.

Once stopped, some of the people we interviewed did not realize they had a right not to acquiesce to police searches, or felt they could not exercise it in the face of the officer's authority.<sup>115</sup> A few allowed officers to search a vehicle because they did not think there were any drugs inside. In many other cases, interviewees told us, they never consented at all, and police simply did what they pleased.

We reviewed arrest reports in Texas and Florida where police accounts of how they obtained consent for a search were highly implausible. Police described defendants voluntarily emptying their pockets and revealing drugs, sometimes without being asked to do so; freely consenting to a search of their person when they had drugs on them; and admitting that they were about to use drugs before the officer found drugs on them.<sup>116</sup> Prosecutor Melba Pearson told us, "I have had [defendants] who sometimes do give up the drugs.... However, many times where we get a story [from police] about how consent was obtained or drugs were located pursuant to a search [it is problematic]."<sup>117</sup>

Other interviewees described police tactics that they said allowed officers to manipulate their way around the requirements of the law. In Brevard County, Florida, Isabel Evans told us that she was arrested in 2015 for the first time for hydromorphine possession and that she felt unable to disobey the officer:

He said my pocket was bulged. He said, "Reach in there and take it out." I pulled it out, and he handcuffed me. The cop knew what he was doing. He couldn't pull it out himself, so he took advantage of my

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<sup>115</sup> ACLU of Illinois, "Racial disparity in consent searches and dog sniff searches: An analysis of Illinois traffic stop data from 2013," August 2014, <http://www.aclu-il.org/wp-content/uploads/2014/08/ACLU-IL-report-re-ITSSSA-data-in-2013.pdf> (accessed July 7, 2016): ("[In] many cases, the motorist's supposed 'consent' to search is not truly voluntary. Consent is often granted on an isolated roadside in a one-on-one encounter with an armed law enforcement official. This setting is inherently coercive. Many civilians believe they must grant consent. Other civilians fear the consequences of refusing to grant consent, such as the issuance of extra traffic citations, or the delay caused by further interrogation or bringing a drug-sniffing dog to the scene. Thus, the overwhelming majority of motorists consent to a search when asked.")

<sup>116</sup> Human Rights Watch review of police arrest reports and affidavits in Orlando, Dallas, and Houston. We spoke to the defendants in these cases in Texas, who told us this was not what had happened. In Florida, the attorney who provided the reports to us told us the police narratives were questionable.

<sup>117</sup> Human Rights Watch interview with Melba Pearson, Miami, December 18, 2015.

ignorance of the law, of a first-timer like me. I'm not going to say you can't do that. I'm scared.<sup>118</sup>

In Shreveport, Louisiana, Glenda Hughes was charged with felony possession of Klonopin in 2015. She told us, "If you say no to the search, that gives them suspicion.... If I had known more, maybe it would have come out differently. It's not my fault though that I don't know the legal system and the laws."<sup>119</sup>

## Feeling Targeted

All of the people arrested for drug possession we interviewed said they experienced fear, anger, or deep feelings of being unfairly targeted when police confronted, searched, and arrested them.

Many interviewees said that because they had been targeted or profiled in the past, they experienced a heightened sense of vulnerability to police intervention and insecurity in their person whenever they were in public. They described constantly feeling the need to look over their shoulder and exercise hyper-vigilance in all their actions, regardless of whether they had drugs on them.<sup>120</sup>

Leonard Lewis, a 28-year-old Black man in Houston, had been arrested and convicted of drug possession in the past. He said he felt that made him more likely to be stopped again and more likely to be arrested once police ran his name. He said the fact that he is big and Black makes him more vulnerable.<sup>121</sup> His mother told us, "[It] mess[es] with his mind. [Leonard] drives like a grandpa, like how an old man drives. He turns on his signals, he stops [before stop signs]. Even when he is pulling into the house, the boy turns on his

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<sup>118</sup> Human Rights Watch interview with Isabel Evans (pseudonym), Auburndale, December 11, 2015. If a person voluntarily produces drugs, this would not constitute a police search under the Fourth Amendment. However, interviewees recounted interactions in which they felt their "voluntary" action to be coerced.

<sup>119</sup> Human Rights Watch interview with Glenda Hughes (pseudonym), Shreveport, February 6, 2016.

<sup>120</sup> Many studies have noted that racial profiling can have long-term behavioral and emotional effects, such as altered clothing choices and driving routes, or discouraging people from acting as "Good Samaritans." Robert Chanin, "Restoring a National Consensus: The Need to End Racial Profiling in America," The Leadership Conference on Civil and Human Rights, March 2011, [http://www.civilrights.org/publications/reports/racial-profiling2011/racial\\_profiling2011.pdf](http://www.civilrights.org/publications/reports/racial-profiling2011/racial_profiling2011.pdf) (accessed July 1, 2016), pp. 21, 23.

<sup>121</sup> Human Rights Watch interview with Leonard Lewis (pseudonym), Houston, March 15, 2016.

signal. He says, ‘Mama, the police are never gonna have a reason to stop me.’”<sup>122</sup> In the Bronx, Angel Suarez explained to us:

I consider myself an addict and sometimes I worry when I’m using, because they search you for no reason. The cops know me; most of the time they see me they stop and search me. It makes it harder to live life when you’re walking down the street watching your back, but at the same time when you don’t have your drug it makes you sick.<sup>123</sup>

Drug enforcement practices do not only affect people who use or have used drugs. They broadly impact people who live in heavily policed neighborhoods, people who are homeless,<sup>124</sup> and people police claim to regard as “suspicious” for whatever reason—sometimes solely because of their race.<sup>125</sup>

### **Damian’s Story**

Damian Williams related his story to us as follows:

In 2016, Damian and his girlfriend were living out of his car in Houston and trying to make ends meet. He said, “We were just working [all the time]. I was going to work during the day; she goes to work at nighttime. It was hectic, it was hard, but it was life.” They had just been approved to rent an apartment when Damian was pulled over for failure to signal. The officer said he smelled marijuana, and while Damian waited in handcuffs, he ransacked the car for 45 minutes, tearing through their bags, throwing their belongings on the ground. The officer finally emerged with half of a pill, and no marijuana. Damian said he did not know where the half-pill came from and thought it

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<sup>122</sup> Human Rights Watch interview with Tiffany Lewis (pseudonym), Houston, March 16, 2016.

<sup>123</sup> Human Rights Watch interview with Angel Suarez (pseudonym), New York, November 24, 2015.

<sup>124</sup> Tristia Bauman, “No Safe Place: The Criminalization of Homelessness in U.S. Cities,” National Law Center on Homelessness & Poverty, July 16, 2014, [https://www.nlchp.org/documents/No\\_Safe\\_Place](https://www.nlchp.org/documents/No_Safe_Place) (accessed July 7, 2016).

<sup>125</sup> According to Department of Justice data on traffic and pedestrian stops in 2011, Black and Latino drivers were at least three times more likely to be searched during traffic stops than white drivers. Lynn Langton, Ph.D. and Matthew Durose, “Police Behavior during Traffic and Street Stops, 2011,” US Department of Justice, Bureau of Justice Statistics, September 2013, <http://www.bjs.gov/content/pub/pdf/pbtss11.pdf> (accessed July 1, 2016); Sharon LaFraniere and Andrew W. Lehren, “The Disproportionate Risks of Driving While Black,” *New York Times*, October 24, 2015, [http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html?\\_r=0](http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html?_r=0) (accessed July 7, 2016).

was a joke at first, but the officer told him it was a felony. Damian was taken to booking and charged with felony possession of Ecstasy.

Damian appeared before a judge at 3 or 4 a.m. and his girlfriend bonded him out the next morning. She had rented a hotel room, because the car they used to sleep in had been impounded. He got out of jail before the buses ran, so he took a taxi straight to Walmart to buy clothes and soap because everything he owned was in his impounded car. Then he went to the hotel room to lie down for half an hour, before he had to catch the bus back to court. He said that all the money they lost on the impoundment, bond, and hotel meant they were no longer able to rent the apartment for which they had been approved. “It’s making me feel a little paranoid every time I see a police officer.... I didn’t think I was doing nothing then, and then I was put in jail and am paying all this money,” he said. On his girlfriend’s urging, Damian cut off his dreadlocks while out on bond and started dressing differently. He said appearance matters to the police.<sup>126</sup>

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### **Darius’ Story**

Darius Mitchell, a Black man in his 30s, said he does not use drugs. From Darius and many other interviewees, we heard a similar story: Police stop a Black man walking or driving in a “bad” neighborhood, citing a minor and sometimes pretextual reason; they treat him as if he is a suspected drug dealer and insist on searching his person or his car without first obtaining consent; they find a small amount of drugs and arrest him for possession; and his life is put into upheaval by a prosecution.

Darius recounted his arrest to us as follows:

Late one night in Jefferson Parish, Louisiana, an officer pulled Darius over as he was leaving his child’s mother’s house. The officer said he had been speeding. When Darius replied that he certainly had not, the officer said he smelled marijuana. He asked

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<sup>126</sup> Human Rights Watch interview with Damian Williams (pseudonym), Houston, March 17, 2016.

whether he could search, and Darius said no. Another officer and canine came and searched his car anyway. They yelled, “Where are the pounds?” suggesting he was a marijuana dealer. The officers eventually found a pill bottle in the glove compartment of Darius’ car, with his child’s mother’s name on it. Darius said that he had driven her to the emergency room after an accident, and she had been prescribed hydrocodone, which she forgot in the car. The police kept him in their vehicle for an hour as they discussed what to do. When they eventually took him in, he was prosecuted for possession of hydrocodone, his first felony charge.

The prosecutor filed charges and took the case all the way to a verdict, despite Darius’ explanation of why he had the pill bottle. Bail was set at \$1,000, and Darius was able to bond out. He paid another \$2,000 to hire a lawyer. Darius was ultimately acquitted at trial, but even months later he remained in financial debt from his legal fees, was behind in rent and utilities bills, and had lost his cable service, television, furniture, and other comforts. He told us:

I was pulling money [from wherever I could]. I had three jobs at the time because I had to pay all these fees, because I still had my own apartment [to pay for and] had to take care of my kids. I was already living paycheck to paycheck. I was making it, but with fines and fees I was really pinching then. I was not paying this to pay that.... It was embarrassing for myself like that. [I had] court fees, lawyer fees, the light bill, rent.... They took the TV, the sofa set. I couldn’t pay it. [I was acquitted] but I still lost a lot. I still had to go through a lot of misery.

Darius added, “On my record, they show that I didn’t get convicted, but it still shows that I got arrested.” Although Darius “walked free,” he still feels bound by his criminal justice debt and his arrest record.<sup>127</sup>

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<sup>127</sup> Human Rights Watch interview with Darius Mitchell (pseudonym), Harvey, January 24, 2016.

## V. Aggressive Prosecutions

I loved to prosecute. I was the avenging angel. I was doing God's work. I was getting the riff-raff off the street. Time proved me to be wrong. So I don't consider those years to be a badge of honor. Guilt. A feeling that I did some things I shouldn't have done.... I have been on both sides of the fence: the War on Drugs is lost. I'm really disgusted with the continuation of the prosecutions. I'm really disappointed.<sup>128</sup>

—Marty Stroud, former assistant district attorney and current defense attorney, Shreveport, Louisiana, February 2016

After police arrest a person, prosecutors have enormous discretion in deciding whether to prosecute, what charges to bring, and how the person will experience the criminal justice system. Because any given set of facts can often support different kinds of charges, if prosecutors decide to prosecute a drug use case, they typically have a range of charges to choose from—from misdemeanor drug paraphernalia to, in most states, felony possession to possession with intent to distribute.<sup>129</sup> The National District Attorneys Association advises, “In making a charging decision, the prosecutor should keep in mind the power he or she is exercising at that point in time. The prosecutor is making a decision that will have a profound effect on the lives of the person being charged, the person's family ... and the community as a whole.”<sup>130</sup>

Despite these opportunities for discretion, many prosecutors are far too willing to throw the book at people who use drugs, to charge them high and to seek the highest possible sentences.<sup>131</sup> While each prosecutor exercises discretion in his or her own cases, office culture often encourages prosecutors to adopt a default position of charging unreasonably high, instead of applying charges that speak appropriately to the facts of the case or

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<sup>128</sup> Human Rights Watch interview with Marty Stroud, Shreveport, February 9, 2016.

<sup>129</sup> As examined later in this section, possession with intent to distribute can be improperly charged based on facts that actually support possession for personal use.

<sup>130</sup> National District Attorneys Association, *National Prosecution Standards (Third Edition)* (National District Attorneys Association: 2009), sec. 4-2.4, available at <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>.

<sup>131</sup> Galveston, Texas prosecutor Chris Henderson acknowledged, “We bring this mentality of ‘I should charge the highest crime; I should seek the highest punishment.’” Human Rights Watch phone interview with Chris Henderson, August 9, 2016.



declining to charge at all.<sup>132</sup> As discussed later in this report, in many cases this appears to be a deliberate tactic aimed at coercing defendants into pleading guilty to a lesser offense—an inherently abusive application of prosecutorial discretion.

Prosecutor Melba Pearson said she believed prosecutors have an obligation to use their discretion to address racial disparities in the cases police bring them:

It's incumbent upon the state to report to the police that we're having this disparity. To say, what can we do about this? ... It is a policing issue if you're stopping a kid 15 times a month for a [car window] tint. [I can say,] "Don't bring me that case. You're clearly racially profiling." Where the circumstances of a stop are such that there are issues of constitutionality, when you don't prosecute, police will notice. When you tacitly approve it, police will continue.<sup>133</sup>

In some cases, prosecutors not only fail to confront this problem but compound it by exercising their own discretion in racially biased or at least racially disparate ways, for instance by charging Black defendants with more serious crimes or seeking sentencing enhancements more often when the defendant is Black.<sup>134</sup>

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<sup>132</sup> Tracy L. Meares, "Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives," *Fordham Law Review*, vol. 64 (1995), <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3220&context=flr> (accessed September 23, 2016), pp. 868-869 ("Overcharging is also due in part to an abhorrence of losing that is central to prosecutorial culture. By charging the defendant with the most serious offenses that the prosecutor believes the defendant's conduct supports, the prosecutor can push up the trial penalty and limit, as a consequence, the defendant's ability to waive his right to trial intelligently and voluntarily."); Josh Bowers, "Punishing the Innocent," *University of Pennsylvania Law Review*, vol. 156 (2008), [https://www.law.upenn.edu/journals/lawreview/articles/volume156/issue5/Bowers156U.Pa.L.Rev.117\(2008\).pdf](https://www.law.upenn.edu/journals/lawreview/articles/volume156/issue5/Bowers156U.Pa.L.Rev.117(2008).pdf), p. 1128 ("prosecutors carry mindsets of 'nondefeat.'"); Glenn Harlan Reynolds, "Ham Sandwich Nation: Due Process When Everything is a Crime," *University of Tennessee Legal Studies Research Paper No. 206*, January 2013 ("prosecutors have no countervailing incentives not to overcharge.").

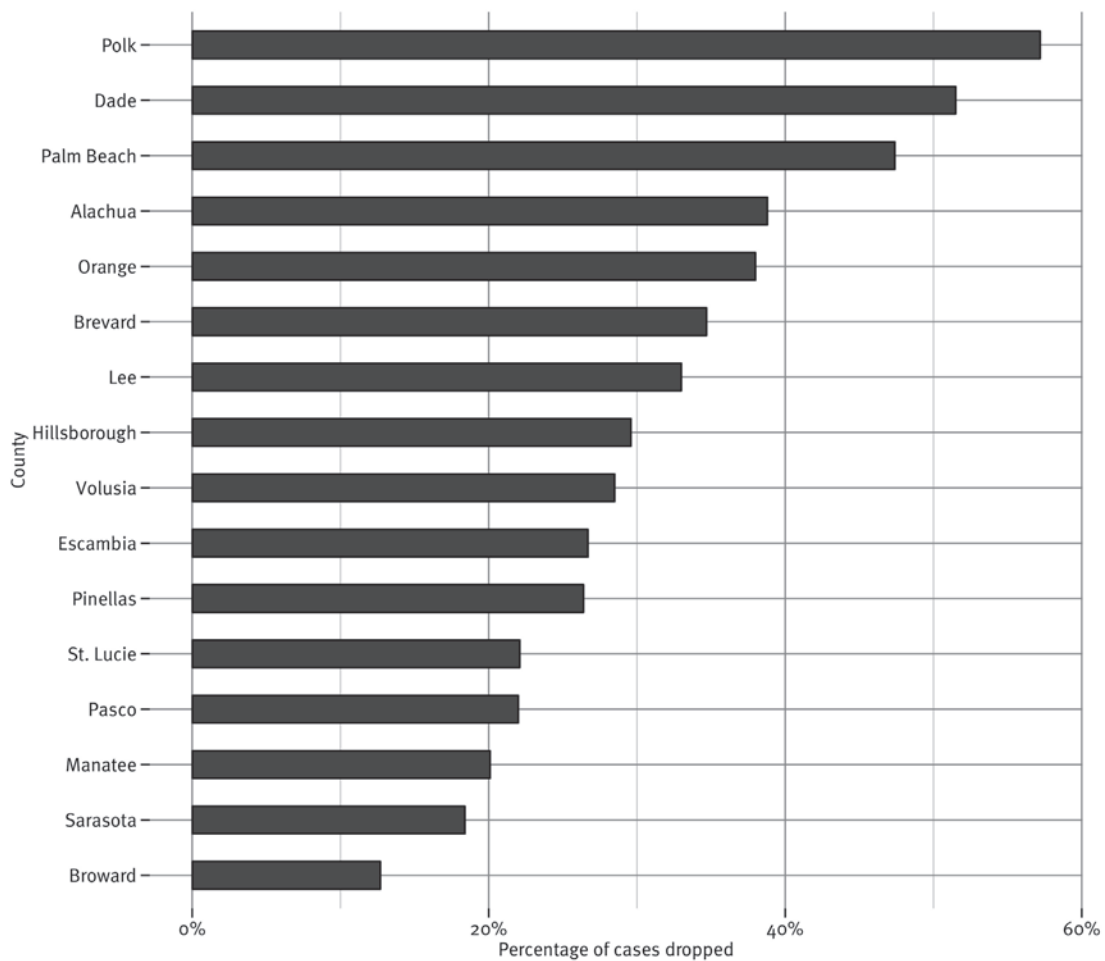
<sup>133</sup> Human Rights Watch interview with Melba Pearson, Miami, December 18, 2015.

<sup>134</sup> Research shows that prosecutors were more likely to charge Black defendants under state habitual offender laws than white defendants similarly situated. The disparity is even greater for less serious crimes than for more serious crimes. Charles Crawford, Ted Chiricos, and Gary Kleck, "Race, racial threat, and sentencing of habitual offenders," *Criminology*, vol. 36 (1998), pp. 481-512; Cyndy Caravelis, Ted Chiricos, and William Bales, "Race, ethnicity, threat, and the designation of career offenders," *Justice Quarterly*, vol. 30 (2011), pp. 869-894; Richard S. Frase, *Just Sentencing: Principles and Procedures for a Workable System* (New York: Oxford University Press, 2013); Richard S. Frase, "What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?," *Crime and Justice*, vol. 38 (2009), pp. 201-280.

Different prosecutors' offices applying the same state laws may prosecute drug possession differently, revealing another layer of potential arbitrariness in who is prosecuted for drug use.

In Florida, among the counties with at least 5,000 possession cases, there were striking disparities in the rate at which prosecutors declined to prosecute drug cases. For example, Polk County prosecutors declined to prosecute 57 percent of drug possession cases brought to them while Broward County prosecutors declined only 13 percent.<sup>135</sup>

Figure 10: Disparities in percentage of drug possession charges dropped by prosecutors in Florida, by county (2010-2015)



Note: Only includes counties with more than 5,000 drug possession charges.  
Source: Human Rights Watch analysis of Florida Office of the State Courts Administrator Offender Based Transaction System data.

<sup>135</sup> Human Rights Watch analysis of Florida Office of the State Courts Administrator Offender Based Transaction System data.

## Going after the Small Stuff

We interviewed over 100 people in Texas, Louisiana, Florida, and New York who were prosecuted for small quantities of drugs—in some cases, fractions of a gram—that were clearly for personal use. Particularly in Texas and Louisiana, prosecutors did more than simply pursue these cases—our interviewees reported that prosecutors often selected the highest charges available and went after people as hard as they could.

### *Possession Charges in Texas for Fractions of a Gram*

Perhaps nothing better illustrates the harmful realities of aggressive prosecution and a charge-them-high philosophy than state jail felony cases in Texas.<sup>136</sup> Our data analysis suggests that in 2015, nearly 16,000 people were convicted and sentenced to incarceration for state jail drug possession offenses.<sup>137</sup> State jail felony drug possession is possession of less than one gram of substances containing common drugs such as cocaine, heroin, methamphetamine, PCP, oxycodone, MDMA, mescaline, and mushrooms.<sup>138</sup> This means they received a felony conviction and time behind bars for possessing less than a gram of drugs—the weight of less than one-fourth of a sugar packet. Depending on the type of drug, its strength and purity, and the tolerance of the user, one gram may be a handful of doses or even a dose or less of many drugs.<sup>139</sup>

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<sup>136</sup> Established in 1993, Texas' state jail system was originally conceived as a way to move people convicted of low-level drug and property crimes out of the crowded prison system. Initially, state jails were only meant to be available for short stints of initial confinement as part of a community supervision sentence. A few years later, however, the legislature changed the system so that "state jail felony" essentially became a new class of low-level felony, which some people now refer to colloquially as "fourth degree." Today, state jails are essentially short-term prisons and are run by the Department of Corrections, as are regular prisons. However, their recidivism rates are worse and sentences must be served day-for-day. Interviewees also said conditions in state jail were far worse than prison. Possession of under one gram of most non-marijuana drugs is a state jail felony, punishable by six months to two years in a state jail facility (or more in prison if enhanced by prior convictions). State jail and under one gram are used here synonymously.

<sup>137</sup> Human Rights Watch analysis of data provided by Texas Office of Court Administration.

<sup>138</sup> It also includes possession of under 20 units of LSD or between 4 ounces and 5 pounds of marijuana. (As noted in the Background section, marijuana possession up to four ounces, 112 grams, is a misdemeanor in Texas.) Dilutants are also weighed, meaning the purity of the substance is irrelevant. TX Health and Safety Code sec. 481.115. Because defense attorneys said almost all of their state jail felony possession cases were for under a gram (rather than for LSD or these relatively large amounts of marijuana), we use "under a gram" synonymously with "state jail felony possession" when describing the law.

<sup>139</sup> Doses vary to extraordinary degrees depending on a person's tolerance and the strength or purity of the substance (Texas law counts the weight of the entire substance including dilutants, regardless of purity). For comparison, the European Monitoring Centre for Drugs and Drug Addiction estimates, based on street level purities in the continent, possible dosages as follows: 100 milligrams for heroin, 100-200 milligrams for cocaine, and several tens to several thousand milligrams for methamphetamines. Interviewees who used drugs regularly explained that their tolerance meant they would require

Data provided to Human Rights Watch by the Texas Office of Court Administration, and presented here for the first time, shows case outcomes for all felony drug possession cases in Texas courts. Although the data does not differentiate between felony degrees, we can extrapolate based on state law and sentencing options.<sup>140</sup> Based on these extrapolations, the data suggests that in Texas in 2015, over 78 percent of people sentenced to incarceration for felony drug possession in Texas were convicted of a state jail felony. That means some 16,000 people were sentenced to time behind bars for possessing less than one gram of commonly used drugs.<sup>141</sup> Because this figure represents only those sentenced to incarceration, the number of people prosecuted and potentially convicted of state jail felony drug possession is likely thousands more, since Texas law requires that all persons convicted of first time state jail felony drug possession receive probation, and judges may impose probation in other cases as well.<sup>142</sup>

The majority of the 30 defendants we interviewed in Texas had substantially less than a gram in their possession when they were arrested: not 0.9 or 0.8 grams, but sometimes 0.2 or 0.02, or even a result from the lab reading “trace,” meaning that the amount was too small even to be measured. One defense attorney in Dallas told us a client was charged with drug possession in December 2015 for 0.0052 grams of cocaine.<sup>143</sup> To put it into perspective, that is equivalent to the weight of 13 ten-thousandths (.0013) of a sugar

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significantly more. European Monitoring Centre for Drugs and Drug Addiction, “Drug profiles,” December 17, 2014, <http://www.emcdda.europa.eu/publications/drug-profiles> (accessed September 23, 2016).

<sup>140</sup> The 2015 drug possession dataset contained information about case dismissals or acquittals, “deferred adjudication” (sometimes also called deferred probation, in which the defendant is not formally convicted but must still complete a period of probation), regular probation (after a conviction), and sentences of incarceration (to local jail, state jail, or prison). A very small number of cases were coded as other. Because Texas law requires that a person receive probation (either deferred or regular) for their first state jail felony possession offense, and because judges are probably more likely to give probation for a smaller amount of drugs than for a larger amount, we expect that the vast majority of cases marked as deferred adjudication or probation are for state jail felonies. However, because the data did not contain this information, we chose not to make assumptions about it and removed those cases from our analysis of state jail felony cases. Next, we assumed for purposes of our analysis that almost all prison sentences imposed for possession were for over one gram. We discounted that by 11 percent because the Texas Department of Criminal Justice’s high value dataset, explained in footnote 305, shows that 11 percent of state prison inmates serving time in 2015 for drug possession were convicted of a state jail felony offense. This rate was applied to the court data count of people sentenced to state prison to estimate the total number of people sentenced to state prison who possessed less than a gram. We also assumed that only state jail felony defendants were sentenced to local jail and state jail. (The data lists only the judge’s sentencing designation, not the actual facility where the inmate is held. It is possible that jails and departments of corrections in practice hold people in other facilities). State jail facilities are meant only for state jail felony convictions. To be sentenced to local jail (“misdemeanor time”) for a felony, a person must be sentenced under TX Penal Code art. 1244A, which is available only for state jail felonies.

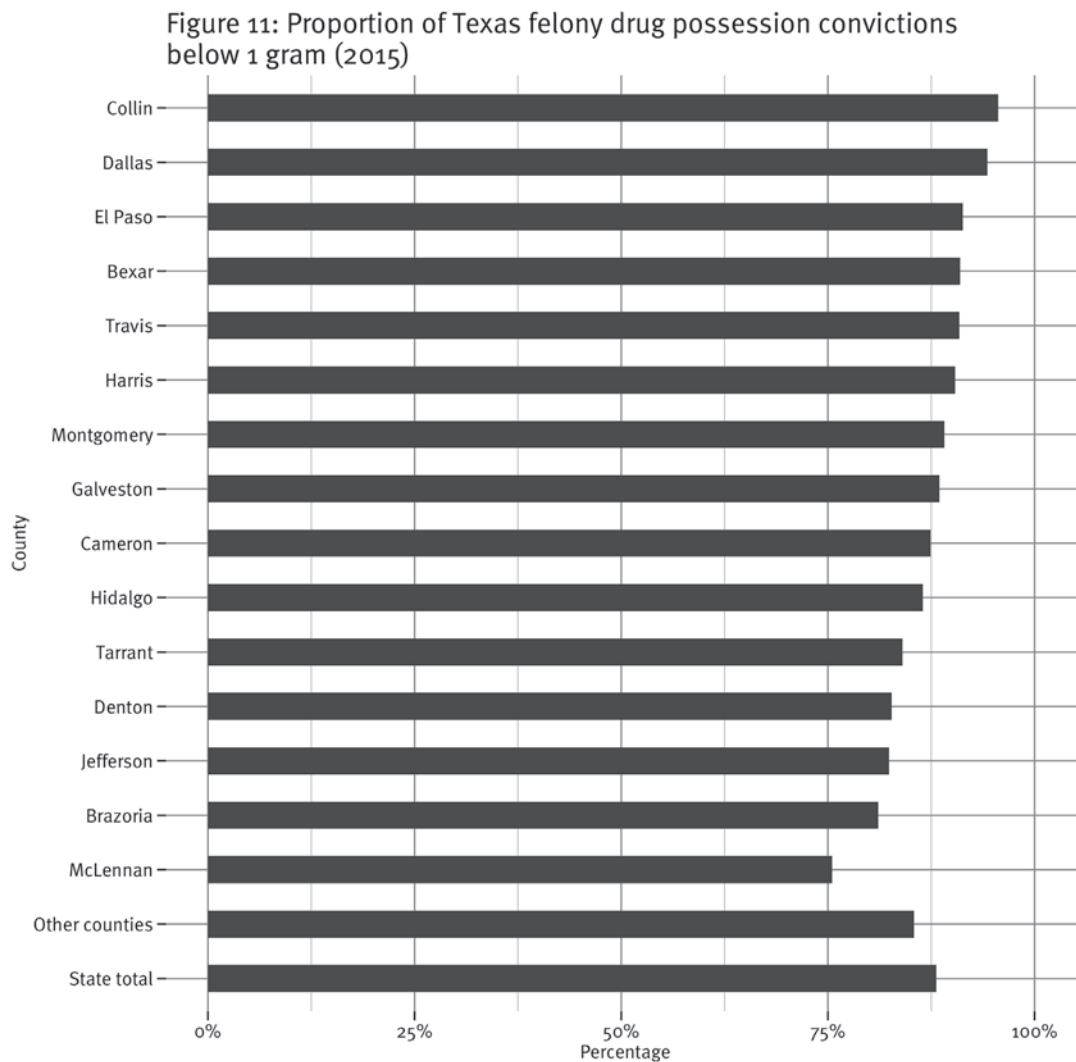
<sup>141</sup> Human Rights Watch analysis of data provided by Texas Office of Court Administration.

<sup>142</sup> See footnote 140.

<sup>143</sup> Human Rights Watch phone interview with Dallas defense attorney, February 4, 2016.

packet. The margin of error for the lab that tested it is 0.0038 grams, meaning it could have weighed as little as 0.0014 grams, or 35 hundred-thousandths (0.00035) of a sugar packet. These numbers are almost incomprehensibly small.

In Dallas County, the data suggests that nearly 90 percent of people sentenced to jail or prison for possession in 2015 were convicted of possessing less than a gram.<sup>144</sup> In fact, throughout the state, the overwhelming proportion of drug possession defendants were sentenced to incarceration for fractions of a gram:



Source: Human Rights Watch analysis of Texas Office of Court Administration data.

<sup>144</sup> Human Rights Watch analysis of data provided by Texas Office of Court Administration.

Bill Moore, a 66-year-old man in Dallas, was prosecuted for third degree felony possession (normally one to four grams) for what the laboratory tested as 0.0202 grams of methamphetamines. The charge was enhanced to a third degree offense under the habitual offender law because of his prior possession charges, which he said were all under a gram as well. He spoke to us after he had pled to three years in prison for that 0.0202 grams: “It was really small; you wouldn’t even believe what I’m talking about. It’s unbelievable that they would even charge me with it.” He added, “It’s about five dollars’ worth of drugs.... Now think about how many thousands of dollars are wasted over five dollars of that stuff.”<sup>145</sup>

In Fort Worth, Hector Ruiz was prosecuted for an empty bag that had heroin residue weighing 0.007 grams. Apparently believing that he deserved aggressive charges, the prosecutor sought enhancements based on Hector’s prior state jail convictions, increasing the high end of his sentencing range from two to ten years. The prosecutor offered him six years in prison in exchange for a guilty plea.<sup>146</sup>

Leonard Lewis was charged with third degree felony possession (one to four grams) in Houston for two tobacco cigarettes dipped in PCP. Because he had two prior felonies, he faced 25 years to life in prison. He told us the actual weight of the liquid PCP on the cigarettes was microscopic. Although his attorney convinced the prosecutors to discount the filter, she said they still counted the weight of the rest of both cigarettes (tobacco and paper), resulting in a final weight of 1.4 grams combined.<sup>147</sup> Tobacco in an average cigarette weighs around 0.65 to 1 gram on its own,<sup>148</sup> meaning the trace amount of PCP on Leonard’s two cigarettes must have been nearly weightless. Nevertheless, Leonard ended up receiving four years in prison for it.<sup>149</sup>

In Dallas, Gary Baker was charged with 0.1076 grams of cocaine. Although he was arrested for outstanding traffic tickets, he and his attorney said the police searched his car for 45

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<sup>145</sup> Human Rights Watch interview with Bill Moore (pseudonym), Dallas, March 8, 2016.

<sup>146</sup> Human Rights Watch interview with Hector Ruiz (pseudonym), Fort Worth, March 11, 2016.

<sup>147</sup> Human Rights Watch interview with defense attorney, Houston, March 14, 2016.

<sup>148</sup> Organisation for Economic Co-operation and Development, “*OECD Health Statistics 2016: Definitions, Sources and Methods: Tobacco consumption in grams per capita (age 15+)*,” June 2016, <http://stats.oecd.org/fileview2.aspx?IDFile=8e59b835-8196-426e-9297-15bc1dab652c> (accessed June 23, 2016).

<sup>149</sup> Human Rights Watch interview with Leonard Lewis (pseudonym), Houston, March 15, 2016.

minutes without finding anything. At his arraignment, the judge informed him he was also charged with possession of a controlled substance. Apparently, after Gary had been taken to booking, an officer reported finding what Gary remembered being described as “crumbs of crack cocaine” on the car console. Gary told us he did not know where the crumbs came from: “For the little amount of cocaine they found in my car, if I put it in your car, you wouldn’t even notice it. Some ‘crumbs’?”<sup>150</sup> The 0.1 grams allegedly discovered by the police is the equivalent in weight of 28 thousandths of a sugar packet.

In Granbury, Texas, Matthew Russell was charged with possession of methamphetamines for an amount so small that the laboratory result read only “trace.” The lab technician did not even assign a fraction of a gram to it. Matthew said the trace amount was recovered from inside his girlfriend’s house, while he was outside. Under the circumstances, he speculated—quite reasonably—that he was charged because of his history of drug use: “I’m not guilty of what they charged me with. I didn’t have any drugs in my possession. Am I guilty of being a drug user? Yes, I am. Did I use drugs the day before? Yes, I did. I admitted that. But I didn’t have any drugs on me. I shouldn’t be here.”<sup>151</sup>

The prosecutor sought enhancements because Matthew had prior felony convictions, mostly out-of-state and related to his drug dependence, Matthew told us. Because of his priors, Matthew faced 2 to 20 years for this trace amount. The prosecutor did not have to seek these enhancements. He also could have offered Matthew a gentler plea deal. Instead, he offered a 3-year discount off the statutory maximum in exchange for a guilty plea: 17 years for a trace case. Matthew refused and insisted on his right to trial. After 21 months of pretrial detention, Matthew finally went to trial in August 2016. A jury convicted him of possessing a trace amount of methamphetamines and sentenced him to 15 years in prison.<sup>152</sup>

Explaining why prosecutors pursue so many state jail possession cases, Galveston prosecutor Chris Henderson told us, “The idea behind it is that we want to prevent the bigger cases that may come down the line.... So we want to try to get to those people early. We want to prevent the murder in a drug deal gone wrong, theft, child endangerment, the

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<sup>150</sup> Human Rights Watch interview with Gary Baker (pseudonym), Dallas, March 9, 2016.

<sup>151</sup> Human Rights Watch interview with Matthew Russell (pseudonym), Granbury, March 10, 2016.

<sup>152</sup> Human Rights Watch correspondence with defense attorney, August 19, 2016.

larger cases.... If we decided not to prosecute small drug cases, we'd see situations like that more often.”<sup>153</sup> However, we are aware of no empirical evidence that low-level drug possession defendants would otherwise go on to commit violent crimes such as murder, and the theft and child endangerment cases can be addressed with the laws that criminalize them.<sup>154</sup> When we asked him whether he thought state jail prosecutions were working to stop crime, he added, “No, I don’t think so.”<sup>155</sup>

### *Paraphernalia Charged as Possession*

In a handful of cases we investigated in Texas and Louisiana, defendants had drug paraphernalia, such as pipes, straws, syringes, or even empty baggies, in their possession when they were confronted by the police. But instead of simply charging them with misdemeanor drug paraphernalia—or letting them go—the police arrested them for drug possession because of the residue or trace amount of drugs left in or on the paraphernalia. And rather than questioning the utility of those arrests, prosecutors formally charged and prosecuted the defendants for drug possession.

Former District Attorney Paul Carmouche explained that the police typically make the initial decision to charge paraphernalia as possession, but that they have discretion not to arrest in those cases at all: “If it were good cops ... they would say, ‘This is BS, we’re not going to do that.’ So, residue ... I don’t think it ought to be charged. The problem for the DA’s office is, it’s going to come in as a possession of cocaine [because] the police are always going to charge the most serious under the facts of the case.”<sup>156</sup>

In such scenarios, the prosecutor still has the authority to reduce the charges, or to dismiss the case altogether. Yet in practice prosecutors often do not deviate in their charges from what is listed on the police report. For example, our data shows that in 93 percent of all drug use/possession cases that were filed in Florida, prosecutors did not deviate from the police arrest charge.<sup>157</sup>

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<sup>153</sup> Human Rights Watch phone interview with Chris Henderson, August 9, 2016.

<sup>154</sup> See section I, The Human Rights Case for Decriminalization.

<sup>155</sup> Human Rights Watch phone interview with Chris Henderson, August 9, 2016.

<sup>156</sup> Human Rights Watch interview with Paul Carmouche, Shreveport, February 9, 2016.

<sup>157</sup> Human Rights Watch analysis of Florida Office of the State Courts Administrator Offender Based Transaction System data from 2010 to 2015.



In Miami, where drug possession carries up to five years in prison, Melba Pearson told us:

[As to] residue prosecutions, it's ridiculous to potentially incarcerate for five years when you don't even have the substance on you. The theory is you just smoked it, but we don't know that's necessarily true. When you don't even have it in your possession, to charge it as a felony, the punishment doesn't fit the crime. It's a bad use of resources. Prosecutors are overburdened and resources are better directed to more serious crime. Enforcing residue cases is a philosophy reflective of "lock everyone up."<sup>158</sup>

The consequences of that philosophy play out in terms of human lives.

In St. Tammany Parish, Louisiana, District Defender John Lindner told us he was still seeing residue cases where needles were charged as heroin possession, which in the state carries a minimum of four years and up to ten years in prison.<sup>159</sup> For example, Amanda Price and her friend were arrested for a needle in St. Tammany Parish. After she had spent two months in pretrial detention, Amanda's charge was reduced to a misdemeanor, but only after her friend (and co-defendant) said the needle was his and took the heroin possession conviction himself.<sup>160</sup>

Prosecutors have even pursued felony indictments and accepted guilty pleas for drug possession in the absence of any evidence. Jason Gaines said he was arrested in Granbury, Texas, for having one syringe cap in his pocket and three unused needles near him, one of which was missing a cap. He said after he had been handcuffed, the police asked if he used meth, and he said yes.<sup>161</sup> According to his attorney, the lab report showed that the syringes were never actually tested, and no meth was found on Jason's person.<sup>162</sup>

On these facts, the prosecutor should not have charged Jason at all; if the needles were unused, there was no real evidence he had committed any crime, only that he might

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<sup>158</sup> Human Rights Watch interview with Melba Pearson, Miami, December 17, 2015.

<sup>159</sup> Human Rights Watch interview with John Lindner, Covington, January 28, 2016.

<sup>160</sup> Human Rights Watch interview with Amanda Price (pseudonym), Covington, January 28, 2016.

<sup>161</sup> Human Rights Watch interview with Jason Gaines (pseudonym), Granbury, March 10, 2016.

<sup>162</sup> Human Rights Watch interview with defense attorney, Granbury, March 10, 2016.

eventually inject drugs sometime in the future—and that he was preparing to do so safely with clean needles.<sup>163</sup> But even if the prosecutor insisted on charging Jason, he could have charged misdemeanor drug paraphernalia. Instead, the prosecutor pursued a felony charge and 89 days after Jason was arrested—one day short of the maximum 90 days Texas prosecutors have to obtain a felony indictment<sup>164</sup>—Jason was indicted for his first felony: possession of methamphetamines. He said:

I was thinking, I told them I was a meth user, which explains why on the indictment it came back methamphetamine. If I were to have told them heroin, it makes me think my indictment would have said heroin, because the needles were brand new; there is no way they could have tested for methamphetamine.<sup>165</sup>

Jason pled to four years' probation on the same day the indictment was read to him in court, before he knew that the lab had never performed a drug test. Jason ultimately had his probation revoked for failure to report to his probation officer, and he pled to 20 months in a Texas state jail facility.<sup>166</sup>

Alyssa Burns was arrested in Houston for a meth pipe and charged with drug possession, her first felony. She said police performed a field test on the pipe, pouring a liquid inside that turned blue to show residue.

Trace cases need to be reevaluated. If you're being charged with a .01 for a controlled substance, the fact that it turned blue, even if there's nothing in

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<sup>163</sup> Criminalizing possession of syringes interferes with the right to health. Human Rights Watch, *In Harm's Way: State Response to Sex Workers, Drug Users and HIV in New Orleans*, December 2013, <https://www.hrw.org/report/2013/12/11/harms-way/state-response-sex-workers-drug-users-and-hiv-new-orleans>; Human Rights Watch, *Injecting Reason: Human Rights and HIV Prevention for Injection Drug Users: California: A Case Study*, September 2003, <https://www.hrw.org/report/2003/09/08/injecting-reason/human-rights-and-hiv-prevention-injection-drug-users>.

<sup>164</sup> TX Code of Criminal Procedure art. 17.151; Human Rights Watch email correspondence with defense attorney, August 24, 2016.

<sup>165</sup> Human Rights Watch interview with Jason Gaines (pseudonym), Granbury, March 10, 2016. We assume that in most jurisdictions admitting to using drugs as a general proposition is not sufficient evidence—is not a confession—of current drug possession. A statement that someone uses drugs is not evidence that they possess any.

<sup>166</sup> *Ibid.*

it, that's an empty baggie, that's an empty pipe. There *used to be* something in it. They are ruining people's lives over it.<sup>167</sup>

In Galveston, Breanna Wheeler's lawyer said she waited 79 minutes while officers called a canine unit and searched the car in which she was a passenger. Breanna told us they found an empty plastic bag under her seat which they alleged belonged to her and had methamphetamine residue on it. After a period of pretrial detention because she could not afford bail, Breanna, a single mother, pled to her first felony conviction and time served so she could return home to her young daughter.<sup>168</sup>

In Houston, Nicole Bishop was charged with two counts of felony possession for heroin residue in an empty baggie and cocaine residue in a plastic straw. The charges meant she was separated from her three children, including her breastfeeding baby. She had been in pretrial detention for two months already when we interviewed her in March 2016.<sup>169</sup>

Miami Judge Dennis Murphy told us judges can take an active role to ensure defendants are not charged with possession for mere drug paraphernalia:

There's so much space for judicial discretion. The police and SA's [State Attorney's] office will typically arrest for residue and charge for paraphernalia and possession. When a defendant is arraigned in my division and the lab report says merely residue, the defendant is invited to [move to] dismiss the possession [charge].... So I dismiss the possession and let them plead to paraphernalia. Despite case law from the Third District [Court of Appeal] saying [residue] is still possession, I disagree.<sup>170</sup>

## Medications Made into Felonies

A number of interviewees were charged with felony drug possession for medications for which they could not provide the prescription. Some interviewees said they were

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<sup>167</sup> Human Rights Watch interview with Alyssa Burns (pseudonym), Houston, March 15, 2016.

<sup>168</sup> Human Rights Watch interview with Breanna Wheeler (pseudonym), Galveston, March 17, 2016.

<sup>169</sup> Human Rights Watch interview with Nicole Bishop (pseudonym), Houston, March 14, 2016.

<sup>170</sup> Human Rights Watch interview with Judge Dennis Murphy, Miami, December 21, 2015.

prescribed the medication in question but had allowed the prescription to lapse.<sup>171</sup> Others had a partner's or friend's medication in their possession when they were arrested. None of them were formally accused of dealing or committing fraud in obtaining the medications. And none of them felt they should be considered criminals simply for possessing pills many other people in the United States keep in their medicine cabinets.

Possession of certain prescription medications without evidence of the prescription is criminalized, sometimes at the felony level, in most states.<sup>172</sup> Although this may derive from a legislative intent to curb misuse and unlawful sale of prescription medicines, and is particularly relevant today with respect to prescription painkillers, its enforcement can be overbroad. Some of the cases we learned about suggest a lack of reasonableness and prosecutorial investigation that might have revealed mitigating facts, where prosecutors failed to exercise discretion to decline cases or to seek lesser charges and instead pursued cases aggressively.

Defendants we met were prosecuted with felony charges for possession of commonly prescribed medications including Adderall, Vyvanse, Xanax, and Klonopin.<sup>173</sup> Anita Robinson, 25, was charged with felony drug possession in Houston for seven Adderall pills. She said that, from the prosecutor's perspective, "it doesn't matter that it's Adderall. [They treat it] like it could be meth or cocaine or whatever; it's just classified with those same drugs."<sup>174</sup>

Furthermore, in some Texas cases we examined in March 2016, prosecutors sought sentencing enhancements for these offenses or chose to charge according to the total weight of the pills, rather than the strength of the medication within them. For example, Adderall pills come in 5 to 30 mg strengths, but because the prosecutor considered the

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<sup>171</sup> It was unclear whether in these cases people had received the pills from another source or whether they were charged with the pills they had initially been prescribed. Texas defense attorney Vik Vrij told us that a number of his clients had been charged with drug possession for pills for which the prescription had expired and/or that were being carried out of the bottle. Although he said he succeeded in getting felony charges dismissed, the fact that the prosecutor brought them initially is of concern. Human Rights Watch phone interview with Vik Vrij, July 20, 2016.

<sup>172</sup> See, for example, Louisiana Commission on Law Enforcement and Administration of Criminal Justice, "Drug Law Comparisons Charts of Southern States," undated, [http://www.lcle.la.gov/sentencing\\_commission/Resources/1%20B.%20Controlled%20Substance%20Comparison.pdf](http://www.lcle.la.gov/sentencing_commission/Resources/1%20B.%20Controlled%20Substance%20Comparison.pdf) (accessed June 22, 2016).

<sup>173</sup> These medications are commonly prescribed for Attention Deficit Disorder and anxiety.

<sup>174</sup> Human Rights Watch interview with Anita Robinson (pseudonym), Dallas, March 9, 2016.

entire weight of the pills, George Morris' possession of seven 20 mg strength Adderall pills translated into a third degree felony under Texas law.

### **George Morris' Story**

George Morris told us his story as follows:

When he was 17 years old, George was convicted of burglary. George said he entered the open window of a friend who owed him money and took a PlayStation 2, and that he was prosecuted for burglary even though his friend's mother tried to get the charges dropped. He served three years in prison.

Ten years later, George was arrested in The Colony, Texas, when police found seven 20 mg Adderall pills in his car. George told us the pills were prescribed to his girlfriend. Because of his prior felony, he faced up to 20 years in prison for possession of the seven pills, despite the fact that the combined strength of the pills was a mere 0.14 grams.

Prosecutors chose to enhance George's charge with the PlayStation 2 conviction so that he faced up to 20 years for the pills. They ultimately offered him six years in prison in exchange for a guilty plea. Although six years is significantly less than a possible 20, it is a very long time from any other perspective and is a grossly disproportionate punishment for George's "crime."

When he spoke to us, George was out on bond and had not decided whether to take the offer, but he said this case had already destroyed his life. He said it caused him to go into a depression for which he was hospitalized. His relationship with his girlfriend of 12 years was strained and eventually ended. His depression was so severe that he left his job and lost his house. He told us, "When I caught that charge, it took so much out of me because I was not doing anything to break the law, not doing anything to affect or hurt anyone around me.... Six years of your life ... for seven Adderall pills."<sup>175</sup>

Before being prosecuted, George said he had a small grass-cutting and construction business; he woke up every day at 8 a.m. and worked all day. He told us everybody

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<sup>175</sup> Human Rights Watch interview with George Morris (pseudonym), The Colony, March 12, 2016.

knew they could make a little money on the side if they sold drugs but that he refused to do so:

I made a vow to God ... I am not going to have these drugs; I am not going to sell no drugs; I am not going to do any drugs. I am going to focus on what I need to focus on, and that is cutting green grass and building fences. So that's what I did.... But I gave up on [that] when I caught that case. I was just like, there's no point in living.... I stay in my room and I sleep.<sup>176</sup>

We met many others like George. One of them was Amit Goel, a 19-year-old college sophomore in Dallas who had been prescribed Adderall since high school but said that he let his prescription run out the previous month. He was arrested with eight pills of Adderall and Vyvanse, another ADHD medication, and was facing a third degree felony for drug possession, which carries two to ten years in prison. He told us he got his prescription renewed the month after his arrest, but the prosecutor continued to pursue felony charges, on what would be Amit's first felony conviction.<sup>177</sup>

Months after our visit to Texas, practitioners told us it had been discovered that possession of Adderall and Vyvanse was “mistakenly” no longer a felony offense, due to the “unintended consequences” of a Texas bill passed in 2015. According to the Texas District and County Attorneys Association, “The upshot of all this is that after September 1, 2015, most (all?) Adderall and Vyvanse crimes became misdemeanors, not felonies.”<sup>178</sup>

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<sup>176</sup> Ibid.

<sup>177</sup> Human Rights Watch interview with Amit Goel (pseudonym), Dallas, March 7, 2016.

<sup>178</sup> Parenthetical and emphasis in original. See Texas District and County Attorneys Association, “Important notice about Adderall (updated),” August 5, 2016, <http://www.tdcaa.com/announcements/important-notice-about-adderall-updated> (accessed August 9, 2016) (“SB 172 added a new subsection (d) to Health & Safety Code §481.103 that excludes any FDA-approved substances from Penalty Group 2 (PG2), even if specifically listed in that section. This FDA-approval language was intended by the original supporters of the bill to be limited to only certain substances in PG2, but the final version mistakenly applies that exemption to *all* substances listed in PG2. No one knows exactly why that was changed, but regardless, we are stuck with the plain language of this broad exemption.... Therefore, if our analysis is correct, you should immediately change your charging protocols, alert your local law enforcement to this change, and then review past cases to see if any of them need to be re-opened. So ... good luck with that!”). Human Rights Watch confirmed this change with an assistant district attorney and several defense attorneys. The news appeared slow to spread.

The three Texas cases, on the previous page, were all being prosecuted as felonies in March.<sup>179</sup>

In Jefferson Parish, Louisiana, Darius Mitchell, profiled in section IV, was charged with his first felony for hydrocodone pills he said his son's mother had left in his car after their visit to the Emergency Room.<sup>180</sup> In Shreveport, Glenda Hughes pled guilty to her first felony for possession of pills that she said were her husband's. She told us she was arrested in her nightgown, without shoes, having run out the door with her purse after her husband beat her. She said that her husband was prescribed Klonopin and, because he would misuse them, she carried them for him to help him comply with the prescribed dosage. Glenda told us her husband said the pills were his and tried to explain things to the prosecutor.<sup>181</sup>

## Charging Distribution in Possession Cases

In all four states we visited, some defendants were arrested in possession of drugs that they said were for their own use, but prosecutors chose to charge distribution or possession with intent to distribute (PWID)—without making any effort, as far as defendants or their lawyers could tell, to investigate whether the drugs were in fact for personal use.

Pursuing distribution charges for facts supporting simple possession is yet another example of prosecutors' charging as aggressively as possible. A Caddo Parish defense attorney summed up what many had told us in all four states we visited: "They overbill the PWID charges. Anything approaching the weight [of distribution], anything with baggies. [Because] if the charge is PWID, it's a higher bond."<sup>182</sup> Because a higher bond means defendants are more likely to have to wait in jail until their case is disposed, and because PWID carries longer sentences, many interviewees felt the charge was meant to force their

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<sup>179</sup> The change in the law appears not to be retroactive, so that those charged before the effective date of September 1, 2015 can still be prosecuted on felony charges. Texas SB 172, sec. 4. All three of the Texas cases above predated September 2015.

<sup>180</sup> Human Rights Watch interview with Darius Mitchell (pseudonym), Harvey, January 24, 2016.

<sup>181</sup> Human Rights Watch interview with Glenda Hughes (pseudonym), Shreveport, February 6, 2016. Glenda said neither her lawyer nor the prosecutor nor the judge tried to obtain evidence of her husband's prescription or to investigate why she was in possession of the pills.

<sup>182</sup> Human Rights Watch interview with defense attorney, Shreveport, February 6, 2016.

hands so they would accept a plea offer on simple possession, a topic explored in more depth in the next section.

In most states, PWID is usually proved based on circumstantial evidence such as the presence of individually packaged bags; scales, ledgers, or records of sales; and, more problematically, the presence of cash. In some states, drug quantity alone is presumptive evidence of possession with intent to distribute or of distribution.<sup>183</sup> In Florida, possession over certain thresholds is considered drug trafficking.<sup>184</sup> Although individually packaged bags, scales, ledgers, and sales records may be sound evidence of distribution in some cases,<sup>185</sup> cash or quantity alone is problematic.

As Judge Murphy told us in Miami, “More than half the time, those PWIDs [should] become possession charges.... You get people on payday [so they have cash]. There goes your rent check, your food check.”<sup>186</sup> Using the presence of cash as evidence of distribution is flawed, both as a matter of evidence and as a matter of fairness. It is clearly not illegal to carry cash; without more, a person’s possession of significant sums in cash is at best extremely dubious evidence of criminal activity of any kind. At worst, it is a flimsy pretext to bolster charges that lack real evidence to support them. In fact, poor people may be more likely to carry cash on them, not because they are drug dealers but because they are less likely to maintain a bank account. A large percentage of poor people are unbanked (having no bank account) or underbanked (relying more heavily on alternative financial providers than on their bank). Black and Latino households are significantly more likely to be unbanked or underbanked than white households.<sup>187</sup>

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<sup>183</sup> For example, in South Carolina, possession of two grains or more of heroin, one gram or more of cocaine, or 28 grams (one ounce) or more of marijuana establishes prima facie evidence of intent to distribute. SC Stat. secs. 44-53-370(d)(1), 44-53-375.

<sup>184</sup> Florida recently lowered some of the thresholds for prescription drugs. Families Against Mandatory Minimums, “How the Reforms to Prescription Drug Trafficking Laws Affect Sentencing Policy in Florida,” undated, <http://famm.org/states-map/florida/how-the-reforms-to-prescription-drug-trafficking-laws-affect-sentencing-policy-in-florida/> (accessed July 31, 2016).

<sup>185</sup> In various jurisdictions, some interviewees said where individually packaged bags were evidence of intent to distribute, it was important that prosecutors consider the number of bags, since a person who purchased drugs for personal use might still have several of them packaged in this way. Others said the presence of a scale alone should not be sufficient evidence, since it is reasonable for anyone buying drugs for personal use to weigh them first, to avoid being cheated.

<sup>186</sup> Human Rights Watch interview with Judge Dennis Murphy, Miami, December 21, 2015.

<sup>187</sup> People who do not have full access to banks must keep their money in their homes or on their person. Many people who are unbanked or underbanked carry large sums of cash at certain times, perhaps to pay a full month’s rent, to pay for a car, or after receiving a month’s wages. This leaves them more vulnerable to law enforcement suspicion and cash seizures. The



In a case in Shreveport, a defendant and his attorney reported that prosecutors used the fact that the defendant had \$800 cash on him to increase the charges against him to include distribution of drugs, and that they did so even after he showed them he had just cashed a check from an insurance claim from a car accident.

David Ross said he was arrested in 2013 with a couple of grams of methamphetamines and eight to ten Percocet pills. Although there was no evidence of actual dealing, he was charged with two separate counts of distribution because he had drugs and money on him. In the courtroom, David told us, the prosecutor offered to lower the charges to possession if he took 10 years in prison—5 on each charge, run consecutively. David accepted on the spot, and the police kept his \$800 through civil forfeiture. He said:

[My cases were] always possession, because I've had a drug problem since I was 16 or 17 years old.... They're going to say you're distributing when they know you're not, so that when it comes to make a deal with you they will drop it down to simple possession and max you out. And you're happy to take it, as you'd rather do 5 than 30.<sup>188</sup>

In addition to the problems of relying solely on cash as evidence, a number of interviewees argued it is a mistake to assume a larger quantity of drugs means the person is necessarily distributing. They said they buy a larger amount because it is cheaper and so that they do not need to return so frequently to their dealer, which can be dangerous and intimidating. Carla James was arrested in Dallas in 2010 for possession of seven grams of methamphetamines. Although she said the police wrote it up as drug possession, she was indicted on distribution charges because of the quantity. But she explained the meth was for personal use:

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unbanked and underbanked populations are disproportionately poor and non-white. In 2013, 50.1 percent of households with family income less than \$15,000 were unbanked or underbanked, 36.4 percent with family income between \$15,000 and \$30,000 were unbanked or underbanked, and 28.4 percent with income between \$30,000 and \$50,000 were unbanked or underbanked. Additionally, roughly half of all Latino and Black households are unbanked or underbanked, while only one in five white households is. Federal Deposit Insurance Corporation, "2013 FDIC National Survey of Unbanked and Underbanked Households," October 2014, [ht https://www.fdic.gov/householdsurvey/2013report.pdf](https://www.fdic.gov/householdsurvey/2013report.pdf) (accessed June 6, 2016), pp. 16-17.

<sup>188</sup> Distribution carries up to 30 years in Louisiana. Human Rights Watch interview with David Ross (pseudonym), Shreveport, February 9, 2016.

I bought a large quantity because I didn't like going to the dope house.... You get more for your money when you get a higher amount.... It's just like going to the grocery store.... You know you need a gallon of milk to make it to Friday. A gallon costs \$2.50, and a half gallon costs \$1.75. Why would you buy the half gallon, knowing it's only going to last half of the week, when the full gallon is only [75 cents] more? Why buy a gram for \$100 when you could buy 7 for \$300?<sup>189</sup>

Where judges call foul, some prosecutors amend the charge down to possession. In Caddo Parish, Louisiana, Judge Craig Marcotte said he had intervened in this way:

Now, have I seen cases charged with possession with intent when they should have been possession? Sure. You can say this looks like possession to me, not possession with intent, which I have done before. A lot of the times, they say, "Okay, judge" [and they downgrade the charge]. You can just tell ... you know, having done this for so long, having seen thousands and thousands of these cases.<sup>190</sup>

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<sup>189</sup> Human Rights Watch interview with Carla James (pseudonym), Dallas, March 9, 2016.

<sup>190</sup> Human Rights Watch interview with Judge Craig Marcotte, Shreveport, February 4, 2016.

## VI. Pretrial Detention and the False Choice of a Plea Deal

Bail is very wrong here, very wrong. It's always too high. That causes at least two problems that I see. Number one, it causes more people to have to stay in jail. [Number two,] when people are sitting in jail they're much more prone to say, "Well, I'll plead because I'll get out."... [But] they shouldn't have been there in the first place. They should have had an unsecured promise to come to court. Because [pleading] is going to come to haunt you down the line.<sup>191</sup>

—Paul Carmouche, former district attorney for Caddo Parish, Louisiana, February 2016

Pretrial detention in drug cases contributes significantly to soaring jail and prison admissions and the standing incarcerated population in the United States. In 2014, approximately 64,000 people per day were detained pretrial for drug possession,<sup>192</sup> many of them in jail solely because they could not afford to post bail. As detailed in this section, this fact gives prosecutors significant leverage to coerce plea deals.

Pretrial detention, an inherently negative experience, also separates many defendants from their families and jobs and threatens lasting harm or disruption to their lives. To avoid all of this—or because long sentences otherwise hang over their head if they lose at trial—many defendants plead guilty simply to secure their release, in cases where they might otherwise want to go to trial.

### Pretrial Detention

During the pretrial stages of a criminal case, judges can either release defendants on their own recognizance or set a money bond (also known as bail).<sup>193</sup> Release on own recognizance (ROR), also known as a personal recognizance (PR) bond, permits someone to be released until the

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<sup>191</sup> Human Rights Watch interview with Paul Carmouche, Shreveport, February 9, 2016.

<sup>192</sup> Peter Wagner and Bernadette Rabuy, "Mass Incarceration: The Whole Pie 2016," Prison Policy Initiative, March 14, 2016, <http://www.prisonpolicy.org/reports/pie2016.html> (accessed August 11, 2016).

<sup>193</sup> Some statutes allow for no bond to be set in certain cases of extremely dangerous offenses, but drug possession is not one of those offenses. Thus all drug possession defendants should in theory have the opportunity to be released pretrial if they can make bond.

next court date simply on a promise to appear; they must pay the specified bond amount if they fail to do so. For people we interviewed in Texas and Louisiana, a PR bond was not offered, even though it was statutorily available to the judge. Instead, bail was set at thousands of dollars.<sup>194</sup>

Defendants who cannot afford to pay the full bail amount often use a bondsman instead. Under this scheme, defendants pay a fee to a private bondsman company (sometimes 10 to 13 percent of the total bail amount), and the bondsman then takes on the obligation to ensure their reappearance. Defendants never receive the bondsman's payment back, so the system has the effect of imposing financial costs on low-income defendants that people who possess the independent means to post bail do not incur. If defendants lack the financial resources to post bail, either through a bondsman or on their own, they remain incarcerated either until they come up with the money or until case disposition.

That effect is wide-reaching. In the two states for which we received court data containing attorney information, the majority of drug possession defendants were indigent—in other words, poor enough that they qualified for court-appointed counsel. In Florida, 64 percent of felony drug possession defendants relied on court-appointed rather than retained counsel. In Alabama, the rate was 70 percent, including marijuana as well as felony drug possession.<sup>195</sup> And these numbers are conservative, because indigent defendants who qualify for court-appointed counsel may still choose to sacrifice other resources and needs to pay for an attorney.<sup>196</sup>

High rates of pretrial detention reflect the reality that judges set bail so high that many defendants cannot afford it. In 2009, the most recent year for which the US Department of Justice has published data, 34 percent of possession defendants were detained pretrial in the 75 largest counties. Nearly all of those detained pretrial (91.4 percent) were held on bail,

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<sup>194</sup> Every criminal defendant has a right to have their bond set within 72 hours of arrest, at which point a neutral magistrate determines the proper bond for the individual case to achieve the goals of the state's bond system. According to defense attorneys in St. Tammany Parish, Louisiana, this is done by a bond commissioner who visits the parish jail twice per week. If this is true, it means that St. Tammany Parish would be systematically violating the 72-hour rule.

<sup>195</sup> By comparison, the rate of appointed counsel use for non-drug felony cases was 57 percent in Florida. (Alabama only provided data on drug cases.) Human Rights Watch analysis of data provided by the Florida Offender Based Transaction System from 2010 to 2015 and the Alabama Sentencing Commission.

<sup>196</sup> Moreover, even those who do not meet the indigency cut-off may still have limited financial means. John P. Gross, "Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of their Sixth Amendment Right to Counsel," *Washington and Lee Law Review*, vol. 70 (2013), <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4331&context=wlur> (accessed September 23, 2016), pp. 1173-1219.

meaning that if they had had the means to pay, they would have been released.<sup>197</sup> That same year, possession defendants in the 75 largest counties had an average bail of \$24,000. Because the higher the bail, the more likely someone will not be able to afford it, the average bail for those detained was even higher. For those defendants, the average was \$39,900.<sup>198</sup>

The money bail system is premised on the idea that defendants will pay to get out of jail and that, if the amount is high enough, they will return to court to get their money back. In theory, the principal goal is to ensure that defendants return: in other words, to prevent flight.<sup>199</sup> Yet data shows that drug possession defendants released pretrial do come back to court. Human Rights Watch has previously examined the myth that released defendants evade justice in New York.<sup>200</sup> Failure to appear rates are similarly low in other jurisdictions and for drug possession specifically. In the 75 largest US counties in 2009, 78 percent of people charged with possession and released pretrial made all their appearances in court; another 18 percent returned to court after their missed appearance(s). This means that in total 96 percent of all possession defendants ultimately came back to court.<sup>201</sup> Although the data does not indicate whether these defendants posted bail or were released on their own recognizance, it certainly counsels in favor of affordable bond that enables release.

When judges set bond, the amount should be individually tailored, reflecting an individualized determination not only of the flight risk posed by a particular defendant but also of that person's ability to pay.<sup>202</sup> But in many jurisdictions we visited, interviewees said judges did not take their individual circumstances into account. In St. Tammany Parish, interviewees said their bonds were set even before they had met their appointed counsel,

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<sup>197</sup> Brian A. Reaves, Ph.D., "Felony Defendants in Large Urban Counties, 2009 - Statistical Tables," US Department of Justice, Bureau of Justice Statistics, December 2013, <http://www.bjs.gov/content/pub/pdf/fdluco9.pdf> (accessed September 25, 2016), table 12.

<sup>198</sup> *Ibid.*, table 16.

<sup>199</sup> Some jurisdictions also set bail because prosecutors and judges are concerned the defendant would be a danger to the community if released.

<sup>200</sup> Human Rights Watch, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, December 2010, <https://www.hrw.org/report/2010/12/02/price-freedom/bail-and-pretrial-detention-low-income-nonfelony-defendants-new-york>.

<sup>201</sup> Brian A. Reaves, Ph.D., "Felony Defendants in Large Urban Counties, 2009 - Statistical Tables," table 18. The data is limited to defendants who returned within one year but does not distinguish between those who returned within 24 hours and those who took longer.

<sup>202</sup> Each state has a separate set of factors. For a discussion of statutory factors applied in New York, see Human Rights Watch, *The Price of Freedom*, pp. 13-19.

without a formal hearing. In a number of jurisdictions in Louisiana, bond is routinely set high, and it is up to the defense counsel to file a motion to reduce bond, which is then scheduled for a hearing sometime later. For low-income defendants unable to pay a high bond, this means they remain detained at least until the bond is reduced some weeks later.

In Texas and Louisiana, we interviewed approximately 30 defendants who could not afford the bondsman amount, let alone their full bail, and as a result were forced to remain in pretrial detention until their case was resolved. For some people, taking a case to trial may mean languishing in detention for over a year. Even for those ready to enter a plea deal, many had to spend months in detention before the prosecutor made an offer. In 2009, the median time between arrest and adjudication for possession defendants in the 75 largest counties was 65 days,<sup>203</sup> which would be spent in jail if a person could not afford bond. For people we interviewed, the wait was often much longer. Jason Gaines was charged with drug possession in Granbury, Texas, and said his bond was set at \$7,500. He told us, “It was important to bond out because I didn’t want to be stuck in here forever. It takes at least three months to go to court for your first offer.”<sup>204</sup>

In our jail interviews in Texas and Louisiana, some pretrial detainees were waiting in jail while their attorneys investigated the case and filed pretrial motions, so that if they were going to consider pleading guilty, they could do so with a better sense of the strengths and weaknesses of their case. Other interviewees remained in pretrial detention because they wanted to go to trial or because they were hoping to get a better offer from the prosecutor. Some said they ultimately gave up, because fighting a case—either at trial or through pretrial motions such as for suppression of evidence—meant waiting too many months. Delays can be caused by overburdened courts and public defender systems, laboratory testing, and lack of communication between offices. When we met him, Matthew Russell had been waiting in pretrial detention for 16 months to take his “trace” possession case to trial. He said, “[If I didn’t have priors,] I’d be looking at 24 months.<sup>205</sup> I’ve done 16 [pretrial].... I spent my 39th birthday here, my 40th birthday here in this jail ... waiting to go to trial.”<sup>206</sup>

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<sup>203</sup> Brian A. Reaves, Ph.D., “Felony Defendants in Large Urban Counties, 2009 - Statistical Tables,” table 20.

<sup>204</sup> Human Rights Watch interview with Jason Gaines (pseudonym), Granbury, March 10, 2016.

<sup>205</sup> The maximum sentence for possession under one gram in Texas is two years.

<sup>206</sup> Human Rights Watch interview with Matthew Russell (pseudonym), Granbury, March 10, 2016.

## Bond Schedules

In Texas jurisdictions we visited, bail was set according to bond schedules that provided presumptive amounts of bail according to the charge, sometimes with enhancements for criminal history, but regardless of ability to pay. As a one-size-fits-all model, bond schedules deprive defendants of individualized determinations. In litigation, the US has emphasized that it would be unconstitutional for detention to depend solely on a person's ability to pay the schedule amount.<sup>207</sup>

Yet the use of bond schedules is prevalent nationwide. A 2009 study of the 112 most populous counties found that 64 percent of those jurisdictions relied on them.<sup>208</sup> Presumptive bail amounts may also vary greatly between jurisdictions within a state, increasing the arbitrariness and inequality of the practice. For example, the ACLU of California reported in 2012 that there were 58 different bond schedules in use across the state. For simple drug possession, presumptive bail amounts were \$5,000 in Fresno and Sacramento, \$10,000 in Alameda and Los Angeles, and \$25,000 in San Bernardino and Tulare.<sup>209</sup> Although, in theory, judges can depart from the schedule in individual cases, defense attorneys told us that as a matter of practice they rarely do.

High bonds also mean that some people we spoke with were detained pretrial even though they were only facing probation post-conviction. In Texas, a first offense state jail felony requires mandatory probation if the person is convicted. Yet many people are detained pretrial, sometimes even for months, before they are convicted and sentenced to probation. This means that someone ends up doing jail time in a case for which the legislature, judge, prosecutor, and defense attorney all agree any period

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<sup>207</sup> As the US Attorney General has phrased it, "It is the position of the United States that, as courts have long recognized, any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pre-trial release, without any regard for indigence, not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy.... Fundamental and long-standing principles of equal protection squarely prohibit bail schemes based solely on the ability to pay. Fixed-sum bail schemes do not meet these mandates. By using a predetermined schedule for bail amounts based solely on the charges a defendant faces, these schemes do not properly account for other important factors, such as the defendant's potential dangerousness or risk of flight." *Varden v. City of Clanton*, No. 15-cv-00034-MHT-WC (M.D. Al.), Statement of Interest of the United States (filed February 13, 2015).

<sup>208</sup> Pretrial Justice Institute, "Pretrial Justice in America: A Survey of County Pretrial Release Policies, Practices and Outcomes," September 2010, <http://www.pretrial.org/download/research/PJI%20Pretrial%20Justice%20in%20America%20-%20Scan%20of%20Practices%202009.pdf> (accessed September 25, 2016), p. 7.

<sup>209</sup> Allen Hopper, Margaret Dooley-Sammuli, and Kelli Evans, "Public Safety Realignment: California at a Crossroads," ACLU of California, March 2012, [https://www.aclunc.org/sites/default/files/public\\_safety\\_realignment\\_california\\_at\\_a\\_crossroads.pdf](https://www.aclunc.org/sites/default/files/public_safety_realignment_california_at_a_crossroads.pdf) (accessed September 27, 2016), p. 20.

of incarceration as a form of punishment is unwarranted.<sup>210</sup>

### **Waiting on Charges in Louisiana**

Defense attorneys in Louisiana told us defendants experienced long waits in detention before the prosecutor charged them through a formal bill of information or indictment. Under international human rights law, authorities cannot hold individuals for extended periods without charge; to do so amounts to arbitrary detention. The US Supreme Court has held that within 48 hours of arrest, a judge or magistrate must make a probable cause determination that the detainee has committed some crime.<sup>211</sup> But beyond the 48-hour rule, the prosecutor has still more time to decide which charges to bring—the Supreme Court has not yet ruled on how long this period may be, and jurisdictions vary widely in how they regulate it.

Under Louisiana Code of Criminal Procedure article 701, the district attorney's (DA) office has 60 days to "accept" the charges in the police report for a felony defendant detained pretrial—far in excess of the period many other US states allow.<sup>212</sup> That means for two months, a defendant who cannot afford bond, and who has not been formally charged—let alone convicted—of any crime, is forced to wait in jail without even knowing the charges against him or her. Judge Calvin Johnson told us, "You shouldn't be arresting a person on January 1 and charging him in March. I mean that just shouldn't be."<sup>213</sup> In St. Tammany and Calcasieu Parishes, public defenders told us that prosecutors regularly would not file charges within the mandatory 60 days, and were routinely granted extensions of time by the court—typically another 30 days—to make their charging decision. Defendants and practitioners call this period of pretrial detention "doing DA time."

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<sup>210</sup> Although Louisiana law does not mandate this result the way Texas law does, some low-level possession defendants also get probation on a first offense. Retired New Orleans Judge Calvin Johnson said this practice was nonsensical: "A [more carefully] thought out system would start out with the premise, if you come to jail for an offense that the next day you could walk into court and plead guilty and get probation for, then you shouldn't get jail [time while you wait]. If the crime doesn't have a minimum sentence attached to it, and the individual does not have a prior history to dictate a jail sentence, then that person shouldn't be in jail [pretrial]. It's stupid for that person to be in jail, for lots of reasons. The cost alone. Keep in mind, in New Orleans it's \$103 a day." Human Rights Watch interview with Calvin Johnson, New Orleans, January 26, 2016.

<sup>211</sup> *County of Riverside v. McLaughlin*, 500 US 44 (1991).

<sup>212</sup> The prosecutor has 150 days to file charges if the defendant has posted bond. LA Code of Criminal Procedure art. 701(B). Many states require the prosecutor to bring charges within 72 hours of arrest. Florida requires formal charges to be brought within 33 days. FL Rules of Criminal Procedure rule 3.134. New York requires formal charges within five days, or six days if the custody period includes a weekend or holiday. NY Criminal Procedure Law sec. 180.80. California requires charges to be brought within 48 hours. CA Penal Code sec. 825. The federal system gives the prosecutor 30 days. 18 USC sec. 3161.

<sup>213</sup> Human Rights Watch interview with Calvin Johnson, New Orleans, January 26, 2016.



Studies show that case outcomes for those fighting their charges from outside of jail are across the board more favorable than for those who are detained pretrial. According to the Bureau of Justice Statistics, in the 75 largest counties in 2009, fewer than 60 percent of defendants charged with drug offenses were convicted if they were released pretrial; however, close to 80 percent of those detained were convicted.<sup>214</sup> Analyzing 60,000 cases in Kentucky from 2009 and 2010, the Arnold Foundation found that defendants detained for the entire pretrial period were over four times more likely to receive a jail sentence and over three times more likely to receive a prison sentence than those released at some point pretrial. Sentences were nearly three times as long for defendants sentenced to jail and more than twice as long for those sentenced to prison than defendants released pretrial.<sup>215</sup>

One of the main reasons pretrial detention correlates with worse case outcomes is that detainees may be more likely to plead guilty when they are already in jail. In fact, our research suggests that prosecutors in some jurisdictions seek and judges set bail at an amount they expect defendants will not be able to pay in order to ensure they end up in pretrial detention, which makes them likely to accept a plea deal faster.<sup>216</sup> Joyce Briggs told us, “They hold you until you plead. That impacts people’s decision to plead. It impacts mine. I know I’m not going to get more than three years and I’ve already done a half a year, so—that’s how our minds work.”<sup>217</sup>

Conditioning loss of liberty on ability to pay infringes on the right to equality under the law and amounts to wealth discrimination.<sup>218</sup> Human rights law requires that pretrial

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<sup>214</sup> Brian A. Reaves, Ph.D., “Felony Defendants in Large Urban Counties, 2009 - Statistical Tables,” figure 17.

<sup>215</sup> Christopher T. Lowenkamp, Ph.D., Marie VanNostrand, Ph.D., and Alexander Holsinger, Ph.D., “Investigating the Impact of Pretrial Detention on Sentencing Outcomes,” Arnold Foundation, November 2013, [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF\\_Report\\_state-sentencing\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf) (accessed September 25, 2016).

<sup>216</sup> Setting bail to ensure pretrial detention will be discussed in a forthcoming Human Rights Watch report about bail in California. See also Human Rights Watch, *The Price of Freedom*, pp. 31-33. Prosecutors know that once a defendant is out of jail, their leverage to get a plea they like diminishes. The defendant who is outside is less likely to agree to a plea than the person detained (as examined below), because time is on their side. This is part of the incentive for prosecutors to ensure people remain detained pretrial. For example, we documented in New York City that those released pretrial on misdemeanor offenses were unlikely to plead to an offense for which they would have to do more time in jail.

<sup>217</sup> Human Rights Watch interview with Joyce Briggs (pseudonym), Shreveport, February 6, 2016.

<sup>218</sup> It is currently the subject of litigation. Since 2015, for example, Equal Justice Under Law has filed 10 class action challenges to the use of money bail in eight different states, several of which have implemented reforms as a result. The US Department of Justice’s Civil Rights Division filed a statement of interest in one of them. *Walker v. City of Calhoun* (N.D. Ga. 2015); *Pierce v. City of Velda* (E.D. Mo. 2015); *Thompson v. Moss Point* (S.D. Miss. 2015); *Varden v. City of Clanton* (M.D. Al. 2015), Statement of Interest of the United States (filed February 13, 2015).

restrictions be consistent with the right to liberty, the presumption of innocence, and the right to equality under the law. Pretrial detention imposed on criminal defendants accused of drug possession solely because they cannot afford bail is inconsistent with those rights. The stress and suffering interviewees charged with drug possession endured in detention simply because of their low-income status is unfair, unnecessary, and inconsistent with human rights.

## Coerced Guilty Pleas

They forced me. I mean there's no doubt in my mind they forced me.<sup>219</sup>

—David Ross, on pleading guilty to drug possession in Caddo Parish, Louisiana

Like all criminal defendants in the United States, people charged with drug possession have a right to trial by jury. In practice, however, jury trials are exceedingly rare, with the majority of defendants at the state and federal levels—across all categories of crime—resolving their cases through guilty pleas.<sup>220</sup> In 2009, between 99 and 100 percent of individuals convicted of drug possession in the 75 largest counties nationwide pled guilty.<sup>221</sup> In Texas, approximately 97 percent of all felony possession convictions between September 2010 and January 2016 were obtained by a guilty plea.<sup>222</sup> In Florida, more than nine out of every ten people facing drug possession charges in court (both misdemeanor and felony) between 2010 and 2015 pled guilty.<sup>223</sup> Only 1 percent of all drug possession defendants in the state went to trial.<sup>224</sup> In New York, such trials were almost nonexistent:

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<sup>219</sup> Human Rights Watch interview with David Ross (pseudonym), Shreveport, February 9, 2016.

<sup>220</sup> Often the plea comes with a plea agreement. After plea negotiations between the parties, the prosecutor's offer of a particular sentence is accepted by the defendant in return for his or her guilty plea in a binding contract. The parties then go to the judge with the recommendation of the sentence. Most judges accept the guilty plea and impose that sentence, to speed along the docket.

<sup>221</sup> Brian A. Reaves, Ph.D., "Felony Defendants in Large Urban Counties, 2009 - Statistical Tables," US Department of Justice, Bureau of Justice Statistics, December 2013, <http://www.bjs.gov/content/pub/pdf/fdlucog.pdf> (accessed September 22, 2016), table 21.

<sup>222</sup> Human Rights Watch analysis of data provided by Texas Office of Court Administration.

<sup>223</sup> This includes those who pled *nolo contendere*, or "no contest," which means that a defendant does not contest the prosecutor's charges. Although it does not admit guilt, a *nolo contendere* plea has the same result—normally a conviction—as a guilty plea. Human Rights Watch analysis of Florida Office of the State Courts Administrator Offender Based Transaction System data.

<sup>224</sup> *Ibid.*

99.8 percent of the 143,986 adults convicted of drug possession between 2010 and 2015 accepted plea deals.<sup>225</sup>

For scores of individuals interviewed for this report, the right to a jury trial was effectively meaningless. For them, the idea of a trial was more of a threat than a right, often because it meant further pretrial incarceration until trial and/or a “trial penalty” in the form of a substantially longer sentence if they exercised that right and lost.

Part of the problem is that the criminal justice system is overburdened, which means not only that prosecutors and judges are busy, but also that public defenders—who are often substantially underfunded—do not have sufficient time and resources to devote to each case,<sup>226</sup> disparately impacting poor defendants, who make up the majority of those charged with drug possession.

So long as dockets remain as crowded as they are today, there will be a powerful incentive for prosecutors to secure pleas in as many cases as possible—including by strong-arm means.<sup>227</sup> As explained by former chief prosecutor Paul Carmouche, “If every defendant said, ‘Hey, we’re going to trial,’ then the system stops. It would be jammed up. You got to plead.”<sup>228</sup>

According to one Texas prosecutor, prosecutors feel pressure to move cases quickly, and the pressure sometimes comes from judges:

It’s so unfair: Everybody in the criminal justice system knows that if a person can’t bond out he’s more likely to plead and you’ll have your case moved.... Judges will campaign on efficiency [and] in order to do that, to say “I have the smallest docket of all judges,” they force the prosecutors to

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<sup>225</sup> Human Rights Watch analysis of New York Division of Criminal Justice Services data.

<sup>226</sup> *Yarls v. Buntun* (M.D. La. 2016); John P. Gross, “*Gideon* at 50: A Three-Part Examination of Indigent Defense in America, Part I: Rationing Justice: The Underfunding of Assigned Counsel Systems,” National Association of Criminal Defense Lawyers, March 2013, <https://www.nacdl.org/reports/gideonat50/rationingjustice/> (accessed September 25, 2016).

<sup>227</sup> Prosecutors, judges, and defense attorneys benefit from the plea system because it expedites the criminal process. Defendants *in theory* also benefit because they receive a discount off the sentence they would have received if they lost at trial.

<sup>228</sup> Human Rights Watch interview with Paul Carmouche, Shreveport, February 9, 2016.

plead more cases and force the defendants to plead to them, by issuing high bonds and refusing to lower them.... That external pressure feeds the lock-them-up system.<sup>229</sup>

### **A Crowded Court Docket—Full of Drug Possession Cases**

Some of the system “jam” is attributable to the large volume of drug possession cases prosecuted and disposed of by state courts. For example, from September 2010 through January 2016, Texas courts disposed of 893,439 drug cases (misdemeanors and felonies). Of all these drug cases, 78 percent (almost 700,000 cases) were for simple possession.<sup>230</sup> Among felony drug cases, 81 percent were for possession.<sup>231</sup> More than half of Texas’ drug cases during this period were misdemeanor cases (such as possession of marijuana or drug paraphernalia). Three quarters of all misdemeanor drug cases in the state were for marijuana possession only. In other words, there were approximately 371,000 marijuana possession cases prosecuted and disposed of in a little over five years.<sup>232</sup>

In total, drug possession cases accounted for over 15 percent of all county and district court criminal dockets in Texas.<sup>233</sup> In Florida, drug possession was the most serious charge in about 14 percent of all cases filed by prosecutors in county or district court.<sup>234</sup>

There is nothing inherently wrong with plea deals as long as the plea process is not coercive.<sup>235</sup> Coercion arises when prosecutors leverage the threat of an egregiously long

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<sup>229</sup> Human Rights Watch phone interview with Texas prosecutor, August 2016.

<sup>230</sup> Where a case contained more than one charge, possession was the most serious charge.

<sup>231</sup> The remaining 19 percent were for sales or manufacturing.

<sup>232</sup> Human Rights Watch analysis of data provided by Texas Office of Court Administration.

<sup>233</sup> Ibid.

<sup>234</sup> Human Rights Watch analysis of Florida Offender Based Transaction System data.

<sup>235</sup> If the original sentence the defendant faced was fair, and if the discount offered by the prosecutor is only a little less than the sentence that would have been available at trial, then in essence the defendant is simply receiving a benefit for not forcing the government to go to trial. However, sometimes the final sentence may be better but remains disproportionately severe for the offense of simple possession. For the constitutional and human rights legal analysis of the plea system, see Human Rights Watch, *An Offer You Can’t Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, December 2013, <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead>.

sentence to induce defendants to plead guilty to a lesser one, or when unreasonably high bail means that the only way to escape lengthy pretrial detention is to plead to probation, time served, or relatively short incarceration.

Before a judge accepts the defendant's guilty plea, the judge must perform a "plea colloquy" with the defendant—a series of questions to defendants to ensure they are knowingly and voluntarily waiving their right to a jury trial.<sup>236</sup> Among those questions is some version of the following, which is constitutionally required in every state and federal system: "Has anyone forced or threatened you to plead guilty, or offered you any promises other than what's contained in your plea agreement?" To a number of interviewees, this felt disingenuous. They knew they had to answer "no" to have their plea accepted, but said it was precisely a combination of coercion, threats, and promises that led them to plead.

Oscar Washington told us, "I remember everything of what the judge said [in] the plea [colloquy]. I felt like my back was against the wall, like the judge had me by the neck when he said, 'Did anyone force you to take this plea?' I couldn't say yes."<sup>237</sup> Interviewees in every jurisdiction we visited said they pled because the cost to their lives of waiting for trial in jail, or of risking the unreasonably steep penalties prosecutors threatened them with should they go to trial and lose, was too high.

### **Pressuring Defendants with "Exploding Offers"**

In many cases we examined in Louisiana and Texas, defendants were pressured into pleading guilty before they had seen the evidence against them or knew anything about the strength of the prosecutor's case. In several jurisdictions, defense attorneys told us that prosecutors would sometimes make an "exploding offer"—a plea deal that was available only if the defendant took it immediately, sometimes the first time the person appeared in court. In other cases, the offer would be off the table if the defendant filed any pretrial motions, for example a motion to suppress. In Dallas, defense attorneys said plea offers were good only until grand jury indictment, which is the formal charging document.

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<sup>236</sup> In Dallas, Human Rights Watch observed a judge perform the entire plea colloquy—for two felony charges—in under 60 seconds. The defendant pled to two years in prison and two felony convictions.

<sup>237</sup> Human Rights Watch interview with Oscar Washington (pseudonym), Shreveport, February 9, 2016.

In Slidell, Louisiana, Joel Cunningham, a Navy veteran, said he pled to 15 years in prison at his 2012 arraignment for possession of marijuana and possession of one gram of cocaine with intent to distribute. At the time he pled, he said he had not seen the evidence against him; it was his first day in court, when the charges are read against a defendant. “The bill of information was filed. Eight days later I was arraigned. Two hours later I pled. The 15-year deal would come off the table if I didn’t plead immediately.” Now that Joel had seen the evidence, he told us he would have challenged it with pretrial motions.<sup>238</sup>

In Caddo Parish, Louisiana, David Ross pled to 10 years for two possession charges. He said he had less than 10 minutes to accept the prosecutor’s offer: “They made me take 10 years that day, or they would have taken me to trial [on distribution] and I would have got a life sentence ... because if you lose in Caddo Parish at trial, you’re getting a life sentence.”<sup>239</sup>

These practices add to the pressures, threats, and promises that lead defendants to plead guilty when they might otherwise exercise their right to require the government to prove its case.

### *Pleading to Get Out of Jail*

For drug possession defendants with little to no criminal history, or in relatively minor cases, prosecutors in each state we visited often made offers of probation or relatively short incarceration terms. A short sentence may effectively mean “time served,” since defendants usually get credit against their sentence for time spent in pretrial detention. Numerous defendants recounted being faced with a choice: fight the case and stay in jail, or take a conviction and walk out the door with their family.

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<sup>238</sup> Human Rights Watch interview with Joel Cunningham (pseudonym), Slidell, February 3, 2016.

<sup>239</sup> David and his lawyer said absolutely there was no evidence of distribution; the charges were for a few grams of meth and a handful of Percocet pills. But the risk was too high to take the distribution charge to trial. Human Rights Watch interviews with David Ross (pseudonym), Shreveport, February 9, 2016, and defense attorney, Shreveport, February 9, 2016. We came across several similar cases in our interviews, raising concerns that there may be a trend of prosecutors “up-charging” possession cases to distribution as a scare tactic, as examined previously. Also in Caddo Parish, Oscar Washington recalled, “The prosecutor said, ‘Take this now or we’re picking a jury ... here’s the [habitual offender] paperwork; I’ll get it ready right now.’” Human Rights Watch interview with Oscar Washington (pseudonym), Shreveport, February 9, 2016.

A Texas prosecutor told us:

Dangling probation out there when a defendant can't afford to bond out is something prosecutors do to plead cases out. Especially in weaker cases, for example when there are multiple people in the car, or identity is an issue; you might dangle probation out there just to get a conviction and if the person screws up on probation you can go back and get the punishment you wanted. That's the reality, because the vast majority of people are not going to be successful on probation.<sup>240</sup>

Numerous defense attorneys told us that they had counseled their clients on the risks of taking a conviction, the onerous conditions of probation, and/or the strength of their case should they choose to fight it and not take a plea. Moreover, if they pled to a felony, it could serve as a predicate for enhancement of a subsequent charge down the road, or an even worse plea coercion. But taking a case to trial until verdict may take months, all of which defendants must spend waiting in jail if they cannot afford bond. Their choice is ultimately between the right to a trial and the promise of freedom. John Lindner, District Defender in St. Tammany Parish, summarized the problem:

Innocent people plead all the time. Not only here, but nationwide. It's a matter of, if I stick you in jail, and you've been in jail for four or five months, and I come to you, "Hey, you can go home today, all you have to say is 'yeah, I'm guilty,' and you get to go home on probation." You might jump on that.<sup>241</sup>

Interviewees explained why it was an obvious choice to plead guilty when they were in detention, although they would have fought their case if they had been on pretrial release:<sup>242</sup>

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<sup>240</sup> Human Rights Watch phone interview with Texas prosecutor, August 2016.

<sup>241</sup> Human Rights Watch interview with John Lindner, Covington, January 28, 2016. The problem of pleading when innocent is examined in the text box above.

<sup>242</sup> Jail conditions are notoriously bad around the country. Although we did not investigate conditions, some pretrial detainees in Louisiana and Texas told us that they were ready to accept a plea deal so they could be transferred from jail to a prison facility. Defense attorneys in both states also pointed to the problem. Considering the harshness of US prison conditions, it is striking that someone would contemplate pleading guilty because jail is so much worse. See Jamie Fellner, "Torture in US Prisons," in *Torture: A Human Rights Perspective*, ed. Kenneth Roth, Minky Worden, and Amy D. Bernstein (New York: The New Press and Human Rights Watch, 2005).

- In New York City, Deon Charles told us he pled guilty to possession with intent to distribute cocaine because his daughter had just been born that day: “I never sold drugs ... it was bogus. [But] I didn’t have the funds to afford to fight [and] my daughter was born [that] day.... I pled because I wanted to see my daughter. And when I pled I got to go home. But I lost my job [as an EMT] because of it.”<sup>243</sup>
- Alyssa Burns, charged in Houston with residue in a meth pipe, said if she could bond out she would take the case to trial. “I would probably win at trial, but I talked to a girl yesterday and she had been sitting here for 11 months waiting for labs....<sup>244</sup> I can’t do it. This place is awful. So now I’m just gonna sign for a felony, flush my degree down the toilet and just see what happens.”<sup>245</sup>
- Breanna Wheeler, a single mother in Galveston, never showed up to chaperone her 9-year-old daughter’s school trip. She had been arrested the night before with residue on a plastic bag. Against her attorney’s advice, she pled to probation and her first felony conviction. They both said she had a strong case that could be won in pretrial motions, but her attorney had been waiting months for the police records and Breanna needed to return to her daughter. Afterwards, her attorney said, “She’s home with her kid, but she’s a felon.”<sup>246</sup>
- Also in Galveston, Jack Hoffman was detained pretrial for meth possession. He told us, “I don’t have money to bond out.... I don’t want to sign [for this felony], but if it means getting out there to my life and my family, I’ll do whatever it takes.... If I could bond out and still work and support my family, then I would fight it. But from in here? ... It’s kind of a catch-22 situation, damned if you do, damned if you don’t.”<sup>247</sup>

Dhu Thompson, a former New Orleans and Caddo Parish prosecutor, warned that a decision to plead to probation, though it seems obvious at the time, may haunt the defendant down the road:

Say you have an individual charged with possession of cocaine. But the individual has now been in jail for 25 days and will plead to anything to get

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<sup>243</sup> Human Rights Watch interview with Deon Charles (pseudonym), New York, November 24, 2015.

<sup>244</sup> She said the woman had sent the labs back for retesting, as Alyssa said she also wanted to, which took even longer than usual.

<sup>245</sup> Human Rights Watch interview with Alyssa Burns (pseudonym), Houston, March 15, 2016.

<sup>246</sup> Human Rights Watch text correspondence with Vik Vrij, April 4, 2016.

<sup>247</sup> Human Rights Watch interview with Jack Hoffman (pseudonym), Galveston, March 17, 2016.



out. He comes to court, and the prosecutor offers him a felony plea. Nine out ten times they're going to take it. [But now] they have that first felony on their record. They can't vote. They can't get a job. You know, family may ostracize them. That may create a problem where now you're a repeat offender because this individual is desperate and does something in a desperate situation.<sup>248</sup>

### *Pleading to Avoid the Trial Penalty*

Prosecutors wield so much power in the plea system that defendants often have no expectation or hope that they will receive a proportionate sentence if they lose at trial.<sup>249</sup> Many prosecutors use the threat of adding, or the promise of dropping, charges or sentencing enhancements to pressure defendants to give up their rights to trial.

Concerned about how a pled-to felony makes clients vulnerable under Louisiana's harsh habitual offender law, public defender Barksdale Hortenstine, Jr. said, "I can't tell you how many clients [I've had where] at the end of the representation, I've told them, 'I will buy you the ticket, I will do anything I can, will you please leave this state? You cannot afford the risk involved in living here.'"<sup>250</sup>

### **The Threat of Enhancements**

In cases we examined in Louisiana and Texas, prosecutors used habitual offender laws to enhance a defendant's sentence range based on prior convictions and then offered to drop the enhancements in exchange for a guilty plea.<sup>251</sup> This tactic was used—even in cases where defendants had only drug possession priors or other non-violent, low-level

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<sup>248</sup> Human Rights Watch interview with Dhu Thompson, Shreveport, February 8, 2016.

<sup>249</sup> Human Rights Watch has documented this problem at the federal level as well. Human Rights Watch, *An Offer You Can't Refuse*. See also, Jennifer Turner, "A Living Death: Life Without Parole For Nonviolent Offenses," ACLU, November 2013, <https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf> (accessed September 25, 2016).

<sup>250</sup> Human Rights Watch interview with Barksdale Hortenstine, Jr., New Orleans, January 29, 2016.

<sup>251</sup> Prosecutors regularly offer to "abandon the paragraphs" in Texas, a reference to the indictment that includes a paragraph for enhancements based on prior convictions. In Louisiana, where the habitual offender, a.k.a. "multi-bill," enhancements are sought after conviction, prosecutors would offer a plea deal based on a negotiated "bill status," agreeing not to seek enhancements based on some or all of the defendant's prior convictions. Because the judge does not inquire into these details of the plea deal, prosecutors have enormous power to negotiate, threaten, and promise in return for guilty pleas. In Louisiana, the multi-bill sentencing ranges are mandatory upon the judge, making it the harshest trial penalty we observed. By contrast, in Texas, although the statutory minimum is mandatory in terms of years required, the judge can elect to have the defendant serve those on probation rather than in prison. In practice, probation sentences are relatively rare except on a first offense.

convictions such as theft—either to scare them into a plea deal or, when they refused, to penalize them for going to trial.

Interviewees in Louisiana and Texas described how prosecutors used fear of enhancements to scare them into accepting plea offers that, in some cases, were horrible “deals” but that seemed reasonable to them nevertheless in light of the trial penalty they faced as habitual offenders. In the New Orleans Public Defender’s Office, Barksdale Hortenstine, Jr. explained, “The risk associated with [the habitual offender law] is so high that any rational lawyer has to advise vigorously to take deals that otherwise would seem absurd. So you end up pleading to five years in prison or eight years in prison [for possession]. Those numbers are commonly passed around.”<sup>252</sup>

### **When the Prosecutor, Not the Judge, Selects the Sentence**

In Louisiana, the habitual offender law provides for mandatory minimums,<sup>253</sup> meaning that the judge typically has no discretion to sentence below them.<sup>254</sup>

Mandatory minimums take sentencing authority away from the judge and place it in the hands of prosecutors instead. Judges in Louisiana acknowledged that this meant the prosecutor wields a powerful tool—“a huge hammer,” according to Caddo Parish Judge Marcotte.<sup>255</sup>

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<sup>252</sup> Human Rights Watch interview with Barksdale Hortenstine, Jr., New Orleans, January 29, 2016.

<sup>253</sup> Not all habitual offender laws impose mandatory minimums. Some substantially raise the maximum available sentence but not the minimum. Others also raise the statutory minimum but other provisions of state law allow the judge to depart downward or to suspend the sentence (in other words, to give probation).

<sup>254</sup> In Louisiana, judges can in theory go below the mandatory minimums if the case is exceptional, according to a case called *State v. Dorthey*. But defense attorneys we met said that although they had often filed *Dorthey* motions, they had never been successful on one. Most judges said they had never granted one. In the case of Bernard Noble, who is currently serving 13 years and 4 months in prison for possession of the equivalent of two joints worth of marijuana (2.8 grams), the judge initially did grant a *Dorthey* motion. However, the Louisiana Supreme Court reversed, finding the case not to be exceptional and not to warrant *Dorthey* relief, allowing the sentence of over 13 years in prison for two joints of marijuana to stand. Human Rights Watch interviews with attorneys at Orleans Public Defenders, January 2016; Matt Ferner, “This Man Is Serving More Than 13 Years In Prison Over Two Joints’ Worth of Marijuana,” *Huffington Post*, August 14, 2015, [http://www.huffingtonpost.com/entry/bernard-noble-marijuana\\_us\\_55b6b838e4b0074ba5a5e160](http://www.huffingtonpost.com/entry/bernard-noble-marijuana_us_55b6b838e4b0074ba5a5e160) (accessed September 25, 2016).

<sup>255</sup> Human Rights Watch interviews with Judge William J. Knight, Covington, January 28, 2016; Judge Craig Marcotte, Shreveport, February 4, 2016; and former judge and current District Attorney James Stewart, Shreveport, February 8, 2016.

Numerous government officials in Louisiana told us the habitual offender law is used mostly for drug dealers and not for those charged with simple possession charges, or that it is used for defendants with violent criminal histories or other serious felony priors and “then the straw that breaks the camel’s back is the possession.”<sup>256</sup> However, we documented cases in Louisiana and also in Texas where prosecutors used the habitual offender law for defendants whose only prior convictions were for drugs, such as Leroy Carter.

After suffering an injury while serving in the Navy, Leroy Carter was given a medical discharge and prescribed pain medications. He became dependent on the medications, and eventually he turned to other drugs. Now Leroy is serving 10 years on a plea deal for possession of marijuana and heroin. He pled guilty in 2012 in New Orleans because he was facing 20 years to life in prison if he lost at trial. His priors were all drug convictions: two marijuana possessions in the early 2000s, a heroin possession in 1999, and a marijuana distribution conviction in 1998.<sup>257</sup> When we spoke to him on the phone, we asked how much time he had to talk. He answered, “Ten years.”<sup>258</sup>

In Texas, defendants told us the habitual offender enhancements made them feel they had no choice but to plead:

- In Fort Worth, Hector Ruiz faced 25 to life for heroin possession because of his two prior felonies. “If I lose at trial, they start at 25.... It’s a scare tactic so you don’t go to trial. ‘You better not go to trial because if you lose, this is what happens! So take the five right now!’ This is not fair.”<sup>259</sup>
- In Granbury, Matthew Russell faced 20 years for a trace amount of methamphetamines. He told us, “I’m so stressed out that some days it almost makes me want to kill myself.... [20 years,] that scares me. And that is what

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<sup>256</sup> Human Rights Watch interview with Sergeant Daniel Seuzeneau, Public Information Officer, Slidell Police Department, February 3, 2016.

<sup>257</sup> Human Rights Watch phone and email communication with Lindsey Hortenstine, Director of Media and Communications, Orleans Public Defenders, January 29, 2016 and February 3, 2016; Human Rights Watch group interview with Eric Carter (pseudonym), Amy Carter (pseudonym), and Calvin Willis (pseudonym), Kenner, January 31, 2016.

<sup>258</sup> Human Rights Watch phone interview with Leroy Carter (pseudonym), January 31, 2016.

<sup>259</sup> As noted in section V above, Hector was also detained on a state jail felony charge, for heroin residue weighing 0.007 grams for which the prosecutor had offered him six years in prison. The charge on which he faced 25 to life was for possession of just over a gram (third degree felony). According to his attorney, the police had weighed the plastic bag along with the drugs in coming up with that weight. Human Rights Watch interviews with Hector Ruiz (pseudonym), Fort Worth, March 11, 2016, and defense attorney, Fort Worth, March 11, 2016.

they are made on. They are made on a man's mental capacity, trying to pervert you by fear. This court system is a game of manipulation.”<sup>260</sup>

- Douglas Watson was arrested in Dallas for what field tested as 0.1 gram of heroin and 0.2 grams of meth found inside a pipe. He was not charged with the paraphernalia. Because he had two prior state jail felonies for possession, his sentencing range was enhanced to two to 10 years in prison. In a split second Douglas decided to plead, waiving laboratory testing and grand jury indictment, because the prosecutor offered him two years in prison.<sup>261</sup> Although it is shorter than many of the other sentences we documented, it was still time behind bars and two felony convictions for a minuscule amount of drugs whose weight Douglas did not even have time to challenge.
- In Dallas, Bill Moore, 66, pled to three years in prison because he faced two to 10 years on what the laboratory tested as 0.0202 grams of meth. He noted that after testing a speck that weighed two hundredths of a gram, the prosecution “wouldn’t have had anything left to show as evidence if [I’d] gone to trial. But what if they did, and they’d given me 10 years instead of three? I wouldn’t have any chance of getting out anytime soon that I know of. [I would have been] in my 70s. It’s hard for me to even say that.”<sup>262</sup>

Relatively few people test whether the prosecutor and judge will follow through with the trial penalty: nationwide, as described above, between 99 and 100 percent of drug possession defendants plead guilty. But Jennifer and Corey were among the 1 percent who insisted on their right to trial, even in the face of the trial penalty. When they lost, they were sentenced to two decades behind bars, of which Louisiana law required they serve every day.

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<sup>260</sup> Human Rights Watch interview with Matthew Russell (pseudonym), Granbury, March 10, 2016.

<sup>261</sup> Human Rights Watch interview with Douglas Watson (pseudonym), Dallas, March 8, 2016.

<sup>262</sup> Human Rights Watch interview with Bill Moore (pseudonym), Dallas, March 8, 2016.

## Jennifer's Story

In 2016 in Covington, Louisiana, Jennifer Edwards was charged with heroin possession for a residue amount. The prosecutor made her a plea offer of seven years in prison. Because of her three drug possession priors (for Xanax, cocaine, and Ecstasy), she faced 20 years to life in prison if she refused the offer and lost at trial. With such a high trial penalty, her lawyer encouraged her to take the plea, but Jennifer insisted on her innocence. She told us, "I got about five minutes [to think about the offer]. That's it.... I asked if I could please have the night to think about it, and they said, 'Nope, the jury's out there, you either taking this deal or you're going to trial.'"<sup>263</sup>

Jennifer took her case to trial, and the jury convicted her. When we spoke to her, she was waiting for the judge to choose a sentence between 20 years and life in prison:<sup>264</sup>

I remember when they said I was guilty in the courtroom, the wind was knocked out of me. I went, "The rest of my life?" I still can't believe it. All I could think about is that I could never do anything enjoyable in my life again. Never like be in love with someone and be alone with them. Just anything, you know.... I'll never be able to use a cell phone ... take a shower in private, use the bathroom in private. Like all those things, I can never do those things.... I told [my attorney] during trial, no matter what happens, they can keep sticking me in here but they can never convince me what I'm doing is wrong.

Jennifer told us that other detainees viewed her case as a cautionary tale:

There's 60 people in my cell, and only one of us has gone to trial. They are afraid to be in my situation. The [prosecutors] threaten everybody. I've seen people take 10 years flat, 15 years flat.<sup>265</sup> I don't even understand it. Ten years flat? Might as well take a chance with the jury. [If

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<sup>263</sup> Human Rights Watch interview with Jennifer Edwards (pseudonym), Covington, January 27, 2016.

<sup>264</sup> The judge ultimately sentenced her to 20 years, which in Louisiana must be served day-for-day.

<sup>265</sup> "Flat time" means the sentence is served day-for-day without earned time credit.

everybody went to trial,] I think it would make the negotiating stronger on our end, but nobody does it. Because if [everyone] did that, they wouldn't be able to bring everyone to trial.... Everybody has to stick together and say, "No," and, "I want a speedy trial."<sup>266</sup>

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### Corey's Story

In 2011, 25-year-old Corey Ladd was arrested in New Orleans with a plastic baggie containing a half-ounce of marijuana. Years before, Corey had pled guilty to two felony convictions, for hydrocodone possession at age 18 and LSD possession at age 21, and had been sentenced to probation for each. This time, the prosecutor sought serious prison time. Because of his priors, the prosecutor chose to charge Corey as a third-time offender, so that he faced a minimum of 13 years and 4 months, up to a maximum of 40 years in prison for marijuana possession. Corey told us he was offered 10 years in exchange for a guilty plea.<sup>267</sup>

Despite the risk of such a high penalty, Corey refused the prosecutor's offer and insisted on his right to trial. In 2013, the jury returned a guilty verdict. The judge imposed the penalty: For possessing a half-ounce of marijuana, she sentenced Corey to 20 years in prison without parole.

Corey appealed his sentence to the state appeals court, which found in 2014 that 20 years was not "excessive" for marijuana possession for a third-time offender.<sup>268</sup> Corey then appealed to the Louisiana Supreme Court, which found in 2015 that the trial judge

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<sup>266</sup> Human Rights Watch interview with Jennifer Edwards (pseudonym), Covington, January 27, 2016.

<sup>267</sup> Human Rights Watch Interview with Corey Ladd, St. Gabriel, February 2, 2016. At the time, a second or subsequent marijuana possession offense carried up to 20 years in prison, and Corey had two prior convictions for marijuana. Soon after Corey was sentenced, the Louisiana legislature amended the marijuana laws. Today, a defendant's first two marijuana possession convictions are misdemeanors. The third carries a statutory range of 0 to 2 years. However, Corey did not benefit from the new laws. The human rights imperative of retroactive application of criminal laws that provide for lesser penalties is examined in section VII.

<sup>268</sup> *State v. Ladd*, 146 So.3d 642 (La. Ct. App. 4th Cir. 2014).

had failed to state her reasons and sent the case back to her for resentencing. Two of the four Supreme Court judges expressed concern that “this sentence on its face seems very harsh.”<sup>269</sup>

When the trial judge resentenced Corey to 17 years without parole, he appealed yet again to the state appeals court. This time, in April 2016, it was the state appeals court that reversed the 17-year sentence and sent Corey’s case back to the trial judge for resentencing. The appeals court wrote:

The laws nationwide are changing, as is public perception. As mentioned above, this defendant would conceivably be in his forties before he is released. Although the defendant’s seventeen-year sentence is within the range of permissible sentences, on its face, the sheer harshness of the sentence shocks the conscience.<sup>270</sup>

In spite of this history, the prosecutor held his ground. He objected to the appeals court’s reversal and filed an appeal of his own to the Louisiana Supreme Court. As of this writing, Corey is waiting for that decision. He has been in prison for 4 years and has never held his 4-year-old daughter outside of prison walls.

### **Why Habitual Offender Laws Do Not Make Sense for Drug Possession**

In the context of drug possession, the effect of habitual offender laws is to punish habitual drug use. Although any criminal sanction for drug use is inappropriate, habitual offender sentencing delivers especially disproportionate punishment. If a person is facing a subsequent conviction for drug possession, it is simply an indication that the criminal justice system has failed to stop drug use, not that the person deserves a longer sentence. Moreover, it risks punishing some people for “recidivism” who may in fact be drug dependent, a health rather than a criminal justice issue.

Several Louisiana officials, recognizing this fact, argued that habitual offender enhancements should not be applied to drug possession. As Judge Calvin Johnson,

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<sup>269</sup> *State v. Ladd*, 164 So.3d 184 (La. Sup. Ct. 2015).

<sup>270</sup> *State v. Ladd*, No. 2015-KA-0772 (La. Ct. App. 4th Cir. 2016).

formerly on the bench in New Orleans, told us, “The rationale for it again is that individuals who commit multiple offenses are bad, bad people and they should be convicted accordingly.... My knee jerk reaction is no.... The fact that a drug user has been arrested for drugs multiple times means only that that person has had drugs multiple times. It doesn’t impact you, or me, or anyone in this room.” He told us he “would take [drug possession] out” of the criminal justice system entirely, “but a step towards that would be to move drug possessors out of the multi-bill statute.”<sup>271</sup>

Reviewing Corey Ladd’s possession case, the Louisiana Court of Appeals for the Fourth Circuit delivered a striking condemnation of the prosecutor’s decision to use the habitual offender law:

[The habitual offender law] dramatically limits judges’ ability to consider the human element and the life-time impact of harsh sentences on both defendants and their families, not to mention the State’s economic interest. Sentences should be sufficient but not greater than necessary to meet the goals and expectations of sentencing. Is it deterrence? Is it punitive? Far too much authority has been usurped from judges under the pretext of appearing “tough” on crime and allowing the habitual offender statute to become what now appears to be an archaic draconian measure. Our state, Louisiana, has some of the harshest sentencing statutes in these United States. Yet, this state also has one of the highest rates of incarceration, crime rate and recidivism. It would appear that the purpose of the habitual offender statutes to deter crime is not working and the State’s finances are being drained by the excessive incarcerations, particularly those for non-violent crimes.<sup>272</sup>

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<sup>271</sup> Human Rights Watch interview with Calvin Johnson, New Orleans, January 26, 2016. James Stewart, Caddo Parish district attorney, acknowledged that at least where someone’s prior criminal convictions are for drug possession, use of the habitual offender law is not appropriate: “Possession cases, where the harm is the individual ... they are not that amenable to multiple bill, if all you have is possession [prior] cases.” Human Rights Watch interview with District Attorney James Stewart, Shreveport, February 8, 2016. Judge William Knight in St. Tammany said the multi-bill “places in the hands of the prosecutor [to say,] ‘We’re throwing the book at her.’ My job is to enforce the laws—and I’ve held my nose sometimes in sentencing.... I don’t personally believe you should multi-bill based on simple possession.” Human Rights Watch interview with Judge William J. Knight, Covington, January 28, 2016.

<sup>272</sup> *State v. Ladd*, No. 2015-KA-0772 (La. Ct. App. 4th Cir. 2016).



For all these reasons, sentences for drug possession should not be subject to enhancement under habitual offender laws, regardless of the prior offense type, and past convictions for drug possession should not be used as predicates for enhancements of sentences for any other offense.

### **The Threat of Higher Charges**

Instead of the threat of enhancements at trial, some defendants face higher charges if they insist on their trial rights, and are offered a plea to the lesser charge of possession if they give up those rights. We heard frequently that prosecutors would charge possession with intent (or distribution) for what otherwise could be considered simple possession and that those cases typically ended in a plea to simple possession. This raises concerns that prosecutors may be overcharging defendants in order to coerce pleas.

A significant number of distribution charges are disposed of with pleas to simple possession. For example, in New York, over half of all possession with intent to distribute arrests and a third of sales arrests were disposed of with guilty pleas to possession charges.<sup>273</sup> In some of these cases, people actually guilty of selling may be getting good deals. However, we documented cases where the more serious initial charges appear instead to represent an attempt at coercing defendants to plead guilty to the more appropriate charge.

#### **Jerry's Story**

Jerry Bennett told us he pled guilty to two-and-a-half years in prison for half a gram of marijuana because the prosecutor threatened to charge him with distribution.

Jerry was arrested in New Orleans in March 2015 and charged with possession of half a gram of marijuana that was found in the backseat of the truck in which he was a passenger. Because he had prior marijuana possession convictions, it was a felony charge. He sat in jail for over eight months while his trial date was set and reset. In the intervening time, his attorney won a motion to suppress evidence. Then the prosecutor made Jerry a plea offer of two-and-a-half years, which Jerry did not want. His attorney

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<sup>273</sup> Human Rights Watch analysis of New York Division of Criminal Justice Services data.

recalls the prosecutor's words: "If he doesn't take this today, we're going to take that offer off the table. There will be no offer. We'll just go to trial, and we're going to change the charge from possession to distribution."<sup>274</sup> Jerry told us, "Half a gram! There ain't no way you could distribute half a gram." He chose not to take the offer and instead go to trial.

When Jerry returned to court at the end of January 2016—almost 11 months after his arrest, during all of which he had been in jail—the prosecutor had a new tactic for getting him to take the two-and-a-half years. He would charge Jerry with both possession *and* distribution (for the same half gram of marijuana). Jerry would be sure to lose on one of them if he went to trial and, when he did, the minimum he would face would be 20 years.

The prosecutor offered Jerry the two-and-a-half years instead. Jerry had been detained pretrial in a jail that was a four-hour drive from his lawyer, his girlfriend, and his 3-year-old daughter. He had not had time to speak to them, but the prosecutor gave him only 10 minutes to decide. His girlfriend had not made it to court in time, but she sent text messages to him via his attorney, begging him to think of their daughter: "Man, just take it, because if they mess with you, you're going to see none of her life."<sup>275</sup>

As Jerry's attorney recalled, "We had a very frank conversation about the fact that, as much as he on principle didn't want to take this, and also didn't want to have to do another year and a half in jail, and he had promised his girlfriend that he was not going to miss the next birthday of his daughter ... it was like, you can miss one more birthday, or you can potentially miss her entire childhood."<sup>276</sup>

Jerry took the two-and-a-half years for marijuana possession, and the prosecutor dropped the distribution charge. When we talked to Jerry in jail the next day, he explained, "They spooked me out by saying, 'You gotta take this or you'll get that.' I'm just worried about the time. Imagine me in here for 20 years. They got people that kill people. And they put you up here for half a gram of weed."<sup>277</sup>

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<sup>274</sup> Human Rights Watch interview with defense attorney, New Orleans, January 2016.

<sup>275</sup> Human Rights Watch interview with Jerry Bennett (pseudonym), New Orleans, January 2016.

<sup>276</sup> Human Rights Watch interview with defense attorney, New Orleans, January 2016.

<sup>277</sup> Human Rights Watch interview with Jerry Bennett (pseudonym), New Orleans, January 2016.

### *Pleading When Innocent*

Numerous interviewees in each state we visited said they had pled guilty even though they were innocent. Many said they did not feel they had any other real choice. Defendants, defense attorneys, judges, and prosecutors in different jurisdictions used the language of gambling: would the defendant “roll the dice” and go to trial? Most defendants said no, because the odds were against them and the stakes were too high.

#### **Tyler’s Plea**

Tyler Marshall was arrested in Louisiana, charged with possession of marijuana, convicted, and sentenced to 10 years in prison. The transcript of his plea colloquy plainly indicates that he either did not understand or did not want to plead guilty:

By the court: Okay, listen to my question again sir. Do you wish to waive your constitutional rights and plead guilty because you have in fact committed this crime?

[Defendant]: But I didn’t do it.

[Defense counsel]: You are pleading guilty.

[Defendant]: I am pleading guilty.

By the court: Okay. And in pleading guilty today you are waiving your constitutional rights. Is that correct?

[Defendant]: Yes ma’am.

By the court: And you are pleading guilty because you committed this crime.

[Defendant]: No ma’am.

[Defense counsel]: Say yes, please.

[Defendant]: Oh, I have to? Yeah. But I’d be lying though.<sup>278</sup>

In Texas, where defense attorneys said laboratory scandals and faulty roadside drug tests had raised concerns, Harris County began testing drugs in possession cases that had already been closed. Since 2010, there have been at least 73 exonerations in Harris County

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<sup>278</sup> Human Rights Watch interview with Tyler Marshall (pseudonym), Louisiana, January 2016 and review of court documents.

for drug possession or sale where the defendant pled guilty for something that turned out not to be a crime at all. In 2015 alone, there were 42.<sup>279</sup>

Of the 42 exonerees in 2015, only six were white.<sup>280</sup> Most or all had been adjudged indigent, meaning they could not afford an attorney and had either a public defender or another attorney appointed for them. One of those attorneys, Natalie Schultz, said a significant number of them were homeless.<sup>281</sup> When the laboratory finally tested their drugs, it found only legal substances or nothing at all.

For example, in July 2014, police arrested Isaac Dixon, 26, for possession of a substance that field tested positive for Ecstasy. Two days later, Isaac pled guilty to felony drug possession and was sentenced to 90 days in the Harris County Jail. More than 14 months later, the substance was tested by a laboratory, and the field test was proved faulty. No drugs were found—only antihistamine and caffeine.<sup>282</sup>

Like Isaac's conviction for drug possession, dozens more in Harris County in 2015 were ultimately vacated and the charges dismissed, but only because authorities took the time to have the drugs tested, after the case dispositions. The exonerations required laboratory testing, defense and prosecution filings for habeas corpus relief, trial court recommendations, and eventual dismissal by the Texas Court of Criminal Appeals.<sup>283</sup> In the meantime, defendants had to endure pretrial detention, probation, sometimes a jail sentence, and the prospect of a felony conviction for action that was lawful.

As the exonerations in Harris County demonstrate, people plead guilty to drug possession even when they are innocent, because the system makes them feel they have no choice.

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<sup>279</sup> The University of Michigan Law School, The National Registry of Exonerations, Harris County 2015, [http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&FilterField1=Exonerated&FilterValue1=8\\_2015&FilterField2=Crime&FilterValue2=8\\_Drug%20Possession%20or%20Sale&FilterField3=County\\_xoo2o\\_of\\_xoo2o\\_Crime&FilterValue3=Harris&&SortField=Convicted&SortDir=Desc](http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&FilterField1=Exonerated&FilterValue1=8_2015&FilterField2=Crime&FilterValue2=8_Drug%20Possession%20or%20Sale&FilterField3=County_xoo2o_of_xoo2o_Crime&FilterValue3=Harris&&SortField=Convicted&SortDir=Desc) (accessed June 10, 2016); Jessica Lussenhop, "Why Harris County, Texas, leads the US in exonerations," *BBC*, February 12, 2016, <http://www.bbc.com/news/magazine-35543898> (accessed June 10, 2016).

<sup>280</sup> The University of Michigan Law School, The National Registry of Exonerations, Harris County 2015.

<sup>281</sup> Human Rights Watch phone interview with Natalie Schultz, Harris County defense attorney, February 19, 2016.

<sup>282</sup> Maurice Possley, "Isaac Dixon," The National Registry of Exonerations, November 3, 2015, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4714> (accessed June 10, 2016).

<sup>283</sup> Human Rights Watch phone interview with Nicolas Hughes, Harris County Public Defender's Office, February 26, 2016.

These cases also show that field tests often produce false positives and yet are sometimes the only evidence of drug possession.<sup>284</sup> Fortunately for the defendants, Harris County invested the time and resources to test drugs after conviction. Harris County Public Defender Alex Bunin told us that if other jurisdictions undertook the same effort, he expected we would see that around the country indigent defendants plead guilty to drug possession when they are innocent.<sup>285</sup>

### **Reducing Charges—Discretionarily, for White Defendants**

Data from New York State suggests that prosecutors' discretion to reduce charges through plea deals is exercised differently in different jurisdictions, and often with racially disparate impact.

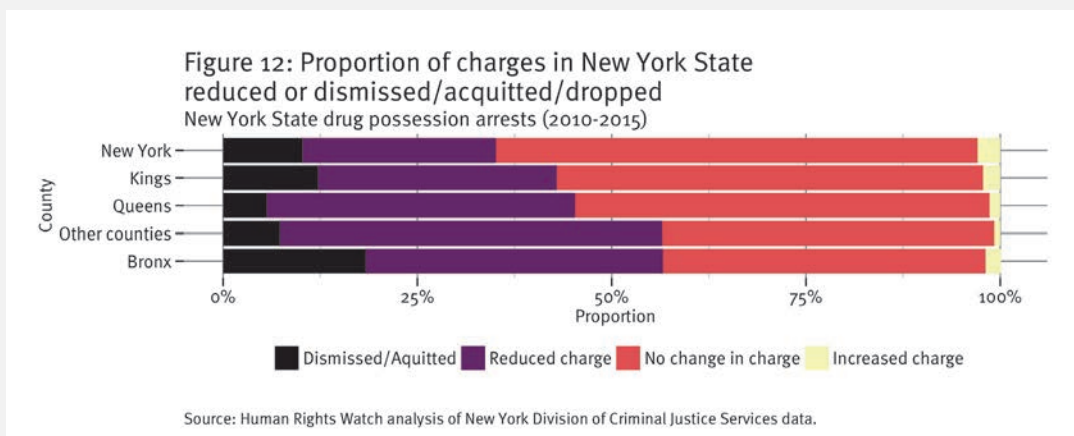
Between 2010 and 2015, 38 percent of drug possession arrests in New York State were disposed of at a reduced level.<sup>286</sup> There were striking disparities between jurisdictions across the state and, within New York City, even among boroughs. In the Bronx, 38 percent of arrests ended in convictions on reduced charges while in Manhattan (New York County) the figure was 25 percent. The majority of downgraded arrests involved misdemeanor charges disposed of as violations.

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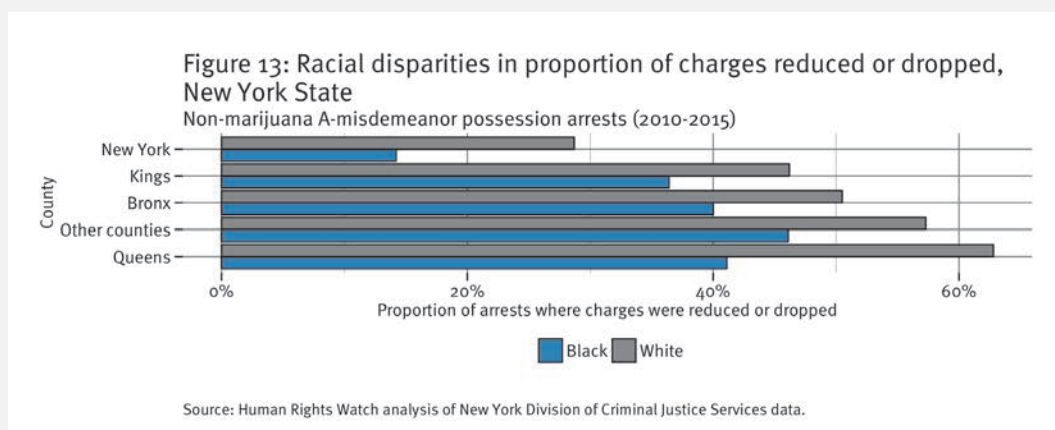
<sup>284</sup> ProPublica and the New York Times recently examined false positives for field tests, including the ones used in Harris County. They concluded, "Tens of thousands of people every year are sent to jail based on the results of a \$2 roadside drug test. Widespread evidence shows that these tests routinely produce false positives.... In Las Vegas, authorities re-examined a sampling of cocaine field tests conducted between 2010 and 2013 and found that 33 percent of them were false positives. Data provided by the Florida Department of Law Enforcement lab system show that 21 percent of evidence that the police listed as methamphetamine after identifying it was not methamphetamine, and half of those false positives were not any kind of illegal drug at all. In one notable Florida episode, Hillsborough County sheriff's deputies produced 15 false positives for methamphetamine in the first seven months of 2014. When we examined the department's records, they showed that officers, faced with somewhat ambiguous directions on the pouches, had simply misunderstood which colors indicated a positive result." Ryan Gabrielson and Topher Sanders, "Busted," *ProPublica* and *New York Times*, July 7, 2016, <https://www.propublica.org/article/common-roadside-drug-test-routinely-produces-false-positives> (accessed July 8, 2016).

<sup>285</sup> Human Rights Watch phone interview with Alex Bunin, Harris County Public Defender's Office, February 16, 2016.

<sup>286</sup> Human Rights Watch analysis of New York Division of Criminal Justice Services data.



The data also shows racial disparities between those who benefit from reductions in or dismissal of charges and those who do not. In New York, for non-marijuana A misdemeanors, the second most common possession arrest charge after marijuana B misdemeanors,<sup>287</sup> white defendants received reduced or dismissed charges at greater rates than Black defendants in all New York City counties, and in the aggregate of all other New York State counties combined.



<sup>287</sup> Class A misdemeanors include criminal possession of a controlled substance in the seventh degree, i.e. amounts up to 0.5 grams cocaine, one-eighth ounce of heroin, or one-half ounce of methamphetamines, or criminally using drug paraphernalia in the second degree. Sentences for A misdemeanors cannot exceed one year in jail or three years of probation. Class B misdemeanors include criminal possession of marijuana in the fifth degree, including marijuana open to public view, and one or more substances containing marijuana of an aggregate weight of at least 25 grams. Sentences for class B misdemeanors cannot exceed three months in jail or one year of probation. NY Penal Law arts. 70.15, 220-221; New York State Office of Mental Health, “Chapter 1: Criminal Justice System for Adults in NYS,” undated, <https://www.omh.ny.gov/omhweb/forensic/manual/html/chapter1.htm> (accessed September 14, 2016).

## VII. Sentencing by the Numbers

If we go back to why we punish—deterrence, protection of the community—long term, jail isn’t doing those things. But no one is thinking long term about it. [There’s a saying,] “Insanity is doing the same thing over and over and expecting a different result.” ... The general community doesn’t understand it’s not working. They don’t know it’s the same 90 people we keep picking up and putting in the system.<sup>288</sup>

—A judge in Central Florida, on the mismatch between criminal law and drug use, December 2015

At year-end 2014, more than 25,000 people were serving sentences in jails and another 48,000 in state prisons for drug possession.<sup>289</sup> The number being admitted to jails and prisons to serve sentences at some point over the course of the year was significantly higher.<sup>290</sup>

In many cases, particularly for people convicted of their first offense, sentences for drug possession can be comparatively short. However, both our interviews and our analysis of sentencing data reveal that some jurisdictions impose very long sentences—even life sentences in Texas—for drug possession. Miami Judge Dennis Murphy told us that some judges impose disproportionate sentences because “they want to be seen as tough, but studies show that long sentences result in nothing but costliness.”<sup>291</sup>

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<sup>288</sup> Human Rights Watch interview with Florida judge, December 2015.

<sup>289</sup> Peter Wagner and Bernadette Rabuy, “Mass Incarceration: The Whole Pie,” Prison Policy Initiative, March 14, 2016, <http://www.prisonpolicy.org/reports/pie2016.html> (accessed August 11, 2016).

<sup>290</sup> The standing population is not a good measure of the total people affected in a year because many more people are admitted over the course of a year than are counted in a single snapshot of population data. In 2009 (the most recent year for which such data is available), about one-third of those entering state prisons for drug offenses (for whom the offense was known) were convicted of simple drug possession. Thomas P. Bonczar et al., “National Corrections Reporting Program: Most Serious Offense of State Prisoners, By Offense, Admission Type, Age, Sex, Race, And Hispanic Origin,” Bureau of Justice Statistics, May 5, 2011, <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2065> (accessed August 15, 2016).

<sup>291</sup> Human Rights Watch interview with Judge Dennis Murphy, Miami, December 21, 2015. According to the Department of Justice (DOJ), in fiscal year 2010 states spent a combined total of \$38.6 billion on state correctional institutions such as prisons. Per capita expenditures for institutions were \$28,323 per inmate that year. In total, assuming average inmate cost was the same in 2014 as it was in 2010, DOJ figures indicate that \$1.34 billion was spent keeping people convicted of drug possession in prison in 2014. US Bureau of Justice Statistics, State Corrections Expenditures, FY 1982-2010, Appendix Table 2, revised April 2014, <http://www.bjs.gov/content/pub/pdf/scefy8210.pdf>. State departments of corrections run prisons as well as other detention facilities, including in some cases lockdown drug treatment facilities, medical facilities, transfer facilities, and others.

## Racial Disparities in Incarceration

In examining who is incarcerated for drug possession, we found that stark racial disparities mark both jail and prison populations. Of the total jail population nationwide (convicted and unconvicted) in 2002 (the most recent year for which such jail data is available), 31,662 Black inmates, 19,203 white inmates, and 14,206 Latino inmates were jailed for drug possession.<sup>292</sup> Given that Black people made up 13 percent and white people 82 percent of the US population in 2002, these numbers mean that Black people were more than 10 times as likely as white people to be jailed for drug possession, even though the drug use rate for each group is roughly equivalent.<sup>293</sup> Of the total state prison population at year-end 2014, 18,800 Black inmates, 17,700 white inmates, and 11,400 Latino inmates were imprisoned for drug possession.<sup>294</sup> These numbers mean that Black people were nearly six times more likely than white people to be in prison for drug possession.<sup>295</sup> Because the US Census Bureau does not include race data for Latinos, we could not assess disparities in their incarceration.

Human Rights Watch analyzed sentencing data for people convicted of drug possession in Florida, New York, and Texas. This section outlines our findings.

In Florida between 2010 and 2015, 84 percent of defendants convicted of felony drug possession were sentenced to prison or jail (about a quarter to state prison and three-quarters to county jail). For misdemeanors, 68 percent of those convicted were sentenced to confinement, almost all going to county jail.<sup>296</sup>

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<sup>292</sup> US Bureau of Justice Statistics, “Profile of Jail Inmates, 2002,” July 2004, Table 4, <http://www.bjs.gov/content/pub/pdf/pjio2.pdf> (accessed September 21, 2016).

<sup>293</sup> The drug possession jail population rate was 86 per 100,000 population for Black people and 8 per 100,000 population for white people. The Census defines “Hispanic or Latino” so that they are included in white or Black, so we are unable to do a comparison with rates of Latinos in jail and prison. Human Rights Watch analysis of 2002 US Census Bureau population statistics; US Census Bureau, “Overview of Race and Hispanic Origin: 2010,” March 2011, <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf> (accessed September 21, 2016).

<sup>294</sup> US Bureau of Justice Statistics, Prisoners in 2014, September 2015, Appendix Table 4, <http://www.bjs.gov/content/pub/pdf/p14.pdf>.

<sup>295</sup> Ibid. Black rate was 57 per 100,000 adult population and white rate was 9.7 per 100,000 adults.

<sup>296</sup> Human Rights Watch analysis of Florida Office of the State Courts Administrator Offender Based Transaction System data.



Whether or not a person is sentenced to prison in Florida depends not only on the conviction offense but also on past criminal record, based on a scoring or points system. A person whose first conviction is for drug possession would not “score out” to prison time under this system, though he or she may be sentenced to county jail.<sup>297</sup> Roughly three of every four felony drug possession defendants were sentenced to terms in county jail or were not sentenced to incarceration at all, suggesting they had little or no significant prior criminal history.

Yet even individuals sentenced to county jail for drug possession spend substantial time behind bars, especially those convicted of felonies:<sup>298</sup>

Table 1: Drug possession sentences, Florida 2010-2015					
Level	Facility	Number sentenced	Average sentence (months)	Median sentence (months)	Most common sentence (months)
Felony	County Jail	34,498	5	3	6
	State Prison	12,184	27	22	12
Misdemeanor	County Jail	20,045	2	1	1

In New York State between 2010 and 2015, the majority (53 percent) of people convicted of drug possession were sentenced to some period of incarceration (33 percent for marijuana and 65 percent for other drugs).<sup>299</sup> The average jail sentence was 44 days for marijuana possession and 63 days for other drugs. Approximately 155 adults were sentenced to one year in jail—the maximum sentence for a misdemeanor—for marijuana possession.<sup>300</sup> Approximately 1,441 adults were sentenced for possession of drugs other than marijuana, and 88 percent of these cases were misdemeanors. Among felony drug possession cases, the average prison sentence was 41 months.<sup>301</sup> At year-end 2015, one of 16 people in

<sup>297</sup> Human Rights Watch interviews with legal practitioners in Florida.

<sup>298</sup> Human Rights Watch analysis of Florida Office of the State Courts Administrator Offender Based Transaction System data.

<sup>299</sup> Human Rights Watch analysis of New York Division of Criminal Justice Services data.

<sup>300</sup> Ibid.

<sup>301</sup> Ibid.

custody in New York State was incarcerated for drug possession. Of those, 50 percent were Black, 28 percent Latino, and 20 percent white.<sup>302</sup>

In Texas between September 2010 and January 2016, more than three-quarters of felony drug possession defendants were sentenced to incarceration: 30,268 to prison, 42,957 to state jails, and 35,564 to county jails.<sup>303</sup> A significant proportion of the rest likely were released on probation because the prosecutor and judge had no choice: Texas law makes probation mandatory for a first-time conviction of drug possession when classified as a state jail felony.<sup>304</sup> This suggests that prosecutors and judges chose not to exercise their discretion to offer probation in the vast majority of cases in which they had some choice.

Between 2012 and 2016, approximately one of 11 people held by the Texas Department of Criminal Justice (TDCJ) was convicted of a drug possession charge as their most serious offense.<sup>305</sup> Two of every three people serving time in a TDCJ facility for drug charges were there for drug possession.<sup>306</sup> Human Rights Watch examined charge and sentence length information for the 49,092 people incarcerated by TDCJ for drug possession during six snapshot days.<sup>307</sup> For the convictions where the drug amount was provided in the data, half were for possession of under one gram (state jail felony), and another 25 percent for possession of one to four grams (third degree felony).<sup>308</sup>

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<sup>302</sup> Data provided to Human Rights Watch by New York Department of Corrections and Community Supervision.

<sup>303</sup> Human Rights Watch analysis of data provided by Texas Office of Court Administration.

<sup>304</sup> In practice, some people receive “straight probation,” meaning a conviction is entered and they are sentenced to probation, whereas others receive “deferred probation” (also known as “deferred adjudication”), in which probation terms are imposed but the defendants do not receive convictions if they successfully complete it. The sentencing data provided to us relates only to straight probation and not deferred adjudication. Although we cannot know the frequency from the data, judges and prosecutors in some cases do give deferred adjudication even when not required to do so by law.

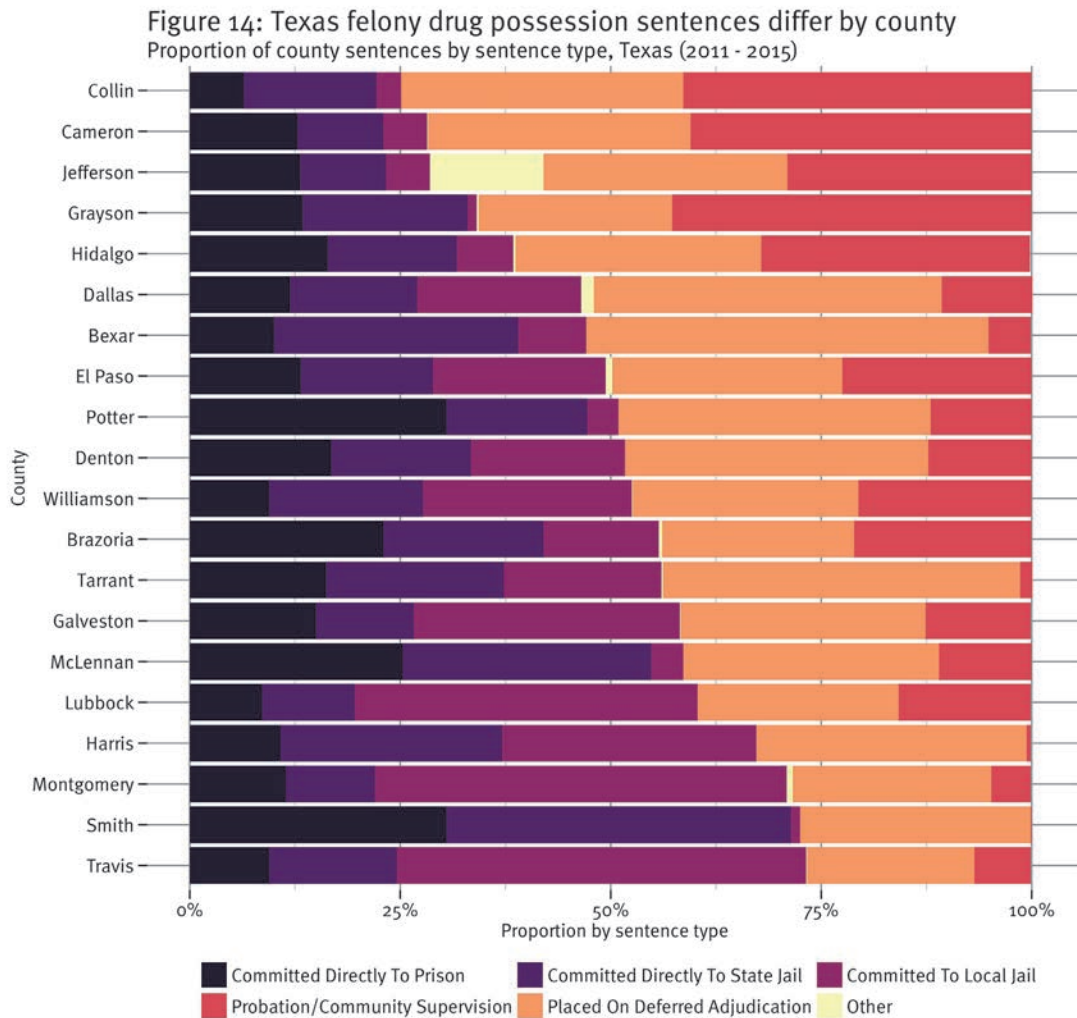
<sup>305</sup> The Texas Department of Criminal Justice (TDCJ) periodically releases snapshot data of everyone under TDCJ custody on a given day and publishes the most current snapshot on its website. TDCJ provided Human Rights Watch with prior snapshot datasets for five days—one day each in May 2012, August 2013, August 2014, August 2015, and February 2016. Human Rights Watch downloaded the April 2016 snapshot from the TDCJ website. On these dates, TDCJ has held between 143,978 and 151,717 people in state prisons or TDCJ-administered state jails. (TDCJ holds about 47.1 percent of inmates in prisons and another 44.8 percent in state jails. The remainder are in Substance Abuse Felony Punishment (SAFP) facilities.)

<sup>306</sup> Human Rights Watch analysis of data provided by the Texas Department of Criminal Justice.

<sup>307</sup> The snapshot days were in May 2012, August 2013, 2014, and 2015, February 2016 and April 2016. The snapshot datasets were combined and duplicates were removed. Drug type was not decipherable from the offense description for half of those serving time for drug possession. Among those where drug type was decipherable, 42.8 percent of convictions were for cocaine, 27 percent for methamphetamine, and 16.5 percent for marijuana.

<sup>308</sup> The other 25 percent were convicted of possessing higher quantities of drugs, either second or first degree felony drug possession. Human Rights Watch analysis of data provided by the Texas Department of Criminal Justice. Over time, there has been no change in the proportion of drug possession inmates that had a state jail (or fourth degree) conviction.

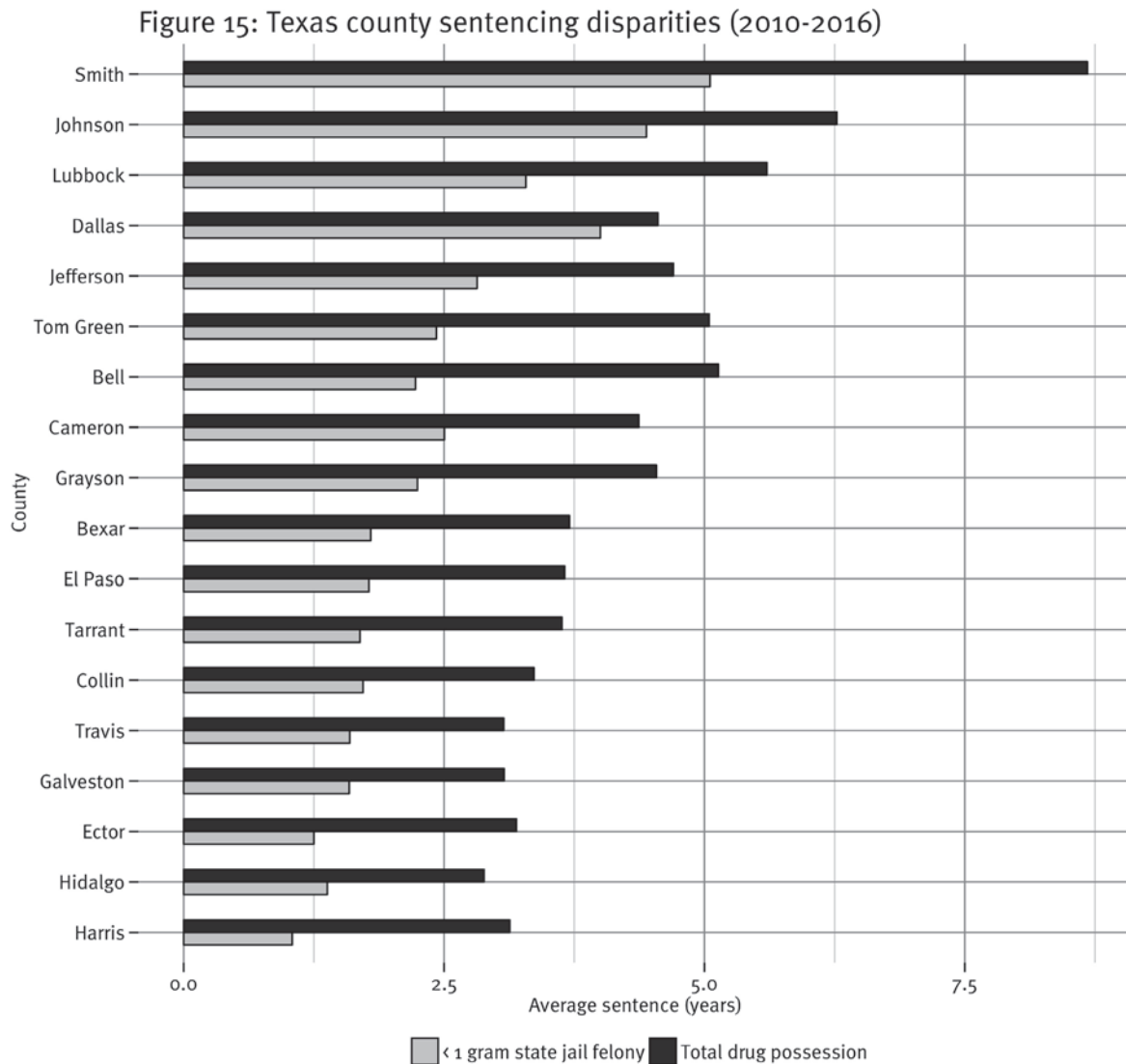
Among the 20 counties that have the largest number of drug possession cases in Texas, there are significant disparities in the types of sentences received for similar charges, showing arbitrariness associated with geography as well as significant opportunity for prosecutorial discretion:



Note: Twenty counties with highest number of drug possession cases only.  
Source: Human Rights Watch analysis of Texas Office of Court Administration data.

Nearly 44 percent of drug possession inmates in Texas were serving sentences of two years or less (the maximum sentence for a state jail felony is two years). A quarter were serving sentences greater than 5 years. Third degree offenses (possession of one to four grams)

had an average sentence of 5.3 years (the sentence range is two to ten years).<sup>309</sup> There were clear county disparities in the sentences for drug possession inmates. In counties with 300 or more unique TDCJ inmates, the median sentences varied greatly by county, for all offenses and also for state jail felonies specifically.



Note: Only includes counties with more than 300 drug possession inmates in the six snapshot datasets.  
Source: Human Rights Watch analysis of Texas Department of Criminal Justice Data

<sup>309</sup> Over the four years of snapshot data, the average sentence for drug possession has decreased slightly from 7.65 years to 6.98 years (the median has stayed consistent at 4 years).

## Life in Prison in Texas for Drug Possession

According to Texas Department Criminal Justice data we analyzed, 116 people were serving life sentences in Texas for drug possession as of February 2016. Ten percent of them (11 people) were sentenced in Smith County, a county that sentenced only 1.7 percent of the state's overall drug possession inmates.

Furthermore, in Texas between 2005 and 2014 at least seven people were sentenced to life in prison for simple possession of an amount of drugs weighing between one and four grams (third degree felony possession)—the weight of less than a sugar packet.<sup>310</sup> Under Texas law, third degree drug possession has a normal sentence range of two to ten years,<sup>311</sup> but if a person has two prior felonies, the habitual offender law gives prosecutors the option to enhance the range to a minimum of 25 years up to 99 years, or life in prison.<sup>312</sup> Although prosecutors need not seek the habitual offender enhancements, they did in these seven possession cases. Moreover, since the sentence is described as a range, not mandatory life in prison, the jury and/or the judge may still impose the minimum sentence, 25 years, or any number of years greater than 25 but short of life imprisonment.

In one of the seven cases, public documents suggest the defendant pled guilty, yet he still received a life sentence for simple possession. In the six other cases, a jury decided a life sentence was appropriate, and the judge let it stand.<sup>313</sup>

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<sup>310</sup> They were one white woman, one white man, two Black men, and three Latino men. Human Rights Watch analysis of data provided by Texas Department of Criminal Justice of people incarcerated post-conviction during the period May 2012 through April 2016.

<sup>311</sup> TX Penal Code sec. 12.34.

<sup>312</sup> TX Penal Code sec. 12.42 et seq.

<sup>313</sup> Human Rights Watch analysis of data provided by the Texas Department of Criminal Justice; Human Rights Watch analysis of public documents and online criminal records for these cases. They are still eligible for, although are not guaranteed, parole.

## Drug Sentencing Reform and Non-Retroactivity

A significant number of states have decriminalized marijuana possession, as described in section XI. For possession of other drugs, some states have implemented reforms reducing drug sentences, though not decriminalizing. These reforms are positive developments, but in many cases they are not retroactive, so thousands of people remain incarcerated, continuing to bear the costs of a felony conviction for actions that the state no longer criminalizes or that it sanctions less severely.

For example, in 2015 Louisiana amended its marijuana laws to make the first two marijuana possession convictions misdemeanors and the third a felony punishable by up to 2 years.<sup>314</sup> This means that the most Corey Ladd—serving 17 years for half an ounce of marijuana—could now face, given his two prior drug possession felonies, is 4 years. Yet he has not benefited from the new law.

In 2015, Alabama passed Senate Bill 67, adding a new, lowest felony class D that includes drug possession and carries lesser penalties than felony class C, at which it was previously classified.<sup>315</sup> But these reforms are also not retroactive, meaning that people sentenced more harshly under the previous law remain unaffected. Data we received from the Alabama Sentencing Commission indicated that as of October 2015, 14,000 people had been convicted of class C drug possession since 2010 and had received sentences that would keep them in prison beyond SB 67 enactment—meaning retroactivity could have had enormous impact.<sup>316</sup>

As a third example, 32 states and the District of Columbia now have Good Samaritan laws that immunize people from prosecution if they seek emergency medical care after someone has overdosed, but again many if not all of these laws lack retroactivity provisions.<sup>317</sup> Thus Byron Augustine is still in a Louisiana prison. Byron called 911 and

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<sup>314</sup> LA R.S. 40:966(E), (F).

<sup>315</sup> Alabama SB 67.

<sup>316</sup> Human Rights Watch analysis of data provided by the Alabama Sentencing Commission. We did not receive information about parole eligibility or actual length of sentence served. However, the majority had been convicted relatively recently: 44 percent in 2014 or 2015, 20 percent in 2013, and 15 percent in 2012.

<sup>317</sup> Human Rights Watch review of state statutes. Good Samaritan laws are examined further in section X.

saved the life of a friend who had overdosed on heroin. Yet Byron was charged with possession of that heroin and was sentenced to 20 years shortly before Louisiana passed its Good Samaritan law.<sup>318</sup> His friend ultimately overdosed again and died while Byron was incarcerated.<sup>319</sup>

Human rights law requires retroactive application of new laws that reduce sentences.<sup>320</sup> Retroactivity is particularly important in this context because the changes to existing law reflect a widespread understanding that sentences imposed prior to the reforms were disproportionately harsh and fundamentally unjust.

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<sup>318</sup> LA Rev. Stat. sec. 14:403.10.

<sup>319</sup> Human Rights Watch interview with Byron Augustine, Slidell, February 3, 2016. Byron was sentenced to 10 years on the heroin possession charge, and another 10—run consecutively (i.e. one after the other)—because his probation from an earlier drug possession case was revoked as a result of the new charge. Almost two years later, he appealed his sentence. Human Rights Watch submitted a letter on the human rights implications of his case. The judge resentenced him to 10 years on each charge to run concurrent (i.e. at the same time) rather than consecutive.

<sup>320</sup> Under article 15 of the International Covenant on Civil and Political Rights, to which the United States is a party, if “subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.” While the United States has filed a reservation to this article, stating that US law generally applies the penalty in force at the time an offense is committed, the validity of the reservation has been called into question. See Connie de la Vega et al., Center for Law and Global Justice, University of San Francisco School of Law, “Cruel and Unusual: U.S. Sentencing Practices in a Global Context,” May 2012, <https://www.usfca.edu/sites/default/files/law/cruel-and-unusual.pdf> (accessed April 14, 2016).

## VIII. Living Under a Dark Cloud: Probation and Criminal Justice Debt

Some people convicted of drug possession are sentenced to probation instead of incarceration.<sup>321</sup> Probation is a less severe sentence than incarceration but carries an explicit threat of incarceration, and the conditions probationers must comply with to avoid incarceration are often onerous. Many people convicted of drug possession also face steep criminal justice debts stemming from an extensive array of fines and court fees—costs that some courts impose without appropriate regard to offenders' ability to pay. Together these factors cause many people convicted of drug possession to live in constant apprehension of further criminal sanctions—a “huge black cloud”<sup>322</sup> that may open up in a downpour at any time.

### Probation

The Bureau of Justice Statistics (BJS) defines probation as “a court-ordered period of correctional supervision in the community, generally as an alternative to incarceration.”<sup>323</sup> Probation often requires regular meetings, drug testing, classes, and fees that can be unrealistic and unforgiving. Seemingly minor violations can trigger sanctions of jail time or revocation of probation.<sup>324</sup>

At year-end 2014, BJS reported that 570,767 people were on probation for drug law violations (the data does not distinguish between possession and sales), accounting for

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<sup>321</sup> In drug possession cases, some prosecutors offer probation for a first offense and/or for a quantity that they consider small. This is systematized under Texas law, whereby the first offense in a state jail felony class (for drug possession under one gram) carries mandatory probation. Some states have systems of “deferred adjudication” or “deferred probation.” Under these systems, the judge typically finds the evidence sufficient to support a conviction but defers that ultimate entry of judgment to allow the individual to complete a probationary period of supervision. If the probationer successfully completes the terms of probation, he or she avoids a conviction altogether. Conversely, under “straight” or traditional probation, the defendant is found guilty and is sentenced to probation instead of incarceration. Either way, if a probationer fails to meet conditions, probation can be revoked and the person is usually sentenced to prison up to the relevant statutory maximum.

<sup>322</sup> Human Rights Watch interview with Anita Robinson (pseudonym), Dallas, March 9, 2016.

<sup>323</sup> US Bureau of Justice Statistics, “Probation and Parole in the United States, 2014,” November 2015, [http://www.bjs.gov/content/pub/pdf/ppus14\\_sum.pdf](http://www.bjs.gov/content/pub/pdf/ppus14_sum.pdf) (accessed September 21, 2016).

<sup>324</sup> Human Rights Watch has documented patterns of abuse and financial hardship inflicted by the “offender-funded” model of privatized probation. See Human Rights Watch, *Profiting from Probation: America's “Offender-Funded” Probation Industry*, February 2014, <https://www.hrw.org/report/2014/02/05/profitting-probation/americas-offender-funded-probation-industry>.



close to 15 percent of the entire state probation population nationwide.<sup>325</sup> While BJS does not distinguish between possession and sales in this data, states provide examples. In Missouri, drug possession is by far the single largest driver of felony probation, accounting for 9,500 people, or roughly 21 percent of the statewide probation total.<sup>326</sup> Simple possession is also the single largest driver of the community supervision population in Florida—accounting for nearly 20,000 cases or 14 percent of the statewide total.<sup>327</sup> In Georgia, possession offenses accounted for 17 percent of new probation starts in 2015<sup>328</sup> and roughly 16 percent of the standing probation population statewide at mid-year 2016.<sup>329</sup>

### *Onerous Conditions*

A large number of individuals in custody and on probation in each state we visited, as well as their defense attorneys, said probation “sets you up to fail.” Probation for drug possession is often designed with specific conditions related to drug use. For people we interviewed, these typically included regular and/or random drug and alcohol testing; weekly, sometimes daily, classes on addiction, anger management, life skills, and sometimes parenting; and meetings with probation officers monthly or on other regular schedules. In some jurisdictions, probation may include drug court participation, described below in section X. In 2009, in the 75 largest counties in the US, BJS reported that 45 percent of people sentenced to probation for drug offenses were required to undergo treatment (BJS did not describe what treatment entailed).<sup>330</sup>

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<sup>325</sup> Thomas P. Bonczar, “Count of yearend probation population by most serious offense,” generated using the Corrections Statistical Analysis Tool (CSAT) – Probation, Bureau of Justice Statistics, <http://www.bjs.gov/probation/> (accessed September 21, 2016).

<sup>326</sup> Missouri Department of Corrections, *Profile of the Institutional and Supervised Offender Population, 2015*, December 2015, <http://doc.mo.gov/Documents/publications/Offender%20Profile%20FY15.pdf> (accessed September 21, 2016).

<sup>327</sup> Florida Department of Corrections, “2014-2015 Agency Statistics: Community Supervision Population, Population by Primary Offenses – June 30, 2015,” [http://www.dc.state.fl.us/pub/annual/1415/stats/csp\\_primary.html](http://www.dc.state.fl.us/pub/annual/1415/stats/csp_primary.html) (accessed September 21, 2016).

<sup>328</sup> Georgia Department of Corrections, “Probationer Statistical Profile, Probation Starts During CY2015,” January 2, 2016, [http://www.dcor.state.ga.us/sites/all/files/pdf/Research/Annual/Profile\\_Probation\\_starts\\_CY2015.pdf](http://www.dcor.state.ga.us/sites/all/files/pdf/Research/Annual/Profile_Probation_starts_CY2015.pdf) (accessed September 21, 2016).

<sup>329</sup> Georgia Department of Corrections, “Probationer Statistical Profile, Active Street Probationers,” January 2, 2016, [http://www.dcor.state.ga.us/sites/all/themes/gdc/pdf/Profile\\_probationers\\_2016\\_o6.pdf](http://www.dcor.state.ga.us/sites/all/themes/gdc/pdf/Profile_probationers_2016_o6.pdf) (accessed September 21, 2016).

<sup>330</sup> Bureau of Justice Statistics, “Felony Defendants in Large Urban Counties, 2009 - Statistical Tables,” Table 28, <http://www.bjs.gov/content/pub/pdf/fdluc09.pdf> (accessed September 21, 2016).

In every state we visited, interviewees said probation was very difficult. A number of them said probation required so much time commitment that they had to give up a job search or leave present employment. Others described concerns about probation officers visiting a place of employment, interrupting their ability to perform work consistently and making public their probation status. Lindsay Phillips described being on probation for felony possession of cocaine in Florida:

They say [probation is] there to integrate you back into society but it isn't.... There was no help. I had been offered a great job opportunity to run a lab at a medical facility. My probation officer said to them, are you sure you want to hire a felon? They had offered the job. Then I get a letter: after much consideration, the offer is no longer available.<sup>331</sup>

### **Gary's Story**

After being sentenced to one-year probation for 0.1076 grams of cocaine in Harris County, Texas, Gary Baker had to quit his job as an interstate truck driver. He said his probation terms, which prevented him from leaving the jurisdiction regularly and required his frequent attendance at probation meetings and drug tests, made interstate driving impossible.

Instead, Gary was trying to find work with a temp agency, picking up what jobs he could. He had experienced more than a 50 percent cut in income. He said, "Last week they sent me out three days and I got that little check today. \$320, when taxes come out I've got \$265. I'm used to bringing home \$700 a week ... \$40,000 a year."

Gary had to pay \$72 a month to probation and had \$800 in court costs and surcharges outstanding. He owed his brother for his bond and for help with car payments. He was living with his sister and could not afford to pay rent or contribute to food costs. And he was getting calls from debt collectors for the first time in his life. "My main concern is to keep my car. I ain't worried about the furniture [I'm losing] and all this other stuff. My car, so I can get to work, has to come first. It's been three months I haven't been able to pay. [If I don't pay] tomorrow, they'll send someone to come get it."<sup>332</sup>

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<sup>331</sup> Human Rights Watch interview with Lindsay Phillips (pseudonym), Auburndale, December 11, 2015.

<sup>332</sup> Human Rights Watch interview with Gary Baker (pseudonym), Dallas, March 9, 2016.

The travel restriction also changed interviewees' relationships with partners and family members. An interviewee in New York City said he had finally decided to violate his probation by leaving the jurisdiction to visit his aging father in Texas. He was nervous about being discovered and having his probation revoked, but faced with a choice between not seeing his father whose health was frail and the possibility of more jail time, he felt he needed to see his father again.<sup>333</sup> In Florida, Lindsay Phillips said her travel restrictions had impacted her relationship with her teenage children. "They live out of state. I can't leave the jurisdiction without permission, and it's a huge hassle because of curfew." She said she had not seen her children in eight months.<sup>334</sup>

In some jurisdictions, conviction for drug possession triggers a driver's license suspension, which we examine at more length below in section IX. In Florida, many interviewees told us the suspension made it impossible to get to mandatory probation meetings and classes. Some did not have money to pay for taxis. People described having to catch multiple buses to get to and from probation appointments, relying on friends and family members if they could. Isabel Evans received probation for her first felony, possession of hydromorphine in Florida. She said,

Probation sets you up to fail.... They know you don't have a license, no transportation. Not everyone has friends and parents who can drive you. I'd call my probation officer to change days to come in, I'd send emails; and he won't respond.... [Once] my friend was driving me [to class], but we were late with a flat tire. I was more than 20 minutes late so was knocked out of [the class] and got my probation violated.<sup>335</sup>

Some defense attorneys told us that probation conditions were so onerous and unrealistic that they would counsel clients to take a short term of incarceration instead. A number of interviewees said if they were to be offered probation again, they would choose incarceration. A former prison warden in Florida acknowledged, "I know guys in prison who'd rather do time than paper."<sup>336</sup>

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<sup>333</sup> Human Rights Watch interview with probationer, New York, October 2015.

<sup>334</sup> Human Rights Watch interview with Lindsay Phillips (pseudonym), Auburndale, December 11, 2015.

<sup>335</sup> Human Rights Watch interview with Isabel Evans (pseudonym), Auburndale, December 11, 2015.

<sup>336</sup> Being "on paper" is a colloquial saying that means being on probation. Human Rights Watch interview with former Florida prison warden, December 2015.

## The Problem with Drug Testing

Numerous interviewees described their frustration with the way drug tests are performed and sanctioned. In St. Tammany Parish, Louisiana, drug court was a condition of Melissa Wright's probation. Her probation officer and the drug court judge told her that although her urine sample had tested negative for drugs and alcohol, she still failed the drug test: her urine was too diluted. A number of drug court participants in that jurisdiction told us dilutions meant they had allegedly been drinking too many fluids, perceived as an attempt to hide drugs in their system. They had been sanctioned with jail time as a result, and Melissa was afraid she risked revocation.

Melissa said she visited a urologist to try to get an explanation for why her urine was diluted, but the urologist told her the sample was normal. Yet the judge insisted otherwise. Melissa told us she was scared; she had already been to jail for dilutions. In St. Tammany, she said, "everyone goes in for dilutions."

I dress to go to jail every time I go to court now. They only let you wear white underclothes in jail, so I wear white long johns under my clothes [to drug court], because otherwise the cell is so cold you get deathly ill. It's like you have no rights once you're in drug court. I used cocaine and alcohol. Does that make me a criminal, a person with no rights for the rest of my life? ... I live in the country. I wake up at 4 a.m. I can't hold urine to get to court to pee at 8 a.m.... I'm 60. The judge says, "Get here at 8 a.m. and don't pee before and you won't be diluted."<sup>337</sup>

No matter who is subjected to it, drug testing is so intrusive that it is considered a search under the Fourth Amendment.<sup>338</sup> Many of those we interviewed brought up testing as a concern; it may become an issue during probation, pretrial release, and assessments for welfare assistance and drug court programs, discussed below in sections IX and X.

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<sup>337</sup> Human Rights Watch interview with Melissa Wright (pseudonym), Covington, Louisiana, January 28, 2016, and phone interview February 4, 2016.

<sup>338</sup> *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) (state-compelled collection and testing of urine constitutes a search under the Fourth Amendment).

Drug testing is additionally problematic for those who are drug dependent. Dependence is a health condition, the normal pattern of which includes relapses into drug use.<sup>339</sup> Punishing drug dependent people for failing a drug test is punishing them for a health condition.

Others chose a felony conviction rather than the chance to do probation without one: Nate Myers pled to his first felony and time served (33 days in jail), although the prosecutor had offered him three years' probation with a deferred adjudication, meaning that if he completed his probation without incident, the case would be dismissed and he would not have a conviction on his record. He chose a felony instead, saying three years of probation would be too hard.<sup>340</sup>

Although many officials told us probation conditions are meant to help people who use drugs, those who had been subject to them said conditions were misaligned with the realities of drug use and dependence. In Auburndale, Florida, Trisha Richardson said, "They never offered me help. Everyone says probation is a set up. They know you're an addict so you're going to get violated immediately [because you use]."<sup>341</sup> In Ft. Lauderdale, Carlos Alvarez recalled his probation in Delaware for drug possession:

There are times I've gone to probation and said, "I'm using, I need help."  
Their response? They turn around and handcuff me. I say, "Please take me to detox." They say, "We can't do that," and they take me to jail instead to break my dependency with no medication; and it starts the cycle again....  
Probation for someone like me, the door is always revolving. It's a set-up. I was constantly getting violated, going back and forth.<sup>342</sup>

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<sup>339</sup> National Institute on Drug Abuse, "Drugs, Brains, and Behavior: The Science of Addiction," July 2014, <https://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/treatment-recovery> (accessed July 25, 2016) ("The chronic nature of the disease means that relapsing to drug abuse at some point is not only possible, but likely."); Jeanne L. Obert et al., "Client's Handbook: Matrix Intensive Outpatient Treatment for People With Stimulant Use Disorders," US Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, 2006, <http://www.ct.gov/dmhas/lib/dmhas/pgs/PGIntegratedMatrixClientHandbook.pdf> (accessed July 26, 2016).

<sup>340</sup> Human Rights Watch interview with Nate Myers (pseudonym), Dallas, March 8, 2016.

<sup>341</sup> Human Rights Watch interview with Trisha Richardson (pseudonym), Auburndale, December 11, 2015.

<sup>342</sup> Human Rights Watch interview with Carlos Alvarez (pseudonym), Orlando, December 11, 2015.

## *Financial Costs*

The costs of probation can sometimes be so prohibitive for poor defendants that they feel compelled to choose a jail sentence instead.<sup>343</sup> In many jurisdictions probationers are required to pay fees to government agencies or, in some cases, to for-profit companies that monitor compliance with probation terms.<sup>344</sup> Monthly fees can range from \$10 to \$135, depending on the state, county, and locality.<sup>345</sup> Keeping up with probation requirements can also become costly, as probationers sometimes must drive long distances—and cover the cost of gas—to meet their probation officer for check-ins or random drug tests, for which they are often financially responsible. This routine can make it difficult to keep a steady job. As one magistrate judge in Idaho noted, “Under certain circumstances, the realities of life may be that they don’t have a car, a driver’s license or a job, and incarceration seems like a good alternative to them.”<sup>346</sup>

Faced with probation fees that may feel unaffordable, many low-income people are pushed to make a false “choice” to serve jail time instead. A Houston defense attorney told us the costs of probation were unrealistic for her homeless client who was charged with state jail felony possession. She asked how he was supposed to pay the monthly fee to the probation office, the weekly fees for urine tests, and the one-time bulk fee for classes, let alone find a way to show up for all the appointments without access to transportation. As she explained, he decided he would do better to sit out a six-month offer in local jail, where he already had credit for pretrial time.<sup>347</sup> Where the high fines and fees imposed as a condition of probation mean that some defendants “choose” to give up their liberty instead, the result is a system that punishes people not only for the crime for which they were convicted but also simply for being poor.

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<sup>343</sup> As discussed in the subsection on Criminal Justice Debt below, the financial costs of being sentenced for drug use or possession can, even without probation, be unbearable for low-income people.

<sup>344</sup> See Human Rights Watch, *Profiting from Probation: America’s “Offender-Funded” Probation Industry*.

<sup>345</sup> See American Probation and Parole Association, “Supervision Fees,” September 2002, [https://www.appa-net.org/eweb/DynamicPage.aspx?webcode=VB\\_HotTopicDetail&fq\\_key=efb7e2c8-b6ce-4bod-a36c-f42d9a1e2ace](https://www.appa-net.org/eweb/DynamicPage.aspx?webcode=VB_HotTopicDetail&fq_key=efb7e2c8-b6ce-4bod-a36c-f42d9a1e2ace) (accessed June 8, 2016). In addition, some states require people to submit their payments online using a credit or debit card, or by mail using a money order or cashier’s check, which could pose additional difficulties for unbanked and underbanked individuals. See, for example, Michigan Department of Corrections, Fee Collection Services, <https://michigan.feeservice.com/FC/Home/FeeServiceInfo> (accessed June 8, 2016).

<sup>346</sup> Laurie Welch, “Probation fees show the high cost of being poor,” *Magic Valley*, August 24, 2014, [http://magicvalley.com/news/local/probation-fees-show-the-high-cost-of-being-poor/article\\_c244bc82-2b53-11e4-bb51-001a4bcf887a.html](http://magicvalley.com/news/local/probation-fees-show-the-high-cost-of-being-poor/article_c244bc82-2b53-11e4-bb51-001a4bcf887a.html) (accessed June 8, 2016).

<sup>347</sup> Human Rights Watch phone interview with defense attorney, Houston, March 15, 2016.

In the 1983 case *Bearden v. Georgia*, the US Supreme Court ruled that probationers cannot have their probation revoked and be jailed simply for failing to pay a fine if they truly cannot afford to pay it. Human Rights Watch and the ACLU have previously documented that some courts do not comply with the spirit, if not the letter, of their *Bearden* requirements.<sup>348</sup> But even where courts do not revoke or jail for nonpayment of fees the probationer cannot afford, some impose probation without regard to the fees in the first place, or to whether the person is able to pay them.<sup>349</sup> Where probation fees are too onerous, they may result in people choosing to serve time instead, or cause people extreme financial and emotional stress.

### *Violations and Revocations*

Many jurisdictions distinguish between substantive and technical probation violations. Substantive violations typically occur when someone is arrested for or convicted of a new crime while on probation. Technical violations result from failing to satisfy a condition of probation, for example failed drug tests, nonattendance at classes or missed probation officer meetings, and nonpayment of fines and fees. Technical violations may result in “short” stints of punishment in jail. Apart from the negative experience of jail, these stints take people out of their daily lives. A former probation officer in Miami told us:

Some people can’t afford the assessments and so they get violated [end up violating the terms of their probation]. Then it’s two to three times more drug testing. Instead of once a month, now sometimes it’s twice a month or twice a week. You have to go in for them, so you miss work. Or if you’re

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<sup>348</sup> Human Rights Watch, *Profiting from Probation: America’s “Offender-Funded” Probation Industry*, February 2014, <https://www.hrw.org/report/2014/02/05/profitting-probation/americas-offender-funded-probation-industry>; Sarah Alexander et al., “In for a Penny: The Rise of America’s New Debtors’ Prisons,” ACLU, October 2010, [https://www.aclu.org/files/assets/InForAPenny\\_web.pdf](https://www.aclu.org/files/assets/InForAPenny_web.pdf) (accessed September 28, 2016).

<sup>349</sup> For example, one interviewee in Texas told us that he had not known the probation fees when he pled to probation, and that he was not informed of them until he showed up at the probation office. Because the probation department and not the court may assess probation fees, judges may not necessarily inquire into ability to pay them. For failures to inquire into ability to pay court-imposed fines and fees more generally (apart from probation), which are discussed in the following subsection on Criminal Justice Debt, see Alicia Bannon, Mitali Nagrecha, and Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, Brennan Center for Justice, 2010, <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> (accessed September 8, 2016), pp. 13-17.

violated, [sometimes] you get house arrest. Or your probation is revoked [and] you're sent to jail or prison.<sup>350</sup>

Sometimes probation is revoked and the individual is sent to prison for technical violations. A study by Pew Charitable Trusts in Maryland found that of all offenses, drug possession had the highest percentage of revocations to prison that were triggered by a technical violation.<sup>351</sup> The study also found that defendants who had a technical violation of probation for their drug offense ended up serving slightly longer sentences than those sentenced straight to prison: newly sentenced drug defendants served an average of 29 months while those who had a technical violation served 31.9 months.<sup>352</sup>

Some interviewees were so afraid of having their probation revoked because of a technical violation, even one as small as missing a meeting, that they failed to report to their probation officer and thus began to accumulate more technical violations. Jason Gaines received probation and his first felony conviction in Granbury, Texas for possession of unused syringes (profiled in section V). His driver's license was suspended after the conviction, so his girlfriend would drive him to work and to meetings with his probation officer. He told us he missed one of those check-ins, because he and his girlfriend had to take his friend to the hospital. He said he was sure his probation would be revoked even if he tried to explain, so he stopped reporting and accumulated technical violations. When he was charged with a revocation of probation, he pled to 20 months in prison, just short of the 24-month statutory maximum.<sup>353</sup>

The former Miami probation officer quoted above told us she does not think drug possession should be a reason for arrest in the first place, in part because it targets low-income defendants and those with drug dependence who are struggling already. "Life has sucked them dry," she said. "A lot of the people I know [with possession cases] are homeless, in shelters, bumming in someone's home." But if they are arrested and given probation, she

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<sup>350</sup> Human Rights Watch interview former probation officer, Miami, December 23, 2015.

<sup>351</sup> Sixty-seven percent of revocations to prison for drug possession cases were revoked because of a technical violation, Pew Charitable Trusts, *Maryland Criminal Justice System Assessment and Intro to Policy Development*, September 11, 2015, <http://goccp.maryland.gov/jrcc/documents/presentation-20150911-justice-assessment.pdf> (access September 21, 2016).

<sup>352</sup> Ibid.

<sup>353</sup> Human Rights Watch interview with Jason Gaines (pseudonym), Granbury, March 10, 2016.



recommended, “Probation officers: don’t violate for positive drug tests. Give them a couple chances.”<sup>354</sup> It is important for probation officers to understand that drug dependence is a health condition and that immediate abstinence is unrealistic.

Judge Murphy, in Miami, also recognized a judge’s role in helping a person complete probation:

On probation, people succeed more in my division because I recognize they’ll have problems. So I’m going to keep in mind they’ll stumble and test dirty, and I’ll say, “Try again, see you in a month,” [rather than revoking their probation on the spot]. Unfortunately, that’s rare. But I like to think I do my part. I get young prosecutors, and I try to impart my perspective to them.<sup>355</sup>

## Criminal Justice Debt

Many people convicted of drug possession are burdened with enormous court-imposed fines, fees, costs, and assessments (collectively, “fines and fees”) that they cannot afford to pay. These fines and fees are in addition to the price of bail (if they can afford it), probation supervision fees, lost income caused by detention, and the financial impact of a criminal record. For some who choose to hire an attorney, the costs of defending their case may already have left them in debt or struggling to make ends meet for months or even years to come.<sup>356</sup>

For others, assessments may include an application fee for a public defender, who has been appointed precisely because the individual has been found unable to pay. All of these circumstances combine to overload and sometimes to crush the lives of people with criminal justice debt from their drug possession prosecution.

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<sup>354</sup> Human Rights Watch interview former probation officer, Miami, December 23, 2015.

<sup>355</sup> Human Rights Watch interview with Judge Dennis Murphy, Miami, December 21, 2015.

<sup>356</sup> See Darius Mitchell’s case, profiled in section IV.

These fines and fees also risk creating a perverse incentive, since they generate substantial revenue for many municipalities and counties.<sup>357</sup> In Florida, fines and fees often reach hundreds or even thousands of dollars.<sup>358</sup>

### Fines and Fees for Drug Possession in Florida

A person charged with an offense in Florida faces a number of mandatory fines and fees, including a county court fee of \$40 if the person contests the charge (compared to \$10 if the defendant does not). The public defender application fee is an additional \$50, which is subject to increase by the court if there is “sufficient proof of higher fees or costs incurred.” If convicted, defendants must pay a conviction cost of no less than \$60 for a misdemeanor and no less than \$225 for a felony,<sup>359</sup> prosecution costs of at least \$50 for a misdemeanor and at least \$100 for a felony, a \$100 fee for any controlled substance violation (plus an additional fee for no more than the underlying fine for the drug offense, which can be as much as \$5,000), a baseline fee upon which certain local governments can impose an \$85 local surcharge, and a 5 percent surcharge imposed on all incurred costs. After 90 days of delinquency, clerks must refer any unpaid court fees to a private attorney or collection agent. Clerks are also required to report nonpayment of fines and fees to state authorities for the purpose of suspending driving privileges.<sup>360</sup>

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<sup>357</sup> See Christopher Albin-Lackey (Human Rights Watch), “For-Profit Justice Means Taxing the Poor,” Spotlight on Poverty and Opportunity, January 7, 2015, <https://www.hrw.org/news/2015/01/07/profit-justice-means-taxing-poor>.

<sup>358</sup> The American Civil Liberties filed a federal lawsuit in August 2015 against Marion County, Florida, on behalf of a man whose driver’s license was suspended for failure to pay his fines and fees. He owed over \$53,000 in court costs and fines that he could not afford, which including the following: Public Defender Application Fee \$50; Criminal Justice Clearing Trust Fund \$3; Crimes Compensation Trust Fund \$50; Additional Court Cost \$225; County Crime Prevention Program \$50; Criminal Justice Education for Local Government \$2; Teen Court \$3; Additional Court Cost for County Programs \$65; Prosecution / Investigation Costs \$100; Controlled Substances Fine \$50,000; 5 percent Surcharge on any Fine \$2,500; Fine Surcharge (Crime Stoppers) \$20; Total \$53,068. *Washington v. Clerk for Marion County, Florida*, Complaint, August 5, 2015, <https://aclufl.org/resources/washington-v-clerk-for-marion-county-florida-complaint> (accessed September 21, 2016). For a map of the income eligibility guidelines for assigned public defenders by state, see John P. Gross, “*Gideon* at 50: A Three-Part Examination of Indigent Defense in America, Part 2: Redefining Indigence: Financial Eligibility Guidelines for Assigned Counsel,” National Association of Criminal Defense Lawyers, March 2014, [https://www.ils.ny.gov/files/gideon\\_2\\_assigned\\_counsel\\_%20financial\\_guidelines\\_noUnd\\_clr\\_map\\_pms5669\\_4162014-102.pdf](https://www.ils.ny.gov/files/gideon_2_assigned_counsel_%20financial_guidelines_noUnd_clr_map_pms5669_4162014-102.pdf) (accessed July 27, 2016), pp. 22-23.

<sup>359</sup> In 2003, new legislation eliminated the court’s ability to waive the baseline fee. FL Stat. Ann. sec. 938.03(2).

<sup>360</sup> See Rebekah Diller, “The Hidden Costs of Florida’s Criminal Justice Fees,” Brennan Center for Justice, 2010, <http://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF&F.pdf> (accessed June 6, 2016), pp. 5-6, 31. As an example of other states, in Oklahoma, fines and fees can include the following: Court Reporter Fee \$20; Bond Filing Fee \$35; Fee to Request Court-Appointed Attorney \$200; County Indigent Defender Application Fee \$15; Charge for Each Felony Offense \$25; Charge for Each Misdemeanor Offense \$15; County Jail Incarceration \$44-\$52 per day; Drug Court Revolving

Some interviewees in Florida, Louisiana, and New York told us they had never paid off their fines and fees and had never been tracked down for them, assuming in some cases that they had been waived or forgotten. Other interviewees had gone to great lengths to stay current on their payment schedules with the court, sometimes sacrificing other financial needs or borrowing from friends and family.

Yet, as many people said, the unpaid fines and fees still made them feel vulnerable and restricted their financial mobility. In New York City, Cameron Barnes told us: “Paying the surcharge wasn’t a priority; I’m on a fixed income. But I know elsewhere people get arrested for not paying, so I feel vulnerable to arrest now because I have outstanding debts.”<sup>361</sup>

A few interviewees in central Florida said they had learned of arrest warrants for their failure to pay fines and fees, and one said she was jailed for nonpayment. Kim Coleman told us her probation officer called to tell her there was a warrant for her arrest related to her unpaid fees—about \$400. Kim turned herself in and was detained for 52 days before the court gave her a hearing. She said she was sentenced to 60 days for her failure to pay and was released on time served.<sup>362</sup>

In Miami, Judge Murphy said it was a “kneejerk” political stance: “Let’s keep hiking up fees and fines in the criminal justice system [for those who] are least able to afford them. The legislature doesn’t want to raise taxes so does it in fines and fees instead.”<sup>363</sup> The Chief Justice of the Florida Supreme Court has also noted that the combination of various court expenses is “beyond the reach” of many defendants.<sup>364</sup>

The American Civil Liberties Union has documented the extensive fines and fees imposed on criminal defendants around the country, and the coercive debt collection practices some courts and local governments employ—including jailing people for nonpayment who

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Fund Fee \$155; and many others. M. Scott Carter and Clifton Adcock, “A Journey Into Debt,” *Oklahoma Watch*, January 31, 2015, <http://oklahomawatch.org/2015/01/31/list-journey-into-debt/> (accessed November 11, 2015).

<sup>361</sup> Human Rights Watch interview with Cameron Barnes (pseudonym), New York, October 29, 2015.

<sup>362</sup> Human Rights Watch interview with Kim Coleman (pseudonym), Auburndale, December 11, 2015.

<sup>363</sup> Human Rights Watch interview with Judge Dennis Murphy, Miami, December 21, 2015.

<sup>364</sup> The Florida Bar News, “Chief Justice Labarga takes his access message to Washington,” May 1, 2016, <https://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/75af1297f3f8ee6e85257fa0043d9f2!OpenDocument> (accessed July 25, 2016).

lack the ability to pay<sup>365</sup>—and has engaged in successful litigation and advocacy.<sup>366</sup> As noted above, more than 30 years ago the US Supreme Court held it unconstitutional to incarcerate people simply because they cannot pay fines or fees.<sup>367</sup>

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<sup>365</sup> See American Civil Liberties Union, “Ending Modern-Day Debtors’ Prisons,” <https://www.aclu.org/feature/ending-modern-day-debtors-prisons> (accessed September 22, 2016); American Civil Liberties Union, *In for A Penny: The Rise of America’s New Debtors’ Prisons*, October 2010, [https://www.aclu.org/files/assets/InForAPenny\\_web.pdf](https://www.aclu.org/files/assets/InForAPenny_web.pdf) (accessed September 22, 2016); ACLU of Louisiana, *Louisiana Debtors’ Prisons: An Appeal To Justice*, August 2015, [https://www.laaclu.org/resources/LADebtorsPrisons\\_2015.pdf](https://www.laaclu.org/resources/LADebtorsPrisons_2015.pdf) (accessed September 22, 2016); ACLU of New Hampshire, *Debtors’ Prisons in New Hampshire*, September 2015, <http://aclu-nh.org/wp-content/uploads/2015/09/Final-ACLU-Debtors-Prisons-Report-9.23.15.pdf> (accessed September 22, 2016); ACLU of Ohio, *In Jail & In Debt : Ohio’s Pay-To-Stay Fees*, <http://www.acluohio.org/wp-content/uploads/2015/11/InJailInDebt.pdf> (accessed September 22, 2016); ACLU of Ohio, *The Outskirts of Hope: How Ohio’s Debtors’ Prisons Are Ruining Lives and Costing Communities*, April 2013, [http://www.acluohio.org/wp-content/uploads/2013/04/TheOutskirtsOfHope2013\\_04.pdf](http://www.acluohio.org/wp-content/uploads/2013/04/TheOutskirtsOfHope2013_04.pdf) (accessed September 22, 2016); ACLU of Washington and Columbia Legal Services, *Modern-Day Debtors’ Prisons: The Ways Court-Imposed Debts Punish People For Being Poor* [hereinafter *Modern-Day Debtors’ Prisons in Washington*], February 2014, [https://aclu-wa.org/sites/default/files/attachments/Modern%20Day%20Debtor%20s%20Prison%20Final%20\(3\).pdf](https://aclu-wa.org/sites/default/files/attachments/Modern%20Day%20Debtor%20s%20Prison%20Final%20(3).pdf) (accessed September 22, 2016); Alison Beyea, “Legislature Has a Chance to End Debtors’ Prisons in Maine,” ACLU of Maine Blog, March 8, 2016, <https://aclumaine.org/legislature-has-chance-end-debtors-prisons-maine> (accessed September 22, 2016); Debtors’ Prisons, ACLU of Colorado, <http://aclu-co.org/court-cases/debtors-prisons> (accessed September 22, 2016) (compiling 2013 letters to municipalities of Westminster, Northglenn, and Wheat Ridge concerning illegal jailing of people unable to pay fines and fees); “Colorado Legislature Approves Ban on Debtors’ Prisons,” ACLU of Colorado press release, April 23, 2014, <http://acluco.org/colorado-legislature-approves-ban-debtors-prisons> (accessed September 22, 2016); Complaint, *Thompson v. Dekalb County*, No. 1:15-cv-280-TWT (N.D. Ga.), January 29, 2015, [https://www.aclu.org/sites/default/files/field\\_document/2015.01.29\\_filed\\_thompson\\_complaint.pdf](https://www.aclu.org/sites/default/files/field_document/2015.01.29_filed_thompson_complaint.pdf) (accessed September 22, 2016); Complaint, *Fuentes v. Benton County*, No. 15-2-02976-1 (Sup. Ct. Wash. Yakima County), October 6, 2015, [https://www.aclu.org/sites/default/files/field\\_document/fuentes\\_v.\\_benton\\_county\\_-\\_complaint.pdf](https://www.aclu.org/sites/default/files/field_document/fuentes_v._benton_county_-_complaint.pdf) (accessed September 22, 2016); Complaint, *Kennedy v. City of Biloxi*, No. 1:15-cv-00348-HSO-JCG (S.D. Miss.), October 21, 2015, <https://www.aclu.org/kennedy-v-city-biloxi-complaint> (accessed September 22, 2016); Complaint for Superintending Control, *In re Donna Elaine Anderson*, Circuit Court Case No. 15-2380-AS (Cir. Court County of Macomb), July 9, 2015, <http://www.aclumich.org/sites/default/files/Complaint%20for%20Superintending%20Control%20with%20exhibits%20FIL-ED.pdf> (accessed September 22, 2016).

<sup>366</sup> The ACLU brought a federal lawsuit in October 2015 against the City of Biloxi, Mississippi for jailing people who were unable to pay court fines and fees in traffic and other misdemeanor cases. According to the complaint, Biloxi “operates a modern-day debtors’ prison. The City routinely arrests and jails impoverished people in a scheme to generate municipal revenue through the collection of unpaid fines, fees, and court costs imposed in traffic and other misdemeanor cases. As a result, each year, hundreds of poor residents of the City and surrounding areas, including individuals with disabilities and homeless people, are deprived of their liberty in the Harrison County Adult Detention Center for days to weeks at a time for no reason other than their poverty and in violation of their most basic constitutional rights.” The Biloxi Municipal Court issued 2,681 arrest warrants against 1,520 people for “failure to pay fines, fees, court costs, or restitution” between September 1, 2014 and June 11, 2015, and at least 415 people were jailed for failure to pay debts between September 1, 2014 and March 26, 2015. *Kennedy v. City of Biloxi*, Case No. Case 1:15-cv-00348-HSO-JCG, Complaint, October 21, 2015, <https://www.aclu.org/other/kennedy-v-city-biloxi-complaint> (accessed September 22, 2016). The parties settled in March 2016. As part of the settlement, Biloxi agreed to make sweeping reforms that both parties agree are a model for courts across the country. See “Biloxi and ACLU Settle Lawsuit Over Jailing of Indigent People,” ACLU press release, March 15, 2016, <https://www.aclu.org/news/biloxi-and-aclu-settle-lawsuit-over-jailing-indigent-people> (accessed September 22, 2016). See also *Thompson v. Dekalb County*, Case No. 1:15-cv-280-TWT (N.D. Ga.), Settlement Agreement, March 18, 2015, [https://www.aclu.org/files/assets/thompson\\_v\\_dekalb\\_county\\_settlement\\_agreement\\_03182015.pdf](https://www.aclu.org/files/assets/thompson_v_dekalb_county_settlement_agreement_03182015.pdf); *Fuentes v. Benton County*, No. 15-2-02976-1 (Sup. Ct. Wash. Yakima County), Settlement Agreement, June 1, 2016, [https://www.aclu.org/sites/default/files/field\\_document/benton\\_county-ifo\\_settlement\\_agreement.pdf](https://www.aclu.org/sites/default/files/field_document/benton_county-ifo_settlement_agreement.pdf); *In re. Anderson*, No. 15-2380-AS (16th Cir. Ct. Mich), Stipulation and Order of Superintending Control, March 8, 2016.

<sup>367</sup> *Bearden v. Georgia*, 461 U.S. 660 (1983).

## IX. The Impact of Incarceration and a Criminal Record

### When People Are Locked Up

You get thrown in here. You don't have any contact with the outside world. I'm waiting on everybody else. My life is still.... Everything is crumbling.<sup>368</sup>  
—Breanna Wheeler, in jail in Galveston, Texas for methamphetamine residue, March 2016

You go to jail, you lose your job, you lose your house, you probably lose your girlfriend or your boyfriend. Your kids are gone. It's devastating.<sup>369</sup>  
—John Lindner, District Defender, 22nd Judicial District, Louisiana, January 2016

Locking people up for their alleged drug use, whether in pretrial detention or following a conviction, has profound consequences in addition to deprivation of liberty. It separates young children from their parents and partners from each other. It can lead to lost jobs, deterioration in health, financial debt, and even homelessness after the period of incarceration is complete. Incarceration also has societal consequences: when so many people are removed from communities, the communities themselves are weakened.<sup>370</sup>

The social science literature on the consequences of incarceration is extensive.<sup>371</sup> Because individuals and families feel incarceration's impact no matter the type of offense, we do not replicate that literature here. But we present some of the most common experiences

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<sup>368</sup> Human Rights Watch interview with Breanna Wheeler (pseudonym), Galveston, Texas, March 17, 2016.

<sup>369</sup> Human Rights Watch interview with John Lindner, Covington, Louisiana, January 28, 2016.

<sup>370</sup> Todd R. Clear, "The Effects of High Imprisonment Rates on Communities," *Crime and Justice*, vol. 37 (2008), pp. 97-132; Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs*, May 2000, <https://www.hrw.org/reports/2000/usa/index.htm>; Dorothy E. Roberts, "The Social and Moral Cost of Mass Incarceration in African American Communities," *Stanford Law Review*, vol. 56 (2004), pp. 1271-1305.

<sup>371</sup> See, for example, Marc Mauer, "The Causes and Consequences of Prison Growth in the United States," *Punishment & Society*, vol. 3 (2001), pp. 9-20; Mary Pattillo, Bruce Western, and David Weiman (eds.), *Imprisoning America: The Social Effects of Mass Incarceration* (New York: Russell Sage Foundation, 2004); Ram Subramanian et al., "Incarceration's Front Door: The Misuse of Jails in America," Vera Institute of Justice, July 29, 2015, [https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy\\_downloads/incarcerations-front-door-report\\_02.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy_downloads/incarcerations-front-door-report_02.pdf) (accessed July 27, 2016); and Jeremy Travis, Bruce Western, and F. Stevens Redburn, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (Washington, DC: The National Academies Press, 2014).

we heard, to emphasize how acutely individuals and families felt these consequences, which compound the wrongs inherent in the criminalization of drug use.

### *Impact on Family*

Incarceration affects not only the people behind bars but also their families, who may depend on them financially, emotionally, and physically. Separation from family and inability to be present at major life milestones of family members and friends may be a defining part of imprisonment for any inmate, regardless of the convicted offense. But where the offense is nothing more than simple drug possession, which should not be criminalized at all, the effects of imprisonment infringe on the right to family unity<sup>372</sup> as well as the rights of children to be raised by their parents.<sup>373</sup>

Child experts agree that loss of parents to prison can be a continuing emotional trauma for children and can have a significant impact on children's development, by depriving them of a critical source of care, stability, and love.<sup>374</sup> For people we spoke to, the well-being of young children in their absence was a source of constant concern, sometimes even more vivid for them than the experience of jail or prison itself. Corey Ladd was incarcerated in New Orleans when his girlfriend was eight months pregnant. He saw his infant daughter, Charlee, for the first time in a courtroom and held her for the first time in the infamous Angola prison. She is four now and thinks she visits her father at work. "She asks when I'm

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<sup>372</sup> The international human right to family unity finds articulation in numerous human rights treaties. The Universal Declaration of Human Rights states that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 78 (1948), art. 16(3). The International Covenant on Civil and Political Rights states in article 17(1) that no one shall be "subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence." Article 23 states that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the state." UN Human Rights Committee, General Comment 19, Article 23, Protection of the Family, the right to marriage and equality of the spouses (Thirty-ninth session, 1990).

<sup>373</sup> Beyond family unity in general, the right of children to be raised by their parents is one of the strongest human rights counseling against the separation of families. Article 24 of the International Covenant on Civil and Political Rights, to which the United States is a party, entitles children "to such measures of protection as are required by [their] status as a minor, on the part of the family, society and the state." Article 9 of the Convention on the Rights of the Child (CRC), which the United States has signed but not ratified, requires that "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when ... such separation is necessary for the best interests of the child." Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, signed by the United States on February 16, 1995, art. 9(1).

<sup>374</sup> Some experts also believe that the children of incarcerated offenders are more likely to be involved in the criminal justice system than other children their age. For the impact of incarceration for drug offenses for children with incarcerated parents in New York, see Human Rights Watch, *Collateral Casualties: Children of Incarcerated Drug Offenders in New York*, June 2002, <https://www.hrw.org/report/2002/06/22/collateral-casualties/children-incarcerated-drug-offenders-new-york>.

going to get off work and come see her,” Corey told us. Corey is a skilled artist and draws Charlee pictures. In turn, Charlee brings him photos of her dance recitals and in the prison visitation hall shows him new dance steps she has learned. Corey, who is currently serving 17 years for marijuana possession, may never see her onstage.<sup>375</sup>

Some parents do not let their children visit jail or prison because they are concerned the experience would be traumatizing. Jason Gaines, detained pretrial in Granbury, Texas, had not seen his 6-year-old daughter for five months: “I don’t want her seeing me in here, you know? ... She is really impressionable at this age, and I just don’t want this to be part of her memory. [I miss her] very much, every day. I call her. She always cries, to the point I don’t want to call.”<sup>376</sup>

Because many jails do not allow contact visits with family, people must view family members through glass and hear their voices through a phone or, worse, through a TV monitor. Darrell Collins said, “You don’t get to hold your kids [which] is just something you can’t get used to. You have to talk to them through the phone, so you can hear them but you can’t reach out and grab their hand.”<sup>377</sup> Tiffany Lewis, whose son Leonard had been detained pretrial in Houston, told us, “I haven’t gone up to see him. It’s too hard for me to go up there and see him [through the glass].”<sup>378</sup>

The mere logistics of remaining in touch, from the travel involved in visits to the price of phone calls, can be prohibitive for some families.<sup>379</sup> Bryan Fisher was trying to come up with \$5,000 for his bond but spent family money on calls instead. He said, “[In jail,] they charge \$25 to set up a phone call here. You get 15 minutes, then if someone calls you back

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<sup>375</sup> Human Rights Watch interview with Corey Ladd, St. Gabriel, February 2, 2016; Human Rights Watch interview with Lisa and Jay Ladd, New Orleans, January 31, 2016.

<sup>376</sup> Human Rights Watch interview with Jason Gaines (pseudonym), Granbury, March 10, 2016.

<sup>377</sup> Human Rights Watch interview with Darrell Collins (pseudonym), Covington, January 27, 2016.

<sup>378</sup> Human Rights Watch interview with Tiffany Lewis (pseudonym), Houston, March 16, 2016.

<sup>379</sup> Some states require people to pay background check fees to visit incarcerated family members. According to a 2014 study, 69 percent of participants identified the cost of phone calls as a barrier to maintaining contact, 47 percent noted the distance to the prison or jail location, and 46 percent responded that visitation-related costs were prohibitive. These costs are not inconsequential; in fact, over one-third of families had to go into debt to cover the costs of phone calls or visitation. Saneta deVuo-no-powell et al., “Who Pays? The True Cost of Incarceration on Families,” Ella Baker Center for Human Rights, Forward Together, and Research Action Design, September 2015, <http://whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf> (accessed July 27, 2016), p. 30.

you get another two to four minutes. Then you have to put another \$25 on it. [Still] I call my kids every night.... I gotta tell them goodnight.”<sup>380</sup>

Incarceration can mean the elimination of part of the household income and can place a partner and other family members in seriously strained circumstances.<sup>381</sup> When we interviewed him, Allen Searle had been in pretrial detention for almost 100 days. He told us, “I’ve been in here for four months, and [my job] was the only income for my family.... [Their] water has been cut off since I’ve been in here. The lights were cut off.... Basically that’s what happens when people come here. It doesn’t just affect us, but it affects everyone around us.”<sup>382</sup> Tyler Marshall’s wife has a disability, and he told us his absence had been demoralizing for her. “My wife, I cook for her, clean for her, bathe her, clothe her.... Now everything is on her, from the rent to the bills, everything.... She’s behind [on rent] two months right now. She’s disabled and she’s doing it all by herself.”<sup>383</sup>

Interviewees expressed dismay over the emotional toll their incarceration was taking on their families. Recalling his incarceration for felony possession of Ecstasy pills in New York City in 2010, Danny Ortiz said, “My pregnant girlfriend was watching me there as I got cuffed.... She had a miscarriage when I was locked up.... It would have been our first child.... I wasn’t able to help. She had no one to go to appointments with her. Shortly after her miscarriage, she broke it off [between us] because I was locked up.”<sup>384</sup>

Lindsay Phillips said, “[My partner is] doing this time with me.... He’s lost a year of his life too. He’s out there, yes, but waiting for a loved one, he’s emotionally stagnant. It’s not just jailing drug use, not just personal. It’s a family issue. He’s there with his hands up, life in standstill.”<sup>385</sup>

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<sup>380</sup> Human Rights Watch interview with Bryan Fisher (pseudonym), Granbury, March 10, 2016.

<sup>381</sup> Approximately 50 percent of respondents to a 2014 study contributed at least half of their “families’ total household income prior to incarceration, and ... their families struggled to cover basic costs of living” after they were incarcerated. Due to the incarceration of a family member, 65 percent of families struggled to meet basic needs, including food (49 percent), housing (48 percent), utilities (45 percent), transportation (40 percent), and clothing (37 percent). Saneta deVuono-powell et al., “Who Pays? The True Cost of Incarceration on Families,” Ella Baker Center for Human Rights, Forward Together, and Research Action Design, pp. 17-18.

<sup>382</sup> Human Rights Watch interview with Allen Searle (pseudonym), Covington, January 27, 2016.

<sup>383</sup> Human Rights Watch interview with Tyler Marshall (pseudonym), Louisiana, January 2016.

<sup>384</sup> Human Rights Watch interview with Danny Ortiz (pseudonym), New York, November 24, 2015.

<sup>385</sup> Human Rights Watch interview with Lindsay Phillips (pseudonym), Auburndale, December 11, 2015.



## Shipped Far Away

The distance between the detention facility and home, often hundreds of miles, can make it difficult or impossible for family to visit. According to the Bureau of Justice Statistics, in 2004 (the latest year for which such data is available), more than 20 percent of people incarcerated in state prisons were in prisons 50 to 100 miles from home, and more than 50 percent were in prisons 101 to 500 miles from home. Only 15.7 percent of inmates were in state prisons less than 50 miles from home. As an inmate's distance from home increases, the likelihood they will receive visits decreases.<sup>386</sup> Overall, fewer than one-third of people in state prisons receive a personal visit in a typical month, due in part to the difficulties posed by distance.<sup>387</sup> Hector Ruiz had served numerous Texas prison sentences for drug possession. He told us when people get sentenced to prison, “they’ll [ship] you anywhere. And [if I] go 400 or 500 miles away from where I’m from ... my wife won’t ever be able to see me.”<sup>388</sup>

Even pretrial detainees are sometimes shipped hours away from home to other facilities, often because of jail crowding. Jerry Bennett was charged in New Orleans but detained pretrial in Franklin Parish, 230 miles away from his girlfriend and their 3-year-old daughter. To address overcrowding in 2016, Harris County Jail in Texas had already completed four transfers of inmates to other jails by April, including to private jails in Jefferson and Bowie counties.<sup>389</sup> Jefferson County is some 80 miles and Bowie County some 300 miles from Houston.

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<sup>386</sup> In 2004, nearly half of the people housed in prisons less than 50 miles from their homes received visits in a typical month, while only 25.9 percent received visits if they were 101 to 500 miles from home. This rate dropped to 14.5 percent for those housed in prisons between 501 and 1,000 miles from their homes. Bureau of Justice Statistics, “Survey of Inmates in State Correctional Facilities,” 2004, [http://www.bjs.gov/content/pub/pdf/sisfcfo4\\_q.pdf](http://www.bjs.gov/content/pub/pdf/sisfcfo4_q.pdf) (accessed June 6, 2016).

<sup>387</sup> Meanwhile, 70 percent were still able to have phone contact in a typical week, suggesting that families and friends wished to make contact when barriers to contact were lower. Bernadette Rabuy and Daniel Kopf, “Separation by Bars and Miles: Visitation in state prisons,” Prison Policy Initiative, October 20, 2015, <http://www.prisonpolicy.org/reports/prisonvisits.html> (accessed June 6, 2016); see also Bureau of Justice Statistics, “Survey of Inmates in State Correctional Facilities.”

<sup>388</sup> Human Rights Watch interview with Hector Ruiz (pseudonym), Fort Worth, March 11, 2016.

<sup>389</sup> St. John Barned-Smith, “Inmates transferred, jails overcrowded,” *Houston Chronicle*, April 17, 2016, <http://www.houstonchronicle.com/news/houston-texas/houston/article/Inmates-transferred-jails-overcrowded-7251977.php> (accessed June 6, 2016).

A number of interviewees said that while they were incarcerated, family members had died. None of them were able to attend the funerals or properly grieve with loved ones. Tom Matthews, in pretrial detention in Houston, told us his uncle had been like a father to him and had died the previous week. Tom found out by letter from his mother. “I was praying he would hold out till I got out. The funeral is Saturday. I won’t be there.”<sup>390</sup>

Ramon Molina had been detained pretrial in Dallas for three months, for possession of 0.05 grams of heroin, when his younger brother died of cancer. His family visited Ramon at the jail to give him the news, but they appeared through video, not face-to-face. He lamented, “Sometimes all you need is a hug, just a hug. Just to see my mother and my sister and my [other] brother crying right there. I couldn’t do nothing.”<sup>391</sup>

Corey Ladd was in jail when his grandmother died and in prison when his younger brother died of an overdose. He was not able to attend either funeral. And he was in prison when his mother was hospitalized and put in a medically induced coma. As his mother told us later, he “wouldn’t have been able to ... say goodbye, just like he didn’t get the opportunity [with] his brother.”<sup>392</sup>

### *Impact on Health*

In each of the four states we visited, people told us that pretrial detention and jail or prison sentences had harmful and sometimes irreversible impacts on their physical and/or mental health. These included experiences of withdrawal and lack of treatment within jails for drug dependence, poor access to antiretroviral treatment and other life-sustaining medications, and improper response to and understanding of mental health needs.

Although it is medically necessary for individuals to be medically supervised while they go through withdrawal for opioids,<sup>393</sup> the majority of jails and prisons in the US do not provide

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<sup>390</sup> Human Rights Watch interview with Tom Matthews (pseudonym), Houston, March 16, 2016.

<sup>391</sup> Human Rights Watch interview with Ramon Molina (pseudonym), Dallas, March 8, 2016.

<sup>392</sup> Human Rights Watch interview with Lisa Ladd, New Orleans, January 31, 2016.

<sup>393</sup> Substance Abuse and Mental Health Services Administration, “Federal Guidelines for Opioid Treatment Programs,” March 2015, p. 24, <http://store.samhsa.gov/shin/content/PEP15-FEDGUIDEOTP/PEP15-FEDGUIDEOTP.pdf> (accessed July 28, 2016); American Society of Addiction Medicine, “The ASAM National Practice Guideline: For the Use of Medications in the Treatment of Addiction Involving Opioid Use,” June 2015, p. 6, <http://www.asam.org/docs/default-source/practice-support/guidelines-and-consensus-docs/asam-national-practice-guideline-supplement.pdf> (accessed July 28, 2016).

medically supervised or medication-assisted withdrawal.<sup>394</sup> A number of interviewees who felt they were opioid dependent said they experienced violent symptoms of withdrawal after their detention. Because they were required to stop their drug use immediately and without the assistance of medications such as methadone or the oversight of medical professionals, they suffered very painful and sometimes frightening physical reactions.

In Louisiana, one woman told us, “I’ve heard people say, ‘Just consider jail your rehab.’ This isn’t rehab. This is hell.”<sup>395</sup> Edwin Castillo told us what it had been like to be detained in south Florida when he was dependent on heroin: “We suffer double when in jail.... You’re seeing stuff, hallucinating. Send me to detox first please.... You have diarrhea, chills. Throwing up, sweats, cramps, body aches, no appetite. You feel like you’re going to die.”<sup>396</sup> In Brooklyn, Cameron Barnes explained why many people sarcastically call the initial pretrial period, spent in the police precinct or courtroom lock-up, “bullpen therapy.” Describing his withdrawal from heroin in 2012, he said, “You’re going through the worst pain in there. Throwing up, defecating; you have the runs and there’s no private place to go.... People are so sick in there. Sometimes they do it on the very floor others are sleeping on. That’s bullpen therapy—to break us. It’s a joke, of course. What’s therapeutic about it? It’s dehumanizing.”<sup>397</sup>

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<sup>394</sup> Legal Action Center, “Confronting an Epidemic: The Case for Eliminating Barriers to Medication-Assisted Treatment of Heroin and Opioid Addiction,” March 2015, <http://lac.org/wp-content/uploads/2014/07/LAC-The-Case-for-Eliminating-Barriers-to-Medication-Assisted-Treatment.pdf> (accessed September 22, 2016), p. 6 (“Access to MAT [medication assisted treatment] in the criminal justice system presents even greater difficulty. A negligible number of jails and prisons offer addiction medication, and most people successfully engaged in MAT are forced to stop abruptly upon incarceration, thereby increasing the likelihood of relapse, recidivism and death.”); Amy Nunn et. al., “Improving Access to Opiate Addiction Treatment for Prisoners,” *Addiction*, vol. 110 (7) (Jun. 2010), p. 1312 (“only 55% of prisons in the United States provide methadone to inmates in any circumstance.... Only 14% of prisons provide buprenorphine to prisoners while incarcerated.... Many prisons adopt abstinence-only policies because of philosophical opposition to pharmaceutical treatment of opiate dependence and preference for abstinence-only programs for incarcerated individuals. These policies reflect a common misconception that opiate dependence is cured when drug use and withdrawal symptoms cease and ignores empirical evidence demonstrating high rates of relapse and alarmingly high rates of opiate overdose among people recently released from prison.”); Shannon Gwin Mitchell et. al., “Incarceration and opioid withdrawal: The experiences of methadone patients and out-of-treatment heroin users,” *Journal of Psychoactive Drugs*, vol. 41(2) (June 2009), p. 145–152.

<sup>395</sup> Human Rights Watch interview with inmate, Louisiana, February 2016.

<sup>396</sup> Human Rights Watch interview with Edwin Castillo (pseudonym), Orlando, December 11, 2015.

<sup>397</sup> Human Rights Watch interview with Cameron Barnes (pseudonym), New York, October 29, 2015. In the Bronx, Ralph Martinez described a similar experience. “For heroin users, you get sick, start throwing up, need a bed. So you don’t care no more, you just want to go home or go to Rikers [the jail]. After you get medicated, then you can deal with your case. They call that bullpen therapy.” Human Rights Watch interview with Ralph Martinez (pseudonym), New York, October 28, 2015.

Numerous interviewees described great difficulties in obtaining prescribed medications. This was of particular concern to people with HIV, who experienced excruciating delays in obtaining HIV medications in New York City in recent years<sup>398</sup>—delays which can be dangerous and create serious health consequences.<sup>399</sup> Human Rights Watch has previously documented in detail the failure to provide HIV services in Louisiana Parish jails.<sup>400</sup> Pretrial detainees in Texas also said they had to wait weeks to see a doctor or get their medications, or that they had not yet received them.<sup>401</sup>

The failure to provide people in jails and prisons with access to needed health care—a problem that persists in many US facilities—violates the right to health and can be dangerous.<sup>402</sup> The US Supreme Court has held that ignoring a prisoner’s serious medical needs can amount to cruel and unusual punishment.<sup>403</sup>

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<sup>398</sup> For example, detained pretrial at Rikers in 2014 on a possession charge, Emily Cooper recalled, “You have to wait a week. You don’t get your meds right away. You tell the doctors about your HIV, and they say wait for the blood tests. My immune system can switch at any time. At a drop of the hat my T cells could drop without my medicine. They say over and over, no holiday from your medicine, take it every day at the same time, once a day, like clockwork. Not having it for a week is scary.” Human Rights Watch interview with Emily Cooper (pseudonym), New York, November 30, 2015.

<sup>399</sup> Interruption in anti-retroviral therapy is associated with increased viral burden, antiretroviral resistance, and increased ability to transmit the virus. S.A. Springer, et al., “Effectiveness of Anti-Retroviral Therapy Among HIV-infected Prisoners: Re-incarceration and the Lack of Sustained Benefit After Release to the Community,” *Clinical Infectious Diseases*, vol. 38:12, (2004), pp. 1754-1760; A.C. Spaulding, et al., “Diversity of Release Patterns for Jail Detainees: Implications for Public Health Interventions,” *American Journal of Public Health*, vol. 101 (Supp. 1) (2011), pp. 347-352.

<sup>400</sup> Human Rights Watch, *Paying the Price: Failure to Deliver HIV Services in Louisiana Parish Jails*, March 29, 2016, <https://www.hrw.org/report/2016/03/29/paying-price/failure-deliver-hiv-services-louisiana-parish-jails>.

<sup>401</sup> For example, in Houston Alyssa Burns told us, “Girls are huddled together on the ground for warmth on the floor, waiting to see a doctor. To get medicine you’re prescribed [takes so long.] I’ve been in here 40 something days now, and I still haven’t seen a doctor.... I’ve just been waiting, waiting, waiting, I don’t even know if I’ll be seen before I go to court. It took me 30 days to be seen for a migraine headache. They gave me a strip of Tylenol that had 8 pills on it and they charged me \$10. And then they say, ‘You can buy aspirin on commissary.’ Yeah, they’re right, you can buy aspirin on commissary, but they are out of stock.” Human Rights Watch interview with Alyssa Burns (pseudonym), Houston, March 15, 2016.

<sup>402</sup> Human Rights Watch, *Paying the Price*; Human Rights Watch, *Barred From Treatment: Punishment of Drug Users in New York State Prisons*, March 24, 2009, <https://www.hrw.org/report/2009/03/24/barred-treatment/punishment-drug-users-new-york-state-prisons>.

<sup>403</sup> The Supreme Court noted, “In the worst cases, such a failure may actually produce physical torture or a lingering death.... In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose.” *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (internal citations omitted).

### Neal's Story

Neal Scott, a 49-year-old Black man in New Orleans, had been homeless for several years. In May 2015, he was arrested for felony possession of cocaine, in an amount his lawyer said was under 0.2 grams, and misdemeanor paraphernalia for a crack pipe. His bond was set at \$7,500, which he could not afford. For the next three months, his lawyer argued repeatedly for a bond reduction, which the prosecutor opposed and the judge denied.

Neal has a rare autoimmune disease that can be debilitating if improperly treated.<sup>404</sup> “They don’t have a cure for it, and the medicine is very, very temporary, [but] if I didn’t take medicine, I would die,” he told us. Neal had received the treatment he needed at local hospitals but said he and his lawyer went “through hell and high water” trying to get it in jail. He never received the medications he needed, and his health took a drastic turn for the worse.<sup>405</sup>

In August 2015, Neal was transferred from jail to the courthouse for a hearing. As he stood in court, he collapsed in front of the judge and prosecutor. His attorney said his eyes rolled back in his head and he began seizing. The courtroom was ordered cleared, and the docket minutes note “there was a medical emergency in the courtroom.”<sup>406</sup> Neal said he has no memory of what happened next. His lawyer recounted it to us:

I was told that we could not call 911 because he’s in the custody of the sheriff, so the sheriff has to be the one to administer the medical [care] ... so they radio to [the jail medical staff]. Two people came in with an oxygen tank, and that was pretty much it. And the client was on the floor; his eyes were rolled back in his head.... They looked at him for a couple minutes, not sure what to do, and then *they* called the EMT.... [It was] over 20 minutes before the EMT got there. And at some point, he stopped what looked like seizing, and he was just breathing, and his

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<sup>404</sup> Although he and his team of lawyers explained the disease in detail to us, and to the court, to protect Neal’s confidentiality we are not naming it here.

<sup>405</sup> Human Rights Watch interview with Neal Scott (pseudonym), New Orleans, February 2, 2016.

<sup>406</sup> Human Rights Watch review of docket (full citation withheld for confidentiality).

eyes were closed and there was water coming out of his eyes, but we couldn't wake him up or anything. He was just not conscious. And he was still cuffed.... Just being in the room for that was pretty awful.... I felt like he could die and I didn't know what to do.<sup>407</sup>

Neal said that during his pretrial detention, "I don't know how many times I passed out because of a lack of medication.... Even though they have all the [details] of my disease, they don't really understand [what happens] when I don't get my medication proper.... It was all but obvious, that neglect."

Neal's lawyer renewed her arguments to reduce his bond, reiterating the devastation that pretrial detention was causing to his health. She told us that although they had witnessed him collapse before them, the prosecutor still opposed and the judge still denied the bond reduction motion. "Even after they had to stop court to take him in an ambulance because he wasn't getting his medication, that wasn't enough," his lawyer said. Eventually, through a combination of donations, Neal's friends and family were able to bond him out. His lawyer said, "They fundraised, basically, to afford his bond, because at that point it became really apparent that he may die if he stays in jail for the rest of this."

After months of not receiving the medicine he required in jail, Neal told us, "My health is at an all-time low right now. I've been fighting on a daily basis, trying ... to accept the decline in my illness ... that never ending pain. I'm paralyzed in half of my feet.... My legs feel like bricks. Every step.... My day-to-day struggle with this disease is torture.... I'm dying [of] pain, and I lose consciousness."

We observed Neal in the courtroom the day he pled guilty. He grimaced and appeared to have difficulty sitting, standing, and remaining alert. He explained to us afterward that he had felt very ill. In exchange for his guilty plea, the prosecutor had given him three years in prison for the fractional amount of cocaine and the paraphernalia. Neal lamented that he would miss his daughter's high school graduation that spring. He said he was afraid he would not survive the years in prison. "I actually cried when I

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<sup>407</sup> Human Rights Watch interview with defense attorney, January 29, 2016.

signed the papers,” he told us. His lawyer said, “For him [three] years could be the rest of his life.”<sup>408</sup>

His lawyer was able to convince the court to give Neal one month to put his affairs in order and say goodbye to his children. When he came to court for sentencing in March, the docket minutes report that he collapsed again and was taken to the hospital. He then went missing.<sup>409</sup>

In June, Neal turned himself in after attending his daughter’s high school graduation. His lawyer told us he apologized to the judge and prosecutor, explaining that he had missed his two older children’s graduations because he was in jail and that he needed to attend this one before he left. Because Neal had failed to appear, his three-year deal was off the table and he faced a minimum of 20. According to Neal’s lawyer, the judge asked the prosecutor if he would give Neal a break. The prosecutor added two years to his sentence.<sup>410</sup> Neal wrote to us in August. He was serving his five-year sentence in a private prison facility that he said could not handle his medical needs, and that his attorney said had no doctor.<sup>411</sup>

### *Returning to Nothing*

For some people, incarceration so interrupts and devastates their lives that they have nothing waiting for them when they get out. Incarceration leads to lost income, lost property, and sometimes lost friendships and family relationships. In Orlando, Edwin Castillo summed it up: “When they lock you up, you lose everything.”<sup>412</sup>

Charlie West was a US military medic stationed in Germany from 1977 to 1981. He was incarcerated for felony possession of cocaine in New York City in 2010. When he got out, he was diagnosed with kidney cancer and had to fight to get Medicaid to cover surgery. He was worried that he would not be able to afford chemotherapy. On his reentry, he told us:

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<sup>408</sup> Human Rights Watch phone interview with defense attorney, May 20, 2016.

<sup>409</sup> Human Rights Watch review of docket (full citation withheld for confidentiality).

<sup>410</sup> Human Rights Watch correspondence with defense attorney, June 22, 2016.

<sup>411</sup> Letter to Human Rights Watch from Neal Scott (pseudonym), August 5, 2016; Human Rights Watch phone call with defense attorney, August 18, 2016.

<sup>412</sup> Human Rights Watch interview with Edwin Castillo (pseudonym), Orlando, December 11, 2015.

You're starting life over. You can't expect to be absent from society and just walk back in. You've lost everything—your job, apartment, whatever you had before you're going to lose that.... When I got out, they released me only with what I had on my back, no referrals to programs or anything.... If you don't have a support network, which I didn't because of drugs, you're on your own. I had an apartment before. I went back after, and the landlord said I abandoned the property.... He had given away or thrown out all my stuff.... Someone else was living there.

Because I caught this felony, I was on the street for five years. I had never been homeless before.... I couldn't get on-the-clock work, so I would do some odds and ends. I didn't have anything; I was scruffy, had nothing to change into for an interview. I didn't have attire to be out in society. I couldn't go to the laundromat, even if I could pay—they'd say get out of here. I'd panhandle, eat out of the garbage.... Before, I was doing seasonal construction work, demolition. I was making good money, bringing home 600 weekly in the summer. [But] you walk out of those [prison] gates and you're on your own.<sup>413</sup>

In Dallas, Carla James, a former nurse, had done stints of probation and prison since 2008 for possession of methamphetamines and Ecstasy. She described to us how she lost her property and the memories of her mother as a result of her incarceration:

I lost everything. Every penny in my bank account.... The first time I went to jail, I had my townhouse over here. I had furniture; I had all my mom's stuff. My mom was a model; she was Miss Louisiana.... I had her gown, pictures, newspaper clippings. I don't have one picture of my mom today.... My son will never see his grandma, [even in] pictures.... I mean, when you don't pay your mortgage, they just sell it off at an auction.... I lost my car, my house, my clothes, my everything ... [even] my nurse's license. [But] it's not just what you lose physical[ly]. It's what you lose internally.<sup>414</sup>

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<sup>413</sup> Human Rights Watch interview with Charlie West (pseudonym), New York, November 29, 2015.

<sup>414</sup> Human Rights Watch interview with Carla James (pseudonym), Dallas, March 9, 2016.



## When People Are Labeled Drug Offenders and Felons

Today, the collateral consequences of a felony conviction form a new civil death. Convicted felons now suffer restrictions in broad ranging aspects of life that touch upon economic, political, and social rights.... The result is a status-based regulatory scheme; by the very fact of an individual's conviction, he or she is subject to a vast array of restrictions.<sup>415</sup>

—Judge Frederick Block, US District Court for the Eastern District of New York, May 2016

The felony conviction is going to ruin my life.... I'll pay for it for[ever]. Because of my record, I don't know how or where I'll start rebuilding my life: school, job, government benefits are now all off the table for me. Besides the punishment even [of prison].... It's my whole future.<sup>416</sup>

—Nicole Bishop, facing two felony convictions for residue in an empty baggie and a plastic straw, March 2016

In addition to the financial, emotional, and family strain of arrest, prosecution, and incarceration, which may continue long after those phases of the criminal process are complete, the labels of “drug offender,” “convict,” and “felon” may have lifelong consequences. A conviction for drug possession triggers literally thousands of statutory exclusions and restrictions—also known as “collateral consequences”—and invites discrimination by private actors such as landlords and employers.

Officials we interviewed recognized how destructive a criminal record can be. In Shreveport, Judge Marcotte said, “Once you get branded with that felony, it's tough to overcome it.”<sup>417</sup> In New Orleans, Judge Calvin Johnson said that because of the sheer number of collateral consequences, “in Louisiana ... this is a life sentence for you. The issue is you're going to have to live with this 'til you die.”<sup>418</sup>

These consequences further compound the already disproportionate nature of criminalizing drug use and possession. Interviewees said they felt that they could never escape their criminal record. Some were concerned that their convictions meant they

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<sup>415</sup> *United States v. Nesbeth*, E.D.N.Y. May 24, 2016, pp. 6-7, 12-14.

<sup>416</sup> Human Rights Watch interview with Nicole Bishop (pseudonym), Houston, March 14, 2016.

<sup>417</sup> Human Rights Watch interview with Judge Craig Marcotte, Shreveport, February 4, 2016.

<sup>418</sup> Human Rights Watch interview with Judge Calvin Johnson, New Orleans, January 26, 2016.

would always be pre-judged by law enforcement officers and judges. Almost all were upset about the ways in which the government's branding of them led to stigma and exclusion. In New York City, Cameron Barnes told us:

When you're a low-income person of color using drugs, you're criminalized—that means demonized, marginalized, stigmatized.... When we're locked up, we're not only locked in but also locked out. Locked out of housing: you can't go to NYCHA [public housing];<sup>419</sup> you're a felon.... Locked out of employment and other services. Locked into a class that's underclass—you're a fixed class; you're not a person anymore, because you had a drug. That's a felony label that stays with you for life. You'll always be a felon.<sup>420</sup>

### *Exclusion from Public Benefits and Rights*

In an opinion issued in May 2016, Judge Frederick Block of the US District Court for the Eastern District of New York decried the fact that “there are nationwide nearly 50,000 federal and state statutes and regulations that impose penalties, disabilities, or disadvantages on convicted felons. Of those, federal law imposes nearly 1,200 collateral consequences for convictions generally, and nearly 300 for controlled-substances offenses.”<sup>421</sup>

Some of the federal and state-imposed collateral consequences are triggered by a felony conviction only, no matter the offense. For others, any drug conviction, including a misdemeanor, counts. Some eligibility requirements single out drug convictions but not convictions for other offenses, suggesting that drug offenses are considered “worse” than other crimes. Many of these consequences severely impact the poor—for example,

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<sup>419</sup> A person with a conviction for a misdemeanor A (the lowest classification of drug possession) and their household are barred from living in NYCHA housing for at least four years after the sentence has been completed, unless NYCHA finds evidence of rehabilitation. Felony convictions trigger longer bars. Bronx Defenders, *The Consequences of Criminal Proceedings in New York State: A Guide for Criminal Defense Attorneys, Civil Legal Services Attorneys, and Other Reentry Advocates*, April 2015, pp. 71-72.

<sup>420</sup> Human Rights Watch interview with Cameron Barnes (pseudonym), New York, October 29, 2015.

<sup>421</sup> Finding these collateral consequences to “serve no useful function other than to further punish criminal defendants,” Judge Block sentenced the defendant in that case to one year of probation, concluding that the collateral consequences she would face were punishment enough. The defendant had been arrested with more than 600 grams of cocaine and convicted by a jury of importation of cocaine and possession of cocaine with intent to distribute. *United States v. Nesbeth*, E.D.N.Y. May 24, 2016, pp. 1-2, 33. Some have argued prosecutors, as well as judges, should take collateral consequences into account. See, for example, Eisha Jain, “Prosecuting Collateral Consequences,” *Georgetown Law Journal*, vol. 104 (2016), pp. 1197-1244.

ineligibility for welfare assistance, subsidized housing, and educational loans, which those with greater financial means do not rely upon.

### **Welfare Assistance**

Section 115 of the Welfare Reform Act of 1996 imposes lifetime ineligibility for welfare benefits on anyone with a federal or state felony drug conviction. No other offenses, including murder and rape, result in ineligibility.

Section 115 removes those with felony drug convictions from the Supplemental Nutrition Assistance Program (SNAP) and Temporary Assistance for Needy Families (TANF).<sup>422</sup> SNAP provides eligible low-income families food assistance on an EBT (electronic benefits transfer) card, which works like a debit card. It is commonly referred to as food stamps. TANF provides cash assistance to eligible pregnant women and families with dependent children to assist with food, housing, utilities, and other non-medical expenses.

Individual states can opt out of the federal ban. More states have chosen to do this for SNAP than for TANF. For SNAP, five states<sup>423</sup> impose the full ban for people with felony drug convictions, 27 states<sup>424</sup> impose a modified ban, and 18 states<sup>425</sup> opt out entirely. For TANF, 13 states<sup>426</sup> continue to impose the full ban, 14 states<sup>427</sup> have eliminated the ban, and 23

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<sup>422</sup> The ban does not apply to the Women, Infants and Children (WIC) program, although recipients must complete federally-mandated drug screening.

<sup>423</sup> Alaska, Mississippi, South Carolina, West Virginia, and Wyoming. Eli Hager, “Six States Where Felons Can’t Get Food Stamps,” The Marshall Project, February 4, 2016, <https://www.themarshallproject.org/2016/02/04/six-states-where-felons-can-t-get-food-stamps#.6zkAJf4qq> (accessed May 27, 2016). Although this article includes Georgia as a state that imposed a full ban, a new law lifted that ban in April 2016. Craig Schneider, “Georgia expected to lift food stamp ban,” *The Atlanta Journal-Constitution*, April 26, 2016, <http://www.ajc.com/news/news/breaking-news/georgia-to-lift-food-stamp-ban/nrB8g/> (accessed September 26, 2016).

<sup>424</sup> Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oregon, Tennessee, Texas, Utah, Virginia, and Wisconsin. Hager, “Six States Where Felons Can’t Get Food Stamps,” The Marshall Project.

<sup>425</sup> Alabama, California, Delaware, Iowa, Kansas, Maine, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Vermont, and Washington. Ibid.

<sup>426</sup> Alaska, Arizona, Delaware, Georgia, Illinois, Mississippi, Missouri, Nebraska, South Carolina, South Dakota, Texas, Virginia, and West Virginia. Ibid.

<sup>427</sup> Alabama, Kansas, Maine, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Vermont, Washington, and Wyoming. Ibid.

states<sup>428</sup> have a modified ban in place.

For those states that have opted out of the ban, some only extend benefits to people convicted of drug offenses after a certain amount of time has passed since their release date—in Louisiana, for instance, the period of ineligibility is one year.<sup>429</sup> In Covington, Melissa Wright said, “Food stamps, you can’t get them for a year. So you go dig in a dumpster. My food stamps are for my kids, not me. My drug conviction shouldn’t be held against my food stamps.”<sup>430</sup>

Modified bans can still result in people losing access to benefits, especially if they continue to use drugs. Several states subject applicants convicted of a drug-related felony to drug testing before they can receive SNAP and TANF benefits.<sup>431</sup> By contrast, federal law prohibits states from drug-testing SNAP applicants who do not have a felony drug conviction.<sup>432</sup>

SNAP and TANF are designed to assist families that have difficulty meeting their basic needs. Denying assistance for the sole reason of a drug conviction only ensures that families will be in even more dire need. These bans by their nature impact the poor and punish them—and, indirectly, their children—more harshly for their drug offenses than they do people of greater financial means.

In March 2015, US Senators Rand Paul of Kentucky and Cory Booker of New Jersey sponsored Senate Bill 675, the REDEEM Act, which would amend the SNAP and TANF bans

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<sup>428</sup> Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, North Carolina, North Dakota, Oregon, Tennessee, Utah, and Wisconsin. Ibid.

<sup>429</sup> Louisiana Legislative Auditor, “Supplemental Nutrition Assistance Program Department of Children and Family Services,” May 1 2013, [http://www.lla.state.la.us/PublicReports.nsf/60607FD8611131F786257B5E006FEF04/\\$FILE/000326B1.pdf](http://www.lla.state.la.us/PublicReports.nsf/60607FD8611131F786257B5E006FEF04/$FILE/000326B1.pdf) (accessed September 22, 2016).

<sup>430</sup> Human Rights Watch interview with Melissa Wright (pseudonym), Covington, January 28, 2016.

<sup>431</sup> Congressional Research Service, “Drug Testing and Crime-Related Restrictions in TANF, SNAP, and Housing Assistance,” November 18, 2015, <https://www.fas.org/sgp/crs/misc/R42394.pdf> (accessed September 22, 2016). Minnesota randomly drug tests those receiving benefits who have been convicted of a drug felony. If they fail a test more than once, they are permanently denied SNAP benefits. Legal Action Center, “Summary of State Laws Modifying the Federal Ban On TANF (Cash Assistance) and Food Stamps,” (undated), [http://lac.org/toolkits/TANF/TANF\\_summary.htm](http://lac.org/toolkits/TANF/TANF_summary.htm) (accessed September 22, 2016).

<sup>432</sup> 7 CFR sec. 273.2(a); Letter from Robin D. Bailey, Jr., Regional Administrator, US Department of Agriculture Food and Nutrition Service, to Keith Horton, Commissioner, Georgia Department of Human Services, June 3, 2014, <http://d35brb9zkbbdsd.cloudfront.net/wp-content/uploads/2014/06/FNS-Letter-to-DHS-Drug-Testing-HB-772-Done-6-3-14.pdf> (accessed August 1, 2016)

so that convictions for drug possession and drug use no longer make a person ineligible. As of this writing, Congress had not yet acted on the proposed bill.<sup>433</sup>

### **Subsidized Housing**

The US Department of Housing and Urban Development (HUD) engages with local public housing authorities (PHAs) and private landlords to offer subsidized housing to low-income families through a number of programs. The three largest are public housing (where the PHA is the landlord), section 8 voucher housing (where the tenant rents on the private market and the PHA pays a portion of the rent), and project-based section 8 housing (where a private landlord receives a subsidy directly from HUD).

Federal law permits a PHA or private landlord of subsidized housing to deny admission to anyone who has a record of past drug-related criminal activity. “Drug-related criminal activity” is defined to include “use of a drug” or “possession of a drug with intent to ... use the drug.”<sup>434</sup> PHAs and landlords have discretion in how far back they choose to look; for example, Miami-Dade County looks for any criminal activity in the past 10 years before application for admission.<sup>435</sup> Some PHAs and landlords deny applicants based simply on an arrest, even if their charges were dismissed.<sup>436</sup>

Once a person is admitted to subsidized housing, drug use by that person, a family member, or even a visitor can lead to eviction. The laws differ slightly depending on the housing program. For public housing and project-based section 8 housing, it is a violation of the lease and grounds for eviction for any member of the household to engage in any drug-related criminal activity on or even off the premises, or for a guest of the household to engage in drug-related criminal activity on the property, even if the guest is visiting only briefly.<sup>437</sup> For the section 8 voucher program, a PHA has discretion to terminate

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<sup>433</sup> Senate Bill 675, Record Expungement Designed to Enhance Employment Act of 2015 or the REDEEM Act, introduced in the US Senate March 9, 2015, <https://www.congress.gov/bill/114th-congress/senate-bill/675> (accessed August 19, 2016).

<sup>434</sup> 42 USCA sec. 1437a(b)(9); 24 CFR 5.100 (2014).

<sup>435</sup> See <http://pdmiami.com/ConsequencesManual.pdf>

<sup>436</sup> <http://pdmiami.com/ConsequencesManual.pdf>

<sup>437</sup> For public housing, see 42 USC sec. 1437d(l); 24 CFR sec. 966.4(f)(12)(i). For project-based section 8 housing, see HUD Multifamily Lease, Form HUD-90105a, para. 23.

participation in the program if a household member or guest engages in drug-related criminal activity.<sup>438</sup>

These strict guidelines, also known as HUD’s “One Strike and You’re Out” policy, not only limit the ability of those who use—or are suspected of using—drugs to find livable housing; they also impact partners, children, and friends, since the policy punishes the entire household for activity by one member or even a guest.<sup>439</sup>

Danny Ortiz was convicted in New York City of third degree possession of Ecstasy. He told us he was not allowed to be at his mother’s home because of it, but that he had had nowhere else to go. He had been staying there secretly but was worried about the repercussions if his circumstances were discovered: “Your family gets tired of it. They don’t want to bring you into the house because they don’t want to lose their housing. My mom lives in section 8 housing.... She doesn’t want to lose her apartment. She’d be homeless. We’d all be homeless.”<sup>440</sup>

## Education

Students convicted of a drug offense while they are receiving federal student aid lose their aid and become ineligible for a period of time. This financial aid includes grants, student loans, and work-study. For drug possession, a first conviction results in a one-year bar, a second conviction in a two-year bar, and a third conviction in a permanent bar from receiving federal student aid.<sup>441</sup> No other category of crime triggers a complete bar on financial aid for students.<sup>442</sup>

In Louisiana, a criminal conviction bars someone from receiving state education benefits for the rest of his or her life. Drug offenses can also serve as the basis for expulsion for up to two

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<sup>438</sup> 24 CFR sec. 982.551(l).

<sup>439</sup> For more on the restrictiveness of HUD’s One Strike policy, see Rebecca Vallas and Sharon Dietrich, “One Strike and You’re Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records,” Center for American Progress, December 2014, <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf> (accessed June 10, 2016).

<sup>440</sup> Human Rights Watch interview with Danny Ortiz (pseudonym), New York, November 24, 2015.

<sup>441</sup> 20 USC sec. 1091(r). A person can regain eligibility by completing an approved drug rehabilitation program, regardless of whether or not they in fact need drug treatment.

<sup>442</sup> See Federal Student Aid, “Students With Criminal Convictions,” (undated), <https://studentaid.ed.gov/sa/eligibility/criminal-convictions#drug-convictions> (accessed September 22, 2016).

years.<sup>443</sup> In Texas, anyone who commits a felony, class A misdemeanor, or controlled substances offense is ineligible for prepaid higher education scholarships.<sup>444</sup> Anyone with a felony conviction in Florida is ineligible for the Florida Bright Futures Scholarship, the largest in-state financial aid program, and may be expelled from a state university.<sup>445</sup>

## Voting

Felony disenfranchisement is the deprivation of the right to vote for those convicted of felonies. In 2010 (the most recent national estimates), 5.85 million people were disenfranchised in the United States because of felony convictions. This accounted for approximately 2.5 percent of the total US voting age population, or one in every 40 adults. Felony disenfranchisement disproportionately affects Black communities at a rate more than four times that of the non-Black population: nearly 7.8 percent of the Black adult population is disenfranchised, compared to 1.8 percent of the rest of the population.<sup>446</sup>

Only Maine and Vermont do not disenfranchise people with felony convictions, allowing those who are incarcerated to vote by absentee ballot. By contrast, Florida, Iowa, and Kentucky impose lifetime disenfranchisement on all people convicted of a felony.<sup>447</sup>

Fourteen other states plus Washington, DC, disenfranchise only those in prison.<sup>448</sup> Another four states disenfranchise those in prison and on parole,<sup>449</sup> while 24 disenfranchise those with felony drug possession convictions who are still serving their sentence, whether in

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<sup>443</sup> Louisiana Justice Coalition, “Now and Later: The Short and Long-Term Consequences of a Louisiana Conviction,” 2010, [http://www.opdla.org/attachments/article/104/CollateralConsequencesClientGuide\\_English.10.pdf](http://www.opdla.org/attachments/article/104/CollateralConsequencesClientGuide_English.10.pdf) (accessed November 11, 2015).

<sup>444</sup> TX Education Code sec. 54.633.

<sup>445</sup> Florida Department of Education, *Bright Futures Student Handbook*, July 2017, <http://www.floridastudentfinancialaid.org/ssfad/PDF/BFHandbookChapter1.pdf> (accessed September 22, 2016).

<sup>446</sup> The Sentencing Project, “State-Level Estimates of Felon Disenfranchisement in the United States, 2010,” July 2012, <http://www.sentencingproject.org/wp-content/uploads/2016/01/State-Level-Estimates-of-Felon-Disenfranchisement-in-the-United-States-2010.pdf> (accessed June 9, 2016).

<sup>447</sup> Brennan Center for Justice, “Criminal Disenfranchisement Laws Across the United States,” July 27, 2016, <http://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states> (accessed August 1, 2016); ACLU, “State Criminal Re-enfranchisement Laws (Map),” 2016, <https://www.aclu.org/map/state-criminal-re-enfranchisement-laws-map> (accessed September 8, 2016).

<sup>448</sup> The states are Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Utah.

<sup>449</sup> California, Colorado, Connecticut, and New York.

prison or on parole or probation.<sup>450</sup> Finally, three states disenfranchise people with multiple felony convictions even after they have completed all the conditions of their sentence.<sup>451</sup>

In some states that do not have lifetime bans, eligibility to vote may be restored automatically after a certain period of time, but individuals may still have to file paperwork to re-register to vote, meaning that many people remain effectively disenfranchised due to lack of information or resources.

In Florida—one of the three states with lifetime bans—a person convicted of drug possession has to wait 5 years after every condition of their sentence is satisfied, including the payment of fines and fees, before they can even petition the governor for rights restoration.<sup>452</sup> Because the office is so backlogged with petitions, it can take 10 years or more before the petition is reviewed.<sup>453</sup>

When Governor Rick Scott took office in January 2011, Florida was denying the vote to more than 1.54 million people convicted of felonies.<sup>454</sup> Between 2011 and 2015, the governor restored voting rights to just 1,866 people.<sup>455</sup> The waiting list currently holds over 10,000 people who have applied for restoration, a fact which in itself discourages others from applying. It would take over 20 years to go through the list at the current pace.<sup>456</sup> According

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<sup>450</sup> Alabama, Alaska, Arkansas, Delaware, Georgia, Idaho, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, and Wisconsin. Alabama has lifetime disenfranchisement for convictions that involve “moral turpitude”; drug possession is not considered to involve moral turpitude, but possession with intent to distribute is. Delaware, Mississippi, and Tennessee have lifetime bans for certain non-drug related offenses such as murder, bribery, and sexual offenses.

<sup>451</sup> Arizona, Nevada, and Wyoming have lifetime disenfranchisement for a second felony conviction.

<sup>452</sup> State of Florida Office of Executive Clemency, “Restoration of Civil Rights, Pardons, Pardons Without Firearm Authority, Firearm Authority, Remission of Fines and Forfeitures,” (undated), <http://www.dc.state.fl.us/restoration.html> (accessed September 22, 2016); Florida Commission on Offender Review, “Restoration of Civil Rights or Alien Status Under Florida Law Without a Hearing, Rule 9A and Rule 10A, Rules of Executive Clemency,” 2011, [https://www.fcor.state.fl.us/docs/clemency/clemency\\_rules.pdf](https://www.fcor.state.fl.us/docs/clemency/clemency_rules.pdf) (accessed September 22, 2016).

<sup>453</sup> Human Rights Watch interview with Desmond Meade, Orlando, December 9, 2015; ACLU of Florida, “2014 Candidate Rights Restoration Candidate Questionnaire,” September 25, 2014, <https://aclufl.org/resources/2014-rights-restoration-candidate-questionnaire> (accessed September 22, 2016).

<sup>454</sup> The Sentencing Project, “State-Level Estimates of Felon Disenfranchisement in the United States, 2010,” table 3.

<sup>455</sup> Spencer Woodman, “Thanks to Republics, Nearly a Quarter of Florida’s Black Citizens Can’t Vote,” *The Intercept*, Dec. 9, 2015, <https://theintercept.com/2015/12/09/floridas-ex-felons-struggle-to-regain-their-voting-rights> (accessed September 22, 2016).

<sup>456</sup> “Change rules to restore voting rights for felons,” editorial, *Tampa Bay Times*, August 19, 2016, <http://www.tampabay.com/opinion/editorials/editorial-change-rules-to-restore-voting-rights-for-felons/2290221> (accessed August 21, 2016).



to Desmond Meade, president of the Florida Rights Restoration Coalition, 2010 is the most recent year that the number of people disenfranchised for felony convictions was officially estimated, but “based on Department of Corrections numbers, we know that about 40,000 people per year are getting new felony convictions, who have never had one before and are now disenfranchised. So with simple math—if only 500 people are getting their rights restored but there are 40,000 new each year—we see that number, 1.54 million, is growing.”<sup>457</sup> According to the *Tampa Bay Times*, 23 percent of voting-age Black Floridians are currently disenfranchised.<sup>458</sup>

Sherry Martin helps secure employment for people with felony convictions. She told us the wait time and backlog mean that people give up trying: “When you get out, you have to wait five years just to apply to get your civil rights restored.... It’s the hierarchy of needs. If you don’t have food and can’t get a job, if you can’t take care of your kids, you’re not focusing on getting your right to vote back.”<sup>459</sup>

But for many interviewees, the loss of the vote impacted their sense of worth and power to make a difference. In Auburndale, Florida, Trisha Richardson, a 19-year-old convicted of possession of Xanax and methamphetamines, said:

I don’t see why [the felony record is] defining. It’s not like we’re a minority; they’re making us a majority. If a matter comes up that is important to me, I can’t vote and make a difference in the world.... You don’t realize—the vote—how important that stuff is until you lose it. I was convicted at 18; I had never been able to vote yet.... I found my voter registration card. I thought, here’s a good high school memory of when me and my friend got registration cards. Now I can’t use it. I just threw it out.<sup>460</sup>

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<sup>457</sup> Human Rights Watch phone interview with Desmond Meade, August 21, 2016.

<sup>458</sup> “Change rules to restore voting rights for felons,” editorial, *Tampa Bay Times*, August 19, 2016, <http://www.tampabay.com/opinion/editorials/editorial-change-rules-to-restore-voting-rights-for-felons/2290221> (accessed September 27, 2016).

<sup>459</sup> Human Rights Watch interview with Sherry Martin (pseudonym), Miami, December 18, 2015.

<sup>460</sup> Human Rights Watch interview with Trisha Richardson (pseudonym), Auburndale, December 11, 2015.

Also in Auburndale, Susan Turner, convicted of possession of various pills, told us, “Not being able to vote, it’s a problem. Your one vote could be that one deciding vote. I want to have a say in what happens in the world.”<sup>461</sup> In Orlando, Kevin Michaelson was convicted of felony possession for half a Xanax pill, which he used for anxiety. He said, “As soon as you catch a felony, you’re not allowed to vote.... I’d like to vote. They took away my rights. The system makes me feel like I’m a nuisance.”<sup>462</sup> Leonard Lewis will be in a Texas prison during the 2016 election for two cigarettes dipped in PCP. He was in prison for drug possession in 2008 and is disappointed he will miss out again this year. “We can make history two times in a row, the first Black president and the first lady president. But I can’t be a part of that,” he said.<sup>463</sup>

Some interviewees said felony disenfranchisement meant the people most affected by drug policies have no power to shape them through their vote. “Drug addicts have been through the issues of the world. Our voice should be heard on important matters in the world because we’ve felt the effects,” said Trisha Richardson. Mara King was convicted of three drug charges: felony Ecstasy possession, misdemeanor marijuana possession, and misdemeanor paraphernalia. She said, “I don’t think it’s right to get arrested for marijuana and [because of that case] you can’t vote now to get it legalized. There are people at the bus terminal asking us if we want to vote for it. It’s unfair we can’t.”<sup>464</sup>

### **Driver’s Licenses**

Federal law conditions some federal highway funds on states’ enactment of laws revoking or suspending someone’s driver’s license for at least six months if they have been convicted of a drug offense, even if the conviction has nothing to do with drug use while operating a motor vehicle. It is the equivalent of saying that anyone in possession of alcohol (were it to be criminalized) may not drive, even if they have no history of drinking and driving.

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<sup>461</sup> Human Rights Watch interview with Susan Turner (pseudonym), Auburndale, December 11, 2015.

<sup>462</sup> Human Rights Watch interview with Kevin Michaelson (pseudonym), Orlando, December 8, 2015.

<sup>463</sup> Human Rights Watch interview with Leonard Lewis (pseudonym), Houston, March 15, 2016.

<sup>464</sup> Human Rights Watch interview with Mara King (pseudonym), Auburndale, December 11, 2015.

States are permitted to impose a suspension period longer than six months if they choose, but states that impose no suspension period lose a portion of their highway funds.<sup>465</sup> Fourteen states automatically suspend licenses for at least six months for drug possession.<sup>466</sup> These states account for nearly half of US residents.<sup>467</sup> Some states impose suspensions longer than six months; Florida, for example, requires a mandatory suspension of one year.<sup>468</sup>

Since 2008, nine states have abandoned mandatory suspensions for drug offenses not related to driving.<sup>469</sup> The latest to do so was Massachusetts: on March 30, 2016, Governor Charlie Baker signed a bill that repealed automatic suspension for people convicted of non-driving related drug crimes and waived the \$500 license reinstatement fee, impacting thousands of people every year.<sup>470</sup> The governor recognized that license suspensions are a

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<sup>465</sup> 23 USC sec. 159.

<sup>466</sup> Arkansas, Delaware, Florida, Georgia, Indiana, Iowa, Mississippi, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Texas, and Virginia. The Clemency Report, “Reefer sanity: States abandon driver’s license suspensions for drug offenses,” September 14, 2014, <http://clemencyreport.org/drivers-license-suspensions-drug-offenses-state-state-list> (accessed June 8, 2016). Alabama eliminated the suspension as part of Senate Bill 67 in 2015. People can also lose their licenses in Florida for a misdemeanor marijuana charge for six to 12 months. 23 FL Stat. sec. 322.055. Some states allow for provisional licenses in cases of “extreme and unusual hardship.” 27 AR sec. 27-16-915; 63 MS sec. 63-1-71; 18.2 VA sec. 251. Delaware charges a \$50 fee to reinstate a suspended license and a \$200 fee to reinstate a revoked license, while New York has a \$50 fee to end a suspension and a \$100 re-application fee for a revoked license. State of Delaware, Division of Motor Vehicles, “Drivers License Revocations,” (undated), [https://www.dmv.de.gov/services/driver\\_services/driver\\_improvement/dr\\_di\\_revocation.shtml](https://www.dmv.de.gov/services/driver_services/driver_improvement/dr_di_revocation.shtml) (accessed June 9, 2016); Molly Kovel and Kate Rubin, “The Consequences of Criminal Proceedings in New York State: A Guide for Criminal Defense Attorneys, Civil Legal Services Attorneys, and Other Reentry Advocates,” Civil Action Practice of The Bronx Defenders, April 2015 Edition, pp. 22-30. In Georgia, reinstatement can also cost \$200. Georgia Department of Driver Services, “Driver’s License Suspensions and Revocations,” November 10, 2015, <http://www.dds.ga.gov/drivers/dldata.aspx?con=1744060376&ty=dl> (accessed June 9, 2016). In Oklahoma, the first drug offense triggers a 180-day revocation; if someone has two or more prior revocations, their subsequent revocation will be for a period of three years. Pennsylvania has similar suspension terms. 47 OK Stat. sec. 47-6-205; 75 PA sec. 1532. Some states require people to complete a drug education course before their license can be reinstated. Texas Department of Public Safety, “Drug or Controlled Substance Offenses,” (undated), <https://www.txdps.state.tx.us/DriverLicense/DrugOffenses.htm> (accessed November 11, 2015); 47 OK Stat. sec. 47-6-205; 23 FL Stat. sec. 322.055.

<sup>467</sup> The Clemency Report, “Reefer sanity: States abandon driver’s license suspensions for drug offenses.”

<sup>468</sup> FL Stat. sec. 322.055(1). By contrast, in Maryland licenses can only be suspended when the offense is related to one’s ability to drive safely, and the license can be suspended for up to 60 days for the first offense and up to 120 days for subsequent offenses. MD Stat. sec. 16-205.

<sup>469</sup> Vermont (2009), Wisconsin (2010), South Carolina (2011), Utah (2011), Connecticut (2011), Hawaii (2011), Colorado (2013), Alabama (2015), and Massachusetts (2016). See The Clemency Report, “Reefer sanity: States abandon driver’s license suspensions for drug offenses,” September 14, 2014, <http://clemencyreport.org/drivers-license-suspensions-drug-offenses-state-state-list> (accessed June 8, 2016); Amy Gorel, “New Law Ends Automatic Driver’s License Suspensions for Drug Crimes,” WBUR, March 30, 2016, <http://www.wbur.org/2016/03/30/baker-bill-automatic-license-suspensions> (accessed June 8, 2016).

<sup>470</sup> In 2015, roughly 7,000 people’s licenses were suspended in Massachusetts. Amy Gorel, “New Law Ends Automatic Driver’s License Suspensions for Drug Crimes.”

barrier to successful re-entry, stating, “I am pleased to sign legislation providing opportunities for those convicted of drug offenses ... to re-enter society, find and keep a job and support their families.”<sup>471</sup>

## Immigration

A misdemeanor or felony conviction for drug possession can have life-changing immigration consequences for non-US citizens. Under federal law, a drug possession conviction is grounds for inadmissibility, meaning that a non-citizen convicted of possession cannot legally enter or remain in the United States and cannot adjust status to US citizenship.<sup>472</sup> Except for possession of marijuana under 30 grams, any conviction for drug possession also makes a non-citizen who is living in or visiting the United States deportable.<sup>473</sup> Once deported, non-citizens are permanently barred by their drug offenses from returning to live with their families in the United States. One immigration attorney told Human Rights Watch that for many people, deportation can feel like a life sentence without the possibility of parole.<sup>474</sup>

Human Rights Watch has documented the ways in which deportation for minor drug offenses, including drug possession, tears US families apart in violation of international human rights norms.<sup>475</sup> From 2007 to 2012, more than 260,000 deportations from the United States were for drug offenses. Deportations of non-citizens with possession convictions increased 43 percent over that same period.<sup>476</sup>

In the Bronx, Andres Morales told us he was charged with cocaine residue in an empty baggie. He said, “I’m afraid with this conviction I’ll be deported in the future. I’ve been a

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<sup>471</sup> Ibid.

<sup>472</sup> 8 USC sec. 1182.

<sup>473</sup> 38 USC secs. 1101, 1227.

<sup>474</sup> Human Rights Watch, *A Price Too High: US Families Torn Apart by Deportations for Drug Offenses*, June 2015, <https://www.hrw.org/report/2015/06/16/price-too-high/us-families-torn-apart-deportations-drug-offenses>, p. 6.

<sup>475</sup> These include the principle of proportionality, right to non-discrimination, right to family unity, rights of the child, and sometimes principle of non-refoulement. For more detailed analyses of the human rights implicated, see Human Rights Watch, *A Price Too High*, sec. VIII, “Drug Control, Immigration Control, and Human Rights”; Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed by US Deportation Policy*, July 17, 2007, “US Deportation Policy Violates Human Rights (sec. VI),” <https://www.hrw.org/report/2007/07/16/forced-apart/families-separated-and-immigrants-harmed-united-states-deportation>.

<sup>476</sup> See Human Rights Watch, *A Price Too High*.

legal permanent resident since 1993. I passed the nationality test but couldn't naturalize because I had an open case. I'm concerned about deportation now. I want to naturalize and become a citizen but I was just told it would be another year now before I can try again. I have three kids, [ages] 13, 12, 8. My whole family and life are here."<sup>477</sup>

In a recent opinion, the US Court of Appeals for the Sixth Circuit expressed concern about the deportation consequence of convictions for low-level drug offenses: "It is unclear to us why it is in our national interests—much less the interests of justice—to exile a productive member of our society to a country he hasn't lived in since childhood for committing a relatively small-time drug offense."<sup>478</sup>

### Jury Service

Thirty-one states and the federal government impose a lifetime ban on jury service for people with felony convictions.<sup>479</sup> As of 2003, 13 million people had lifetime ineligibility for jury service because of their felony convictions, representing about 6 percent of the adult population and 30 percent of Black men.<sup>480</sup> Almost all the other states impose bans while the person is under correctional supervision (including incarceration, parole, or probation), and many extend those bans for a certain number of years after the sentence is complete.<sup>481</sup> Only Maine allows people with felony convictions to serve on a jury without such restrictions. Colorado allows people with felony convictions to be a trial juror but not a grand juror.<sup>482</sup>

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<sup>477</sup> Human Rights Watch interview with Andres Morales (pseudonym), New York, November 24, 2015.

<sup>478</sup> *Jae Lee v. United States of America*, Case No. 14-5369 (United States Court of Appeals for the Sixth Circuit), Opinion, June 8, 2016, <http://www.ca6.uscourts.gov/opinions.pdf/16ao135p-06.pdf> (accessed September 23, 2016).

<sup>479</sup> For the federal government ban, see 28 USC sec. 1865(b)(5). The 31 states are Alabama, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming. In addition, as of 2003, Alabama has a lifetime ban for people with repeat convictions; people with first convictions are only banned while they are serving their sentence. Brian C. Kalt, "The Exclusion of Felons from Jury Service," *American University Law Review*, vol. 53 (2003), <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1090&context=aulr> (accessed September 23, 2016), pp. 65-189.

<sup>480</sup> *Ibid.*

<sup>481</sup> States with bans during correctional supervision are Alaska, Connecticut (during incarceration or seven years from conviction, whichever is longer), DC (during incarceration plus 10 years after incarceration), Idaho, Illinois (the ban is challengeable for cause), Indiana, Iowa (challengeable for cause), Kansas (during incarceration or 10 years from conviction, whichever is longer), Massachusetts (during incarceration or seven years from conviction, whichever is longer), Minnesota, North Carolina, North Dakota, Oregon (during incarceration plus 15 years after incarceration to serve on criminal and grand juries), Rhode Island, South Dakota, Washington, Wisconsin. *Ibid.*

<sup>482</sup> *Ibid.*

Beyond the loss of opportunity for individuals to participate in civic life, ineligibility for jury service has broader impacts on the criminal justice system. By barring people with felony convictions from serving on juries, the federal government and the majority of states prevent those who have been most affected by the criminal justice system from participating in it in any other way. They also make it more difficult to ensure that juries are racially diverse—compounding problems of racial discrimination and underrepresentation in jury selection.<sup>483</sup>

Even states that do not impose a lifetime ban allow prosecutors and judges the discretion to reject potential jurors because of their convictions, making it easier for prosecutors to exclude Black people from juries.<sup>484</sup> As the chair of the California Assembly Judiciary Committee noted during a hearing in April 2015, current laws and practices prevent juries from accurately reflecting the demographics of counties and states: “[By] allowing ex-felons to participate in the jury process ... more men of color [would] be entered into the jury pool, creating a more representative sample of the state’s diversity.”<sup>485</sup>

### Other Bans

Thousands of other federal and state exclusions apply for drug possession and other felony convictions: nearly 50,000 federal and state statutes impose collateral consequences. The following are just a few examples.

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<sup>483</sup> Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, August 2010, <http://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf> (accessed June 22, 2016).

<sup>484</sup> In the 1986 case *Batson v. Kentucky*, the US Supreme Court held it is unconstitutional to use peremptory strikes—the striking of jurors without cause during jury selection—solely to exclude jurors on the basis of their race. 476 U.S. 79 (1986). However, prosecutors have found ways of getting around this prohibition. See Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, pp. 5-6, 14. (“There is evidence that some district attorney’s offices explicitly train prosecutors to exclude racial minorities from jury service and teach them how to mask racial bias to avoid a finding that anti-discrimination laws have been violated....In courtrooms across the United States, people of color are dramatically underrepresented on juries as a result of racially biased use of peremptory strikes.... [For example, the] high rate of exclusion of racial minorities in Jefferson Parish, Louisiana, has meant that in 80% of criminal trials, there is no effective black representation on the jury.”)

<sup>485</sup> California Assembly, Committee on Judiciary, Hearing on AB 324, April 14, 2015, [http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab\\_0301-0350/ab\\_324\\_cfa\\_20150412\\_145417\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0301-0350/ab_324_cfa_20150412_145417_asm_comm.html) (accessed June 23, 2016). The proposed legislation, Assembly Bill 324, would have walked back the lifetime exclusion and banned only people with felony convictions who had not yet completed probation, parole, post-release community supervision, or mandatory supervision. The bill did not make it out of committee. California Legislative Information, “AB-324 Trial jurors: eligibility (2015-2016),” undated, [http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill\\_id=201520160AB324](http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160AB324) (accessed September 28, 2016).

A conviction for drug possession can drastically impact a person's parental rights and ability to be involved in their children's lives. For example, under New York law, if a parent's incarceration causes a child to be in foster care for more than 15 months during any 22-month period, a foster care agency may seek to terminate parental rights.<sup>486</sup> A felony drug conviction, specifically, disqualifies a person from adoption or from becoming a foster parent if the drug conviction occurred within the past five years.<sup>487</sup> In Louisiana, people convicted of a felony offense lose any claim to spousal support, but if spousal support is awarded to their former spouse, their obligation to pay support continues while they are incarcerated. Parental rights may be terminated if someone fails to pay child support or to maintain contact for six months in a row, even while incarcerated.<sup>488</sup> Alabama law provides for termination of parental rights for any felony conviction.<sup>489</sup>

A number of jurisdictions prohibit parents convicted of certain felonies, including for drugs, from volunteering at public schools, including chaperoning school events such as field trips.<sup>490</sup> Trisha Richardson was convicted at age 18 for possession of Xanax and methamphetamines in Polk County, Florida. As a 19-year-old without children, her first concern was the impact her conviction might have on her ability to be the kind of mother she wanted to be: "With a felony record because of drugs, I know I won't be able to go on field trips when I have kids."<sup>491</sup>

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<sup>486</sup> NY Soc. Serv. Law sec. 384-b(3)(l).

<sup>487</sup> NY Soc. Serv. Law sec. 378-a(2)(e).

<sup>488</sup> Louisiana Justice Coalition, "Now and Later: The Short and Long-Term Consequences of a Louisiana Conviction," 2010, [http://www.opdla.org/attachments/article/104/CollateralConsequencesClientGuide\\_English.10.pdf](http://www.opdla.org/attachments/article/104/CollateralConsequencesClientGuide_English.10.pdf) (accessed November 11, 2015), p. 13.

<sup>489</sup> AL sec. 12-15-319.

<sup>490</sup> Jessie Rossman, "Don't Punish Kids for Parent's Misdeeds," ACLU of Michigan, November 18, 2010, <http://www.aclumich.org/article/don%E2%80%99t-punish-kids-parents%E2%80%99-misdeeds> (accessed September 23, 2016) (Grand Rapids School District has a policy of prohibiting individuals with any type of felony record from volunteering in their children's schools regardless of the age of the conviction); Emily Friedman and Karin Halperin, "Reformed Heroin Addict Mom Barred From Volunteering at Daughter's School," *ABC News*, August 25, 2010, <http://abcnews.go.com/US/aclu-sues-rhode-island-school-districts-stringent-volunteer/story?id=11481056> (accessed September 23, 2016); Devin Katayama, "JCPS Background Checks Block Parents From Volunteering, Even for Years-Old Offenses," *WFPL*, August 25, 2013, <http://wfpl.org/jcps-background-checks-block-parents-volunteering-even-years-old-offenses> (accessed September 23, 2016); Gabrielle Russon, "Criminal past could keep parents from volunteering at Sarasota schools," *Herald Tribune*, September 2, 2014, <http://www.heraldtribune.com/article/20140902/article/140909932> (accessed September 23, 2016).

<sup>491</sup> Human Rights Watch interview with Trisha Richardson (pseudonym), Auburndale, December 11, 2015.

A felony conviction also makes a person ineligible to enlist in the United States Armed Forces,<sup>492</sup> a consequence highlighted by some interviewees who wanted to serve. A person convicted of a felony is ineligible to accrue certain Veterans Administration<sup>493</sup> and Social Security<sup>494</sup> benefits while incarcerated, and not all benefits are automatically resumed upon release. Conviction for drug possession can result in loss of federal commercial benefits, such as any grant, contract, loan, professional license, or commercial license provided by a federal agency.<sup>495</sup>

### *Vulnerability to Private Discrimination*

That record becomes the focus.... It's there forever. It's very unfair; it's debilitating.... People look at you differently: You're a felon. That word has such a stigma, but what do I have that tag for?<sup>496</sup>

—Sherry Martin, convicted in the 1990s of cocaine possession, December 2015

By labeling a person convicted of drug possession a “felon” or “drug offender,” states subject thousands of individuals each year to stigma and sometimes discrimination by private actors. Many interviewees said the stigma affected the way others engaged with them socially, or led others not to engage with them at all. In Louisiana, Texas, and Florida interviewees pointed to the ease with which potential employers and landlords—and also potential partners and friends—could find their arrest or conviction record through a simple search of their name on the internet.

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<sup>492</sup> 10 USC sec. 504(a).

<sup>493</sup> 38 USC sec. 1505(a). Veterans incarcerated for a felony or misdemeanor for over 60 days will stop receiving VA pension payments, which may resume after release. Veterans convicted of a felony are ineligible for VA apportionment, which would give a portion of the money taken from their benefits to the veteran's family; they also lose certain education benefits, and may only receive benefits for tuition and supplies. To get their benefits reinstated, veterans must contact the VA and reapply within one year of release. US Department of Veterans Affairs, “Incarcerated Veterans,” (undated), <http://www.benefits.va.gov/persona/veteran-incarcerated.asp> (accessed July 26, 2016).

<sup>494</sup> 42 USC secs. 402(x), 1382(e)(4)(A). Anyone in jail or prison for more than 30 continuous days after being convicted of a crime (or anyone who is confined after violating probation or parole) is ineligible for Social Security benefits while incarcerated. If the period of incarceration is longer than a year, one must submit a new application and get re-approved for Supplemental Security Income. One must visit a Social Security office with proof of release to reinitiate payments, which can begin within the month of release; however, release will not automatically make someone eligible for Social Security benefits. Social Security, “Benefits After Incarceration: What You Need To Know,” (undated), <https://www.ssa.gov/reentry/#&ao=6> (accessed July 26, 2016).

<sup>495</sup> A first drug possession conviction can result in loss of eligibility for all federal commercial benefits for up to one year; a second or subsequent possession conviction can result in loss up to five years. 21 USCA sec. 862(b) (2015).

<sup>496</sup> Human Rights Watch interview with Sherry Martin (pseudonym), Miami, December 18, 2015.



Most interviewees focused on how their criminal record resulted in the tangible loss of income and stable housing.

## Employment

In most states, private employers can legally discriminate on the basis of criminal history during the hiring process, sometimes by asking job applicants to check a box on application forms if they have been convicted of a crime. Although more than 100 cities and counties around the country have adopted “ban the box” policies<sup>497</sup>—and President Obama has called for Congress to ban the box in federal government hiring<sup>498</sup>—most of these measures have been limited to government employers. As an exception, nine states have barred private employers from asking about an applicant’s criminal history on job application forms.<sup>499</sup>

In the states we visited, interviewees repeatedly named employment difficulties as one of the most urgent consequences of their drug possession case, including where it involved a misdemeanor charge. People we interviewed said any criminal history—even an arrest that was not adjudicated—impacted their employability.

Many people told us that they were asked about their criminal record in the hiring process and that they believed they did not get jobs because of their response. In Miami, Sherry Martin said of her cocaine possession conviction:

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<sup>497</sup> Michelle Natividad Rodriguez and Beth Avery, “Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies,” National Employment Law Project, June 1, 2016, <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide> (accessed June 22, 2016).

<sup>498</sup> The White House, Office of the Press Secretary, “Fact Sheet: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly-Incarcerated,” November 2, 2015, <https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation> (accessed September 23, 2016).

<sup>499</sup> Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont. Further, Wisconsin law specifically prohibits public or private employers or licensing agencies from discriminating against employees or job applicants on the basis of an arrest or criminal record. New York City’s Fair Chance Act, effective October 27, 2015, prohibits most public or private employers from asking about an applicant’s criminal record before making a job offer. Rodriguez and Avery, “Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies”; State of Wisconsin, Fair Employment Law, [https://dwd.wisconsin.gov/er/discrimination\\_civil\\_rights/fair\\_employment\\_law.htm](https://dwd.wisconsin.gov/er/discrimination_civil_rights/fair_employment_law.htm) (accessed September 23, 2016); NYC Commission on Human Rights, “Fair Chance Act,” <http://www1.nyc.gov/site/cchr/about/inside-cchr.page> (accessed September 23, 2016).

[It is] almost 20 years behind me. And there's still that box and you have to be honest. That record becomes the focus. They're not concerned about the total, what you've done with yourself since then.... It's like having a ball and chain around your neck forever. It ruins your life.<sup>500</sup>

Lindsay Phillips, convicted of cocaine possession in Florida, said ban-the-box would not be enough, because employers in her experience often ran a background check as the last step of the hiring process, usually after an interview but one time even after she had started working:

I was at a job for a month, a medical assistant at a doctor's office, then the background check came in and they released me. It's company policy not to employ felons, they said; it's not personal, because they love me. Now in interviews I disclose, and they say they can't hire me.... If I didn't have my significant other, I would have been homeless.... It's a daunting feeling, knowing I'll be faced with constant rejection; that I'll constantly rely on others and not be self-sufficient. My kids can't look to me as a source of stability because I can't find that stability for myself because of my record.<sup>501</sup>

Others who had just been convicted of their first felony or who were fighting their first felony charge told us they feared it would ruin their lives. For example, Amit Goel, a 19-year-old sophomore in Dallas charged with a felony for possession of Adderall and Vyvanse, said, "If I get convicted, why finish school anyways? It'd be a waste of time with a conviction [because] you can't get good jobs after a background check."<sup>502</sup> In Shreveport, Glenda Hughes described what it meant for her to be convicted of her first felony, for possession of Klonopin: "I feel screwed.... I can't be a doctor or psychologist; I can't do the higher up things I would have liked. It takes away—you can only go so far as a felon."<sup>503</sup>

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<sup>500</sup> Human Rights Watch interview with Sherry Martin (pseudonym), Miami, December 18, 2015.

<sup>501</sup> Human Rights Watch interview with Lindsay Phillips (pseudonym), Auburndale, December 11, 2015.

<sup>502</sup> Human Rights Watch interview with Amit Goel (pseudonym), Dallas, March 7, 2016.

<sup>503</sup> Human Rights Watch interview with Glenda Hughes (pseudonym), Shreveport, Louisiana, February 6, 2016.

Some interviewees talked about the limited types of jobs that were available to people with felony drug convictions:

- In an office that helps people with felony convictions find jobs in Miami, Sherry Martin said of those in the waiting room, “No one in that reception is a big time criminal or dealer. But they can only work making beds, in food prep, construction, collecting garbage, or at a fast food. Most of the jobs we can get for them, it’s \$7.25, the minimum wage in Florida. This is what [the felony] does, you’re getting locked into minimum wage jobs.... They get to the box and have to check yes. And [the conviction] could be 30 years ago.... This creates recidivism. It’s a self-fulfilling prophesy when they tell us you’re nothing but a criminal.... I know people with PhDs working at Pizza Hut!”<sup>504</sup>
- In Houston, Leonard Lewis told us he went into depression when he could not make a living because he had been convicted of possession at age 18. “I have to settle for [temp work,] places that pay \$7.45 and \$8, stuff like that.... Average work day is like four hours. Four hours at 7 or 8 dollars, you aren’t going to do anything with that. I put that in my gas tank. You got the mental stress of having to help your family, help pay bills, but you ain’t got nothing.... [My possession conviction] is when this all started. It blocked me out of everything.”<sup>505</sup>

Luke Jenkins was arrested in Titusville, Florida at age 19 for possession of two ounces of marijuana. He said, “Now I’m a convicted felon which carries with me for rest of my life.... That’s why I had to open my own business and work extra hard. My heart breaks for someone who didn’t have the same resources that I was able to tap into. Because if you don’t, you end up back in the cycle of the system. It was a pivotal experience that still hangs over me 10 years later.”<sup>506</sup>

For other interviewees, their possession conviction excluded them from the professional licenses or further vocational training they had anticipated. In many states, licensing authorities may suspend, revoke, or deny licensure based on convictions from the past

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<sup>504</sup> Human Rights Watch interview with Sherry Martin (pseudonym), Miami, December 18, 2015.

<sup>505</sup> Human Rights Watch interview with Leonard Lewis (pseudonym), Houston, March 15, 2016.

<sup>506</sup> Human Rights Watch phone interview with Luke Jenkins (pseudonym), Melbourne, Florida, December 3, 2015.

several years. Occupations that require a license include teaching, nursing, architecture, law enforcement, plumbing, barbering, and many more.<sup>507</sup> These exclusions apply even when there is no evidence that drug use impacted the person's professional abilities or that they ever appeared for work under the influence.

### **Jasmine's Story**

In central Florida, Jasmine Adams' arrest for cocaine possession meant she had to give up her life's work as a schoolteacher:

I loved being a teacher. I had been teaching for ten years and two weeks, early childhood education.... I was two weeks in, in kindergarten again, when they found out what had happened with my cocaine arrest. They said I could take paid leave while they did their own investigation or I could voluntarily resign. I asked what would happen to my kindergarten kids: they'd have a substitute teacher. I can't do that to little kids; they were my little babies. It's not fair to have such inconsistency in their school lives in the first weeks of school. So I voluntarily resigned.

I was devastated. I had gone to the University of Florida, was getting my masters to be a principal or assistant principal. To know all of that I had lost—I don't think I've ever been so sad in my life. Then the State of Florida contacted me about my teaching certificate and I voluntarily surrendered it. They sent a letter saying it was a violation of ethics.

This is my fifth year not teaching, being in this crazy bubble [of criminal justice] you lose track of time, of the real world.... I lost my job. I lost my house because I couldn't pay for it—a deed in lieu of foreclosure. I couldn't pay the mortgage....

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<sup>507</sup> For example, in Oklahoma, anyone with a felony conviction is prohibited from ever being a state employee or obtaining licensures in at least 31 different professions. Oklahoma Policy Institute, "Oklahoma Restrictions on Job Licensing for Ex-Felons," undated, <http://okpolicy.org/wp-content/uploads/Occupational-Licensing-Restrictions.pdf?997616> (accessed October 5, 2016). In Maryland, anyone convicted of a drug crime must disclose it when applying for or renewing a license. Washington Lawyers' Committee, "The Collateral Consequences of Arrests and Convictions under D.C., Maryland, and Virginia Law," October 22, 2014, [http://www.washlaw.org/pdf/wlc\\_collateral\\_consequences\\_report.pdf](http://www.washlaw.org/pdf/wlc_collateral_consequences_report.pdf) (accessed October 5, 2016).

I would love to work with kids again and be around kids again, but it will never happen. I have drug charges. They don't allow you in the State of Florida to be around kids again.... Even in a daycare. The one thing I knew I was good at—I knew I was good, my evaluations from parents were impeccable. Even the HR woman said she knew how good I was. She said your file speaks for yourself. She was so sad for me. I lost everything.<sup>508</sup>

## Housing

Interviewees in all states we visited said that their drug possession conviction prevented them from obtaining housing.

- In Houston, Leonard Lewis said, “Being a felon, you can’t rent an apartment. You can get one, but it’s gonna be somewhere you don’t want to be at. If you want to live somewhere that’s half decent, you’re not gonna be able to be on the lease. [When I looked for my own apartment,] everyone kept telling me, ‘Well, sir, we’re not gonna waste your time with an application fee.’... I got an apartment locator, and the places she showed me, it was like, no I can’t do that one.”<sup>509</sup>
- In Harlem, Frank Torres said, “Because of my convictions, I lost opportunities to have an apartment because people don’t want to rent to me. I went to a housing interview and the landlord said, ‘Have you been convicted? Well then, I can’t help you.’”<sup>510</sup>
- Susan Turner, convicted at age 18 for possession of Xanax and methamphetamines in central Florida, told us her felony record meant she could no longer live with her father and stepmother because their Homeowner’s Association did background checks on every person who lives there. A “criminal background, convicted or not” means you’re denied by the housing authorities, she said.<sup>511</sup>

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<sup>508</sup> Human Rights Watch interview with Jasmine Adams (pseudonym), Auburndale, December 11, 2015.

<sup>509</sup> Human Rights Watch interview with Leonard Lewis (pseudonym), Houston, March 15, 2016.

<sup>510</sup> Human Rights Watch interview with Frank Torres (pseudonym), New York, October 29, 2015.

<sup>511</sup> Human Rights Watch interview with Susan Turner (pseudonym), Auburndale, December 11, 2015.

## X. How Criminalization Undermines Health

Personal use of drugs should be decriminalized because people ... don't need to be punished.... The court system isn't going about it in the right way at all. If someone is [messing] up their own life by personal use, they should receive help or treatment.<sup>512</sup>

—Karen Peterson, prosecuted multiple times in Florida for possession of methamphetamines, Ecstasy, and Xanax, December 2015

Is criminalization of narcotics appropriate? Society and current laws say yes.... [But with] the pure possession person, we're clearly not doing a very good job: We keep arresting and incarcerating.<sup>513</sup>

—Judge William Knight, Covington, Louisiana, January 2016

Rather than promoting health, criminalization can create new barriers to health for those who use drugs. Criminalization drives drug use underground; it discourages access to emergency medicine, overdose prevention services, and risk-reducing practices such as syringe exchanges; and, by incarcerating people who use drugs—too often without proper medical attention—it causes deterioration of physical and mental health and increases significantly the risk of overdose upon release.<sup>514</sup>

Although many people only use drugs recreationally or occasionally, drug use can lead to devastating consequences, including fatal overdoses. For those with drug dependence,

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<sup>512</sup> Human Rights Watch interview with Karen Peterson (pseudonym), Miami, December 21, 2015.

<sup>513</sup> Human Rights Watch interview with Judge William Knight, Covington, January 28, 2016.

<sup>514</sup> See Human Rights Watch, *Barred From Treatment: Punishment of Drug Users in New York State Prisons*, March 24, 2009, <https://www.hrw.org/report/2009/03/24/barred-treatment/punishment-drug-users-new-york-state-prisons>; Human Rights Watch, *In Harm's Way: State Response to Sex Workers, Drug Users and HIV in New Orleans*, December 11, 2013, <https://www.hrw.org/report/2013/12/11/harms-way/state-response-sex-workers-drug-users-and-hiv-new-orleans>; Human Rights Watch, *Injecting Reason: Human Rights and HIV Prevention for Injection Drug Users*, September 8, 2003, <https://www.hrw.org/report/2003/09/08/injecting-reason/human-rights-and-hiv-prevention-injection-drug-users>; Megan McLemore (Human Rights Watch), "Prisons Are Making America's Drug Problem Worse," commentary, *Politico*, March 11, 2015, <https://www.hrw.org/news/2015/03/11/prisons-are-making-americas-drug-problem-worse>; Human Rights Watch submission to Office of the UN High Commissioner for Human Rights on the Issue of Drugs and Human Rights, May 15, 2015, <https://www.hrw.org/news/2015/05/15/human-rights-watch-submission-office-un-high-commissioner-human-rights-issue-drugs>.

the state can better protect and promote their health by harm reduction and social services than through the criminal justice system.

Indeed, rates of drug use across drug types in the US have not decreased over the past 25 years, despite widespread criminalization.<sup>515</sup> Heroin and prescription opioid use has skyrocketed, as have overdoses associated with them.<sup>516</sup> Criminalization has also not helped advance evidence-based prevention strategies or led to wider understanding of safer drug use practices among relevant populations.<sup>517</sup>

Nor does incarceration offer a solution for those who struggle with drug dependence, who may simply end up caught in a revolving door to prison.<sup>518</sup> As New Orleans public defender Barksdale Hortenstine, Jr. said:

I can't tell you how many cases I've had when the client has literally only ever been arrested or convicted for the simple use of a substance. Usually cocaine, cocaine, cocaine, cocaine, paraphernalia, cocaine. For that person to be sent to prison for 20 years, or to be put in the position in which they

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<sup>515</sup> Substance Abuse and Mental Health Services Administration, "Substance Abuse in States and Metropolitan Areas: Model Based Estimates from the 1991-1993 National Household Surveys on Drug Abuse," September 1996, Exhibits 3.1-3.4; Substance Abuse and Mental Health Services Administration, "Results from the 2014 National Survey on Drug Use and Health: Detailed Tables," Table 1.23B.

<sup>516</sup> Centers for Disease Control, "Opioid Data Analysis," March 14, 2016, <https://www.cdc.gov/drugoverdose/data/analysis.html> (accessed July 31, 2016).

<sup>517</sup> See, for example, Tim Rhodes, "Risk environments and drug harms: A social science for harm reduction approach," *International Journal of Drug Policy*, vol. 20 (2009), pp. 193-201; Paula Mayock, Jennifer Cronly, and Michael C. Clatts, "The Risk Environment of Heroin Use Initiation: Young Women, Intimate Partners, and 'Drug Relationships,'" *Substance Use & Misuse*, vol. 50 (2015), pp. 771-782; Joanne Csete, <https://www.opensocietyfoundations.org/reports/prevention-drug-use-and-problematic-use>. To mitigate some of the risks of overdose, other countries have explored testing sites where drug users can test the contents of their purchases without fear of prosecution. See European Monitoring Centre for Drugs and Drug Addiction, "Scientific Project; ChEck iT!", January 20, 2012, [http://www.emcdda.europa.eu/html.cfm/index52035EN.html?project\\_id=1780&tab=overview](http://www.emcdda.europa.eu/html.cfm/index52035EN.html?project_id=1780&tab=overview) (accessed September 14, 2016); APDES, "CheckIn: free mind to fly," 2015, <http://www.apdes.pt/en/services/health-harm-reduction-human-rights/checkIn.html> (accessed September 14, 2016); Margriet van Laar et al., "Report to the EMCDDA: The Netherlands Drugs Situation 2012," Reitox National Focal Point, December 28, 2012, [http://www.emcdda.europa.eu/attachements.cfm/att\\_213776\\_EN\\_2012%20Netherlands%20National%20report%20full.pdf](http://www.emcdda.europa.eu/attachements.cfm/att_213776_EN_2012%20Netherlands%20National%20report%20full.pdf) (accessed September 14, 2016).

<sup>518</sup> There is a high risk of overdose following forced abstinence in jail and prison. E.L. Merrill, A. Kariminia, I.A. Binswanger, M.S. Hobbs, M. Farrell, J. Marsden, S.J. Hutchinson, and S.M. Bird, "Meta-analysis of drug-related deaths soon after release from prison," *Addiction*, September 2010, vol. 105(9), pp. 1545-54.

have to plead for seven or eight years flat time because they haven't "learned their lesson" shows how much [we're missing].<sup>519</sup>

## Failure to Provide Appropriate Treatment for Drug Dependence

For individuals who are drug dependent, criminalization fails to provide appropriate treatment in line with the human right to health. A full analysis of drug dependence treatment options available in different states is beyond the scope of this report. Other sources point to gaps in the availability of affordable and scientifically sound treatment, including lack of capacity in treatment programs, and the failure of many state Medicaid programs to cover medication needed for treatment of opioid dependence.<sup>520</sup>

Treatment should be affordable and available voluntarily in the community. It is not acceptable for treatment to be available only in the criminal justice system, depriving people who want treatment for drug dependence of such treatment unless they are arrested.

We spoke to a number of people who said they were drug dependent and wished they had access to voluntary treatment outside of the criminal justice system.<sup>521</sup> Even where jurisdictions had treatment programs available through the criminal justice system—such as drug courts (examined below) or diversion programs—many interviewees whose criminal histories were comprised only of low-level non-violent offenses and sometimes only drug possession said that they were never offered participation in the programs or any other kind of treatment or social services support.

- In Fort Worth, Texas, Hector Ruiz had a long record of drug possession convictions. He told us, "I've had an addiction since I was 23, but through all my incarcerations they have never offered help. They have never said they

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<sup>519</sup> Human Rights Watch interview with Barksdale Hortenstine, Jr., New Orleans, January 29, 2016.

<sup>520</sup> See Brendan Saloner and Shankar Karthikeyan, "Changes in Substance Abuse Treatment Use Among Individuals With Opioid Use Disorders in the United States, 2004-2013," *Journal of the American Medical Association*, vol. 314 (2015), pp. 1515-1517; The American Society of Addiction Medicine, "Advancing Access to Addiction Medications: Implications for Opioid Addiction Treatment," June 2013, [http://www.asam.org/docs/default-source/advocacy/aaam\\_implications-for-opioid-addiction-treatment\\_final](http://www.asam.org/docs/default-source/advocacy/aaam_implications-for-opioid-addiction-treatment_final) (accessed August 1, 2016).

<sup>521</sup> A number of states offer drug treatment within prison, including in special facilities, for example Texas' Substance Abuse Felony Punishment Program (SAFP). SAFP is under the ambit of the Texas Department of Corrections and is in a "lock-down" facility, meaning those sentenced to SAFP are still treated like prisoners. Interviewees told us that SAFP is not a place where they would feel comfortable tackling their drug dependence. Programs that impose involuntary treatment within a detention center do not comply with right to health principles.



could give me drug rehab, any type of rehab at all.... It's hard to just get out [of prison] with no job, no stability; you go right back to where you come from [and use again]. This place is a revolving door for people like me. Putting people in jail is not gonna help nobody. If anything, it makes them worse.”<sup>522</sup>

- In Covington, Louisiana, Allen Searle told us, “They never offered me a drug treatment... they never gave me a chance on anything.... Putting people in jail for drugs is not helping anybody. It's not helping their families; it's not helping anything around them.”<sup>523</sup>
- In Dallas, Nate Myers said he turned to drugs after his son died and that he wished he had been offered help rather than handcuffs: “At the time of my arrest, I wish they had asked more questions, like what's going on in your life, why do you have these drugs, how can I help you? ... I should be offered help but instead am shackled and treated like an animal, rather than [understanding] I'm using it to cope.”<sup>524</sup>
- Speaking to us from jail in Granbury, Texas, Matthew Russell said, “Do they realize what they are doing to people's lives in here? ... Because of my drug addiction, they just keep punishing me. [Using drugs,] in our society that makes me a bad person? Because I can't overcome an addiction? They never offered me no help. I have been to prison five times, and it's destroyed me; each time I go it takes another part of me.”<sup>525</sup>

A number of prosecutors, judges, and correctional staff we interviewed agreed that more treatment should be available to those who want it, outside of the criminal justice system. For example, a former prison warden and chief of security, who spent more than 25 years working in the Florida Department of Corrections, said:

The individual should be looked at in a possession case. In their life, what's going on? Are they trying to provide for their family? There has to be an alternative for simple possession. You shouldn't go to prison. By

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<sup>522</sup> Human Rights Watch interview with Hector Ruiz (pseudonym), Fort Worth, March 11, 2016.

<sup>523</sup> Human Rights Watch interview with Allen Searle (pseudonym), Covington, Louisiana, January 27, 2016.

<sup>524</sup> Human Rights Watch interview with Nate Myers (pseudonym), Dallas, March 8, 2016.

<sup>525</sup> Human Rights Watch interview with Matthew Russell (pseudonym), Granbury, Texas, March 10, 2016.

criminalizing it, we take a guy who's not a criminal and put him in with criminals. You're not making him a better person.<sup>526</sup>

Some officials expressed concern to us that if drug use were decriminalized, there would be no “hook” to help people get the treatment they need. But this implies that people who are drug dependent need to be forced into treatment against their will. In fact, many of our interviewees who identified as drug dependent did want treatment, but it was not available to them. Moreover, the reality is that the criminal justice “hook” has not succeeded in connecting people to evidence-based, quality treatment. And, as a Florida judge pointed out, to the extent criminal justice actors seek to divert people to treatment, they can still do so if people commit other offenses under the influence of drugs, where the criminal law remains more appropriate: “When people are high, trespass and stealing is still criminal. Get them that way, divert them that way. We can do it without criminal possession.”<sup>527</sup>

## Obstacles to Emergency Care

Criminalizing drug use may hinder access to emergency medical care in the event of an overdose or other drug-related health emergency. Because police often respond to 911 calls, calling for an ambulance often also means calling for the police. If the police are empowered to arrest a person for drug possession in such circumstances, an individual is faced with the choice of seeking help and facing possible criminal charges or allowing a possibly fatal overdose. This risks creating a situation where criminal sanctions are not only disproportionate but are enforced in a way that interferes with the rights to health and life under international human rights law. Fear of police involvement has been identified by many researchers as the most common reason people say they do not call 911 when witnessing an overdose.<sup>528</sup>

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<sup>526</sup> Human Rights Watch interview with former Florida prison warden, December 2015.

<sup>527</sup> Human Rights Watch interview with Florida judge, December 2015.

<sup>528</sup> See Drug Policy Alliance, “911 Good Samaritan Laws: Preventing Overdose Deaths, Saving Lives,” February 2016, citing sources, [http://www.drugpolicy.org/sites/default/files/DPA\\_Fact%20Sheet\\_911%20Good%20Samaritan%20Laws\\_%28Feb.%202016%29.pdf](http://www.drugpolicy.org/sites/default/files/DPA_Fact%20Sheet_911%20Good%20Samaritan%20Laws_%28Feb.%202016%29.pdf) (accessed June 18, 2016).

For this reason, Good Samaritan laws are imperative. Thirty-two states and the District of Columbia currently have Good Samaritan laws in place.<sup>529</sup> These laws ensure that people will be immune from arrest or prosecution if they call 911 to seek help for someone who has overdosed. Before Louisiana passed its Good Samaritan law, Byron Augustine called 911 when his friend overdosed on heroin. He saved his friend's life but was charged with felony drug possession for the drugs his friend used and with a probation revocation for an underlying drug possession case. He is currently serving 10 years on both. Yet Byron said saving his friend's life was worth it. He had known he risked arrest by calling for help but said, "That's my friend, I wasn't going to let him die. Even when I went to [court], the judge asked about that. But man, I couldn't let my friend die, I couldn't have that on my conscience." Byron told us that after he was arrested, his friend overdosed again and did not survive. Because he was incarcerated, Byron was not able to attend the funeral.<sup>530</sup>

Even where Good Samaritan laws are in place, they may not protect friends or family members involved in drug use from being charged with homicide when there is a fatal overdose.<sup>531</sup> This is true even where the friend or family member also uses drugs and/or did not know the dangers of the dosage. The apparent trend toward considering homicide

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<sup>529</sup> In 2007, New Mexico was the first state in the nation to pass a 911 Good Samaritan law. Subsequently 31 additional states, plus the District of Columbia, have passed similar statutes. They are Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Washington State, West Virginia, and Wisconsin. Three more states, Utah, Indiana, and Virginia, have adopted laws providing for mitigation in cases of good-faith reporting of an overdose, but these states do not provide immunity. Michigan adopted a 911 Good Samaritan law that applies to minors only. See Drug Policy Alliance, "911 Good Samaritan Laws: Preventing Overdose Deaths, Saving Lives," February 2016, [http://www.drugpolicy.org/sites/default/files/DPA\\_Fact%20Sheet\\_911%20Good%20Samaritan%20Laws\\_%28Feb.%202016%29.pdf](http://www.drugpolicy.org/sites/default/files/DPA_Fact%20Sheet_911%20Good%20Samaritan%20Laws_%28Feb.%202016%29.pdf) (accessed June 18, 2016); National Conference of State Legislatures, "Drug Overdose Immunity and Good Samaritan Laws," August 1, 2016, <http://www.ncsl.org/research/civil-and-criminal-justice/drug-overdose-immunity-good-samaritan-laws.aspx> (accessed September 23, 2016).

<sup>530</sup> Human Rights Watch interview with Byron Augustine, Slidell, Louisiana, February 3, 2016.

<sup>531</sup> See Rob Kuznia, "Her fiance gave her heroin. She overdosed. Does that make him a murderer?" *Washington Post*, May 8, 2016, [https://www.washingtonpost.com/national/her-fiance-gave-her-heroin-she-overdosed-does-that-make-him-a-murderer/2016/05/08/f9a9e79a-f29b-11e5-a2a3-d4e9697917d1\\_story.html](https://www.washingtonpost.com/national/her-fiance-gave-her-heroin-she-overdosed-does-that-make-him-a-murderer/2016/05/08/f9a9e79a-f29b-11e5-a2a3-d4e9697917d1_story.html) (accessed June 18, 2016) ("Prosecutors in New Jersey, Tennessee, West Virginia and Louisiana have recently dusted off dormant War on Drugs-era laws to subject sellers and providers to homicide charges and stiff sentences on par with convictions for shooting, beating or poisoning people to death. In New York, Ohio and Virginia, lawmakers have introduced bills to allow murder charges to be filed in drug-overdose deaths."). For a number of recent cases in Louisiana, see, for example, Naomi Martin, "Murder charge comes after heroin overdose of friend," *The Times-Picayune*, August 11, 2014, [http://www.nola.com/crime/index.ssf/2014/08/in\\_gentilly\\_heroin\\_overdose\\_no.html](http://www.nola.com/crime/index.ssf/2014/08/in_gentilly_heroin_overdose_no.html) (accessed August 19, 2016); Joe Gyan, "Baton Rouge man sentenced for giving heroin to girlfriend, who died of an overdose," *The Advocate*, March 24, 2015, [http://www.theadvocate.com/baton\\_rouge/news/article\\_d5c925aa-bf84-58bf-81ee-b61f588dc4e6.html](http://www.theadvocate.com/baton_rouge/news/article_d5c925aa-bf84-58bf-81ee-b61f588dc4e6.html) (accessed August 19, 2016); Joe Gyan, "Denham Springs man convicted of giving girlfriend fatal dose of heroin claims life sentence cruel, unusual punishment," *The Advocate*, February 9, 2016, [http://www.theadvocate.com/baton\\_rouge/news/article\\_69e9c040-9d22-55d9-8dab-3d50e55d2921.html](http://www.theadvocate.com/baton_rouge/news/article_69e9c040-9d22-55d9-8dab-3d50e55d2921.html) (accessed August 19, 2016).

charges in such cases is therefore distinct from the broader move to prosecute dealers who know they are selling dangerously high or misleading dosages to people who may not know the strength of the drug they are buying.

We have not investigated the practice of charging friends and family members who provide a fatal dose, but it risks undercutting Good Samaritan laws. If arrest and prosecution for drug possession are enough to discourage overdose witnesses from calling 911, the motivation behind Good Samaritan laws, witnesses will be even less likely to call for help if they might face murder charges should the ambulance fail to arrive in time. These practices risk encouraging people to leave a friend or loved one to die.

### **Law Enforcement Alternatives**

In 2011, Seattle piloted a program called LEAD, Law Enforcement Assisted Diversion. The first “pre-booking” diversion program in the country, LEAD gives King County law enforcement discretion to direct people who would otherwise be charged with low-level drug offenses or prostitution to housing, treatment, and other services instead. Those found in possession or sale of up to five grams, in some cases ten grams, of certain drugs are eligible for LEAD.<sup>532</sup> If participants complete the case management program within 30 days, the prosecutor does not charge them.<sup>533</sup> According to one LEAD implementer, because the program is a “harm reduction model, [it] doesn’t require a person to maintain abstinence,”<sup>534</sup> and participants cannot be sanctioned for drug use.<sup>535</sup>

LEAD emerged from a realization that the status quo was not working and that it was rife with racial disparities. Jim Pugel, former interim Seattle Police Chief, said that before LEAD:

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<sup>532</sup> Jim Pugel, Presentation at “Drug Policy and Progress on Sentencing Reform,” a side event during the United Nations General Assembly Special Session on the World Drug Problem, April 20, 2016.

<sup>533</sup> Ibid.

<sup>534</sup> Ibid.

<sup>535</sup> Drug Policy Alliance, Law Enforcement Assisted Diversion (LEAD): Reducing the Role of Criminalization in Local Drug Control, February 2016, [http://www.drugpolicy.org/sites/default/files/DPA%20Fact%20sheet\\_Law%20Enforcement%20Assisted%20Diversion%20\(LEAD\)%20\\_\(Feb.%202016\).pdf](http://www.drugpolicy.org/sites/default/files/DPA%20Fact%20sheet_Law%20Enforcement%20Assisted%20Diversion%20(LEAD)%20_(Feb.%202016).pdf) (accessed June 18, 2016).

Things went off the rails when we said we, the police and the prosecutors, know best [how to respond to drug use].... We were arresting people day in and day out, putting them in jail with the help of prosecutors and judges for a small amount of drugs ... smaller than the M&M candies. People were going to jail for years and years. When they got out, we'd arrest them again for doing the same thing.<sup>536</sup>

At the time, Seattle had one of the worst rates of racial disparities for drug arrests in the country, prompting a lawsuit against the Seattle Police Department that went on for years.<sup>537</sup> One of the upshots of the litigation was a reevaluation of the police's relationship with the community and the eventual formulation of the LEAD program,<sup>538</sup> with multiple collaborators among other government agencies and civil society representatives.<sup>539</sup>

LEAD programs provide an alternative to criminal charges and give officers the opportunity to connect people to social services and other support instead. Some officials told us this was greatly needed: In St. Tammany Parish, Louisiana, Sheriff Randy Smith said, "It's not about putting 100 people in jail that are using—which [we could do, since] it is illegal to possess and use drugs—but it's getting them the help. And that is what I think sometimes we're missing in law enforcement."<sup>540</sup> Although the "help" should not automatically be treatment for drug dependence, in some cases treatment options are needed. Sergeant Daniel Seuzeneau, Public Information Officer in Slidell Police Department, said the problem is that too often treatment is not available and so officers feel their only option is to arrest:

If one of our officers stops a guy right now and he just shot up heroin, has a bag of heroin and a used needle ... what is he to do? There is no "ok, we're not going to arrest you, we're going to bring you to this rehab center,"

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<sup>536</sup> Pugel, Presentation.

<sup>537</sup> Drug Policy Alliance, Law Enforcement Assisted Diversion.

<sup>538</sup> Ibid. See also Pugel, Presentation (saying LEAD was "started by a racial disparities argument").

<sup>539</sup> LEAD, *About LEAD*, <http://leadkingcounty.org/about/> (accessed June 18, 2016).

<sup>540</sup> Human Rights Watch interview with Police Chief Randy Smith, Slidell, February 3, 2016.

because there is none, that's not an option. If you don't arrest him and they OD later, what are parents going to do? And if you do arrest him, then you've got this debacle of does this person really need to be in jail? They need help. It's just a catch-22; it's a vicious cycle.<sup>541</sup>

Studies of LEAD in Seattle indicate that it has decreased recidivism; improved outcomes for participants in housing, employment, and income; and decreased criminal justice utilization and associated financial costs.<sup>542</sup> Santa Fe implemented the country's second LEAD program in 2014,<sup>543</sup> and Albany, NY, Huntington, WV, and Canton, OH followed in 2015 and early 2016.<sup>544</sup>

Ultimately, LEAD is still a criminalization model, since participation cannot be considered truly voluntary if the alternative is to be charged for drug possession. It also risks mistakenly assuming that anyone who uses or possesses drugs needs help. But it is less intrusive and onerous than some other pre-adjudication or diversion models. The establishment of LEAD programs can be an interim step, until decriminalization is implemented.<sup>545</sup>

## Drug Courts: A Flawed Solution

Recent years have seen a trend toward the establishment of drug courts—specialized courts that provide certain drug defendants with various forms of required treatment and

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<sup>541</sup> Human Rights Watch interview with Sergeant Daniel Seuzeneau, Slidell, Louisiana, February 3, 2016.

<sup>542</sup> University of Washington – Harborview Medical Center, “LEAD Program Evaluation: Criminal Justice and Legal System Utilization and Associated Costs,” June 24, 2015, <http://static1.1.sqspcdn.com/static/f/1185392/26401889/1437170937787/June+2015+LEAD-Program-Evaluation-Criminal-Justice-and-Legal-System-Utilization-and-Associated-Costs.pdf?token=YQ9BVcVKNeUwc1pFYJ5MnlwhTGg%3D> (accessed September 23, 2016).

<sup>543</sup> See City of Santa Fe, “City Launches LEAD Putting Santa Fe in Proactive Spotlight,” May 5, 2014, [http://www.santafenm.gov/news/detail/city\\_launches\\_lead\\_putting\\_santa\\_fe\\_in\\_proactive\\_spotlight](http://www.santafenm.gov/news/detail/city_launches_lead_putting_santa_fe_in_proactive_spotlight) (accessed June 19, 2016).

<sup>544</sup> LEAD National Support Bureau, “Fact Sheet,” (undated), <http://www.leadbureau.org/#!/resources/cjta> (accessed June 19, 2016).

<sup>545</sup> Even in the absence of LEAD programs, local governments and law enforcement can adopt harm reduction policies including safe injection sites (also known as supervised injection facilities), places where people who inject drugs can do so under medical supervision and without police harassment and be referred to other services. See British Columbia Ministry of Health Services, “Insite Supervised Injection Site,” (undated), <http://supervisedinjection.vch.ca/> (accessed July 30, 2016).

judicial monitoring and supervision, as an alternative to incarceration, with the goal of preventing “drug use relapse and criminal recidivism.”<sup>546</sup>

Since the first drug court in the US opened in Florida in 1989, the model has spread rapidly. By December 2014, there were more than 3,000 drug courts nationwide, offering eligible defendants court-supervised treatment in cases where dependence is judged to be at the root of the offense.<sup>547</sup> Officials such as former Governor Rick Perry of Texas often speak proudly of their diversion of defendants into drug courts.<sup>548</sup> US officials have even promoted drug courts internationally, as an alternative to strict prohibition.<sup>549</sup>

A thorough assessment of drug courts is beyond the scope of this report. We did not undertake a full investigation of drug courts in the US and recognize that drug courts, often part of broader initiatives aimed at reforming the justice system, reducing incarceration, and promoting safer neighborhoods, seek to address many of the same concerns outlined in this report.

Yet the basic premise of drug courts is inherently problematic for people charged with nothing more serious than drug possession: Drug courts remain squarely within the criminal justice system and are premised on criminalization; they are not an alternative to it. Many continue to impose punishment for personal drug use and operate in ways that raise other human rights concerns, including by placing health decisions in the hands of

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<sup>546</sup> National Institute of Justice, *Drug Courts*, (undated), <http://www.nij.gov/topics/courts/drug-courts/pages/welcome.aspx> (accessed June 20, 2016).

<sup>547</sup> Ibid.

<sup>548</sup> See Walt Nett, “Gov. Perry says drug court program matches Texas values,” April 3 2014, *Lubbock Avalanche-Journal*, <http://lubbockonline.com/local-news/2014-04-02/gov-perry-says-drug-court-program-matches-texas-values#.V2w4YdlrKUK> (accessed June 23, 2016); Matt Arco, “Christie pitches crime, drug addiction plan at 2016 campaign stop in Camden,” July 17, 2015, *NJ.com*, [http://www.nj.com/politics/index.ssf/2015/07/christie\\_criminal\\_justice\\_reform\\_speech.html](http://www.nj.com/politics/index.ssf/2015/07/christie_criminal_justice_reform_speech.html) (accessed June 23, 2016); Barack Obama, Remarks by the President at the NAACP Conference, July 14, 2015, The White House, Office of the Press Secretary, “Remarks by the President at the NAACP Conference,” July 14 2015, <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference> (accessed June 23, 2016); Hillary Clinton, 2016 NBC Democratic Debate, Jan 17, 2016, [http://www.ontheissues.org/2016/Hillary\\_Clinton\\_Drugs.htm](http://www.ontheissues.org/2016/Hillary_Clinton_Drugs.htm) (accessed June 23, 2016).

<sup>549</sup> See Rory Watson, “US Official Preaches Benefits of ‘Drug Courts’ in Curbing Misuse,” March 12, 2015, *British Medical Journal*, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC554064/> (accessed June 23, 2016).

criminal judges, arbitrarily limiting access to evidence-based drug treatment options, and punishing people for relapses that are a normal part of drug dependence.<sup>550</sup>

### *The US Drug Court Model*

Some form of drug court was in operation in each of the states we visited, although their target populations, criteria of participation, and methods varied greatly.<sup>551</sup>

As of 2012, the majority of drug courts operated post-adjudication—in other words, after a defendant pled guilty.<sup>552</sup> Whether a criminal conviction is ever formally recorded, and if so, when, varies by jurisdiction. In some jurisdictions, the judge does not enter a conviction following the guilty plea unless the person fails drug court. In others, convictions are entered but if defendants complete the requirements of drug court programs their sentences are deferred, modified, suspended, or the conviction is expunged.<sup>553</sup> In drug courts we visited in Louisiana, participation was simply a condition of probation—and failure to complete the drug court program meant revocation of probation and imposition of a prison term.<sup>554</sup>

Entry into drug court is highly selective. In many programs, the defendant must have little to no prior criminal history. Some programs are available only for first-time offenses—a requirement of serious concern because it means the programs likely target people who are not drug dependent and do not need treatment. In some jurisdictions we visited, a person could be admitted only upon the approval or recommendation of the prosecutor.<sup>555</sup>

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<sup>550</sup> For the broader effects of the drug court movement on the criminal justice system and incarceration, see Jessica Eaglin, “The Drug Court Paradigm,” *American Criminal Law Review*, vol. 53, no. 595, August 10, 2016.

<sup>551</sup> In Florida and Louisiana, we observed drug court in two jurisdictions, attended drug court programming with counselors in another jurisdiction, and spoke with drug court judges and participants, separately, in three jurisdictions.

<sup>552</sup> For adults, almost 80 percent of drug courts had post-plea “point of entry.” Including drug courts designed for juveniles (23 percent of all drug courts) brings the total post-plea to 73 percent. Bureau of Justice Statistics, “Census of Problem-Solving Courts, 2012,” September 2016, <http://www.bjs.gov/content/pub/pdf/cpsc12.pdf> (accessed September 15, 2016), Appendix Table 11.

<sup>553</sup> Justice Policy Institute, “Addicted to Courts: How a Growing Dependence on Drug Courts Impacts People and Communities,” March 2011, [http://www.justicepolicy.org/uploads/justicepolicy/documents/addicted\\_to\\_courts\\_final.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/addicted_to_courts_final.pdf) (accessed June 24, 2016), pp. 2-3.

<sup>554</sup> Louisiana law stipulates that defendants accepted into the drug probation program waive their right to a trial and must enter a guilty plea. The period of supervision must be at least 12 months, and defendants may be ordered to serve a prison sentence if they do not successfully finish the program. LA Rev. Stat. sec. 13:5301.

<sup>555</sup> Eligibility varies based on the specific drug court; some require that it be a first offense, and most require that the offense be non-violent. See, for example, Florida Supreme Court Task Force on Treatment-Based Drug Courts, “Florida’s Adult Drug



Drug courts typically require frequent scheduled and random drug tests, court appearances, group sessions and classes, and meetings with case managers or counselors. In some jurisdictions, participants are required to pay for these activities.<sup>556</sup> In some cases, it can take years to successfully complete drug court. One drug court judge told us he had had defendants give up and ask to be sentenced to jail because drug court was too hard.<sup>557</sup> Other defendants simply fail to meet the requirements.<sup>558</sup>

Substantial research has been done on whether drug courts are “successful.” These analyses usually measure success in terms of abstinence and absence of rearrest.<sup>559</sup> However, many of the evaluations initially used to garner support for drug courts have been questioned, due in part to the courts’ methods (such as only admitting those who are most likely to be “successful” in the program) and lack of acceptance of proven and clinically-indicated medical treatments.<sup>560</sup>

### *Human Rights Concerns*

Drug courts raise several rights concerns, some of which have been examined by others in detail.

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Court: Recommended Practices,” April 2007, <http://www.flcourts.org/core/fileparse.php/260/urlt/toolkit.pdf> (accessed June 24, 2016), p. 4.

<sup>556</sup> See, for example, 11th Judicial Circuit Adult Drug Court, St. Charles County, “Program Manual,” April 25, 2013. Participants are required to pay for assessment, submit a \$200 payment when they start the program, pay monthly drug court fees, and submit monthly payments for drug testing (and pay a \$25 for retesting if a sample is diluted).

<sup>557</sup> Human Rights Watch interview with Judge Craig Marcotte, Shreveport, February 4, 2016.

<sup>558</sup> According to a 2011 GAO report, completion rates range from 15 percent to 89 percent. United States Government Accountability Office, “Adult Drug Courts,” GAO-12-53, December 2011, <http://www.gao.gov/assets/590/586793.pdf> (accessed June 24, 2016), p. 20.

<sup>559</sup> National Association of Criminal Defense Lawyers, “America’s Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform,” September 2009, p. 47; Ojmarrh Mitchell et al., “Assessing the effectiveness of drug courts on recidivism: A meta-analytic review of traditional and non-traditional drug courts,” *Journal of Criminal Justice*, vol. 40 (2012), pp. 60-71; Douglas B. Marlowe, “Research Update on Adult Drug Courts,” National Association of Drug Court Professionals, December 2010, [http://www.nadcp.org/sites/default/files/nadcp/Research%20Update%20on%20Adult%20Drug%20Courts%20-%20NADCP\\_1.pdf](http://www.nadcp.org/sites/default/files/nadcp/Research%20Update%20on%20Adult%20Drug%20Courts%20-%20NADCP_1.pdf) (accessed August 1, 2016), pp. 1-2 (“In addition to significantly less involvement in criminal activity, the Drug Court participants also reported significantly less use of illegal drugs and heavy use of alcohol”).

<sup>560</sup> See, for example, Joanne Csete and Denise Tomasini-Joshi, “Drug Courts: Equivocal Evidence on a Popular Intervention,” Open Society Foundations, February 2015, <https://www.opensocietyfoundations.org/sites/default/files/drug-courts-equivocal-evidence-popular-intervention-20150518.pdf> (accessed August 1, 2016); Nastassia Walsh, “Addicted to Courts: How a Growing Dependence on Drug Courts Impacts People and Communities,” Justice Policy Institute, March 2011, [http://www.justicepolicy.org/uploads/justicepolicy/documents/addicted\\_to\\_courts\\_final.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/addicted_to_courts_final.pdf) (accessed August 1, 2016).

First, because the alternative to drug court participation is typically criminal prosecution or incarceration, decisions to participate are not fully voluntary. A fundamental principle of medical ethics is that medical treatment should only be provided with full, voluntary, and informed consent. And because most drug courts require some kind of treatment program, defendants, whatever the extent of their drug use, may be pressured into unwanted and/or unnecessary medical care, in violation of the right to health. Some may not need it: Judge Knight, who used to run a drug court in St. Tammany Parish, Louisiana, acknowledged that “not everyone with three cocaine convictions is an addict or even dependent.”<sup>561</sup>

Where drug court is available only to people facing charges for the first time, higher-income and white defendants are more likely to be enrolled, even without any discriminatory intent on the part of officials involved, because Black people, Latinos, and the poor are more likely to be arrested and prosecuted for drug possession. According to a 2008 survey, 21 percent of drug court participants nationwide were Black (though Black people made up 35 percent of drug offense arrestees), and 10 percent were Latino.<sup>562</sup>

When participants relapse or fail to complete the program, drug courts can lead them to spend more time in jail than they would have spent had they gone through the normal courtroom process—also imposing greater financial costs on the court system due to additional proceedings and incarceration costs.<sup>563</sup> This is particularly problematic for

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<sup>561</sup> Human Rights Watch interview with Judge William J. Knight, Covington, January 28, 2016. A number of drug court personnel in various states told us some programs were more carefully tailored, so that “high risk” and “high need” people would get different treatment than people who just recreationally or socially use. In 2015, New York passed a law to authorize “eligible defendants, in the judicial diversion program who need treatment for opioid abuse or dependence, to receive certain medically prescribed treatment therefor.” NY CPL sec. 216.05. See also Joanne Csete and Holly Catania, “Methadone treatment providers’ views of drug court policy and practice: a case study of New York State,” *Harm Reduction Journal*, vol. 10 (2013), pp. 1-9; Harlan Matusow et al., “Medication assisted treatment in US drug courts: Results from a nationwide survey of availability, barriers and attitudes,” *Journal of Substance Abuse Treatment*, vol. 44 (2013), pp. 473-480.

<sup>562</sup> West Huddleston and Douglas B. Marlowe, “Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Court Programs in the United States,” Bureau of Justice Assistance, National Drug Court Institute, July 2011, <http://www.ndci.org/sites/default/files/nadcp/PCP%20Report%20FINAL.PDF> (accessed June 24, 2016), p. 30. Several studies have found that fewer Black and Latino participants successfully complete drug court programs than white participants. See, for example, Shelli B. Rossman et al., “The Multi-Site Adult Drug Court Evaluation: The Impact of Drug Courts, Volume 4,” Urban Institute, Justice Policy Center, December 2011, <https://www.ncjrs.gov/pdffiles1/nij/grants/237112.pdf> (accessed June 24, 2016), pp. 38-39. However, successful completion depends not only on the drug court participant but also the judge and other program officials who measure “success.”

<sup>563</sup> See Joanne Csete and Denise Tomasini-Joshi, “Drug Courts: Equivocal Evidence on a Popular Intervention,” *Open Society Foundations*, February 2015, <https://www.opensocietyfoundations.org/reports/drug-courts-equivocal-evidence-popular-intervention> (accessed June 20, 2016), p. 9 (“If the person ‘fails’ court-supervised treatment, he or she is likely to be returned to the adversarial courts and, with a guilty plea on the record, may wind up with a harsher sentence than if he or she had been able with the aid of counsel to mount a defense in the first place. A 2013 meta-analysis of what this means for

people who suffer from drug dependence—precisely the population drug courts are intended to help—because, as noted by one commentator, “relapsing is a natural and expected occurrence for people with substance use disorders, yet drug courts currently throw participants who relapse during treatment in jail, where violence is widespread and treatment is virtually nonexistent.”<sup>564</sup>

Indeed, the drug court courtroom can feel like an area of hyper-paternalism.<sup>565</sup> In jurisdictions we visited, defendants were called in to meet with the judge sometimes several times a month, and each defendant took a turn standing before the public gallery and reporting on their dependence and abstinence. The judge asked questions, and—at least in those courtrooms we observed—the defendant responded without the advice of counsel. When a defendant failed to comply with the terms of the program in some way—for instance, had a positive or “diluted” urinalysis, missed a class, or failed to appear for community service—sanctions were imposed. In two courtrooms we observed, a group of defendants waited to go to jail because they were being sanctioned, while the drug court judge chided them and told them to watch what was done to the current defendant at the podium.<sup>566</sup>

While practitioners often insist that drug court is a “team effort,” defendants still risk losing their liberty if they fail to comply with program expectations. It is cause for concern whenever such defendants, without the advice of counsel,<sup>567</sup> are induced to make statements that result in jail time, community service, and other sanctions typically imposed as criminal punishment.

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incarceration outcomes, using data from 19 studies in the United States, concluded drug court participants in the jurisdictions studied did not spend less time overall incarcerated than non-participants because of the long sentences imposed on people who “failed” the court-dictated treatment plan.”)

<sup>564</sup> Daniel N. Abrahamson, “Drug courts are not the answer,” Justice Policy Institute, May 12, 2015, <http://www.justicepolicy.org/news/9204> (accessed June 24, 2016).

<sup>565</sup> In a report by a member of the National Association of Drug Court Professionals, incentives and sanctions are referred to as “the carrot *and* the stick.” (italics in original) The author explains: “Balance positive reinforcement with punishment to reduce undesired behaviors and replace them with desired prosocial behaviors.” Douglas B. Marlowe, “Behavior Modification 101 for Drug Courts: Making the Most of Incentives and Sanctions,” National Drug Court Institute, September 2012, <http://www.ndci.org/sites/default/files/BehaviorModification101forDrugCourts.pdf> (accessed June 24, 2016).

<sup>566</sup> Human Rights Watch observation of drug courts in Florida and Louisiana; Human Rights Watch interviews with scores of defense attorneys and defendants in Florida, Louisiana, and Texas.

<sup>567</sup> Even if a public defender is assigned to the courtroom, this does not suffice unless the defender knows the details of the specific case at hand and consults with the defendant before the defendant speaks. In one courtroom, a drug court participant told us the judge prohibited defense attorneys from entering. Human Rights Watch phone interview with Jessica Coburn, Louisiana, August 12, 2016.

Finally, by requiring treatment within the court system—managed ultimately by a judge trained in law, not medicine—some drug courts provide treatment that is inappropriate and inconsistent with the right to health. For example, some programs are over-inclusive, trying to treat marijuana defendants with a model designed for cocaine or opiate dependence.<sup>568</sup> Others have denied participants access to medication-assisted therapies, such as buprenorphine and methadone treatment, even though decades of research show they are the best option for treating opioid dependence. Michael Botticelli, director of the White House Office of National Drug Control Policy, and the Substance Abuse and Mental Health Services Administration (part of the US Department of Health and Human Services) announced in 2015 that no federal funds would be available to drug courts that deny access to such therapies.<sup>569</sup>

If carefully implemented to avoid some of the concerns above, drug courts may provide a useful alternative for addressing acts that the state may legitimately criminalize—for example, property crimes committed in connection with drug dependence. But drug courts are inappropriate in cases of drug use and possession, where the person caused no harm to others, since states should decriminalize those offenses entirely.

The drug court professionals we met appeared to be well intentioned and truly wanted to help people struggling with drug dependence. It is positive that states and the federal government are trying to keep many people who use drugs out of jail. But the priority should be to ensure that drug dependence treatment and social support services are available and affordable in communities, so that people who want treatment can get it at their earliest opportunity—without criminal sanctions hanging over their heads.

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<sup>568</sup> See, for example, Csete and Tomasini-Joshi, “Drug Courts: Equivocal Evidence on a Popular Intervention,” *Open Society Foundations*, p. 10; Drug Policy Alliance, “Drug Courts Are Not the Answer: Toward a Health-Centered Approach to Drug Use,” March 22, 2011, [http://www.drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer\\_Final2.pdf](http://www.drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer_Final2.pdf) (accessed August 1, 2016).

<sup>569</sup> In 2015, the Huffington Post undertook an investigation that revealed a number of drug courts in Kentucky were denying these treatments. In a call with reporters, the White House responded directly and the federal government amended the conditions of federal funding to drug courts. Jason Cherkis, “Dying to Be Free: There’s A Treatment For Heroin Addiction That Actually Works. Why Aren’t We Using It?” *Huffington Post*, January 28, 2015, <http://projects.huffingtonpost.com/dying-to-be-free-heroin-treatment> (accessed August 21, 2016); Ryan Grim, “Federal Government Set To Crack Down On Drug Courts That Fail Addicts,” *Huffington Post*, February 5, 2015, [http://www.huffingtonpost.com/2015/02/05/drug-courts-suboxone\\_n\\_6625864.html](http://www.huffingtonpost.com/2015/02/05/drug-courts-suboxone_n_6625864.html) (accessed August 21, 2016); Substance Abuse and Mental Health Services Administration, “SAMHSA Treatment Drug Courts: Request for Applications, Part 1,” 2015, <http://www.samhsa.gov/sites/default/files/grants/pdf/ti-15-002-modified-due.pdf> (accessed August 21, 2016), pp. 9-10.

## XI. The Way Forward: A Call for Decriminalization

Human Rights Watch and the American Civil Liberties Union call upon the US federal and state governments to decriminalize all drug use and possession of drugs for personal use. Decriminalization of drug use and possession for personal use means the complete removal of criminal sanctions for use and possession.<sup>570</sup>

We are not alone in this call. A number of human rights and public health bodies have urged states to decriminalize. These bodies include the World Health Organization, the United Nations Office of the High Commissioner for Human Rights, the Joint United Nations Programme on HIV/AIDS (UNAIDS), the Organization of American States, the International Federation of the Red Cross and Red Crescent Societies, the Global Commission on Drug Policy, and the American Public Health Association.<sup>571</sup> In April 2016 the United Nations General Assembly held a Special Session (UNGASS) on the World Drug Problem, to convene a global debate about the costs of the current prohibitionist framework for dealing with drugs.<sup>572</sup> In advance of the session, several UN special rapporteurs issued a

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<sup>570</sup> As explained in the methodology section, decriminalization would still leave room for civil and administrative sanctions such as monetary fines. There are strong arguments in favor of depenalization as well. One step further beyond depenalization is legalization, in which a state taxes and regulates rather than prohibits, as all US states do with alcohol.

<sup>571</sup> See World Health Organization, “Policy brief: H.I.V. prevention, diagnosis, treatment and care for key populations: consolidated guidelines July 2014,” (Geneva: World Health Organization, 2014), [http://apps.who.int/iris/bitstream/10665/128048/1/9789241507431\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/128048/1/9789241507431_eng.pdf) (accessed June 21, 2016), p. 91; United Nations High Commissioner for Human Rights, “Study on the Impact of the World Drug Problem on the Enjoyment of Human Rights,” September 4, 2015, [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A\\_HRC\\_30\\_65\\_E.docx](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A_HRC_30_65_E.docx) (accessed June 21, 2016); Joint United Nations Programme on HIV/AIDS (UNAIDS), “The Gap Report,” July 10, 2014, [http://files.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2014/UNAIDS\\_Gap\\_report\\_en.pdf](http://files.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2014/UNAIDS_Gap_report_en.pdf) (accessed June 21, 2016); Organization of American States, “The Drug Problem in the Americas: Analytical Report,” 2013, [http://www.oas.org/documents/eng/press/introduction\\_and\\_analytical\\_report.pdf](http://www.oas.org/documents/eng/press/introduction_and_analytical_report.pdf) (accessed June 21, 2016); International Federation of Red Cross and Red Crescent Societies, Statement to the United Nations Commission on Narcotic Drugs, 55th Session, <http://www.ifrc.org/en/news-and-media/opinions-and-positions/speeches/2012/to-the-commission-on-narcotic-drugs-55th-session/> (accessed June 21, 2016); Global Commission on Drug Policy, “Taking Control: Pathways to Drug Policies That Work,” 2014, <http://www.gcdpsummary2014.com/> (accessed June 21, 2016).

In the United States, the American Public Health Association has called to “eliminate federal and state criminal penalties and collateral sanctions for personal drug use and possession offenses and avoid unduly harsh administrative penalties, such as civil asset forfeiture.” American Public Health Association, “A.P.H.A. Policy Statement 201312: Defining and Implementing a Public Health Response to Drug Use and Misuse,” 2013.

<sup>572</sup> See Special Session of the United Nations General Assembly on the World Drug Program (UNGASS 2016), <https://www.unodc.org/ungass2016/en/about.html>.

joint letter urging decriminalization and depenalization of drug use and possession.<sup>573</sup>

Decriminalization is not an untested proposition. A number of countries around the world do not criminalize drug use or possession for personal use under the law, or do not enforce criminal laws in practice. For example, personal drug use and possession are not criminalized by law in Portugal, Spain, the Czech Republic, and Costa Rica.<sup>574</sup> As examined below, Portugal's decriminalization of all drugs in 2001, and the more recent experience of marijuana decriminalization in many states across the United States, provide forays into the decriminalization space and show that harms from drug use have not increased as a result. To the contrary, Portugal's model reveals that decriminalization may actually protect and promote health much more effectively than a criminal justice approach: for example, Portugal has seen decreased rates of overdose deaths.

While not breaking with the current criminalization framework, the Obama Administration has articulated some understanding of the need for alternatives and reforms. In its non-paper for the 2016 UNGASS, the US government recommended that the summit's outcome document "declare that people who use drugs should receive support, treatment and protection, rather than be punished" and "encourage the consideration of alternatives to incarceration and other criminal-justice reform for drug-related offenses."<sup>575</sup> Michael Botticelli, director of the White House Office of National Drug Control Policy, has

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<sup>573</sup> Joint Open Letter by the UN Working Group on Arbitrary Detention; the Special Rapporteurs on extrajudicial, summary or arbitrary executions; torture and other cruel, inhuman or degrading treatment or punishment; the right of everyone to the highest attainable standard of mental and physical health; and the Committee on the Rights of the Child, on the occasion of the United Nations General Assembly Special Session on Drugs, April 15, 2016.

<sup>574</sup> Steve Rolles and Niamh Eastwood, "Drug Decriminalisation Policies in Practice: A Global Summary," September 2012, [https://www.hri.global/files/2012/09/04/Chapter\\_3.4\\_drug-decriminalisation\\_.pdf](https://www.hri.global/files/2012/09/04/Chapter_3.4_drug-decriminalisation_.pdf) (accessed September 7, 2016), pp. 161-162; The Law Library of Congress, Global Legal Research Center, "Decriminalization of Narcotics," July 2016, <https://www.loc.gov/law/help/decriminalization-of-narcotics/decriminalization-of-narcotics.pdf> (accessed September 6, 2016); Tomáš Zábranský et al., "Impact Analysis Project of New Drugs Legislation: Summary Final Report," Office of the Czech Government, Secretariat of the National Drug Commission, 2001, [http://www.druglawreform.info/images/stories/documents/Czech\\_evaluation\\_2001\\_PAD\\_en.pdf](http://www.druglawreform.info/images/stories/documents/Czech_evaluation_2001_PAD_en.pdf) (accessed September 5, 2016). For more on other countries that have instituted a decriminalization model, see Niamh Eastwood, Edward Fox, and Ari Rosmarin, "A Quiet Revolution: Drug Decriminalisation Across the Globe," Release, March 2016, <http://www.release.org.uk/sites/default/files/pdf/publications/A%20Quiet%20Revolution%20-%20Decriminalisation%20Across%20the%20Globe.pdf> (accessed July 26, 2016).

<sup>575</sup> Human Rights Watch, *Comments on the US Non-Paper for 2016 UNGASS on the World Drug Problem*, August 24, 2015, <https://www.hrw.org/news/2015/08/24/comments-us-non-paper-2016-ungass-world-drug-problem>.

emphasized public health approaches to problematic drug use.<sup>576</sup> And in its 2017 budget request, the Obama Administration increased the amounts for prevention and treatment programs, so that, in Botticelli's words, the government would for the first time be "funding public health and public safety efforts at near-identical levels."<sup>577</sup> Decriminalization, coupled with strong investment in harm reduction measures, is best placed to achieve these important public health goals.

## Portugal's Successful Decriminalization of All Drugs

In 2001, Portugal decriminalized the acquisition, use, and possession of illicit drugs in quantities up to a 10-day supply. Drug trafficking and sales still remain criminal offenses and are still prosecuted, but the person who uses is not criminalized.<sup>578</sup>

Importantly, Portugal did not simply decriminalize personal use and possession; it invested substantial resources into treatment and harm reduction services as well. Under the Portuguese model, when police find people in possession of drugs, they give them an administrative violation ticket, akin to a traffic ticket in the US. The person is then required to meet with a commission, made up of a social worker, a medical professional, and a lawyer, that is designed to respond to any health needs. If the person is drug dependent, the commission makes a referral to a treatment program where attendance is voluntary. If the person is not drug dependent, usually nothing more than payment of the fine is required. Criminal sanctions are never imposed for personal use or low-level possession.<sup>579</sup>

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<sup>576</sup> See, for example, Michael Botticelli, "Remarks to the Plenary Session of the 59th UN Commission on Narcotic Drugs," March 14, 2016, as prepared for delivery, <https://www.whitehouse.gov/the-press-office/2016/03/14/ondcp-director-michael-botticelli-remarks-plenary-session-59th-un> (accessed July 31, 2016).

<sup>577</sup> The White House, "Fact Sheet: Administration's Drug Control Budget Represents Balanced Approach to Public Health and Public Safety," February 9, 2016, <https://www.whitehouse.gov/the-press-office/2016/02/09/fact-sheet-administrations-drug-control-budget-represents-balanced> (accessed July 20, 2016); Office of National Drug Control Policy, "National Drug Control Budget: FY 2017 Funding Highlights," February 2016, [https://www.whitehouse.gov/sites/default/files/ondcp/press-releases/fy\\_2017\\_budget\\_highlights.pdf](https://www.whitehouse.gov/sites/default/files/ondcp/press-releases/fy_2017_budget_highlights.pdf) (accessed July 20, 2016).

<sup>578</sup> Law No. 30/2000 of November 29, entered into effect on July 1, 2001. See also Glenn Greenwald, *Drug Decriminalization in Portugal: Lessons for Creating Fair and Successful Drug Policies*, The Cato Institute, April 2, 2009, <http://www.cato.org/publications/white-paper/drug-decriminalization-portugal-lessons-creating-fair-successful-drug-policies> (accessed June 21, 2016).

<sup>579</sup> Ibid. See also Drug Policy Alliance, *Drug Decriminalization in Portugal: A Health-Centered Approach*, February 2015, [https://www.drugpolicy.org/sites/default/files/DPA\\_Fact\\_Sheet\\_Portugal\\_Decriminalization\\_Feb2015.pdf](https://www.drugpolicy.org/sites/default/files/DPA_Fact_Sheet_Portugal_Decriminalization_Feb2015.pdf) (accessed June 17, 2016); Open Society Foundations, *Drug Policy in Portugal: Decriminalizing Drug Use*, June 2011, <https://www.opensocietyfoundations.org/sites/default/files/drug-policy-in-portugal-english-20120814.pdf> (accessed June 17, 2016); Carl Hart, *High Price: A Neuroscientist's Journey of Self-Discovery That Challenges Everything You Know About Drugs and Society*, (New York: Harper Perennial, 2012), pp. 324-325.

The results of Portugal's decriminalization so far indicate that public safety is much better served by a public health rather than criminal justice response to problematic drug use.<sup>580</sup> According to a 2010 evaluation,<sup>581</sup> rates of overall use in the population have stayed low—below the European average, and far lower than rates in the United States—while use by adolescents and use by people deemed to be drug dependent or who inject has declined. More than 80 percent of cases before the commissions are deemed non-problematic and dismissed without sanction. The number of people receiving drug treatment jumped by more than 60 percent after decriminalization. Deaths caused by drug overdoses decreased from 80 deaths in 2001 to 16 deaths in 2012.<sup>582</sup> Decriminalization has also not triggered so-called “drug tourism,” a 2009 UN study found.<sup>583</sup> According to Fernando Negrão, a former police chief and then-head of Portugal's Institute on Drugs and Drug Addiction, “There were fears Portugal might become a drug paradise, but that simply didn't happen.”<sup>584</sup>

In 2014 researchers studied changes in the social cost of drug use in Portugal, which they defined as “a sum of public expenditure on drugs, private costs (incurred by individuals who use drugs) and costs incurred by society (indirect costs, such as lost productivity).”<sup>585</sup> They found that the per capita social cost of drug use decreased an overall 18 percent since decriminalization. The study authors attribute this decrease largely to the reduction in legal system costs associated with criminalizing drug use and to savings in health-related costs resulting from decreased problematic drug use.<sup>586</sup>

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<sup>580</sup> Caitlin Elizabeth Hughes and Alex Stevens, “What Can We Learn from the Portuguese Decriminalization of Illicit Drugs?” *British Journal of Criminology*, vol. 50, no. 6 (2010).

<sup>581</sup> This evaluation was the first on Portugal's decriminalization to appear in an English peer-reviewed journal and was based on examination, over a period of years, of all the available Portuguese evaluative documents as well as a range of interviews. Ibid.

<sup>582</sup> Ibid; Drug Policy Alliance, *Drug Decriminalization in Portugal: A Health-Centered Approach*.

<sup>583</sup> United Nations Office on Drugs and Crime, “World Drug Report 2009,” p. 168. [https://www.unodc.org/documents/wdr/WDR\\_2009/WDR2009\\_eng\\_web.pdf](https://www.unodc.org/documents/wdr/WDR_2009/WDR2009_eng_web.pdf) (accessed June 17, 2016).

<sup>584</sup> Quoted in Alison Roberts, “How Portugal Dealt with Drug Reform,” BBC News, January 22, 2004, <http://news.bbc.co.uk/2/hi/europe/3421523.stm> (accessed June 17, 2016).

<sup>585</sup> Ricardo Goncalves, Ana Lourenco, and Sofia Nogueira da Silva, “A Social Cost Perspective in the Wake of the Portuguese Strategy for the Fight against Drugs,” *International Journal of Drug Policy*, vol. 26 (February 2015).

<sup>586</sup> Ibid.



## US States' Experiments with Marijuana Decriminalization

In the United States, four states and the District of Columbia have legalized possession of marijuana for personal use by persons 21 and older. In November 2012 Colorado and Washington became the first states to pass laws legalizing personal possession and regulating marijuana production, distribution, and sales. Voters in Alaska, Oregon, and the District of Columbia followed suit in 2014. An additional 11 states have completely decriminalized personal marijuana possession, at least formally,<sup>587</sup> treating it merely as an administrative or civil infraction, much like a traffic ticket.<sup>588</sup> Five more states treat marijuana possession as a fine-only misdemeanor.<sup>589</sup> Because no jail time attaches, some advocates consider these five states to have decriminalized as well.<sup>590</sup>

In 2013, the US Department of Justice gave the go-ahead for state-level decriminalization of marijuana, issuing guidance to federal prosecutors not to interfere with states' implementation of laws legalizing marijuana, so long as they do not interfere with certain federal priorities. In fact, the deputy attorney general noted that a regulated marijuana

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<sup>587</sup> For states that still criminalize marijuana possession "in public view," enforcement can still be harsh and widespread, and sometimes rights violative. For example, in New York City, very often marijuana possession was "in public view" only after police officers unlawfully pulled it out of the person's pocket. Harry C. Levine and Loren Siegel, "Marijuana Madness: The Scandal of New York City's Racist Marijuana Possession Arrests," in John A. Eterno, ed., *The New York City Police Department: The Impact of Its Policies and Practices* (New York: CRC Press, 2015).

<sup>588</sup> These states are California (CA Health & Safety Code sec. 11357), Connecticut (CT Gen. Stat. sec. 21a-279), Delaware (16 DE C. secs. 4714, 4764), Maine (17-A M.R.S. secs. 1102, 1107-A; 22 M.R.S. sec. 2383), Maryland (MD Crim. Law Code Ann. secs. 5-402, 5-601), Massachusetts (ALM GL ch. 94C secs. 32L, 34), Mississippi (MS Code Ann. sec. 41-29-139), Nebraska (RRS NE sec. 28-416), New York (NY CLS Penal secs. 221.05, 221.10), Rhode Island (RI Gen. Laws sec. 21-28-4.01), and Vermont (18 VSA sec. 4230). Each of these states has a certain weight threshold up to which possession is decriminalized. Of the 15, five states have thresholds between 10 and 15 grams (Connecticut, Maryland, North Carolina, Rhode Island, and Vermont), seven states have thresholds between 25 and 30 grams (California, Delaware, Massachusetts, Mississippi, Nebraska, Nevada, and New York), and three states have thresholds between 40 and 100 grams (Maine, Minnesota, and Ohio). Additionally, Connecticut, Mississippi, Nebraska, New York, and Vermont treat subsequent instances of possession more harshly, increasing fines and sometimes imposing jail sentences. Furthermore, in some of these states, possession or use of marijuana in public view is still criminalized. See, for example, the experience of New York City in Harry C. Levine and Loren Siegel, "Marijuana Madness: The Scandal of New York City's Racist Marijuana Possession Arrests," in John A. Eterno, ed., *The New York City Police Department*, p. 127.

<sup>589</sup> These states are Minnesota (MN Stat. secs. 152.025, 152.027), Missouri (MO Rev. Stat. secs. 195.017, 195.202), Nevada (NV Rev. Stat. Ann. secs. 193.140, 453.336, 453.411), North Carolina (NC Gen. Stat. secs. 15A-1340.23, 90-95), and Ohio (ORC Ann. sec. 2925.11).

<sup>590</sup> See Drug Policy Alliance, "Why Marijuana Decriminalization is Not Enough," February 10, 2016, <http://www.drugpolicy.org/resource/why-marijuana-decriminalization-not-enough> (accessed June 17, 2016); NORML, "States That Have Decriminalized," (undated) <http://norml.org/aboutmarijuana/item/states-that-have-decriminalized> (accessed June 17, 2016). However, if people still have a criminal record for the misdemeanor, it is not true decriminalization.

market may further federal priorities of combatting organized crime.<sup>591</sup> The federal government should take the same approach with regard to other drugs, allowing states the freedom to develop and experiment with new models of decriminalization.

States that have legalized marijuana have realized substantial cost savings and created new revenue. For example, one year after retail sales began, tax revenue from marijuana reached \$41 million in Colorado and almost \$83 million in Washington State, along with considerable revenues from licenses and fees. There was no increase in violent crime or traffic fatalities following legalization.<sup>592</sup> There was also no reported increase in rates of marijuana use among children.<sup>593</sup>

Although trend lines in the states that have recently decriminalized are still taking shape, there are millions of dollars to be saved simply by not making arrests. The American Civil Liberties Union has estimated that in 2010 the annual fiscal cost of marijuana possession enforcement in the United States was \$3.614 billion for police, judicial and legal, and corrections expenditures and that an average misdemeanor arrest cost, at minimum, between \$1,000 and \$2,000.<sup>594</sup> In 2015, there were approximately 574,640 arrests for

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<sup>591</sup> US Department of Justice, Memorandum from James M. Cole, *Guidance Regarding Marijuana Enforcement*, August 29, 2013, <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (accessed June 18, 2016); Human Rights Watch, “US: Federal Go-Ahead for Local Marijuana Laws,” August 30, 2013, <https://www.hrw.org/news/2013/08/30/us-federal-go-ahead-local-marijuana-laws> (accessed June 18, 2016). See Carrie Johnson, “DEA Rejects Attempt To Loosen Federal Restrictions On Marijuana,” NPR, August 10, 2016, <http://www.npr.org/2016/08/10/489509471/dea-rejects-attempt-to-loosen-federal-restrictions-on-marijuana> (accessed August 12, 2016).

<sup>592</sup> In fact, the rates in both states declined. Drug Policy Alliance, “Marijuana Legalization in Washington After 1 Year of Retail Sales and 2.5 Years of Legal Possession,” July 6, 2015, [http://www.drugpolicy.org/sites/default/files/Drug\\_Policy\\_Alliance\\_Status\\_Report\\_Marijuana\\_Legalization\\_in\\_Washington\\_July2015.pdf](http://www.drugpolicy.org/sites/default/files/Drug_Policy_Alliance_Status_Report_Marijuana_Legalization_in_Washington_July2015.pdf) (accessed June 6, 2016); Drug Policy Alliance, “Marijuana Legalization in Colorado After One Year of Retail Sales and Two Years of Decriminalization,” January 5, 2015, [http://www.drugpolicy.org/sites/default/files/Colorado\\_Marijuana\\_Legalization\\_One\\_Year\\_Status\\_Report.pdf](http://www.drugpolicy.org/sites/default/files/Colorado_Marijuana_Legalization_One_Year_Status_Report.pdf) (accessed June 17, 2016).

<sup>593</sup> Ibid. See also Seth Ammerman, Sheryl Ryan, William P. Adelman, “The Impact of Marijuana Policies on Youth: Clinical, Research, and Legal Update,” *American Academy of Pediatrics*, March 2015, vol. 135, issue 3, <http://pediatrics.aappublications.org/content/135/3/e769.full-text.pdf> (“Decriminalization of recreational use of marijuana by adults has also not led to an increase in youth use rates of recreational marijuana”); Colorado Department of Education, Colorado Department of Public Health and Environment, Colorado Department of Human Services-Office of Behavioral Health, “Healthy Kids Colorado Survey,” 2015, [https://www.colorado.gov/pacific/sites/default/files/PF\\_Youth\\_HKCS-2015-Exec-Summary.pdf](https://www.colorado.gov/pacific/sites/default/files/PF_Youth_HKCS-2015-Exec-Summary.pdf) (“Four out of five Colorado high school students have not used marijuana in the last 30 days, a rate that remains relatively unchanged since 2013. Colorado does not significantly differ from the national average in lifetime or current marijuana use”).

<sup>594</sup> American Civil Liberties Union, *The War on Marijuana in Black and White*, p. 75, 71.

marijuana possession nationwide, more arrests than for all violent crimes combined.<sup>595</sup> This translates into approximately one marijuana possession arrest every 55 seconds, or over \$1,000 spent every minute.

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<sup>595</sup> Federal Bureau of Investigation, 2015 Crime in the United States, Persons Arrested, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/persons-arrested/persons-arrested> (accessed September 27, 2016).

## Recommendations

The central recommendation of this report is that the US Congress and state legislatures end the criminalization of personal use of drugs and possession of drugs for personal use. This will require changes to federal and state law.

In the interim, within the existing legal framework, government officials at the local, state, and federal levels should adopt the recommendations listed below to minimize the imposition of criminal punishment on people who use drugs and to mitigate the harmful collateral consequences and social and economic discrimination experienced by those convicted of drug possession and by their families and communities. At the same time, officials should ensure that education on the risks and potential harms of drug use and affordable, evidence-based treatment for drug dependence are available outside of the criminal justice system.

### To State Legislatures

Decriminalize the personal use and possession for personal use of all drugs. Until decriminalization has been achieved, pursue the following:

- Make drug possession a ticketable offense or, at the very least, a misdemeanor, regardless of the nature of the drug, drug quantity or weight, and number of prior convictions.
- Establish a strong presumption for personal recognizance (PR) bonds/release on own recognize (RORs) where drug possession or paraphernalia are the top or only charges.
- Establish a strong presumption of non-incarceration sentences for drug possession. End mandatory minimum sentence schemes to restore to judges the ability to impose proportionate sentences in all drug possession cases.
- Amend habitual offender laws to exclude drug possession entirely, such that 1) possession charges cannot be enhanced based on prior convictions, and 2) possession convictions cannot be used to enhance another charge.
- Support a public health approach to drug use to minimize the adverse consequences of drug use, to reduce drug dependence, and to support safe

habits around drug use and increased access to emergency care, including syringe exchange programs, Good Samaritan legislation, standing orders for naloxone, and other harm reduction measures. Appropriate sufficient funds to provide access to voluntary, affordable drug treatment programs, in the community as well as in correctional facilities, for all who seek it.

- Appropriate sufficient funds to enable public defender offices and appointed counsel to zealously represent all criminal defendants who cannot secure other representation.
- Provide sufficient funding to courts to eliminate their reliance on user fees, which incentivizes the imposition of crippling fees, court costs, and assessments on poor people sentenced for drug offenses.
- Enact legislation or regulations to substantially limit the circumstances in which the use or possession for personal use of drugs is grounds for the revocation of pretrial supervision, probation, or parole.
- Amend state statutes so that no adverse consequences attach by law to convictions for drug possession, including for SNAP, TANF, and subsidized-housing benefits.
- If not already in place, pass “ban the box” measures for government employment. Pass laws prohibiting private employers and landlords from discriminating on the basis of drug possession convictions.
- Mandate and fund data systems to track—by race, age, drug, and location—arrests and convictions for drug possession, while being careful to protect individual privacy rights.
- Include a retroactivity provision in all future reforms to drug use and possession laws, and, to the extent possible, apply the terms of already enacted reforms to decrease the drug sentences of individuals sentenced for the same offenses prior to the reforms.

## To Sheriffs and Police

To the extent permitted by law and by limits on the appropriate exercise of discretion, decline to arrest individuals for personal use of drugs, including on possession and paraphernalia charges. Even if there are legal grounds to believe that a person is in possession of drugs for personal use, to the extent permitted by law decline to conduct

searches for drugs with the purpose or intent of finding drugs that would warrant nothing more than possession charges. Until then, if stops, frisks, searches, or arrests for drug possession are made, pursue the following:

- Charge individuals with the lowest-level offense supported by the facts, for example, paraphernalia instead of possession.
- Do not measure officer or department performance based on stop or arrest numbers, and do not set quotas or provide incentives for numbers of stops, frisks, searches, or arrests.
- Work in conjunction with community members, drug treatment specialists, and mental health professionals to explore alternatives to arrest. Incentivize/reward officer actions that prioritize the health and safety of people who use drugs.
- Adopt model consent search policies that include requiring police to have reasonable suspicion before seeking consent, and, irrespective of the outcome of the search, requiring officers to provide a “receipt” documenting the interaction. Require officers to specifically advise civilians of the potential perils of consenting to search and their right to decline consent, and require officers to secure written, audio recorded, or video recorded consent prior to conducting a consent search.
- On a regular basis, analyze and publish data on all consensual or non-consensual stops, frisks, searches, observations, and interviews. The published data should be broken down by race, gender, age, and the officer’s basis for the encounter or action.

## **To State Prosecutors**

Whenever possible, decline to bring charges related to personal use of drugs, including possession and paraphernalia charges. If charges are brought, pursue the following.

To the extent permitted by law and by limits on the appropriate exercise of discretion, chief prosecutors should institute office policies that direct prosecutors to:

- Refrain from prosecuting trace or residue cases and from applying habitual offender laws to drug possession cases or using possession priors for enhancements.

- Seek only those charges that would yield a fair and proportionate sentence for each individual defendant in light of the facts known about that defendant. For plea deals, explicitly prohibit prosecutors from: 1) threatening higher sentences to secure pleas from drug defendants and 2) amending the charge or seeking enhancements to raise the sentence faced by a defendant solely because the defendant refused to plead guilty.
- Increase data collection and transparency regarding: 1) charges brought for arrests for possession, 2) cases filed as possession, 3) cases filed as another charge but disposed as possession, 4) cases in which the habitual offender law was used in connection with a possession case, as either a prior or an enhanced charge, and 5) the numbers of possession defendants held in pretrial detention for failure to make bail.

To the extent permitted by law and by limits on the appropriate exercise of discretion, individual prosecutors should:

- Use lesser charges such as paraphernalia instead of possession charges where the facts or law support it.
- Cease to prosecute trace or residue cases and cases concerning fractions of a gram.
- Recommend bail be set in unsecured or partially secured bonds. Do not request bail at an amount that a person is unable to pay. Do not press for bail in a form or amount that is higher than reasonably necessary to ensure court appearance or that is likely to result in the defendant's pretrial detention.
- In prescription pill cases, ensure every opportunity for investigation into the existence of a valid prescription has been taken, and consider declining to prosecute such cases where the quantity of pills is small.
- Cease to prosecute possession with intent to distribute based only on circumstantial evidence of cash present and/or large quantities of drugs, if those quantities reasonably could have been bought in bulk for personal use.
- Do not charge distribution or possession with intent to distribute, or threaten to so charge, to obtain a simple possession plea. Where the evidence available to the prosecutor suggests possession is for personal use only, do not charge higher.

- Cease the practice of seeking habitual offender enhancements for drug possession charges. Do not allow drug possession priors to serve as predicates for enhancement of other charges. Ensure that defendants are aware of this in plea negotiations.
- Ensure all collateral consequences of a drug conviction, including for immigration, are given appropriate consideration in plea negotiations and applications for post-conviction relief.
- Refrain from negotiating plea deals with drug possession defendants who have not yet been appointed counsel.

## To State Judges and Judiciaries

To the extent permitted by law and by limits on the appropriate exercise of discretion:

- Eliminate the use of bond schedules for all offenses related to drug use, including possession and paraphernalia.
- Appoint counsel as soon as possible following arrest.
- Except in extraordinary circumstances, release defendants on their own recognizance if they are charged with nothing more than drug possession. Do not detain a person simply based on roadside drug test results, if a laboratory has not yet tested the drugs. If bond must be set, use discretionary authority under current law to set bond in forms and amounts that defendants can afford, eliminating money bail wherever possible and imposing the least restrictive conditions to ensure public safety and future court appearance. Ensure no defendant charged with possession is detained pretrial for inability to pay or post bond.
- Impose non-incarceration sentences for drug possession. Sentence defendants at the bottom of the range and depart downward from statutory minimums as permitted by state law.
- Do not revoke probation or parole for drug use or for technical violations related to drug dependence or poverty.
- Ensure no fees for appointed counsel or other court fees are imposed on people who are adjudged indigent. Ensure no person is incarcerated for inability to pay court fines or fees.



- Increase data collection and transparency regarding case outcomes and sentences for cases charged as drug possession and, where different, for cases disposed as drug possession.
- Require probation and parole officers to generate pre-sentence reports for all drug possession cases and to include a collateral consequences section.
- To the extent drug courts are employed, defer to drug treatment specialists on all clinical questions. Treatment offered through drug courts should be consistent with current best practice recommendations and include medication-assisted therapy for people with opioid dependence. Participants should never be failed from the program or sanctioned with jail time solely on the basis of behavior that is a normal part of their medical condition, including relapses and failed drug tests.

## **To State Probation Officers and Parole Boards**

To the extent permitted by law and by limits on the appropriate exercise of discretion:

- Do not charge a person on probation with a technical violation for using drugs or for possessing drugs for personal use, especially where there may be drug dependence involved.
- Where a legal reform has decreased the sentences for certain offenses but has not made the decreases retroactive, consider the newly decreased sentence when determining an existing inmate's parole eligibility.

## **To State Departments of Corrections and Local Jail Administrators**

- Ensure timely access to HIV prevention services and evidence-based drug treatment, including access to medication-assisted therapies, such as buprenorphine and methadone treatment, for inmates with opioid dependence.

## **To Other Local Government Entities**

- Enact ban-the-box laws for public and private employers and landlords and take other appropriate action to prohibit them from discriminating on the basis of a drug possession conviction.

- Design and implement public health initiatives to decrease the risks and potential harms of drug use and ensure affordable voluntary treatment and education for those who seek it.

## To the Federal Government

### *Congress*

Decriminalize the personal use of drugs, as well as possession of drugs for personal use.

Until then, pursue the following:

- Appropriate sufficient funds to support evidence-based voluntary treatment options and harm reduction services in the community.
- Amend federal statutes so that no adverse consequences attach by law to convictions for drug possession, including for SNAP, TANF, and subsidized-housing.
- Eliminate deportation based on convictions for simple drug possession, and amend the drug offense bars to entering the US and gaining lawful permanent resident status so that individuals are not barred for simple possession of drugs.

### *Department of Justice*

- Provide training and clarification to state law enforcement agencies that federal funding programs, such as those administered by the Bureau of Justice Assistance, do not encourage or incentivize high numbers of arrests for drug possession and that arrest numbers are not a valid measure of law enforcement performance.
- Condition any federal funding to law enforcement agencies on their enforcing a ban on racial profiling and documenting their pedestrian and traffic stops, arrests, and searches by race, ethnicity, and gender, designating money for data collection if needed.
- Direct the Bureau of Justice Statistics to report on racial disparities in arrests, pretrial detention, incarceration sentences, and probation and parole for drug possession cases nationwide, rather than classifying all offenses as “trafficking” or “other.”

- Direct the Federal Bureau of Investigation to immediately begin keeping data on Latinos arrested as part of the Uniform Crime Reports, rather than classifying them as either white or Black.
- Direct the Drug Enforcement Agency to remove marijuana from the list of “schedule I” controlled substances under federal law, which is the most restricted category of illicit drugs.

#### *Department of Health and Human Services*

- Fund and encourage programs, including pilot programs, emphasizing public health approaches to drug use.

#### *Department of Housing and Urban Development*

- Amend HUD guidelines to take drug possession out of the “One Strike” policy. Communicate to all public housing authorities (PHAs) and section 8 landlords that receive HUD subsidies that drug possession or use convictions should not be a bar to admission or a ground for eviction.
- Work with the Department of Health and Human Services to provide resources to PHAs and section 8 landlords on the availability of drug treatment in the community for those tenants who seek it.

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# EVERY 25 SECONDS

## The Human Toll of Criminalizing Drug Use in the United States

Every 25 seconds someone in the United States is arrested for possessing drugs for personal use. This amounts to more than 1.25 million arrests per year and makes drug possession the single most arrested crime in the country. Black and white adults use drugs at similar rates, but a Black adult is 2.5 times more likely to be arrested for drug possession.

As a result of these arrests, on any given day at least 137,000 people are behind bars. Tens of thousands more are convicted, cycle through jails and prisons, and spend extended periods on probation and parole, often burdened with crippling debt from court-imposed fines and fees.

*Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States* documents the devastating harms caused by enforcement of drug possession laws. This joint report by Human Rights Watch and the American Civil Liberties Union is based on extensive new analysis of federal and state-level data, and over 365 interviews conducted primarily in Louisiana, Texas, Florida, and New York.

Members of the public understandably want government to take actions to prevent the potential harms of drug use. Yet criminalization is not the answer. Four decades after the declaration of the “war on drugs,” rates of drug use have not significantly decreased and treatment for drug dependence is often unavailable. Instead, criminalizing drug possession has caused tremendous harm—separating families; excluding people from job opportunities, public benefits, and voting; and exposing them to discrimination.

Human Rights Watch and the ACLU urge federal and state authorities to end these harms by decriminalizing personal use and possession of all drugs. The report also provides detailed recommendations authorities should follow to minimize the harmful consequences of current laws and policies, until decriminalization is achieved.

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