

CRUEL AND UNUSUAL

U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT



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EXECUTIVE SUMMARY

“Our resources are misspent, our punishments too severe, our sentences too long.”

U.S. Supreme Court Justice Anthony Kennedy¹

In the United States, people who are found in possession of drugs, a non-violent offense, can be sentenced to die behind bars.² A person can get a 25 year to life sentence for stealing golf clubs if he has committed two previous offenses,³ or a life sentence if he has stolen small sums of money three times.⁴ A person can get a series of consecutive sentences for each of the component parts of his conduct, such as counting each child pornography file as a separate offense, resulting in a 150 year sentence, much longer than if that person had actually molested a child.⁵ A person who sells a handful of drugs can face a mandatory sentence of 15 years.⁶ In many states, a child can be prosecuted at any age, tried as an adult, and sentenced to life without parole.⁷ U.S. law allows the same defendant to face prosecution twice, by both the federal and state government.⁸ And even if legislators decide to enact laws that lighten sentences, the new law does not automatically apply to prisoners already serving their sentences.⁹

All of these sentencing practices—life without the possibility of parole, “three strikes” laws, consecutive sentences, mandatory minimums, juvenile justice laws, dual sovereignty, and non-retroactive application of ameliorative law—are used frequently in the United States in ways they are not in the rest of the world. These American practices, focused on goals of

1 U.S. Supreme Court Justice Anthony Kennedy, Address at American Bar Association Annual Meeting (Aug. 9, 2003) (transcript available at <http://www.abanow.org/2003/08/speech-by-justice-anthony-kennedy-at-aba-annual-meeting/>).

2 Harmelin v. Michigan, 501 U.S. 957 (1991). The Supreme Court upheld a life without parole sentence for simple possession of a little more than a pound of cocaine, a non-violent offense. The case involved Michigan’s “650 Lifer Law,” which made LWOP mandatory for any offender possessing more than 650 grams of cocaine or heroin. The law resulted in overcrowding in prisons, requiring many to be granted commutations by the state’s governor.

3 Ewing v. California, 538 U.S. 11 (2003). Ewing was convicted of felony grand theft for stealing three golf clubs, worth \$399 a piece. Because Ewing had been convicted previously of four felonies, he received a 25 years to life sentence pursuant to California’s three strikes law.

4 Rummel v. Estelle, 445 U.S. 263 (1980). The defendant was convicted in Texas for two felonies (fraudulent use of a credit card to obtain \$80 worth of goods or services, and passing a forged check in the amount of \$28) and was convicted of a third felony, obtaining \$121 by false pretenses, and received a mandatory life sentence under Texas’s recidivist statute.

5 Jacob Carpenter, *East Naples Man’s Life Sentence for Child Porn Too Harsh, Attorney Says*, NAPLES NEWS, Nov. 3, 2011, <http://www.naplesnews.com/news/2011/nov/03/east-naples-mans-life-sentence-child-porn-too-hars/>.

6 Testimony of Michelle Collette, (Sep. 20, 2011), <http://www.famm.org/Repository/Files/COLLETTE%20TESTIMONY%209-20-11.pdf> (last accessed April 3, 2012). Arrested in Massachusetts in possession of 607 Percocet pills, a prescription painkiller, Collette faced a 15-year minimum under Massachusetts’ mandatory minimum for drug trafficking.

7 Graham v. Florida, 130 S.Ct. 2011, 2026 (2010). The Court noted that “even a 5-year-old, theoretically” could be prosecuted criminally. The word “theoretically” denotes that prosecutors refraining from prosecuting juveniles of especially young age is a matter of practice rather than law. Although criminal prosecutions of very young offenders may not be practiced currently, the lack of statutory definitions of age of criminal responsibility could permit this practice to change over time.

8 Bartkus v. Illinois, 359 U.S. 121, 124, 128-129 (1959); Abbate v. United States, 359 U.S. 187 (1959).

9 1 U.S.C.A. § 109 (West 2012); S. David Mitchell, *In with the New, Out with the Old: Expanding the Scope of Retroactive Amelioration*, 37 AM. J. CRIM. L. 1, 5 (2009).

deterrence and retribution, neglect the possibility of rehabilitation. Meanwhile, international human rights law places social rehabilitation and reformation as the aims of any penitentiary system. The International Covenant on Civil and Political Rights, a human rights treaty that the United States has signed and ratified, says, “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”¹⁰ By ratifying this document, the United States has agreed that it will uphold this basic human right.

Despite this obligation, the United States is an outlier among countries in its sentencing practices. The U.S. is among the minority of countries (20%) known to researchers as having life without parole (LWOP) sentences. The vast majority of countries that do allow for LWOP sentences have high restrictions on when they can be issued, such as only for murder or for two or more convictions of life sentence-eligible crimes. The number of prisoners serving LWOP sentences is more than 41,000 in the United States.¹¹ In contrast, there are 59 serving such sentences in Australia,¹² 41 in England,¹³ and 37 in the Netherlands.¹⁴ The size of the U.S.’s LWOP population dwarfs other countries’ on a per capita basis as well; it is 51 times Australia’s, 173 times England’s, and 59 times the Netherlands’.¹⁵

Recidivism statutes in the United States allow a person with multiple convictions to be given lengthy sentences. While many countries take past criminal history into account for sentencing, very few of them apply a blanket punishment that is as harsh as those used in the United States, where 3,700 people who have never committed a violent crime are serving 25 years to life in California alone.¹⁶

A systemic problem in the United States is that courts have not considered consecutive sentencing, or punishing one wrong as if it were two or more, as a major problem.¹⁷ As a result, they have not offered comprehensive remedies or established clear lines on when sentences should be consecutive or concurrent. Only 21% of countries around the world, including the United States, allow uncapped consecutive sentences for multiple crimes arising out of the same act.

Mandatory minimum sentences in the United States have also increased sentence lengths, particularly for drug crimes. Under federal law, a judge must sentence a person convicted of possession of a kilogram of heroin to at least 10 years. The same offender in Britain would receive a maximum sentence of 6 months.¹⁸

There is no minimum age of criminal liability in many U.S. jurisdictions (in 32 out of 50 states) and in the 18 states that do have them, the age is less than 10.¹⁹ International legal standards however suggest the minimum age of criminal liability to be 12.²⁰ The United States is only one of 16% of countries in the world that allow for juveniles to be tried and sentenced

10 International Covenant on Civil and Political Rights, Dec. 16 1966, S. Treaty Doc. No. 95-20 (1992), art. 10(3), 999 U.N.T.S. 171.

11 ASHLEY NELLIS & RYAN S. KING, *THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA*, (2009).

12 John L. Anderson, *The Label of Life Imprisonment in Australia: A Principled or Populist Approach to an Ultimate Sentence 1* (2012) (unpublished manuscript) (on file with authors). This figure refers to known cases in five of eight jurisdictions in Australia.

13 *Vinter and Others v. United Kingdom*, Apps. Nos. 66069/09 and 130/10 and 3896/10, Eur. Ct. H.R., para. 37 (2012) (this figure refers to cases of “whole life orders” in England and Wales).

14 Dirk van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink?*, 23 Fed. Sent. R. 39, 41 (2010).

15 U.S. Population as 313,292,000. *Resident Population of the United States*, UNITED STATES CENSUS BUREAU, <http://www.census.gov/population/www/popclockus.html> (last visited Apr. 12, 2012); Australia’s population as 22,876,120. *Population Clock*, Australian Bureau of Statistics, <http://www.abs.gov.au/ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/1647509ef7e25faaca2568a900154b63?OpenDocument> (last visited Apr. 12, 2012); England and Wales as 54,072,000. Simon Rogers, *England and Wales’ population broken down by race, sex, age, and place*, THE GUARDIAN (Feb. 26, 2010, 12:06PM), <http://www.guardian.co.uk/news/datablog/2010/feb/26/population-ethnic-race-age-statistics#data> (last visited Apr. 12, 2012); Netherlands as 16,728,091. *Statline*, CENTRAAL BUREAU VOOR DE STATISTIEK, <http://statline.cbs.nl/StatWeb/publication/?VW=T&DM=SLEN&PA=37943eng&LA=EN>.

16 *Rough Justice in America, Too Many Law, Too Many Prisoners*, THE ECONOMIST, Jul. 22, 2010, available at, <http://www.economist.com/node/16636027> (last visited Apr. 9, 2012); Emily Bazelon, *Arguing Three Strikes*, N.Y. TIMES, May 21, 2010, available at, <http://www.nytimes.com/2010/05/23/magazine/23strikes-t.html> (last visited Apr. 9, 2012).

17 Jacqueline E. Ross, *Damned Under Many Headings: The Problem of Multiple Punishment*, 29 AM. J. CRIM. L. 245, 249 (2002).

18 MaryBeth Lipp, *A New Perspective on the “War on Drugs”: Comparing the Consequences of Sentencing Policies in the United States and England*, 37 LOY. L.A. L. REV. 979, 1014 (2004).

19 DON CIPRIANI, *CHILDREN’S RIGHTS AND THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY* 221-222, (Ashgate, 2009).

20 Committee on the Rights of the Child, General Comment No. 10: Children’s Rights in Juvenile Justice, para. 33, U.N. Doc. CRC/C/GC/10 (April 25, 2007).

as adults. The United States is the only country in the world that in practice sentences juveniles to life without parole.²¹ Its maximum sentence for juveniles, life without parole, is much more severe than those found in the majority of the world (65%), which either limit sentences to 20 years or less or reduce the degree of the crime for juveniles. The United States, Somalia, and South Sudan are the only three countries in the world that are not state parties to the Convention on the Rights of the Child.²²

The United States, Canada, and Micronesia are the only countries known to researchers that allow successive prosecution of the same defendant by both the federal and state government for the same crime.²³

International law and practice indicate that when a change of law will benefit an offender it should apply retroactively. The majority of countries in the world (67%) provide for this type of retroactive application of ameliorative law. In contrast, the U.S. federal government and state legislatures frequently refuse to apply the lighter penalty to those already sentenced.²⁴

The sentencing practices in the United States persist at the same time that the United States has the largest prison population in the world and the highest incarceration rate in the world.²⁵ Never before have so many people been locked up for so long and for so little as in the United States.

21 Connie de la Vega and Michelle Leighton, *Sentencing our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983 (2008).

22 U.N. Convention on Rights of the Child, GA Res. 44/25, Annex, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989). It is important to note that although a transitional government has been in place since 2004, Somalia's regions are controlled through other local governing bodies who act independently of one another without a central governing body. *The World Factbook*, THE CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html> (last visited Apr. 11, 2012). Additionally, South Sudan is a newly formed country, gaining independence on July 9th, 2011. *The World Factbook*, THE CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/od.html> (last visited Apr. 11, 2012).

23 *Bartkus v. Illinois*, 359 U.S. 121, 124, 128-129 (1959); *Abbate v. United States*, 359 U.S. 187 (1959); Jeffrey S. Raynes, *Federalism vs. Double Jeopardy: A Comparative Analysis of Successive Prosecutions in the United States, Canada, and Australia*, 5 CAL. W. INT'L L. J. 399 (1974); Micronesia, Trust Territory Controlled Substances Act, Pub. L. No. 5-110, §299.

24 1 U.S.C.A. § 109 (West 2012); S. David Mitchell, *In with the New, Out with the Old: Expanding the Scope of Retroactive Amelioration*, 37 AM. J. CRIM. L. 1, 5 (2009).

25 LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010 3 (Dec. 2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf>; INTERNATIONAL CENTRE FOR PRISON STUDIES, ENTIRE WORLD - PRISON POPULATION RATES PER 100,000 OF THE NATIONAL POPULATION, available at http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poprate.

TERMS & ABBREVIATIONS

CONCURRENT SENTENCES:	Sentences that are served simultaneously, entitling the inmate to release after he or she has served the term of the longest sentence among several sentences, merging the punishments for lesser offenses into the most serious one.
CONSECUTIVE OR CUMULATIVE SENTENCES:	Sentences that distinguish between more than one crime and assign punishment for each. They are then served one after the other until all have been served.
CONVENTION ON THE RIGHTS OF THE CHILD (CRC):	An international human rights treaty committing states parties to upholding rights of children. Article 37 says, “Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age,” and “Every child deprived of liberty shall be treated...in a manner which takes into account the needs of persons of his or her age.” All countries of the world except the United States, Somalia, and South Sudan are states parties to the CRC.
DETERMINATE SENTENCE:	A sentence consisting of a specific number of months or years the offender must serve in prison before he or she can be released.
DOUBLE JEOPARDY OR NON BIS IN IDEM OR NE BIS IN IDEM:	Two prosecutions of the same person for the same crime. They are usually prohibited but there are various exceptions. These exceptions differ in each country, and can be for prosecution by two different sovereigns, when new facts come to light, or when there are errors in fact or law.
DUAL SOVEREIGNTY:	An exception to the prohibition on double jeopardy. Because state courts and federal courts represent distinct sovereigns, under the “dual sovereignty” doctrine, a defendant can be tried and acquitted in state court and then subsequently tried again for the same crime in a federal court, or vice versa.
HABITUAL OFFENDER LAW OR RECIDIVIST STATUTE:	Laws which provide for enhanced penalties due to previous convictions.
INDETERMINATE SENTENCE:	A sentence range imposed by a judge with the actual sentence to be served to be determined at a later time by an administrative body, e.g., a parole board.
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR):	A human rights treaty committing states parties to upholding civil and political rights. Article 10(3) provides that countries have the obligation to make prison systems provide “treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.” The United States ratified the ICCPR in 1992.
JUVENILE LIFE WITHOUT PAROLE (JLWOP):	Such a sentence means that the juvenile will never be eligible for parole, and will effectively spend the rest of his or her life in prison.

JUS COGENS:	Peremptory norms accepted and recognized by the international community. No derogation is permitted and such a norm can be modified only by a subsequent norm of general international law having the same character. It is considered to be a law so fundamental to the inter-relationship of states that a state cannot derogate from them, even by agreement.
LIFE SENTENCES OR LIFE WITH PAROLE:	Sentences which are indeterminate in nature and which allow the convict to be reviewed for early release on parole.
LIFE WITHOUT PAROLE (LWOP):	Life sentences without the possibility of parole, early release, or remission. They may be reduced only by commutation or pardon, but not parole. Sometimes called “natural life,” “true life,” “whole life,” or “flat life.” These sentences differ from long sentences that would roughly equate to one’s life, such as an 80-year sentence, in that there is no possibility of early release. At the time of sentencing, LWOP sentences ensure an a priori denial of the ability of the offender to rehabilitate or re-enter society.
MANDATORY MINIMUM SENTENCE:	A statutory provision requiring a judge to assign a specified minimum sentence upon conviction of an enumerated crime.
MINIMUM AGE OF CRIMINAL RESPONSIBILITY (MACR)/ MINIMUM AGE OF CRIMINAL LIABILITY:	The age at which a person becomes subject to the full penalties provided by the criminal law, an age which varies by country.
PAROLE:	Earned early release (prior to the completion of the maximum period of confinement) from prison through a regularized bureaucratic decision-making process.
RETROACTIVE APPLICATION OF AMELIORATIVE LAW OR LEX MITIOR:	The principle that when a law is changed and benefits an offender, it applies retroactively.
TRANSFER TO ADULT COURT:	When a child is removed from juvenile court and tried in adult court. In the United States being transferred to an adult court means that the juvenile will be tried as an adult without any mention of his or her age or his or her status as a minor. In other countries being tried as an adult does not necessarily mean that the protections afforded in juvenile courts no longer apply.
WESTERN EUROPE AND OTHERS (WEOG):	A regional grouping at the UN General Assembly of Western European countries, Australia, Canada, Israel, New Zealand, and the United States.

METHODOLOGY

The research for this report, conducted over the course of 15 months by three researchers, three contributing scholars, and two research assistants, surveyed the laws of all 193 member states of the United Nations under the guidance of a professor. The team examined countries' constitutions, penal codes, criminal procedure laws, juvenile codes, and parole and prisons statutes to understand their sentencing regimes. For each country, the team identified whether the state may issue life without parole sentences, how long persons must serve before parole eligibility, maximum sentences, lengthened sentences for prior convictions, consecutive sentences, mandatory minimum penalties, double jeopardy in countries with both state and federal criminal systems, and retroactive application of ameliorative law. For juvenile justice provisions, researchers established maximum sentences for juveniles, transfer of juveniles to adult courts, and the minimum age of criminal responsibility for each country.

Some of the research for the countries was conducted in-country. One researcher traveled in February and March 2011 to Argentina in order to interview lawyers, judges, and activists to ascertain the application of Latin American sentencing laws. One of the contributing scholars conducted research while in Central Asia in 2011 on the region's sentencing laws. For the rest of the countries, the team, comprising English, French, Spanish, Portuguese, Arabic, Korean, Italian, and Russian speakers, located statutes in their original languages when available and, if not available, English translations to identify and categorize relevant statutory and constitutional provisions.

The researchers made efforts to corroborate by checking against different versions of statutes, speaking with legal practitioners when necessary, and by researching secondary literature. In some instances, statutes were not located despite repeated efforts to reach legal practitioners in-country and therefore results are unavailable in some instances and marked as such in the Appendix. The project, necessarily constrained by time and resources, is based primarily on review of constitutions and statutes. As a result, some of the information for the 193 countries may have been changed by subsequent legislative amendments or case law. In addition, practice in countries may, to varying degrees, differ from law. The primary focus was to examine codified legal standards on sentencing in each country. The team examined practice in implementation of laws when available and relevant. When analyzing countries, the team used the United Nations General Assembly's regional

groupings.²⁶ Researchers intentionally did not investigate the death penalty as this topic has received thorough treatment by other organizations.²⁷

Parole and early release mechanisms are different from executive pardons or commutations and were interpreted as such in categorizing countries with regard to life without parole sentences. Executive pardons, commutations, and provisions for compassionate release were not considered to be the equivalent of parole as they are in most cases not regularly reviewed or granted with measurable frequency. For juvenile justice provisions, his or her majesty's pleasure was interpreted to mean life without parole if a secondary source or local practitioner could confirm such an interpretation. Otherwise, his or her majesty's pleasure doctrine, which in theory requires an executive power to decide whether continued detention is justified, was interpreted to be the equivalent of life with parole unless provisions specifically exempted such persons from parole eligibility. Remission, or reduction of a sentence dependent upon good behavior in prison, was considered to be the equivalent of parole.

26 *United Nations Regional Groups of Member States*, DEPARTMENT FOR GENERAL ASSEMBLY AND CONFERENCE MANAGEMENT, <http://www.un.org/depts/DGACM/RegionalGroups.shtml> (last visited Apr. 12, 2012).

27 *See, Figures on the Death Penalty*, AMNESTY INTERNATIONAL, <http://www.amnesty.org/en/death-penalty/numbers> (last visited Apr. 12, 2012).

SECTION I: INTRODUCTION AND OVERVIEW

“Among mainstream politicians and commentators in Western Europe, it is a truism that the criminal justice system of the United States is an inexplicable deformity.”

Vivien Stern, secretary general of Penal Reform International²⁸

“Thirty years ago 10% of the general fund went to higher education and only 3% went to prisons. Today almost 11% goes to prisons and only 7.5% goes to higher education. Spending 45% more on prisons than universities is no way to proceed into the future.”

Former California Governor Arnold Schwarzenegger, 2010 State of the State Address²⁹

The severity and length of criminal punishments distinguishes the United States from the rest of the world. The mere number of prison admissions is not the issue; in fact, several European countries outpace the United States in admissions per year per capita.³⁰ The issue is that American prison stays are on average much longer than in the rest of the world.³¹ Sentence severity in the United States has reached an extreme that contradicts its stated human rights obligation to direct its prisons system towards the primary goals of reformation and social rehabilitation, as set forth in the International Covenant on Civil and Political Rights (ICCPR), which it ratified in 1992.³²

Life without parole sentences, by their very definition, discount the possibility of rehabilitation. Inmates serving life without parole sentences are often denied access to rehabilitative services in prison. Individuals sentenced to life without parole are viewed as being irredeemable, or incapable of rehabilitation, and therefore undeserving of review by experts to determine whether they should be released prior to the end of their lives.

Recidivist statutes that place non-violent offenders in prison for a third crime, despite already having paid their debt to society via prior prison time, place a premium on incapacitation over rehabilitation. Consecutive sentences which stack up to the equivalent of *de facto* life without parole sentences by breaking up conduct into separate crimes deprive prisoners of potential rehabilitation. Mandatory minimum sentences, in particular for drug crimes, de-emphasize defendants' need for treatment and drug therapy and instead emphasize incapacitation and retribution.

The United States' treatment of children is misaligned with international norms on juvenile justice, as set out by the Convention on the Rights of the Child (CRC) and the practice of nations. The lack of a minimum age of criminal liability in most U.S. jurisdictions and the extremely low ages in others fail to meet international standards setting the age at 12. The trial and sentencing of juveniles in adult courts in the United States violate protections enshrined in the ICCPR. The use

28 Adam Liptak, *Inmate Counts in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, <http://www.nytimes.com/2008/04/23/us/23prison.html>.

29 Arnold Schwarzenegger, State of the Union Address (Jan. 6, 2010) (transcript available at <http://www.cahcc.com/index.php/the-news/150-transcript-of-gov-arnold-schwarzenegger-delivering-state-of-the-state-address>).

30 Liptak, *supra* note 28.

31 For example, burglary convicts serve on average 16 months in prison in the United States, compared to five months in Canada or seven months in England. *Id.* (citing Marc Mauer, Executive Director of The Sentencing Project).

32 International Covenant on Civil and Political Rights, *supra* note 10, art. 10(3).

of juvenile life without parole sentences in the United States violates a near-global consensus that children are capable of rehabilitation as well as legal standards in the CRC and ICCPR.

This report aims to provide an international human rights law and comparative law perspective on various sentencing practices in the United States. Given that the incarceration rate in the United States is the world's highest, concerned parties should ask why so many U.S. states and the federal government continue to use sentencing doctrines that most countries around the world have turned their backs on. Surveys demonstrate that Americans believe that sentences should be shorter. Over 80% of voters favor reducing prison time and creating instead a stronger probation and parole system.³³ The country's criminal laws and policies should better reflect this desire.

Outcry from victims' rights groups and other voters demanding long sentences have played a role in lengthening sentences. Clamor for tough penalties and the political gains offered by punitive approaches have relegated rehabilitation and proportionality to a second tier of priorities and have left the practical consequences of over-incarceration hidden.³⁴ Because most state court judges and prosecutors are elected in the United States, they tend to amplify some voters' tough-on-crime positions.

The rise of private prisons and the lobbying efforts by prison guards unions have also contributed to the increase in lengthy prison terms. The motivation of corporations to seek a growing flow of income has led private prison corporations to lobby in favor of lengthier sentences.³⁵ Two private prison corporations contributed almost \$2 million to support state campaigns and policies seeking longer criminal sentences and mandatory sentences.³⁶ Private facilities currently house about 6% of state prisoners and 16% of federal prisoners.³⁷

Prison guard unions have also played a role in driving up prison terms. As one scholar phrased it, "The formula is simple: more prisoners lead to more prisons; more prisons require more guards; more guards means more dues-paying members and fund-raising capability; and fund-raising, of course, translates into political influence."³⁸ For example, California's prison guard union contributed to initiatives to pass the state's three strikes law and to replace substance abuse treatment with incarceration.³⁹ It successfully opposed an initiative to limit the crimes that trigger a life sentence under the three strikes law.⁴⁰ The union also donated money to victims' rights groups that support longer prison terms as well as numerous California politicians, spending more than \$7.5 million a year on political activities.⁴¹ Prison guard unions in other states including Florida, Michigan, New York, and Rhode Island, have also endorsed candidates who support imposing tough penalties, ending parole, and enforcing mandatory minimums.⁴²

33 THE PEW CENTER ON THE STATES, PUBLIC OPINIONS ON SENTENCING AND CORRECTIONS POLICY IN AMERICA (2012), available at http://www.pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestatesorg/Initiatives/PSPP/PEW_NationalSurveyResearchPaper_FINAL.pdf.

34 See, e.g., PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY vi (Andrew von Hirsch, Andrew Ashworth & Julian Roberts eds., Hart Publishing, 2nd ed. 1998); Anthony Bottoms, *The Philosophy and Politics of Punishment and Sentencing*, in THE POLITICS OF SENTENCING REFORM 18 (Chris Clarkson & Rod Morgan eds., 1995); JULIAN ROBERTS ET AL., PENAL POPULISM AND PUBLIC OPINION: LESSONS FROM FIVE COUNTRIES 5-8 (2003); Anderson, *supra* note 12.

35 THE INSTITUTE ON MONEY IN STATE POLITICS, POLICY LOCKDOWN: PRISON INTERESTS COURT POLITICAL PLAYERS (2006), available at <http://www.followthemoney.org/press/Reports/200605021.pdf>; MARTHA ELENA MENENDEZ, HUMAN RIGHTS ADVOCATES PRISON PRIVATIZATION AND PRISON LABOR: THE HUMAN RIGHTS IMPLICATIONS, 6-7 (2012), available at <http://www.humanrightsadvocates.org/wp-content/uploads/2010/05/Prison-Privatization-and-Forced-Prison-Labor-2012.pdf>.

36 Corrections Corporation of America contributed \$1.1 million and GEO Group \$880,000. THE INSTITUTE ON MONEY IN STATE POLITICS, POLICY LOCKDOWN: PRISON INTERESTS COURT POLITICAL PLAYERS (2006), available at <http://www.followthemoney.org/press/Reports/200605021.pdf>.

37 AMERICAN CIVIL LIBERTIES UNION, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION (2011), <http://www.aclu.org/prisoners-rights/banking-bondage-private-prisons-and-mass-incarceration> (last accessed April 11, 2012); Brian Gran & William Henry, *Holding Private Prisons Accountable: A Socio-Legal Analysis of "Contracting Out" Prisons*, 34 Social Justice 173 (2007-2008), available at http://www.case.edu/artsci/soci/Gran/documents/Gran_Henry.pdf.

38 Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 224 (2008).

39 Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 66 STAN. L. REV. 1197 (2008).

40 Id.

41 Tim Kowal, *The Role of the Prison Guards Union in California's Troubled Prison System*, League of Ordinary Gentlemen, (June 5, 2011), <http://ordinary-gentlemen.com/blog/2011/06/05/the-role-of-the-prison-guards-union-in-californias-troubled-prison-system/>; Volokh, *supra* note 39, at 1197.

42 Volokh, *supra* note 39, at 1197.

SECTION II: FINDINGS

“[Prison sentences have become] vastly harsher than in any other country to which the United States would ordinarily be compared.”

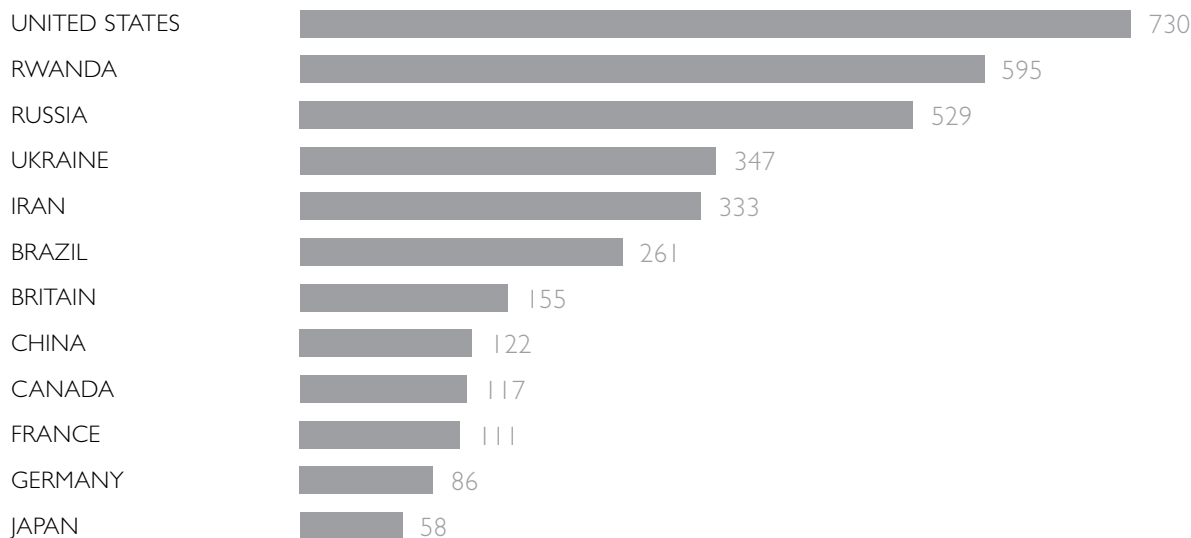
Michael Tonry, a leading authority on crime policy⁴³

A. LONG SENTENCING

The United States has the highest incarceration rate in the world, with almost 2.3 million prisoners.⁴⁴ Comprising only 5% of the world’s population, U.S. prisoners account for 25% of the world’s prison population.⁴⁵ Many American prisoners are serving long sentences, some of them irreducible in length. One of every 10 state prisoners is serving a life sentence.⁴⁶ An additional 11% have sentences longer than 20 years.⁴⁷ The number of prisoners serving life sentences quadrupled between 1984 and 2008, from 34,000 to more than 140,000.⁴⁸ The number of prisoners serving life sentences in federal prisons grew tenfold from 410 to 4,200 during the same time period.⁴⁹

INMATES PER 100,000 POPULATION

Selected Countries, 2010 or Latest Available



Based on data from International Centre for Prison Studies

43 Liptak, *supra* note 28.

44 LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010 3 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf>; *Entire World - Prison Population Rates per 100,000 of the National Population*, INTERNATIONAL CENTRE FOR PRISON STUDIES, available at http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poprate (last visited Apr. 11, 2012).

45 INTERNATIONAL CENTRE FOR PRISON STUDIES, *ENTIRE WORLD - PRISON POPULATION RATES PER 100,000 OF THE NATIONAL POPULATION*, http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poprate (last visited April 11, 2012); Liptak, *supra* note 28.

46 JAMIE FELLNER, *OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES*, HUMAN RIGHTS WATCH 6 (Jan. 27, 2012).

47 *Id.*

48 NELLIS & KING, *supra* note 11.

49 FELLNER, *supra* note 46, at 34.

The outsized prison population is in part attributable to three decades of “tough-on-crime” legal and policy changes.⁵⁰ These have included new laws that increased the likelihood and length of prison sentences by establishing mandatory minimum sentences and three strikes laws, increasing the number of crimes punished with life without parole sentences, and stacking punishments through consecutive sentences. These harsh sentencing practices have created long sentences out of step with the rest of the world. Only eleven other countries in the world known to researchers use all four of these sentencing practices—life without parole sentencing, mandatory minimums, uncapped consecutive sentences, and recidivism statutes.⁵¹ These practices help to explain why, despite a declining crime rate, the U.S. prison population has grown six-fold since 1980.⁵²

The rise in prison rates has had a profound impact on the costs of the prisons system in the United States.⁵³ More than \$60 billion each year is spent on prisons and jails.⁵⁴ A year at a state prison costs \$45,000 on average for each prisoner.⁵⁵ Spending on state prisons increased five-fold over the past 20 years, from \$10 billion to more than \$50 billion.⁵⁶ Aging prison populations cause budgetary problems for the state charged with the responsibility of their healthcare.⁵⁷ The population of elderly prisoners has grown quickly. The number of prisoners aged 65 or older grew at 94 times the rate of the overall prison population between 2007 and 2010.⁵⁸ The cost of healthcare for an elderly prisoner is much higher, sometimes several times higher, than for a younger prisoner.⁵⁹ For example, in California, 90% of prison healthcare costs goes to elderly prisoners.⁶⁰

Few are released early, despite the fact that most people mature out of crime as they age.⁶¹ Due to high burdens of proof for inmates to meet parole requirements, rates of parole are low. For example, only 6% of prisoners convicted of murder receive parole in California.⁶² Meanwhile, the recidivism rate in California for persons who were serving a life sentence with parole is less than 1%.⁶³ The care requirements for elderly prisoners, such as assistance and accommodation for mobility impairment, dementia, or chronic illnesses, are similar to those offered at nursing homes rather than prisons.⁶⁴ It is uncertain whether the deterrent benefits of LWOP are outweighed by better rehabilitative programs or increasing the capacity of law enforcement agencies, or whether the retributive properties of prisons should outweigh state investment in education or health care.⁶⁵

50 MARC MAUER, COMPARATIVE INTERNATIONAL RATES OF INCARCERATION: AN EXAMINATION OF CAUSES AND TRENDS, PRESENTED TO THE U.S. COMMISSION ON CIVIL RIGHTS 2, 6-7 (2003), available at http://www.sentencingproject.org/doc/publications/inc_comparative_intl.pdf.

51 These countries are Australia, Ghana, Kenya, Lesotho, Seychelles, Tanzania, United Kingdom, Palau, Nigeria, Sierra Leone, and Uzbekistan. Other countries may use all four sentencing practices (life without parole, recidivist statutes, uncapped consecutive sentences, and mandatory minimums), but the team was unable to locate statutes proving their existence.

52 MAUER, *supra* note 50, at 2, 6.

53 PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS (2009), http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf.

54 *Effective Re-Entry Programmes can keep Ex-Prisoners out of Jail*, THE ECONOMIST, Apr. 20, 2011, available at <http://www.economist.com/node/18587528>.

55 *Effective Re-Entry Programmes can keep Ex-Prisoners out of Jail*, THE ECONOMIST, Apr. 20, 2011, available at <http://www.economist.com/node/18587528>.

56 *Id.*

57 Sadhbh Walshe, *How California's Lifers are Dying Inside*, THE GUARDIAN, Jan. 18, 2012, available at <http://www.guardian.co.uk/commentisfree/cifamerica/2012/jan/18/how-california-lifers-dying-inside>; Gregory J. O'Meara, *Compassion and the Public Interest: Wisconsin's New Compassionate Release Legislation*, 23 FED. SENT. REP. 33, 33 (2010).

58 FELLNER, *supra* note 46, at 6.

59 In California, an older prisoner can cost three times that of a younger prisoner. “If Inmate X is incarcerated at age 37, he costs taxpayers about \$49,000 a year. But as he ages, his health care expenses will increase. At age 55, he could cost the state \$150,000 a year.” *Life In Prison: The Cost of Punishment*, (KPBS television broadcast Jan. 25, 2010), available at <http://www.kpbs.org/news/envision/prisons/>.

60 *Id.*; FELLNER, *supra* note 46. The Supreme Court held in May 2011 that prison overcrowding in California had led to unconstitutionally deficient medical care for prisoners. *Brown v. Plata*, 131 S. Ct. 1910 (2011).

61 ROBERT WEISBERG, DEBBIE A. MUKAMAL & JORDAN D. SEGALL, *LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA* 17 (2011), available at http://blogs.law.stanford.edu/newsfeed/files/2011/09/SCJC_report_Parole_Release_for_Lifers.pdf.

62 *Id.* at 4.

63 *Id.* at 17. Recidivism rates among lifers in California has been 5 out of 860 prisoners, or 0.6%.

64 *Life In Prison: The Cost of Punishment*, *supra* note 59.

65 Michael M. O'Hear, *The Beginning of the End for Life Without Parole?*, 23 FED. SENT. REP. 1, 5 (2010).

Prohibitions on cruel, unusual, inhuman, or degrading punishments are found in many domestic constitutions and international and regional human rights instruments.⁶⁶ Much of U.S. case law on criminal sentences has focused on procedure rather than proportionality.⁶⁷ Thus, American jurisprudence has focused on procedural flaws that make a certain conviction or sentence illegal rather than pronouncing the penalty itself unduly severe or disproportionate, with some exceptions.⁶⁸ The U.S. Supreme Court has adopted categorical rules prohibiting capital punishment for certain crimes or certain classes of offenders. For example, the U.S. Supreme Court has prohibited the death penalty for crimes against individuals other than homicide,⁶⁹ and for crimes committed by juveniles⁷⁰ and by persons with mental retardation.⁷¹ When doing so, the Court has taken into account “objective indicia of society’s standards, as expressed in legislative enactments and state practice” and the Court’s “own independent judgment” of the crime and offender.⁷² When the Supreme Court has ruled on the proportionality of sentences other than capital punishment, its test has been whether a penalty is “grossly disproportionate,”⁷³ in deference to legislatures and their “assessment of the efficacy of various criminal penalty schemes.”⁷⁴ In 2010, the Court ruled in *Graham v. Florida* that life without parole for juveniles convicted of crimes other than homicide is unconstitutional. *Graham* is an unusual case in that it held that a punishment other than capital punishment was incompatible with the Eighth Amendment prohibition on cruel and unusual punishment for a class of offenders.⁷⁵

The U.S. Supreme Court has taken into account international standards when ruling that particular sentences violate the Eighth Amendment’s prohibition on “cruel and unusual punishments.”⁷⁶ Indeed, the United States has a long tradition of incorporating international law into its own, starting from the country’s founding.⁷⁷ In the first of a long line of cases citing international and foreign law, the Court stated that “civilized nations of the world are in virtual unanimity that statelessness [the punishment in question in the case] is not to be imposed as punishment.”⁷⁸ When examining the death penalty for rape convictions, it wrote that it “is not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.”⁷⁹ When considering felony murder, the Court noted in 1982 that the “doctrine of felony murder has been abolished in England and India, severely restricted in Canada, and a number of other Commonwealth countries, and is unknown in continental Europe.”⁸⁰ The Court said, “We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel or unusual” and acknowledged views “by other nations that share our Anglo-American heritage, and by the leading members of the Western Community” when it ruled in 1988 that a 14-year-old convicted of first degree murder could not be executed.⁸¹ The Court

66 See, e.g., International Covenant on Civil and Political Rights, *supra* note 10, art. 7; Universal Declaration of Human Rights, art. 5, December 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); European Convention on Human Rights, art. 3, Nov. 4, 1950, 213 U.N.T.S. 221; Charter of Fundamental Rights of the European Union, art. 4, Dec. 7, 2000, C 364/1; Convention Against Torture, art. 16, Dec. 10, 1984, 1465 U.N.T.S. 85, 113; Dirk van Zyl Smit and Andrew Ashworth, *Disproportionate Sentences as Human Rights Violations*, 67 MOD. L. REV. 541, 543 (2004).

67 Adam Gopnick, *The Caging of America*, THE NEW YORKER, Jan. 30, 2012; Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101 (1995).

68 Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101 (1995).

69 Coker v. Georgia, 433 U.S. 584 (1977); Kennedy v. Louisiana, 128 S. Ct. 2641 (2008).

70 Roper v. Simmons, 543 U.S. 551 (2005).

71 Atkins v. Virginia, 536 U.S. 304 (2002).

72 Roper, 543 U.S. at 563-64.

73 See *Rummel v. Estelle*, 445 U.S. 263 (1980) (allowing life with parole for obtaining money under false pretenses under a recidivist statute); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (allowing life without parole for possession of cocaine); *Ewing v. California*, 538 U.S. 11 (2003) (allowing 25 years to life under a “three strikes” recidivism statute); *Hutto v. Davis*, 454 U.S. 370 (1982) (allowing forty years imprisonment for selling marijuana). See also, *Solem v. Helm*, 463 U.S. 277 (1983) (striking down LWOP for passing a worthless check); Youngjae Lee, *The Purposes of Punishment Test*, 23 FED. SENT. REP. 58 (2011). The proportionality analysis consists of two tests, the culpability test and the purposes of punishment test.

74 Roper, 543 U.S. at 572.

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

76 See Amnesty International, et al. as Amici Curiae Supporting Petitioners, *Miller v. Alabama* (2012) (No. 10-9646), 2012 WL 174238 for a more thorough treatment of the 8th Amendment jurisprudence citing international and foreign law and practice.

77 Amnesty International, et al. as Amici Curiae Supporting Petitioners, *Miller v. Alabama* (2012) (No. 10-9646), 2012 WL 174238.

78 *Trop v. Dulles*, 356 U.S. 58, 102 (1958).

79 Coker v. Georgia, 433 U.S. 584, 596 n. 10. (1977).

80 *Edmund v. Florida*, 458 U.S. 782, 798 (1982).

81 *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988).

wrote in 2002 that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”⁸² In *Roper v. Simmons* the Court said, “It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty.”⁸³ In *Graham*, the Court recognized the value of “the judgment of the world’s nations,” citing foreign laws and international practice and opinion as evidence that “demonstrates that the Court’s rationale has respected reasoning to support it” when outlawing juvenile life without parole for non-homicide offenders.⁸⁴

The United States, as party to the International Covenant on Civil and Political Rights, has agreed that its corrections system will be rehabilitative.⁸⁵ The treaty states that “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”⁸⁶ The Human Rights Committee, an independent body of experts that monitors implementation of the ICCPR by its states parties, wrote in its General Comment on Article 10 that “[n]o penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner. States parties are invited to specify whether they have a system to provide assistance after release and to give information as to its success.”⁸⁷

While the United States differs from most countries in that it has both federal and state criminal jurisdictions, the U.S. Supreme Court has said that states must also carry out the United States’ international legal obligations.⁸⁸ When ratifying the International Covenant on Civil and Political Rights, Congress wrote that “the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein and otherwise by the state and local governments.”⁸⁹ Thus, the country’s international human rights treaty obligations extend to the states as well as to the federal government.

The Standard Minimum Rules for the Treatment of Prisoners, adopted by the United Nations as guidance, states that countries “should utilize all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners.”⁹⁰ The Basic Principles for the Treatment of Prisoners similarly provides that “favourable conditions shall be created for the reintegration of the ex-prisoner into society under the best possible conditions.”⁹¹

Regional human rights experts have agreed that long sentences can undermine the rehabilitative purposes of corrections. For example, the Special Rapporteur on Prisons and Conditions in Africa has stated, “Punishment which attacks the dignity and the integrity of the human being, such as long-term and life imprisonment...run contrary to the essence of imprisonment.”⁹²

82 *Atkins v. Virginia*, 536 U.S. 304, 315 n. 21 (2002).

83 *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

84 *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010).

85 International Covenant on Civil and Political Rights, *supra* note 10, art. 10(3).

86 International Covenant on Civil and Political Rights, *supra* note 10, art. 10(3).

87 U.N. Human Rights Committee, *General Comment 21, art. 10, 33*, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

88 *Medellin v. Texas*, 552 U.S. 491, 536 (2008) (Stevens, J. concurring): “One consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation.” In a follow-up opinion on the denial of habeas corpus relief, Justice Stevens again emphasized the point: “I wrote separately to make clear my view that Texas retained the authority and, indeed, the duty as a matter of international law to remedy the potentially significant breach of the United States’ treaty obligations . . .” *Medellin v. Texas*, 129 S.Ct. 360, 362, (2008) (Stevens, J., dissenting).

89 138 CONG. REC. S4781 (daily ed. Apr. 2, 1992).

90 United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, ¶ 56-59, U.N. Doc. E/5988 (1977).

91 Basic Principles for the Treatment of Prisoners, G.A. Res. 45/11, U.N. Doc. A/RES/45/111 (Dec. 14, 1990).

92 African Commission on Human and Peoples’ Rights, *Report of the Special Rapporteur on Prisons and Conditions in Africa, Mission to the Republic of South Africa*, (June 14-30, 2004), available at http://www.achpr.org/english/Mission_reports/South%20Africa/Special%20Rap_Prison_South%20Africa.pdf.

I. LIFE WITHOUT PAROLE SENTENCES

“To attempt to justify any period of penal incarceration, let alone imprisonment for life...without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity.”

South African Constitutional Court Judge Laurie Ackerman⁹³

While many countries have life sentences and prisoners do in fact die in prison around the world, a life without parole (LWOP) sentence removes any uncertainty *at the time of sentencing* about the possibility of rehabilitation by condemning the inmate to die in prison.⁹⁴ Meanwhile, ordinary life sentences, while not *guaranteeing* eventual release, historically were indeterminate, inherently incorporating the possibility of release.⁹⁵ Most prison systems allow for review by a parole board or a judiciary to assess a prisoner’s possibility for release, usually on the basis of demonstrating reformation or good behavior. However, a life without parole sentence removes this possibility of review, and often restricts access to rehabilitative services such as education or training.⁹⁶ LWOP, like capital punishment, “alter[s] the offender’s life by a forfeiture that is irrevocable.”⁹⁷ Life without parole sentences remove the possibility of hope of rehabilitation; the convict is seen as irredeemable, or beyond help.⁹⁸ LWOP has been described as a “civil death.”⁹⁹

Some death penalty opponents have viewed life without parole sentences as the natural and lesser alternative to the death penalty.¹⁰⁰ However, questions remain as to whether a lifetime in prison is more humane than or similarly effective in its objectives to capital punishment.¹⁰¹ For example, LWOP’s general deterrent effects are far from proven.¹⁰² As the deterrence grounds of the death penalty continue to be the most hotly debated claim in criminology, it is unlikely that LWOP would serve any stronger of a general deterrent than the death penalty. As a retributive mechanism, LWOP seems ill-served to be an appropriate sentence for certain types of crimes, including property crimes and drug crimes, even if committed by recidivists, as their alleged victims rarely endure irreparable and permanent damage.¹⁰³

A guarantee of regular review for release differs widely from actual release. Those considered irredeemably dangerous or incapable of rehabilitation ought not to be released. However, that conclusion should be reached only upon review by professionals who make that assessment over regular intervals of time.

It should also be noted that LWOP sentences differ at least in theory from *de facto* life imprisonment, that is, sentences so long that the convict will likely die in prison, reaching decades to centuries.¹⁰⁴ However, these long *de facto* life sentences “blur if not obliterate all distinction between life with and without the possibility of parole.”¹⁰⁵

93 *S v. Dodo* 2001 (3) SA 382, 404 (CC) at para 38 (S.Afr.).

94 Life without parole sentences are sometimes called “flat life,” “natural life,” or “whole life” sentences. See MARC MAUER, RYAN S. KING, & MALCOLM C. YOUNG, *THE SENTENCING PROJECT, THE MEANING OF “LIFE”: LONG PRISON SENTENCES IN CONTEXT* (2004); and DIRK VAN ZYL SMIT, *TAKING LIFE IMPRISONMENT SERIOUSLY IN NATIONAL AND INTERNATIONAL LAW*, (Kluwer Law International 2002).

95 Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT. REP. 27, 29 (2010).

96 A. COYLE, *REPLACING THE DEATH PENALTY: THE VEXED ISSUE OF ALTERNATIVE SANCTIONS* (P. Hodgkinson & W. Schabas eds., 2004); Van Zyl Smit, *supra* note 14, at 44 (stating that Dutch offenders serving LWOP sentences are not offered programs to enable them to return to society).

97 U.S. Supreme Court Justice Anthony Kennedy in *Graham v. Florida*, 130 S. Ct. 2011 (2010).

98 Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT. REP. 75 (2010); Catherine Appleton & Brent Grover, *The Pros and Cons of Life Without Parole*, 47 BRIT. J. CRIMINOLOGY 597, 599 (2007).

99 O’Hear, *supra* note 65, at 5.

100 Note, *A Matter of Life and Death: The Effect of Life without Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1840 (2006).

101 Robert Blecker, *Less than We Might: Meditations on Life in Prison Without Parole*, 23 FED. SENT. REP. 10 (2010) (arguing for abolishing LWOP and refinement of the death penalty, and for less focus on the length of incarceration and more on the conditions of incarceration for retributive purposes).

102 “We can number [the death penalty’s] failures [to deter], but we cannot number its successes.” ROYAL COMM’N ON CAPITAL PUNISHMENT, 1949-1953 REPORT, 1953, [Cmd. 8932], at 20; O’Hear, *supra* note 65, at 5.

103 O’Hear, *supra* note 65, at 5.

104 PENAL REFORM INTERNATIONAL, *ALTERNATIVE SANCTIONS TO THE DEATH PENALTY INFORMATION PACK* 10 (2011).

105 Robert Blecker, *Less than We Might: Meditations on Life in Prison Without Parole*, 23 FED. SENT. REP. 10 (2010).

LIFEWITHOUT PAROLE SENTENCES IN THE UNITED STATES

The United States is one of only a handful of countries that uses LWOP sentences, and is by far the world's leader in the number of persons serving such a sentence.¹⁰⁶ There are approximately 41,000 prisoners serving life without parole sentences in the U.S.¹⁰⁷ The population of people serving LWOP sentences has tripled over the past 16 years.¹⁰⁸ Forty-nine of 50 U.S. states, the United States, and the District of Columbia allow life without parole sentences. Six states and the United States *require* all life sentences to be without the possibility of parole.¹⁰⁹

LWOP is mandatory upon conviction for at least one specified offense in 27 states.¹¹⁰ LWOP is mandatory in many states for a murder conviction, and in at least eight, it is mandatory upon conviction under a recidivism statute.¹¹¹ The mandatory nature of LWOP in these states removes any discretion for judges or juries and deprives the defendant of any possibility to put any mitigating factors or special circumstances before the sentencing court.¹¹² For example, in New Jersey, once an aggravating factor has been introduced, mitigating factors can no longer be introduced in court proceedings.¹¹³ In the federal system, mandatory minimum life sentences apply to murders, some gun and drug offenses, and habitual offenders, including third-time drug offenders.¹¹⁴

The use of LWOP has expanded despite prisoners serving life *with* the possibility of parole receiving parole at low rates. In California, only 18% of prisoners serving life are ever granted parole by the parole board.¹¹⁵ The likelihood of an offender convicted of murder being granted parole by the parole board and the California governor approving that decision is only 6% for murder convictions.¹¹⁶ Parole boards rarely permit early release.

The United States is the world's only country sentencing juveniles to life without parole (JLWOP).¹¹⁷ In 2010, the Supreme Court ruled in *Graham v. Florida* that a state "need not guarantee the [juvenile non-homicide] offender eventual release," but only "some realistic opportunity to obtain release."¹¹⁸ (See section below on maximum sentences for juvenile offenders for more information on JLWOP).

The use of LWOP is widespread in the United States and available for non-homicide offenses. It is available as a punishment in instances where the death penalty is not a possible sentence, such as for conviction of kidnapping, armed robbery, drug crimes, and other crimes, including shoplifting.¹¹⁹ Thirty-seven states make LWOP available for non-homicide offenses.¹²⁰ The Supreme Court upheld in *Harmelin v. Michigan* a life without parole sentence for simple possession of a little more

106 The 1962 Model Penal Code originally rejected the idea of life without parole sentences, stating "persons convicted of murder but not sentenced to death are subject to imprisonment for a maximum term of life and a minimum term of not more than ten years. This resolution reflects the judgment that supervised release after a period of confinement is altogether appropriate for some convicted murderers, even though incarceration for the prisoner's lifetime may be required in other instances." MODEL PENAL CODE AND COMMENTARIES, Part II, §§ 210.0 to 213.6, § 210.6 cmt. 10 at 152 (1980).

107 NELLIS & KING, *supra* note 11 (this 41,000 figure also includes roughly 2,000 juveniles sentenced to LWOP).

108 Nellis, *supra* note 95, at 27.

109 *States Offering Life Without Parole*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/life-without-parole> (last visited Apr. 13, 2012). The six states that require all life sentences to be without the possibility of parole are Illinois, Iowa, Louisiana, Main, Pennsylvania, and South Dakota; Nellis, *supra* note 95, at 27. There are about 5,200 prisoners serving life without parole in the federal system. Molly M. Gill, *Clemency for Lifers: The Only Road Out is the Road Not Taken*, 23 FED. SENT. REP. 21, 21 (2010).

110 Nellis, *supra* note 95, at 27.

111 Nellis, *supra* note 95, at 27 (the states are Alabama, California, Florida, Georgia, Louisiana, South Carolina, Virginia, and Washington).

112 See section below on mandatory minimums.

113 Nellis, *supra* note 95, at 29.

114 Molly M. Gill, *Clemency for Lifers: The Only Road Out is the Road Not Taken*, 23 FED. SENT. REP. 21, 21 (2010); 21 U.S.C. § 841(b)(1)(A).

115 WEISBERG, *supra* note 61.

116 WEISBERG, *supra* note 61.

117 See de la Vega & Leighton, *supra* note 21, at 983; See the section below on juvenile justice for more information on juvenile life without parole.

118 *Graham v. Florida*, 130 S. Ct. 2011 at 2034 (2010).

119 In Georgia, one of the few states with good data on LWOP, 60% of people serving LWOP were convicted of murder. The remaining 40% were convicted of other offenses. Op-Ed., *The Misuse of Life Without Parole*, N.Y. TIMES, Sept. 12, 2011 at A30.

120 Nellis, *supra* note 95, at 27.

than a pound of cocaine, a non-violent offense.¹²¹ The case involved Michigan’s “650 Lifer Law,” which made LWOP mandatory for any offender possessing more than 650 grams of cocaine or heroin.¹²² The law resulted in overcrowding in prisons, requiring many to be granted commutations by the state’s governor.¹²³

In January 2012, Eric Hamilton, 44, was sentenced to life without parole in Louisiana for possession of more than 400 grams of cocaine, typically punishable by 15 to 30 years. However, because he had been convicted in 1994 and 2002 of other drug offenses, he is now sentenced to die in prison.

Source: Claire Galofaro, *Slidell Cocaine Dealer Sentenced to Life in Prison as a Habitual Offender*, TIMES PICAYUNE, Jan. 24, 2012, available at http://www.nola.com/crime/index.ssf/2012/01/slidell_cocaine_dealer_sentenc.html (last visited May 2, 2012).

The widespread use of LWOP coincided with a rise in the late 1980s and 1990s of harsh sentencing policies enacted by legislatures to divest the judiciary or parole boards of discretion, such as determinate sentencing, mandatory minimums, and truth in sentencing laws that restricted parole.¹²⁴ Until the 1970s, life without parole did not exist.¹²⁵ The number of persons serving life without parole has tripled from 12,000 in 1992 to more than 41,000 in 2008.¹²⁶ The Model Penal Code, drafted by the American Law Institute, lawyers, judges, and scholars who write Restatements of the Law and draft model statutes, recommends that life without parole sentences be permissible only in instances where LWOP is the sole alternative to a death sentence.¹²⁷

INTERNATIONAL LAW AND STANDARDS ON LIFE WITHOUT PAROLE SENTENCING

The United States’ excessive use of the LWOP sentence is at odds with its stated international obligations. International human rights law, while silent on the specific terms of life without parole, requires states to uphold the promise that “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”¹²⁸

Several international criminal tribunals bar LWOP sentences. The International Criminal Court (ICC), which tries the gravest of crimes in the world, including genocide, war crimes, and crimes against humanity, cannot sentence convicts to life without parole. At the ICC, life sentences are reviewable after 25 years.¹²⁹ The Rome Statute, the enacting law of the International Criminal Court has 121 states parties, indicating wide agreement on the level of punishment appropriate for the worst of the world’s crimes.¹³⁰ At the Extraordinary Chambers in the Courts of Cambodia, life sentences are reviewable after 20 years.¹³¹ The International Criminal Tribunal for Rwanda, does have LWOP.¹³² Rwanda, however, also has the third highest incarceration rate in the world, after the United States and St. Kitts and Nevis.¹³³

121 Harmelin v. Michigan, 501 U.S. 957 (1991).

122 Michigan, FAMILIES AGAINST MANDATORY MINIMUMS, at <http://www.famm.org/state/Michigan.aspx> (last visited April 8, 2012).

123 Molly M. Gill, *Clemency for Lifers: The Only Road Out is the Road Not Taken*, 23 FED. SENT. REP. 21, 21 (2010).

124 Nellis, *supra* note 95, at 28.

125 Note, *A Matter of Life and Death: The Effect of Life without Parole Statutes on Capital Punishment*, 119 Harv. L. Rev. 1838, 1840 (2006).

126 Op-Ed., *The Misuse of Life Without Parole*, N.Y. TIMES, Sept. 12, 2011 at A30.

127 *Model Penal Code: Sentencing*, THE AMERICAN LAW INSTITUTE 12 (March 25, 2011), available at <http://www.ali.org/00021333/Model%20Penal%20Code%20TD%20No%202%20-%20online%20version.pdf>.

128 International Covenant on Civil and Political Rights, *supra* note 10, art. 10(3).

129 Rome Statute of the International Criminal Court, art. 110(3), 17 July 1998, A/CONF. 183/9.

130 *States Parties to the Rome Statute*, INT’L CRIMINAL COURT, <http://www.icc-cpi.int/Menu/ASP/states+parties/> (last visited April 11, 2012).

131 Cambodia Penal Code, art. 513.

132 See Jamil Ddamulira Mujuzi, *Life Imprisonment in International Criminal Tribunals and Selected African Jurisdictions – Mauritius, South Africa and Uganda 132-62* (May 13, 2009) (unpublished thesis) (on file with authors).

133 *Entire World, Prison Population Rate per 100,000 of the National Population*, INT’L CENTRE FOR PRISON STUDIES, http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poprate (last visited April 11, 2012).

Numerous European instruments reject the use of LWOP sentences and instead promote the idea that human rights norms require offenders serving life sentences to be treated as capable of rehabilitation. The 1976 Resolution of the Committee of Ministers on the Treatment of Long-Term Prisoners was based on a memo that said, “Nobody should be deprived of the chance of possible release. Just how far this chance can be realised must depend on the individual prognosis.”¹³⁴ The Council of Europe’s European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment recommended that conditional release be available for all prisoners, including those sentenced to life.¹³⁵ The report concludes that no category of prisoners should be “stamped” as likely to spend their natural life in prison and that no denial of release should ever be final, not even for recidivists.¹³⁶ The 1999 Recommendation of the Committee of Ministers concerning Prison Overcrowding, the 2003 Recommendations on Conditional Release, and the 2006 European Prison Rules all argued the desirability of parole.¹³⁷

In Europe, countries can refuse to allow the extradition of an alleged offender if that person faces LWOP in the requesting country. The European Union’s Council Framework Decision on Arrest Warrants provides that states can refuse to extradite unless the warrant-issuing state has legal provisions allowing for review of sentences after 20 years.¹³⁸ Similarly, the Convention on the Prevention of Terrorism allows restrictions on extradition when the person to be extradited may face LWOP.¹³⁹

In a January 2012 decision by the European Court of Human Rights, *Vinter v. U.K.*, the court ruled four votes versus three that LWOP in the United Kingdom, applied according to the discretion of the judge, is not incompatible with the right to be free from inhuman or degrading treatment or punishment as enshrined in Article 3 of the European Convention on Human Rights, which prohibits “inhuman or degrading treatment or punishment.”¹⁴⁰ The Court, however, drew a critical distinction between mandatory versus discretionary LWOP sentences:

For...a mandatory sentence of life imprisonment without the possibility of parole, the Court considers that greater scrutiny is required. The vice of any mandatory sentence is that it deprives the defendant of any possibility to put any mitigating factors or special circumstances before the sentencing court.... This is especially true in the case of a mandatory sentence of life imprisonment without the possibility of parole, a sentence which, in effect, condemns a defendant to spend the rest of his days in prison, irrespective of his level of culpability and irrespective of whether the sentencing court considers the sentence to be justified.... [T]he trend in Europe is clearly against such sentences.... [T]hese considerations mean that such a sentence is much more likely to be grossly disproportionate than any of the other types of life sentence, especially if it requires the sentencing court to disregard mitigating factors which are generally understood as indicating a significantly lower level of culpability on the part of the defendant, such as youth or severe mental health problems.... The Court concludes therefore that, in the absence of any such gross disproportionality, an Article 3 issue will arise for a mandatory sentence of life imprisonment without the possibility

134 *Draft General Report on the Treatment of Long-Term Prisoners*, Doc. No. CM (75)143add3 (1975), cited in van Zyl Smit, *supra* note 14, at 47.

135 *Memorandum of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Actual/Real Life Sentences* 55 (Jun. 27, 2007), available at <http://www.cpt.coe.int/en/working-documents/cpt-2007-55-eng.pdf>.

136 *Id.*

137 *Recommendation R (99) 22 of the Committee of Ministers to Member States Concerning Prison Overcrowding and Prison Population Inflation* (1999), available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=538633&SecMode=1&DocId=412108&Usage=2>; *Recommendation Rec (2003) 22 of the Committee of Ministers to Member States on Conditional Release (Parole)* (2003), available at <https://wcd.coe.int/ViewDoc.jsp?id=70103&Site=COE>; *Recommendation Rec (2006) 2 of the Committee of Ministers to Member States on the European Prison Rules* (2006), available at <https://wcd.coe.int/ViewDoc.jsp?id=955747>.

138 *European Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States*, art. 5(2), June 13, 2002, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:NOT>.

139 Convention on the Prevention of Terrorism, Council of Europe art. 21, 2005, C.E.T.S. No. 196.

140 *Vinter*, *supra* note 13, para. 37.

of parole in the same way as for a discretionary life sentence, that is when it can be shown: (i) that the applicant's continued imprisonment can no longer be justified on any legitimate penological grounds; and (ii) that the sentence is irreducible de facto and de jure.¹⁴¹

The dissenting minority in the case believed that LWOP constitutes inhuman or degrading treatment. It emphasized that "it is necessary to have a suitable review mechanism in place right from the beginning."¹⁴² They said that the "Article 3 problem" consists "equally importantly, of depriving [the offender] of any hope for the future, however tenuous that hope may be."¹⁴³

COMPARATIVE COUNTRY INFORMATION ON LIFE WITHOUT PAROLE SENTENCING

Only the United States and 37 other countries out of the world's 193 are known to researchers as having LWOP statutes (20%).¹⁴⁴ The vast majority of countries have no discernible statutory provision allowing for such a sentence.¹⁴⁵

Many countries expressly outlaw life sentences, either in statute, constitution, or constitutional court decisions. Thirty-three countries set maximum sentences at a limited number of years.¹⁴⁶ The constitutions of 10 countries, Angola, Brazil, Cape Verde, Colombia, Costa Rica, El Salvador, Portugal, Sao Tome & Principe, Timor Leste, and Venezuela, prohibit perpetual or life-long sentences.¹⁴⁷

Those countries that do allow for LWOP generally have extremely low numbers of prisoners serving such sentences. The Netherlands has 37.¹⁴⁸ England has 41.¹⁴⁹ Australia has 59 known cases.¹⁵⁰ In comparison, the United States has more than 41,000.¹⁵¹ The U.S. LWOP population per capita is 51 times greater than Australia's, 173 times England's and 59 times the Netherlands'.¹⁵²

141 Vinter, *supra* note 13, para 93.

142 *Id.* (joint partly dissenting opinion of Judges Garlicki, David Thór Björgvinsson and Nicolaou).

143 *Id.* (joint partly dissenting opinion of Judges Garlicki, David Thór Björgvinsson and Nicolaou).

144 Albania, Argentina, Australia, Brunei Darussalam, Bulgaria, Burundi, China, Comoros, Cuba, Eritrea, Ethiopia, Ghana, Hungary, Israel, Kazakhstan, Kenya, Lao People's Democratic Republic, Liberia, Lithuania, Malta, Marshall Islands, Namibia, Netherlands, New Zealand, Nigeria, Palau, Seychelles, Sierra Leone, Slovakia, Solomon Islands, Sweden, Tajikistan, Tanzania, Turkey, Ukraine, United Kingdom, and Zimbabwe.

145 There were 21 countries for which researchers could not locate statutory or case law text confirming whether LWOP exists or not. They are: Barbados, Bhutan, Dominica, Equatorial Guinea, Gambia, Grenada, Guyana, Indonesia, Kuwait, Lebanon, Libya, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saudi Arabia, South Sudan, Suriname, Syria, Thailand, Trinidad and Tobago, Turkmenistan, and the United Arab Emirates.

146 These are Andorra (30), Angola (30), Bolivia (30), Bosnia (45), Brazil (30), Cape Verde (25), Colombia (50), Costa Rica (50), Croatia (40), Dominican Republic (30), Ecuador (35), El Salvador (75), Guinea Bissau (25), Honduras (30), Italy (30), Maldives (25), Mauritius (60), Mexico (70), Montenegro (30), Mozambique (30 years), Nepal (30), Nicaragua (30), Panama (50), Paraguay (25), Peru (35), Portugal (25), San Marino (40), Serbia (40), Spain (40), Macedonia (20), Timor-Leste (30), Uruguay (30), Venezuela (30).

147 Angola Const. art. 66; Brazil Const. art. 5 (XLVII); Cape Verde Const. art. 31; Colombia Const. art. 34; Costa Rica Const. art. 40; El Salvador Const. art. 27; Portugal Const. art. 29(4); Sao Tome & Principe Const. art. 37; Timor Leste Const. art. 32; Venezuela Const. art 44(3).

148 Van Zyl Smit, *supra* note 14, at 41.

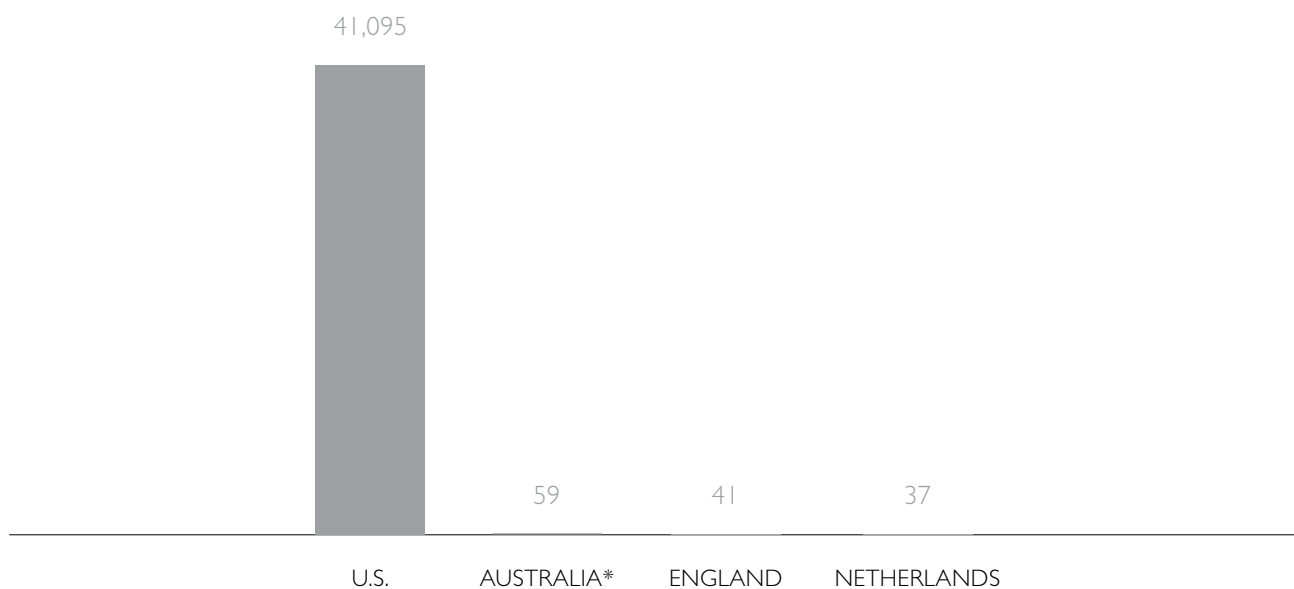
149 Vinter, *supra* note 13, para. 37; Van Zyl Smit, *supra* note 14, at 41 (as of 28 April 2011, 4,900 prisoners were serving mandatory life sentences for murder in England and Wales. Forty-one of them were subject to whole life orders. Since January 1, 2000, 37 whole life orders had been imposed, eight of which were subsequently reduced by the Court of Appeal. None have been released on compassionate grounds since 2000).

150 Anderson, *supra* note 12, at 9-13 (there are 12 in Victoria, 1 in Tasmania, 39 in New South Wales, 0 in Queensland, and 7 known cases in South Australia. The number of persons serving LWOP in Western Australia, Northern Territory, and Australian Capital Territory is unknown).

151 NELLIS & KING, *supra* note 11.

152 U.S. Population as 313,292,000. *Resident Population of the United States*, UNITED STATES CENSUS BUREAU <http://www.census.gov/population/www/popclockus.html> (last visited Apr. 11, 2012); Australia's population as 22,876,120. AUSTRALIAN BUREAU OF STATISTICS, <http://www.abs.gov.au/ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/1647509ef7e25faaca2568a900154b63?OpenDocument>, (last visited Apr. 11, 2012); England and Wales as 54,072,000. Simon Rogers, *England and Wales' population broken down by race, sex, age, and place*, THE GUARDIAN (Feb. 26, 2010, 12:06 PM), <http://www.guardian.co.uk/news/datablog/2010/feb/26/population-ethnic-race-age-statistics#data> (last visited Apr. 11, 2012). ; Netherlands as 16,728,091. *Statline*, CENTRAAL BUREAU VOOR DE STATISTIEK, <http://statline.cbs.nl/StatWeb/publication/?VW=T&DM=SLEN&PA=37943eng&LA=EN>.

THE NUMBER OF PRISONERS SERVING LIFE WITHOUT PAROLE SENTENCES IN SEVERAL COUNTRIES



* Known cases of LWOP in five of eight jurisdictions in Australia.

Based on data from Ashley Nells & Ryan S. King, "No Exit: The Expanding Use of Life Sentences In America," The Sentencing Project, July 2009; John L. Anderson, "The Label of Life Imprisonment in Australia: A Principled or Populist Approach to an Ultimate Sentence," (unpublished manuscript, on file with authors); Dirk Van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink*, 27 Fed. Sent. Rep. 39, 41 (2010); *Cases of Vinter and Others v. the United Kingdom*, Applications nos. 66005909 and 130/10 and 3896/10, Strasbourg, Jan 17, 2012, para 37.

Those countries that do have LWOP sentences generally reserve them for extreme cases, or the gravest of crimes, unlike the United States, where there is a much lower bar. Of the 37 countries that do allow for LWOP sentences, 21 of them are more restrictive than the U.S. in that they require certain conditions, such as commission of a *violent* crime from an enumerated list¹⁵³ or repeated offenses.¹⁵⁴ Two countries with life without parole allow for extraordinary cases in which, after 25 or 30 years, the convict still may be released.¹⁵⁵ In England and Wales, LWOP is allowed only in the following cases: murder of two or more persons, with *each* involving high levels of premeditation, abduction, or sadistic conduct; the murder of a child involving abduction or sadistic motivation; murder for political, religious, or ideological cause; and murder by an offender previously convicted of murder.¹⁵⁶ Slovakia allows for life without parole sentences only in instances where a person who has been sentenced to life, is released on parole, commits another serious crime, and is sentenced to life imprisonment for a second time.¹⁵⁷ In Hungary, only those sentenced to two consecutive life sentences are unable to be reviewed for parole.¹⁵⁸

153 Argentina, Burundi, China, Liberia, New Zealand, Palau.

154 Argentina, China, Comoros, Hungary, Lao People's Democratic Republic, Slovakia, and Uzbekistan.

155 Albania and Cuba.

156 England and Wales Criminal Justice Act, 2003, § 269(4), Schedule 22, paragraph 3 of the act states that prisoners given mandatory life sentences can apply to the High Court to ask the court to specify the minimum term of imprisonment. The High Court, where the Secretary of State has notified the prisoner that a whole life tariff has been set, may make an order that the prisoner is never eligible for release. England and Wales Criminal Justice Act, 2003, Sch. 21, para 4(1) and (2); *Vinter, supra* note 13 (the European Court of Human Rights ruled that LWOP did not violate a right to be free from inhuman or degrading treatment or punishment enshrined in the European Convention on Human Rights. The first applicant was convicted of murder, released, and committed a second murder. The second applicant had murdered five family members allegedly for financial gain. The third applicant was convicted of murder of four persons following confession. Under the law in England and Wales, the trial judge, in passing a mandatory life sentence for murder, determines the minimum term which the prisoner must serve before release).

157 Slovakia Penal Code, sec. 67.

158 Hungary Penal Code, sec. 47(c).

Israel reserves the sentence only for persons convicted of murdering the prime minister on political or ideological grounds.¹⁵⁹ In contrast, in the United States, a person can be handed a life sentence for one non-violent crime, such as drug possession.¹⁶⁰

COUNTRY	STATUTE	DIFFERENCES FROM U.S. LWOP POLICY
Albania	Penal Code, art. 65	LWOP provision is immediately followed by words, "Only in extraordinary circumstances may the convicted serving life imprisonment be released on parole, [and precisely when]: He has served no less than twenty-five years of imprisonment and, during the period serving his sentence, has had excellent behavior and it is deemed that the educational aim has been achieved."
Argentina	Penal Code, arts. 14, 80(7), 124, 142, 170	LWOP is reserved only for recidivist offenders, for crimes committed "in order to prepare, facilitate, consummate or conceal another crime or to secure impunity for themselves or another;" a death occurring during sexual abuse of a minor under 16, intentional murder during a kidnapping of three or more people, or murder during a kidnapping for ransom.
Australia	New South Wales: Crimes Act 1900, sec. 19A(2), Crimes (Sentencing Procedure Act) sec. 102; Victoria: Sentencing Act 1991, sec. 11(1), 109; South Australia: Criminal Law (Sentencing) Act 1988, secs. 32(1) &(5)(ab), (c), 32A; Western Australia: Sentencing Act 1995, sec. 90; Tasmania: Sentencing Act 1997, sec. 18; Northern Territory: Sentencing Act 1995, sec. 53A; Australian Capital Territory: Crimes (Sentencing) Act 2005 sec. 65(4) ¹⁶¹	
Brunei Darussalam	Penal Code, sec. 53(2)	
Bulgaria	Penal Code, art. 38a	Immediately after defining life as "natural life," law states that "Imprisonment for life may be substituted by deprivation of liberty for a term of thirty years, provided the convict has served no less than twenty years."
Burundi	Penal Code, arts. 45, 127, 136	LWOP is allowed for a list of enumerated crimes, "crimes of genocide, crimes against humanity, war crimes, murder, sexual assault, torture and armed robbery."
China	Penal Code, art. 81	LWOP is only for recidivists or those who are convicted of "murder, bombing, robbery, rape, kidnap, or other violent crimes."
Comoros	Law No 81-08 of 1981 Organizing Parole, art. 2	LWOP is only for recidivist felons.
Cuba	Penal Code, art. 30	LWOP provision is immediately followed by statement that parole may be granted in exceptional cases after 30 years.
Ghana	Prisons Service Act, NRCD 46, 1972, sec. 34	
Hungary	Penal Code, sec. 47	The convict must be handed at least two life sentences.
Israel	Conditional Parole Law, 5761-2001, art. 30A	LWOP allowed only for persons convicted of murdering Prime Minister with a political-ideological motive.
Kazakhstan	Penal Code, art. 48	LWOP issued only as alternative to death penalty. Shall not be applied to women, juveniles, or males 65 or older at time of conviction.
Kenya	Prisons Act, sec. 46(1)(ii)	

159 Israel Conditional Parole Law, 5761-2001, art. 30A.

160 Harmelin v. Michigan, 501 U.S. 957 (1991).

161 Anderson, *supra* note 12, at 3-5.

Lao People's Democratic Republic	Penal Code, art. 47	LWOP applies only to recidivist offenders or offenders sentenced to death penalty commuted into life imprisonment.
Lesotho	Criminal Procedure and Evidence Act, sec. 344A	
Liberia	Act to Amend Chapters 14 and 15 Sub-Chapter	LWOP applies only to murder caused by armed robbery, terrorism or hijacking, (C), Title 26 of the Liberian Code of Law Revised, sec. 15.34
Lithuania	Penal Code, arts. 51, 77	
Malta	Penal Code, art. 493	
Marshall Islands	Penal Code, sec. 190	
Namibia	Criminal Procedure Act of 2004, sec. 307 ¹⁶²	
Netherlands	Penal Code, art. 31	
New Zealand	Sentencing Act, sec. 86E	LWOP allowed only for murder.
Nigeria	Media report ¹⁶³	LWOP is for kidnapping in River State.
Palau	Palau National Code, Title 17, sec. 4205	LWOP allowed only for terrorism resulting in the death of a person.
Seychelles	Prisons Act, sec. 30(a)	
Sierra Leone	Keir Starmer; Theodora A. Christou, Human Rights Manual and Sourcebook for Africa, British Institute of International and Comparative Law, Bar Human Rights Committee of England and Wales at 867; Interview with Sierra Leonean lawyer ¹⁶⁴	
Slovakia	Penal Code, sec. 67	LWOP applies only to a person sentenced to life, paroled, convicted for a second crime and sentenced to life a second time.
Solomon Islands	Prisons Act, sec. 114	
Sweden	Penal Code Chapter 26, sec. 6	
Tajikistan	Penal Code, art. 76	LWOP can be given only to offenders whose capital sentences have been commuted or "especially dangerous recidivists."
Tanzania	Prisons Act, sec. 49; Parole Boards Act (Act 25 of 1994), sec. 4(a)	
Turkey	Penal Code, arts. 47(1), 48(1), 82(1); media report ¹⁶⁵	LWOP allowed only for aggravated forms of felonious homicide and formerly death penalty-eligible crimes.
Ukraine	Penal Code, arts. 64, 81; Catherine Appleton &	LWOP cannot apply to juveniles, pregnant women, or persons over 65 at time Brent Grover; The Pros and Cons of Life Without conviction. Parole, 47 BRIT. J. CRIMINOLOGY 597, 601 (2007)
United Kingdom	Criminal Justice Act 2003, sec. 269(4), Schedule 21, para 4(1) and (2), Schedule 22, para 3; Vinter and Others v. United Kingdom, Applications nos. 66069/09 and 130/10 and 3896/10 (2012)	LWOP is allowed only in the following cases: murder of two or more persons, with each involving high levels of premeditation, abduction, or sadistic conduct; the murder of a child involving abduction or sadistic motivation; murder for political, religious, or ideological cause; and murder by an offender previously convicted of murder.

162 The Namibian Criminal Procedure Act of 2004 was still not in force as of Apr. 5, 2012, and the Criminal Procedure Act No. 51 of 1977 was still applicable. The High Court of Namibia, <http://www.superiorcourts.org.na/high/legislation/criminal.html> (last visited Apr. 5, 2012).

163 Gilbert da Costa, *New Nigeria Law Would Give Kidnappers Life Term Imprisonment*, VOICE OF AMERICA, May 9, 2009, <http://www.voanews.com/english/news/a-13-2009-05-09-voa25-68688427.html>

164 Phone interview with lawyer from Sierra Leone, (Oct. 18, 2011).

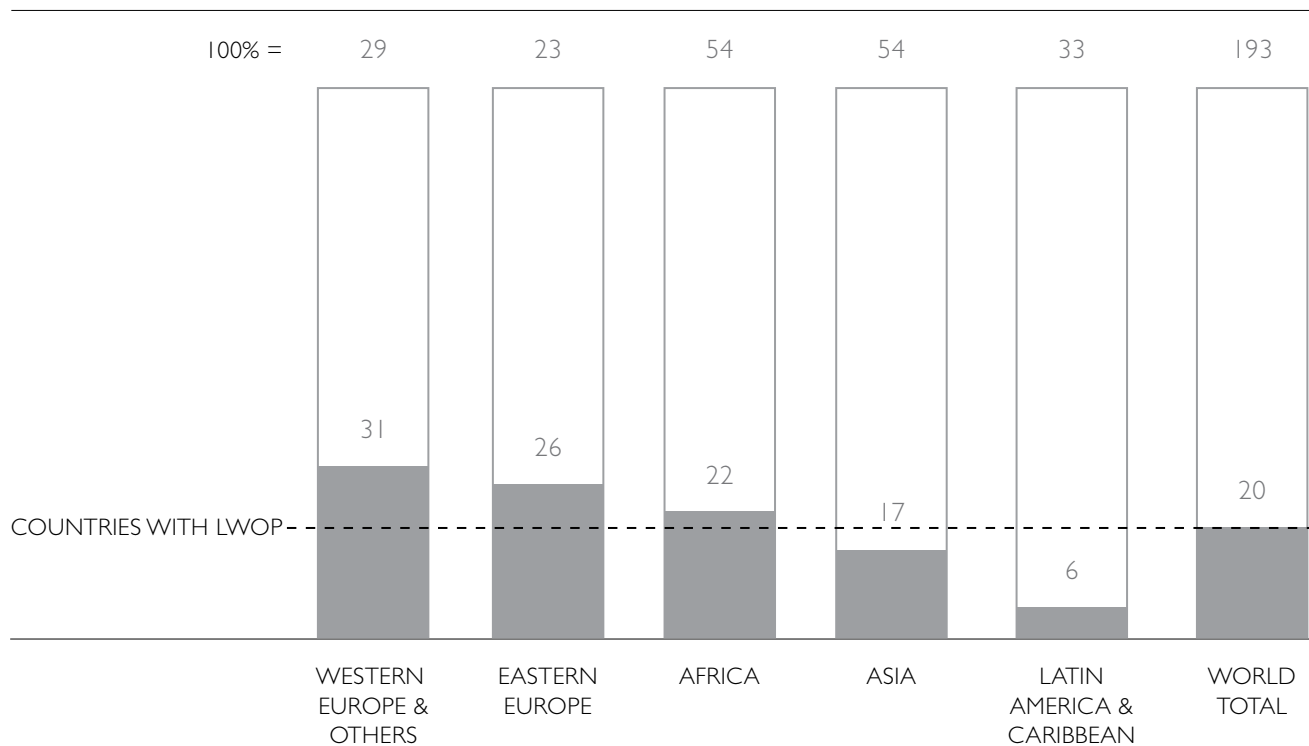
165 *Turkey Agrees to Death Penalty Ban*, BBC, Jan. 9, 2004, <http://news.bbc.co.uk/2/hi/europe/3384667.stm>.

Uzbekistan	Penal Code, art. 73	LWOP applies only to death penalty commutations and special dangerous recidivists.
Zimbabwe	Criminal Procedure and Evidence Act, sec. 344A	

The United States is in the 5% of countries using both the death penalty and LWOP. There are only eight other countries in the world other than the United States that have both the death penalty and LWOP. They are China, Comoros, Cuba, Israel, Kazakhstan, Lesotho, Nigeria, and Zimbabwe. For the remaining 29 LWOP countries, there is no death penalty, either in statute or practice.¹⁶⁶ LWOP for these countries is their most serious punishment available, and therefore the closest alternative to the death penalty.

LIFE WITHOUT PAROLE BY REGION

Number of Countries with Life Without Parole Sentencing, Percentage



Refer to Appendix for country citations.

Countries in Western Europe and others, as categorized by the United Nations, top the world's regions in using LWOP.¹⁶⁷ Almost a third of these countries (31%, or 9 countries) have LWOP sentences. They are: Australia, Israel, Malta, Netherlands, New Zealand, Sweden, Turkey, United Kingdom, and United States. Eastern Europe and Africa also have higher than

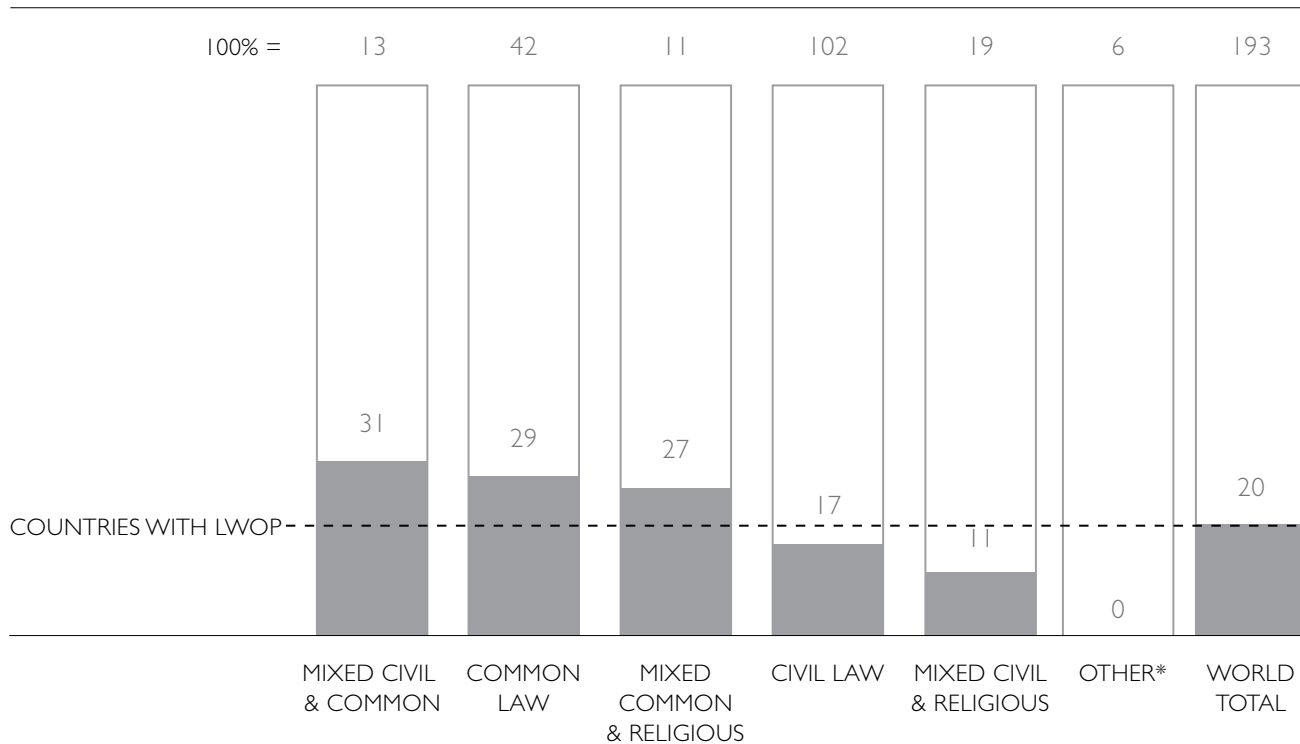
¹⁶⁶ These are Albania, Argentina, Australia, Brunei Darussalam, Bulgaria, Burundi, Ghana, Hungary, Kenya, Lao People's Democratic Republic, Liberia, Lithuania, Malta, Marshall Islands, Namibia, Netherlands, New Zealand, Palau, Seychelles, Sierra Leone, Slovakia, Solomon Islands, Sweden, Tajikistan, Tanzania, Turkey, Ukraine, United Kingdom, Uzbekistan. *Death Penalty Abolitionist and Retentionist Countries*, AMNESTY INT'L, <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> (last visited April 11, 2012).

¹⁶⁷ *United Nations Regional Groups of Member States*, DEP'T FOR GEN. ASSEMBLY AND CONFERENCE MGMT, <http://www.un.org/depts/DGACM/RegionalGroups.shtml> (last visited Apr. 11, 2012).

the world’s average use of LWOP. Asia and Latin America/Caribbean have lower rates of LWOP than the world average. A higher percentage of developed countries than developing countries have life without parole sentences. Of the 34 nations in the Organization for Economic Cooperation and Development (OECD), the United States and eight other countries (26%) have LWOP. A lower percentage of non-OECD countries, 29 of 159 (18%) have LWOP. These figures accord with life imprisonment having historically been indeterminate and subject to review.¹⁶⁸

LIFE WITHOUT PAROLE BY COUNTRIES’ LEGAL TRADITIONS

Number of Countries with Life Without Parole Sentencing, Percentage



*Religious; or mixed civil, common, & religious. Refer to Appendix for country citations.

When examining legal traditions, common law countries are more likely than civil law countries to allow life without parole sentences. Mixed civil and common law countries, common law, and mixed common law and religious countries are more likely than those with civil law traditions to have life without parole sentences.¹⁶⁹

Several constitutional and supreme courts have ruled life without parole sentences to be incompatible with their constitutions.¹⁷⁰ The German Constitutional Court ruled in 1977 that inmates serving life sentences must have the hope of being released under clear procedures.¹⁷¹ The procedure for releasing prisoners serving life sentences had to be made explicit in primary legislation, and the German legislature inserted a paragraph into the Criminal Code doing so.¹⁷² Mexico’s Supreme

168 MARC MAUER, RYAN S. KING, & MALCOLM C. YOUNG, THE SENTENCING PROJECT, THE MEANING OF “LIFE”: LONG PRISON SENTENCES IN CONTEXT (2004).

169 *The World Factbook*, THE CIA, <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html> (last visited Apr. 11, 2012).

170 Van Zyl Smit, *supra* note 14, at 41.

171 Bundesverfassungsgericht [BverfGE] [Federal Constitutional Court] June 21, 1977, 45, 187 (Ger.).

172 GESETZ UBER DEN VOLLZUG DER FREIHEITSSTRAFE UND DER FREIHEITSENTZIEHENDEN MASSREGELN DER BESSERUNG UND SICHERUNG (STRAFVOLLZUGSGESETZ) [Prisons Act], Mar. 16, 1076 (BVB1. I S. 581), art. 2 (Ger.).

Court ruled LWOP unconstitutional because it amounted to cruel and unusual punishment.¹⁷³ Courts in France,¹⁷⁴ Italy,¹⁷⁵ and Namibia¹⁷⁶ have also recognized that prisoners serving life sentences have a fundamental right to review for potential release. In South Africa, several court decisions affirmed that life-long imprisonment without review for release is unconstitutional, with South African Constitutional Court Judge Laurie Ackerman writing,

To attempt to justify any period of penal incarceration, let alone imprisonment for life...without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings...are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence...the offender is being used essentially as a means to another end and the offender's dignity assailed.¹⁷⁷

Life without parole sentences remove any ambiguity allowing for the possibility of rehabilitation. Because they remove any possibility of subsequent revision, they are a “covenant with the past,” irrevocable and unwavering in the resolution that a person is *a priori* unable to reform sufficiently to re-enter society. The retributive qualities of LWOP, particularly in instances of temporary harm against people or property, are questionable. A request to do away with LWOP is not a request that all prisoners serving life sentences be eventually released, but rather that their cases be reviewed after sentencing with some regularity to assess whether continued detention can be justified.

2. RECIDIVIST/HABITUAL OFFENDER STATUTES

The majority of countries in the world, 76% of nations with available information, have some type of enhanced penalties for habitual offenders or recidivists. Habitual offender laws provide for higher penalties based on previous criminal convictions and the individual's prior criminal history; offenders are punished for their past behavior in addition to their current crime.¹⁷⁸ Nonetheless, the severity and applicability of these sanctions differ wildly across jurisdictions. These sentences can be problematic when judicial discretion is removed and mandatory punishments are required regardless of the circumstances surrounding the offense. On the most extreme end of the spectrum, these laws may result in a sentence that is grossly

173 Pleno de la Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta, Novena Época*, Octubre de 2001, Tesis P./J. 125/2001 (Mex.); Rodrigo Labardini, *Life Imprisonment and Extradition: Historical Development, International Context, and the Current Situation in Mexico and the United States*, 11 Sw. J. L. & TRADE AM. 1, 2 (2005); Catherine Appleton & Brent Grover, *The Pros and Cons of Life Without Parole*, 47 BRIT. J. CRIMINOLOGY 597, 608 (2007); The Mexican Supreme Court held that the state requesting extradition “must provide assurances that life imprisonment will not be imposed” because life imprisonment is an “unusual or extreme” punishment. Vanessa Maaskamp, Note, *Extradition and Life Imprisonment*, 25 LOY. L.A. INT'L & COMP. L. REV. 741, 749 (2003). Further, the Court emphasized that rehabilitation is the primary goal of criminal sentencing. *Id.*, at 750.

174 Conseil Constitutionnel [CC] [Constitutional Court], decision No. 93-334 DC, Jan. 20, 1994, paras. 12-13 (Fr.) (stating that convicts are eligible for parole in any event after serving 30 years).

175 Corte Cost. Sentenza, 27 Settembre 1987, n. 274 For it. I, 2333 (It.).

176 *S v. Nehemia Tjijo*, April 9, 1991 (unreported) quoted in Namibia Supreme Court Feb. 6, 1996, *S v. Tcoeib* (1) SACR 390 (NmS) (1996) (Namib.), available at <http://www.saflii.org/na/cases/NASC/1996/1.html>: “[Life imprisonment] removes from a prisoner all hope of his or her release. When a term of years is imposed, the prisoner looks forward to the expiry of that term when he shall walk out of gaol a free person, one who has repaid his debt to society. Life imprisonment robs the prisoner of this hope. Take away his hope and you take away his dignity and all desire he may have to continue living. Article 8 of the [Namibian] Constitution entrenches the right of all people to dignity. This includes prisoners. The concept of life imprisonment destroys human dignity reducing a prisoner to a number behind the walls of jail waiting only for death to set him free.”

177 *S v. Dodo* 2001 (3) SA 382, 404 (CC) at para. 38 (S.Afr.); see also *Nkosi & Others v. S* 2002(JOL 10209 (SCA) (S. Afr.)). The appellants were convicted of a number of offences including murder. While allowing the appeal, the Supreme Court of Appeal wrote, “The courts are discouraged from imposing excessively long sentences of imprisonment in order to avoid having a prisoner being released on parole. A prisoner serving a sentence of life imprisonment will be considered for parole after serving at least 20 years of the sentence, or at least 15 years thereof if over 65 years, according to the current policy of the Department of Correctional Services. A sentence exceeding the probable life span of a prisoner means that he [or she] will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment.”

178 John Kimpflen, *Habitual Criminals and Subsequent Offenders*, 39 Am. Jur. 2d Habitual Criminals, Etc. § 1.

disproportionate to the crime triggering the sentence.¹⁷⁹ For instance, in certain jurisdictions in the United States, a person with past felony convictions may receive a harsher penalty for shoplifting than a first-time murder conviction.¹⁸⁰ This has helped create a system in which prisons are filling with repeat offenders serving extraordinarily long sentences for different offenses committed over a period of years. In California, roughly 24% of the total prison population is serving sentences for second and third strikes.¹⁸¹ This means that a quarter of all California prisoners have received increased prison sentences due to prior convictions, without focusing on the severity of their most recent crime.

Generally, the decision to apply an enhanced penalty is made by a judge during sentencing. In some countries the recidivism statutes do not increase the actual prescribed penalty for the offense, but instead deem the habitual offender ineligible for parole for specified increments or the entire term of the sentence.¹⁸² In many countries, prior convictions may be considered an aggravating factor at sentencing.¹⁸³ Other statutes require a mandatory minimum sentence upon conviction of a second or third felony crime. In the United States this includes “three strikes and you’re out” provisions which typically provide a sentence of 25 years to life for someone upon conviction of their third felony.

RECIDIVIST STATUTES IN THE UNITED STATES

The United States has a long history of enacting habitual offender laws.¹⁸⁴ However, a dramatic acceleration occurred in the 1990s when legislatures enacted habitual offender laws, specifically three strikes laws, in reaction to perceived increases in crime rates and threats to public safety.¹⁸⁵ Twenty-four states and the federal government passed some version of a three strikes law between 1993 and 1995.¹⁸⁶ In enacting these laws the goal was to limit judicial discretion and create a formulaic method to keep “career criminals” off the streets. The reasoning was focused on retribution, incapacitation, and deterrence.¹⁸⁷ These laws encapsulate the belief that someone who has committed previous crimes will continue to do so and that these “habitual offenders” should be removed from society in order to keep the public safe. In addition, legislators and the general public believe that the threat of harsh sentences will serve a deterrent effect. While the deterrent effects of recidivism statutes are debatable, there is clear indication that these sentences have played a role in increasing the U.S. prison population as part of the proliferation in “tough on crime” sentencing laws enacted in the past 30 years.¹⁸⁸ In 1990, prior to the enactment of three strikes laws across the United States, the national prison population was 1,148,176.¹⁸⁹ In California in 1996 there were 1,822 defendants serving life in prison under the three strikes law for identifiable offenses, while in 2002 this number had increased to 7,148 individuals serving such sentences.¹⁹⁰ Nationally, the prison population has more than doubled since 1990 to 2.3 million.¹⁹¹

179 *People v. Taylor*, 83 Cal. Rptr. 2d 919, 923 (1999). (Associate Justice Earl Johnson Jr. from the California Court of Appeal in his dissenting opinion in *People v. Taylor* described the case as “a scenario somewhat reminiscent of a late 20th Century, real life *Les Miserables*, a hungry, homeless man is sent away for 25 years to life for trying to break into a church so he could eat some food he thought the church would be glad for him to have.”).

180 See *Lockyer v. Andrade*, 538 U.S. 63 (2003) (in two separate incidences, Leandro Andrade stole a total of nine videotapes worth roughly \$150 from a Kmart. Because he had previous felony convictions (all nonviolent), he received two consecutive terms of 25 years to life); CAL. PENAL § 190(a) (West 2012) (under the California Penal Code a defendant guilty of 2nd degree murder shall serve 15 years to life).

181 CAL. DEP’T OF CORR. AND REHAB., CORRECTIONS: YEAR AT A GLANCE 24 (Fall 2011), available at http://www.cdcr.ca.gov/News/docs/2011_Annual_Report_FINAL.pdf (As of December 31, 2010, 40,998 inmates of a total 162,821 were serving sentences for 2nd and 3rd strikes).

182 See Appendix for details on Albania, Argentina, Belarus, Belgium, El Salvador, France, Georgia, Honduras, Ireland, Mongolia, Nicaragua, and Uruguay.

183 See Appendix for details on Afghanistan, Andorra, Armenia, Azerbaijan, Bolivia, Bosnia and Herzegovina, Chile, Croatia, Democratic Republic of Korea, Denmark, Germany, Latvia, Marshall Islands, Micronesia, Nigeria, Palau, Serbia, Seychelles, Sierra Leone, Spain, Swaziland, Switzerland, The Former Yugoslav Republic of Macedonia, Turkey, and Ukraine.

184 FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA 4 (Oxford University Press 2001).

185 *Id.*

186 Anne Goldin, *The California Three Strikes Law: A Violation of International Law and a Possible Impediment to Extradition*, 15 SW. J. INT’L LAW 327, 330 (2009).

187 *Id.*

188 Marc Mauer, *Why are Tough on Crime Policies so Popular?*, 11 STAN. L. & POL’Y REV. 9 (1999).

189 L. JANKOWSKI, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE 6(1991), available at <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=133285>.

190 Alex Ricciardulli, *The Broken Safety Valve: Judicial Discretion’s Failure to Ameliorate Punishment Under California’s Three Strikes Law*, 41 DUQ. L. REV. 1, 31-32 (2002).

191 LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010, at 7 (2011) available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf>.

The most infamous example of a stringent habitual offender law is California’s three strikes law, which provides a sentence of 25 years to life for anyone convicted of a felony who has committed two prior serious or violent offenses.¹⁹² While the public pushes for “the worst of the worst” to be taken off the streets, the reality is that most third strike convictions are for non-violent felonies: fifty-four percent of third strike commitments under California’s three strikes law were for drug, property, and other non-violent crimes.¹⁹³ Less than half (46%) of third strike commitments in California were for crimes involving actual physical violence.¹⁹⁴ Of those, the vast majority (77%) were for assault and robbery. Contrary to public belief, only 3% were homicides.¹⁹⁵ According to data from the California Department of Corrections and Rehabilitation, “[i]n 2009, approximately 32,000 inmates in [California’s] prison system were serving indeterminate life terms, roughly one fifth of the entire prison population and the highest proportion of lifer inmates of any state in the U.S.”¹⁹⁶

The fact that California is incarcerating large numbers of non-violent and low level offenders for 25 years to life is especially noteworthy in light of the recent U.S. Supreme Court ruling that required California to release 40,000 prisoners from overcrowded prisons due to the fact that the inadequacy of medical and mental health care in California prisons constituted cruel and unusual punishment.¹⁹⁷ The Court found that the unsustainable California prison population resulted in crowding which “creates unsafe and unsanitary conditions that hamper effective delivery of medical and mental health care. It also promotes unrest and violence and can cause prisoners with latent mental illnesses to worsen and develop overt symptoms. Increased violence requires increased reliance on lockdowns to keep order, and lockdowns further impede the effective delivery of care.”¹⁹⁸

Three strikes convictions in California frequently result in sentences that are grossly disproportionate to the actual crime committed. These disparate outcomes often arise from the fact that the third felony can be any felony, with the prosecution and trial judge able to decide if certain crimes, known as “wobblers,” will be considered felonies or misdemeanors for purposes of the third strike law.¹⁹⁹ If a prosecutor or trial judge decides that the crime will constitute a felony, it triggers the three strikes law, while if the same crime is categorized as a misdemeanor, it will not be applicable under the statute. In addition, juvenile convictions count as strikes under the law.²⁰⁰ As a result, there have been 25 years to life sentences given upon third strike convictions for the petty theft of two pairs of children’s shoes from a discount store, for stealing a car jack from the back of an open tow truck,²⁰¹ and for a homeless man stealing food out of a church soup kitchen.²⁰²

Under federal law, past criminal history can result in disproportionately harsh sentences particularly for drug offenders. A defendant convicted of a federal drug crime with two or more prior felony drug convictions is subject to a mandatory minimum of life imprisonment;²⁰³ all life sentences are without the possibility of parole.²⁰⁴ The result is that anyone with two drug felonies will be sentenced to die in prison. These outcomes are all too prevalent due to the fact that an offender with

192 CAL. PENAL CODE § 667 (West 2012).

193 Aaron Rappaport & Kara Dansky, *State of Emergency: California’s Correctional Crisis*, 22 FED. SENT’G REP. 133 (2010) (citing Estimates and Statistical Analysis Section Data Analysis Unit, Offender Information Services Branch, California Department of Corrections and Rehabilitation, *Prison Census Data*) (as of December 31, 2009).

194 *Id.*

195 *Id.*

196 Aaron Rappaport & Kara Dansky, *State of Emergency: California’s Correctional Crisis*, 22 FED. SENT’G REP. 133, 134 (2010).

197 *Brown v. Plata*, 131 S. Ct. 1910 (2011).

198 *Id.* at 1919.

199 *Ewing v. California*, 538 U.S. 11, 17 (2003) “In California, prosecutors may exercise their discretion to charge a ‘wobbler’ as either a felony or a misdemeanor. Likewise, California trial courts have discretion to reduce a ‘wobbler’ charged as a felony to a misdemeanor either before preliminary examination or at sentencing to avoid imposing a three strikes sentence.”

200 CAL. PENAL CODE § 667(c)(3) (West 2012).

201 *Success Stories*, STANFORD THREE STRIKES PROJECT, http://www.law.stanford.edu/program/clinics/threestrikesproject/#success_stories (last visited Apr. 13, 2012).

202 *People v. Taylor*, 83 Cal. Rptr. 2d 919 (1999).

203 Prohibited acts A, 21 U.S.C. § 841.

204 *Nellis*, *supra* note 95, at 28.

more than one conviction is ineligible for the statutory safety valve, a mechanism which exists to prevent inequitable results.²⁰⁵ The federal safety valve only allows judges to avoid providing the mandatory minimum in certain drug offenses for first-time, low-level, non-violent offenders provided they fully disclose all information and evidence to the government.²⁰⁶ The extremely limited application of this statute effectively cuts off any possibility of sentence reduction for recidivists.²⁰⁷

The U.S. Supreme Court has heard cases alleging that three strikes laws violate the Eighth Amendment's prohibition against cruel and unusual punishment. However, the Court has made it clear that "outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."²⁰⁸

In *Solem v. Helm*, the Supreme Court held that the Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."²⁰⁹ In that case, the defendant was sentenced to life without parole for uttering a "no account" check for \$100 after seven non-violent felony convictions. Ordinarily, Solem would have faced a maximum five-year sentence and a \$5,000 fine for the crime.²¹⁰ Under South Dakota's recidivist statute he received a life without parole sentence. While the Court found that Solem's punishment to be cruel and unusual, the proportionality test used to make that finding was subsequently disregarded in cases such as *Harmelin*.²¹¹

The Supreme Court examined California's three strikes laws in *Ewing v. California* and *Lockyer v. Andrade*.²¹² In *Ewing*, the Court found the three strikes law constitutional as applied to a third strike for felony grand theft for stealing three golf clubs, worth \$399.²¹³ The Court deferred to the legislative decision to enact the three strikes laws in the interest of deterrence and incapacitation.²¹⁴ The Court concluded that Ewing's sentence was not disproportionate because he was not being sentenced solely for the theft of the three golf clubs, but also for his history of felony recidivism.²¹⁵ In *Lockyer*, the Court found that two consecutive 25 years to life sentences for a third strike conviction for the theft of videotapes worth \$150 did not violate "clearly established law" and thus did not warrant federal habeas relief.²¹⁶ In doing so, the Court concluded that "[t]he gross disproportionality principle reserves a constitutional violation for only the extraordinary case," which this case, a *de facto* life without parole sentence for the theft of \$150 worth of videotapes, did not merit.²¹⁷ In the United Kingdom, Ewing and Andrade's crimes would have been inapplicable under the recidivist statute and they would have received a maximum of seven years as opposed to their 25 years to life sentences.²¹⁸

INTERNATIONAL LAW AND STANDARDS ON RECIDIVIST STATUTES

Recidivist statutes have not been addressed in great detail in the context of international law. The Human Rights Committee (HRC), an independent body of experts that monitors implementation of the ICCPR by its states parties, has displayed concern over potential rights violations in mandatory sentencing in the context of three strikes laws. The HRC conducted a review of Australia and specifically requested that Australia, "[p]lease indicate whether measures have been taken to abolish

205 Criminal Procedure, Imposition of a sentence, 18 U.S.C. § 3553(f).

206 *Id.*

207 U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 352 (2011).

208 *Rummel v. Estelle*, 445 U.S. 263, 272 (1980).

209 *Solem v. Helm*, 463 U.S. 277, 284 (1983).

210 *Id.* at 282.

211 *Harmelin v. Michigan*, 501 U.S. 957 (1991) (discussed in the section on Life Without Parole Sentences in this report).

212 *Ewing v. California*, 538 U.S. 11 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003).

213 *Ewing v. California*, 538 U.S. 11 (2003).

214 *Id.* at 25.

215 *Id.* at 29-30.

216 *Andrade*, 538 U.S. at 71-73.

217 *Andrade*, 538 U.S. at 77.

218 Anne Goldin, *The California Three Strikes Law: A Violation of International Law and a Possible Impediment to Extradition*, 15 Sw. J. INT'L LAW 327, at 346-347 (2009).

the mandatory sentencing legislation (so-called “three strikes law”) still existing in the Criminal Code of Western Australia, which reportedly disproportionately affects children and indigenous peoples.”²¹⁹

COMPARATIVE COUNTRY INFORMATION ON RECIDIVIST STATUTES

Virtually all of the countries surveyed for this report provided some type of increased penalty for recidivists. What distinguishes the United States from the rest of the world, however, is the lack of judicial discretion in sentencing schemes aimed at recidivists and the length of sentences that result. While countries recognize the need to address the criminal history of a habitual offender at sentencing, most allow the judge to decide the weight and impact that previous convictions will have for sentencing purposes (74%).²²⁰ This approach is different from that of the United States where statutes such as the federal habitual offender law tie judges’ hands by requiring a harsh mandatory minimum upon conviction of a third strike. Judicial discretion is the integral key in preventing disproportionate sentences and unjust outcomes.

Seventy-four percent of countries surveyed allow judges to decide whether to increase the penalty for a recidivist at sentencing, there is a clear understanding that this type of decision should be reserved to the judiciary.²²¹ Of the 26% of countries that appear to limit judicial discretion, 21% require a specific non-parole period. This does not constitute an increased penalty *per se*; it simply requires that recidivists serve a standard percentage of the term. Because parole is not generally guaranteed, a recidivist would not necessarily serve more time than a first-time offender who is eligible but has not yet been granted parole. This leaves only 21% of countries, including the United States, that require a mandatory increased punishment for an offender with prior convictions.

<p>90 COUNTRIES HAVE DISCRETIONARY ENHANCED PENALTIES FOR PREVIOUS CONVICTIONS (JUDICIAL DISCRETION) 57%</p>	<p>Algeria, Australia, Bangladesh, Belarus, Belize, Benin, Botswana, Brazil, Burkina Faso, Burundi, Cameroon, Canada, Central African Republic, Chad, China, Comoros, Cote d’Ivoire, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Estonia, Finland, Gambia, Ghana, Greece, Guinea, Guinea Bissau, Hungary, Iceland, India, Indonesia, Iraq, Italy, Kazakhstan, Kuwait, Kyrgyzstan, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Mali, Malta, Mauritius, Mexico, Monaco, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Netherlands New Zealand, Norway, Pakistan, Papua New Guinea, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Russian Federation, Rwanda, San Marino, Senegal, Singapore, Slovenia, South Sudan, Sri Lanka, Sweden, Syrian Arab Republic, Tajikistan, Tanzania, Togo, Tunisia, Uganda, United Arab Emirates, United Kingdom, Uruguay, Uzbekistan, Viet Nam, Yemen, Zambia.</p>
<p>27 COUNTRIES CONSIDER PREVIOUS CONVICTIONS AS A RELEVANT FACTOR AT SENTENCING (JUDICIAL DISCRETION) 17%</p>	<p>Afghanistan, Andorra, Armenia, Azerbaijan, Bolivia, Bosnia and Herzegovina, Chile, Croatia, Cyprus, Democratic Republic of Korea, Denmark, Germany, Latvia, Marshall Islands, Micronesia, Nicaragua, Nigeria, Palau, Serbia, Seychelles, Sierra Leone, Spain, Swaziland, Switzerland, The Former Yugoslav Republic of Macedonia, Turkey, Ukraine</p>

219 U.N. Human Rights Committee, *List Of Issues To Be Taken Up In Connection With The Consideration Of The Fifth Periodic Report Of Australia*, U.N. Doc. CCPR/C/AUS/5 (Nov. 24, 2008).

220 Refer to Appendix for country citations.

221 There were 33 countries for which researchers could not locate statutory or case law text confirming the existence of recidivism laws. They are: Antigua and Barbuda, Bahamas, Barbados, Bhutan, Colombia, Dominica, Equatorial Guinea, Grenada, Guyana, Haiti, Iran, Israel, Jamaica, Lebanon, Maldives, Panama, Paraguay, Peru, Romania, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Sao Tome and Principe, Saudi Arabia, Solomon Islands, Suriname, Tonga, Trinidad and Tobago, Turkmenistan, Tuvalu, Vanuatu, and Zimbabwe.

9 COUNTRIES REQUIRE A SPECIFIC NON-PAROLE PERIOD FOR RECIDIVISTS (NO JUDICIAL DISCRETION) 6%	Albania, Argentina, Belgium, El Salvador, France, Georgia, Honduras, Ireland, Mongolia
33 COUNTRIES REQUIRE MANDATORY INCREASED PENALTIES FOR RECIDIVISTS GREATER THAN FIRST-TIME OFFENDER PENALTIES (NO JUDICIAL DISCRETION) 21%	Angola, Bahrain, Brunei Darussalam, Bulgaria, Cambodia, Cape Verde, Costa Rica, Cuba, Czech Republic, Dominican Republic, Ecuador, Fiji, Gabon, Guatemala, Japan, Jordan, Kenya, Kiribati, Lao People's Democratic Republic, Malaysia, Mauritania, Niger, Oman, Philippines, Republic of Congo, Slovakia, Somalia, South Africa, Sudan, Thailand, Timor-Leste, United States, Venezuela

Commentary in Peru's penal code prohibits increased punishments for recidivists because providing additional punishment for a debt that has already been paid to society essentially constitutes double jeopardy.²²² Under certain recidivist laws, offenders are penalized for crimes they committed in the past, even though they have already served time in prison. In the case of *R v. Offen*, the Court of Appeal for the Criminal Division of Britain and Wales (the highest court before the Supreme Court) found that Articles 3 and 5 of the European Convention, as incorporated in the U.K. Human Rights Act of 1998, prohibited the application of a life sentence under the U.K.'s recidivist statute if the offender would not be considered a danger to society.²²³ Article 3 of the European Convention prohibits torture and inhuman or degrading punishment and²²⁴ Article 5 of the European Convention guarantees the right to liberty and security of person.²²⁵

3. CONSECUTIVE SENTENCES

When offenders commit multiple offenses, some countries issue consecutive or cumulative sentences, which are served one after the other. Others issue concurrent sentences, which are all served simultaneously, entitling the inmate to release after he or she has served the term of the longest sentence, or in other words merge the punishments for lesser offenses into the most serious one. Some countries allow both types of sentencing.²²⁶ Whether conduct constitutes one or several crimes brings into question whether a conviction can be entered for all the applicable offenses as well as whether the total amount of punishment should be increased.²²⁷ Courts and legislatures must then decide when criminal acts should be treated as one offense or several.²²⁸

The practice of multiplying charges and convictions for the same criminal act is potentially problematic for several reasons. It can result in duplicative penalties that lose sight of the fact that there has been only one transaction.²²⁹ In criminal law, these interests can be protected to some degree by good legislative draftsmanship, deletion of duplicative criminal provisions, and being watchful of "legislative proliferation."²³⁰ Consecutive sentences can become *de facto* life without parole sentences when the possibility of parole is moved beyond the expected lifetime of the defendant, such as when sentences stack up to be many decades long or a defendant is issued multiple life sentences.²³¹

222 Peru Criminal Code, Antecedentes no. 14.

223 *R v. Offen*, [2001] 1 WLR 253, 254, 276 (Eng.); Anne Goldin, *The California Three Strikes Law: A Violation of International Law and a Possible Impediment to Extradition*, 15 SW. J. INT'L LAW 327, 338-339 (2009).

224 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 213 U.N.T.S. 222.

225 *Id.* at art. 5.

226 Refer to Appendix for country citations.

227 Carl-Friedrich Stuckenberg, *A Cure for Concursum Delictorum in International Criminal Law?*, 16 CRIMINAL LAW FORUM 361, 362 (2005).

228 *Id.*

229 *Id.* at 364.

230 *Id.* at 364.

231 Daniel Engber, *Isn't One Life Sentence Enough?*, SLATE, Aug. 19, 2005, available at http://www.slate.com/articles/news_and_politics/explainer/2005/08/isnt_one_life_sentence_enough.html (last visited Apr. 12, 2012). For example, Dennis Rader, sentenced to 10 consecutive life sentences for the murder of 10 people, will be eligible for parole after having served a minimum of 175 years.

CONSECUTIVE SENTENCES IN THE UNITED STATES

A systemic problem in the United States is that courts have not understood double counting, that is punishing one wrong as if it were two or more, as a major issue.²³² As a result, neither courts nor legislatures have offered comprehensive remedies. For example, a defendant who makes a single sale of narcotics can be handed three consecutive terms for violating three laws: sale of narcotics outside the original stamped package, sale of narcotics not pursuant to the appropriate Treasury order forms, and sale of narcotics known by the seller to have been illegally imported.²³³ In another example, if a defendant deposits a check obtained by fraud, he can be found guilty of both the National Stolen Property Act as well as the mail fraud statute.²³⁴ A person who robs a bank can be consecutively sentenced for both entering a bank with intent to commit robbery and for robbery.²³⁵ An accountant who doctors his account books to defraud the Internal Revenue Service can have his sentence enhanced twice: once for his use of a special skill and again for using sophisticated means to hide the crime.²³⁶ Defendants are commonly prosecuted for preparatory crimes, such as conspiracy to commit other crimes, as well as have their sentences enhanced for particular intent, such as under hate crime statutes.²³⁷

The same wrong can be prosecuted as multiple offenses, resulting in decades- to centuries-long sentences for first-time non-violent offenders, sentences sometimes far surpassing those for murderers. There can be a tendency for such sentences serving symbolic functions in high-profile cases.

*Daniel Enrique Guevara Vilca, 26, was sentenced to 154 years in prison in November 2011 for 454 counts of possessing child pornography. Each count represented one image. This sentence was longer than some for manslaughter, aggravated assault, child molestation, and rape of minors.*²³⁸

*Sholam Weiss was convicted of 78 counts, including racketeering, money laundering and fraud charges, for stealing money from National Heritage Life Insurance and received 845 years in prison.*²³⁹ *His projected release date is in 2754.*

*Norman Schmidt, charged with conspiracy to commit mail fraud, wire fraud, and securities fraud, as well as actual mail fraud, wire fraud, and securities fraud, was sentenced to 330 years.*²⁴⁰

*In California, Rodrigo Caballero was convicted of three counts of attempted murder for shooting at three teens and wounding one when he was 16.*²⁴¹ *He was sentenced to 110 years to life for three consecutive life terms. He will be eligible for parole in 2112, when he is 122 years old.*²⁴² *He is therefore effectively sentenced to die in prison.*

232 See Ross, *supra* note 17, at 249.

233 Gore v. United States, 357 U.S. 386 (1958).

234 Pereira v. United States, 347 U.S. 1 (1954). The federal statutes held to have been violated were 18 U.S.C. § 2314 (1952) and the mail fraud statute, 18 U.S.C. § 1341.

235 Prince v. United States, 352 U.S. 322 (1957).

236 U.S. Sentencing Guidelines Manual, §§ 3B1.3 and 2T1.1(b)(2) (2010).

237 See Apprendi v. New Jersey, 120 S.Ct. 2348 (2010).

238 Jacob Carpenter, *East Naples Man's Life Sentence for Child Porn Too Harsh, Attorney Says*, NAPLES NEWS, Nov. 3, 2011, <http://www.naplesnews.com/news/2011/nov/03/east-naples-mans-life-sentence-child-porn-too-hars/>.

239 William K. Rashbaum, *845 Years in Prison, If the Authorities Can Catch Him*, N. Y. TIMES, Mar. 9, 2000.

240 Press Release, U.S. Attorney's Office, District of Colorado, Norman Schmidt Sentenced to 330 Years in Federal Prison for Multi-Million Dollar "High Yield" Investment Fraud, available at http://www.justice.gov/usao/co/press_releases/archive/2008/April08/4_29_08.html (last accessed Feb. 23, 2012).

241 Bob Egelko, *Court: Teen's 110-year Sentence is Constitutional*, SFGATE, Jan. 19, 2011, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/01/18/BA2R1HAT4J.DTL>

242 Brief for Appellant at 1, California v. Rodrigo Caballero, No. B217709 (2nd App. District Div. 4, 2011).

U.S. state and federal courts have repeatedly rejected claims that consecutive sentences constitute cruel and unusual punishment.²⁴³ Courts have permitted 20 years imprisonment (two consecutive 10-year sentences) for passing bad checks²⁴⁴ and 30 years for wire fraud (six consecutive 5-year sentences), sentences which in other countries are reserved for violent crimes.²⁴⁵

Historically, in common law, judges were entrusted with the decision whether sentences for discrete offenses should be served consecutively or concurrently.²⁴⁶ Under U.S. federal law, federal courts can issue concurrent and consecutive sentences.²⁴⁷ Similarly, many states have enacted statutes or rules of criminal procedure or courts have issued case decisions to allow consecutive sentencing.²⁴⁸ Some states establish a presumption of consecutive sentences with concurrent sentences issued only when the court explicitly lists its reasons for issuing its sentences simultaneously.²⁴⁹ Some state laws *require* consecutive sentencing for certain crimes, such as crimes committed by a prisoner or escapee, sex offenses, other offenses committed while in possession of a firearm, or multiple offenses of the same statute.²⁵⁰

There has been little principled consistency in the United States as to whether sentences should run concurrently or consecutively.²⁵¹ As a result, there is an array of tests to assess whether two crimes are the same or not. The wide discretion given to judges and the multitude of legal tests to distinguish whether an act comprises more than one crime indicate that the problem of multiple offenses is one that has invited diverse judicial approaches that sometimes allow consecutive sentences and sometimes do not.²⁵²

- The “Blockburger test” from *Blockburger v. United States* says that offenses are different if each requires proof of some fact that the other does not.²⁵³ This test merges lesser included offenses, like robbery, into their aggravated versions, such as armed robbery because a robbery conviction needs no further proof than that required for armed robbery.²⁵⁴ The U.S. Sentencing Commission’s Sentencing Guidelines acknowledges this need to avoid redundant counts by sorting greater and lesser included crimes.²⁵⁵

243 See generally, Howard J. Halperin, *Length of Sentence as Violation of Constitutional Provisions Prohibiting Cruel and Unusual Punishment*, 33 A.L.R. 3d 335 (1970).

244 *Boerngen v. U.S.*, 326 F.2d 326 (5th Cir. 1964).

245 *Lindsey v. U.S.*, 332 F.2d 688 (9th Cir. 1964).

246 *Oregon v. Ice*, 555 U.S. 160 (2009).

247 Crim. Pro. Code, 18 U.S.C. §3584(a). The statute states, “If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.”

248 Erin E. Goffette, Note, *Sovereignty in Sentencing: Concurrent and Consecutive Sentencing of a Defendant Subject to Simultaneous State and Federal Jurisdiction*, 37 VAL. U. L. REV. 1035, 1050, FN 67 (2003); See Alexander Bunin, *Time and Again: Concurrent and Consecutive Sentences Among State and Federal Jurisdictions*, CHAMPION 34, Mar. 21, 1997.

249 These include Delaware, D.C., Florida, Louisiana, Montana, Virginia, Washington, West Virginia, and Wyoming. See, e.g., DEL. CODE ANN. tit. 11, § 3901(d) (West 2012) (ordering that no term of imprisonment for a state offense shall be run concurrently with any other state sentence); D.C. CODE ANN. § 23-112 (West 1996); FLA. STAT. ANN. § 921.16(1) (West 2012); LA. CODE CRIM. PROC. ANN. art. 883 (West 2012) (mandating a presumption of consecutive sentences under specific conditions); MONT. CODE ANN. § 46-18-401(1)(a), (4) (West 2001); VA. CODE ANN. § 19.2-308 (Michie 2000); WASH. REV. CODE ANN. § 9.92.080(3) (West 2012); W. VA. CODE § 61-11-21 (West 2000); see also *Robertson v. Superintendent of Wise Corr. Unit*, 445 S.E.2d 116, 117 (Va. 1994); *Keith v. Leverette*, 254 S.E.2d 700, 703 (W. Va. 1979); *Apodaca v. State*, 891P.2d 83, 85 (Wyo. 1995). See Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Respondent, *Oregon v. Ice*, 555 U.S. 160 (2009) (No. 07-901), 2008 WL 3539502, for comprehensive coverage of states’ consecutive sentencing statutes.

250 Erin E. Goffette, Note, *Sovereignty in Sentencing: Concurrent and Consecutive Sentencing of a Defendant Subject to Simultaneous State and Federal Jurisdiction*, 37 VAL. U. L. REV. 1035, 1050, FN 71 (2003).

251 See 24 C.J.S. Criminal Law § 2098.

252 See Phillip E. Johnson, *Multiple Punishment and Consecutive Sentences: Reflections on the Neal Doctrine*, 59 CAL. L. REV. 357 (1970).

253 *Blockburger v. U.S.*, 284 U.S. 299 (1932). Though the Blockburger test is often referenced with respect to double jeopardy, it is also used to distinguish whether the same act has constituted more than one crime, such as in the issuance of multiple sentences.

254 See Ross, *supra* note 17, at 249.

255 U.S. Sentencing Guidelines Manual, § 3D1.2 n.3 (2010).

- The “same act or transaction” test, advocated by U.S. Supreme Court Justice William Brennan in several dissenting opinions, treats two offenses as the same if they arise from the same course of conduct, no matter how many crimes a prosecutor could allege and no matter the definitional differences between them.²⁵⁶ While the Supreme Court has not adopted this test, 17 states have in order to ban successive prosecutions.²⁵⁷
- Several state courts use a “single intent” test; if they were animated by a single criminal purpose, offenses are the same.²⁵⁸ This prevents cumulative punishment when the same conduct violates multiple laws or is difficult to break into units for prosecution.²⁵⁹

With the proliferation of laws at both state and federal levels in the United States, a broad range of conduct has become criminalized.²⁶⁰ The explosion of federal law creating over 4,000 crimes means that federal prosecution is possible at the same time state prosecution is, which sometimes means that sentences must be served consecutively in first a federal prison and then a state prison, or vice versa.²⁶¹ The U.S. Supreme Court will decide in 2012 whether consecutive sentences can be imposed by a federal court to follow a state sentence that has not yet been served.²⁶²

In 2010, the Supreme Court issued a unanimous decision that a federal gun statute²⁶³ tacking on an extra mandatory minimum of five years for gun possession, seven years for brandishment, or 10 years for discharge for persons convicted of a drug or violent crime was permissible.²⁶⁴ The decision confirmed that such sentences are not only mandatory minimums, but also consecutive, so that they must be imposed in addition to any other sentence, including the sentence for the underlying drug offense or other crime of violence.²⁶⁵ Prosecutors can effectively seek an additional five-year sentence for mere gun possession at the same time of the commission of a crime, even if the gun was not used in the commission of the crime.

The issuance of consecutive sentences, particularly when paired with mandatory minimums can result in *de facto* life imprisonment sentences. Consecutive sentences amounting to life or near-life sentences, particularly for non-violent offenses such as selling drugs prioritize retributive interests. Most importantly, such sentences neglect the possibility that offenders can be rehabilitated.

*Weldon Angelos, a then 24-year-old music producer in Utah with no prior convictions, was sentenced in federal court for three related marijuana sales of about \$350 each. Since he possessed a weapon during the course of these sales, the sentencing judge was required to impose harsh consecutive penalties, regardless of the fact that the gun was never used in the sales. Angelos is currently serving a 55-year sentence with no possibility of parole during that time in federal prison.*²⁶⁶

256 *State v. Truitt*, 454 U.S. 1047 (1981) (Brennan, J., concurring); *Ashe v. Swenson*, 397 U.S. 436, 453 (1970) (Brennan, J., concurring); *Brooks v. Oklahoma*, 456 U.S. 999, 1000 (1982) (Brennan, J., dissenting); *Snell v. United States*, 450 U.S. 957, 958 (1982) (Brennan, J., dissenting); *Werneth v. Idaho*, 449 U.S. 1129, 1130 (1981) (Brennan, J., dissenting) (joined by Marshall, J.); *Duncan v. Tennessee*, 405 U.S. 127, 131 (1972) (Brennan, J., dissenting) (joined by Douglas, J., Marshall, J.).

257 George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Prohibition*, 71 IOWA L. REV. 323, 376 (1986) (describing range of “same offense” test).

258 See Ross, *supra* note 17, at 261.

259 *Id.*

260 *Rough Justice in America, Too Many Law, Too Many Prisoners*, THE ECONOMIST, Jul. 22, 2010, <http://www.economist.com/node/16636027> (last accessed Apr. 9, 2012). Criminalized conduct includes “interstate transport of water hyacinths, trafficking in unlicensed dentures, or misappropriating the likeness of Woodsy Owl.

261 See Note, Erin E. Goffette, *Sovereignty in Sentencing: Concurrent and Consecutive Sentencing of a Defendant Subject to Simultaneous State and Federal Jurisdiction*, 37 VAL. U. L. REV. 1035 (2003); *Rough Justice in America, Too Many Law, Too Many Prisoners*, THE ECONOMIST, Jul. 22, 2010.

262 *Setser v. United States* (No. 10-7387) <http://www.scotusblog.com/case-files/cases/setser-v-united-states/>. See Alexander Bunin, *Time and Again: Concurrent and Consecutive Sentences Among State and Federal Jurisdictions*, CHAMPION 34 (Mar. 21, 1997).

263 Crim. Pro. Code, 18 U.S.C. § 924(c).

264 *Abbott v. Gould*, 131 S. Ct. 18 (2010).

265 *Abbott v. Gould*, 131 S. Ct. 18 (2010); *U.S. Supreme Court Rules Against Abbott and Gould*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://www.famm.org/courts/FAMMLegalBriefs/USSupremeCourtrulesagainstAbbottandGould.aspx> (last visited Apr. 13, 2012).

266 *Weldon Angelos*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://www.famm.org/facesofFAMM/FederalProfiles/WeldonAngelos.aspx> (last visited Apr.

*Atiba Parker was convicted in Mississippi of two counts of sale of cocaine and one count of possession of cocaine when he was 29. He received a total of three sentences that run consecutively for a total of 42 years. His projected release date is 2048, when he will be 71.*²⁶⁷

INTERNATIONAL LAW AND STANDARDS ON CONSECUTIVE SENTENCES

Though international human rights law is silent on consecutive sentencing sentences, the United States' obligations to orient its prisons system towards rehabilitation are violated by uncapped consecutive sentences, which become *de facto* life sentences. There is little international law on how multiple offenses tried at the same time (*concursum delictorum*) should be punished.²⁶⁸ The guiding principle in international criminal law and case law established by the *ad hoc* tribunals, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, is that the convict's final penalty should reflect the entire range of criminal conduct and his or her overall culpability, the so-called "totality principle."²⁶⁹ At the *ad hoc* courts, judges could decide on whether sentences would be issued consecutively or concurrently without specifying the sentence for each charge or count.²⁷⁰

However, at the International Criminal Court, the judges must pronounce a separate sentence for each crime and then a joint sentence specifying the total period of imprisonment.²⁷¹ The maximum sentence must be no less than the highest individual sentence pronounced and is capped at either 30 years or life imprisonment, which is itself reviewable after 25 years.²⁷²

COMPARATIVE COUNTRY INFORMATION ON CONSECUTIVE SENTENCES

Over three-quarters of the countries in the world regulate consecutive sentencing more stringently than the United States—either they issue sentences concurrently, they cap consecutive sentences at a number of years, or they merely enhance the sentence for the most serious offense. The U.S. is in a minority of countries (21%) that allow uncapped consecutive sentences for multiple crimes arising out of one act. The largest block of countries use concurrent sentences, where the punishment for the most serious offense absorbs those for less serious offenses (46%). Many countries do allow consecutive sentences but cap them anywhere from 15 years to life (26%). A small group of countries issues one sentence for multiple offenses, but it is enhanced and capped (6%).²⁷³

Many countries with common law traditions use both consecutive and concurrent sentences and give the judge discretion in imposing one or the other. In many civil law countries, the defendant may be tried and convicted of two or more distinct offenses growing out of a single course of conduct but may only be punished for the most severe.²⁷⁴ Many of those countries have statutory language stating that if there is conjunction between several crimes, only one sentence of imprisonment is imposed, and it cannot exceed the maximum allowed by law to punish the most serious offense.²⁷⁵ The legal concept is that the punishment meted out for the most severe offense is deemed sufficient or that lesser offenses are absorbed into the most

9, 2012).

267 *Atiba Parker – Mississippi*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://www.famm.org/ProfilesOfInjustice/StateProfiles/AtibaParker.aspx> (last visited April 8, 2012).

268 Silvia D'Ascoli, SENTENCING IN INTERNATIONAL CRIMINAL LAW 129 (2011).

269 *Id.*; Kunarac et al, TJ, 22 February 2001, para 551; Prosecutor v. Vasiljevic, Case No IT-98-32-T, Trial Judgment, Nov. 29, 2002, para 266; Delalic et al, AJ, Feb. 20, 2001, paras 429-430.

270 D'Ascoli, *supra* note 268, at 267.

271 Rome Statute of the International Criminal Court, *supra* note 129, art. 78, para 3.

272 Rome Statute of the International Criminal Court, *supra* note 129, art. 78, para 3; art. 110, para 3.

273 Refer to Appendix for country citations.

274 J. A. C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309, 1323 (1932).

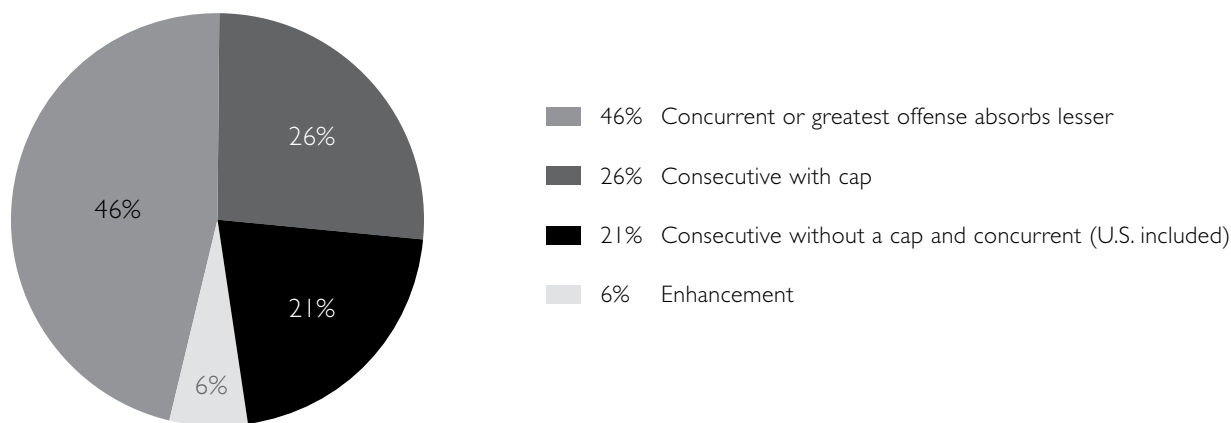
275 Carl-Friedrich Stuckenberg, *A Cure for Concursum Delictorum in International Criminal Law?*, 16 CRIMINAL LAW FORUM 361, 371 (2005) (this is sometimes called "subsidiarity" or "consumption").

serious offense.²⁷⁶ Some countries allow for a mere enhancement of the maximum for the most serious offense.²⁷⁷ Some countries' statutes provide for concurrent sentencing when one course of conduct violates several criminal provisions and for consecutive sentencing when several discrete acts violate several criminal provisions.

CONSECUTIVE SENTENCING

Countries by Type of Sentencing for Multiple Offenses Arising from Same Act

100% = 170 countries



Refer to Appendix for country citations.

<p>79 COUNTRIES DO NOT HAVE CONSECUTIVE SENTENCING OR MERGE LESSER OFFENSES INTO MOST SERIOUS OFFENSE WHEN SAME ACT (46%)</p>	<p>Albania, Algeria, Argentina, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belgium, Belize, Bolivia, Bosnia, Burkina Faso, Burundi, Cambodia, Cameroon, Central African Republic, Chad, Chile, China, Comoros, Cote d'Ivoire, Croatia, Czech Republic, Democratic Republic of Congo, Denmark, Djibouti, Egypt, Estonia, France, Gabon, Germany, Greece, Guinea, Haiti, India, Iran, Iraq, Israel, Japan, Jordan, Kazakhstan, Kuwait, Lao People's Democratic Republic, Lebanon, Liberia, Libya, Liechtenstein, Luxembourg, Madagascar, Malaysia, Mali, Mauritania, Monaco, Mongolia, Morocco, Myanmar, Niger, Oman, Pakistan, Papua New Guinea, Paraguay, Peru, Poland, Qatar, Republic of Korea, Rwanda, San Marino, Senegal, Singapore, Slovakia, Sudan, Syria, Thailand, Tunisia, Turkey, United Arab Emirates, Vanuatu, Zambia</p>
<p>44 COUNTRIES ALLOW FOR CONSECUTIVE SENTENCES BUT CAP THEM (26%)</p>	<p>Capped at 15 years: North Korea Capped at 20 years: Afghanistan, Latvia, Netherlands Capped at 25 years: Cape Verde, Maldives, Moldova, Portugal, Tajikistan Capped at 30 years: Andorra, Angola, Brazil, Cuba, Georgia, Guinea Bissau, Honduras, Italy, Montenegro, Mozambique, Nicaragua, Slovenia, Somalia, Timor Leste, Venezuela Capped at 35 years: Ecuador</p>

²⁷⁶ *Id.* at 371 n.19.

²⁷⁷ See Lугоz, Commentaire du Code Penal Suisse, art. 68 (1939) (if defendant sentenced for more than one offense, penalty is limited to no more than one and one-half times the maximum for the most serious offense).

	<p>Capped at 40 years: Philippines, Serbia, Spain Capped at 50 years: Costa Rica, Guatemala, Panama Capped at 60 years: Colombia Capped at 70 years: Mexico Capped at 75 years: El Salvador Capped at 1/3 more than max, or life: Indonesia Capped at 15 years or life: Armenia Capped at 20 years or life: Finland, Lithuania Capped at 25 years or life: Ukraine Capped at 30 years or life: Russian Federation, Vietnam Twice the sentence for most serious offense: Norway, Togo Consecutive allowed, but only for rape (capped at 20 years) and larceny (capped at 30 years): Mauritius</p>
<p>36 COUNTRIES ALLOW JUDGES TO ISSUE CONCURRENT OR CONSECUTIVE SENTENCING WITH NO KNOWN CAP (21%)</p>	<p>Australia, Botswana, Canada, Cyprus, Fiji, Gambia, Ghana, Ireland, Jamaica, Kenya, Kiribati, Kyrgyzstan, Lesotho, Malawi, Micronesia, Namibia, Nauru, New Zealand, Nigeria, Palau, Saint Lucia, Samoa, Seychelles, Solomon Islands, South Africa, South Sudan, Sri Lanka, Swaziland, Tanzania, Tuvalu, Uganda, United Kingdom, United States, Uzbekistan, Yemen, Zimbabwe</p>
<p>FOR 11 COUNTRIES, ONE SENTENCE IS ISSUED BUT IT IS ENHANCED AND CAPPED (6%)</p>	<p>Sentence for worst crime bumped up by 1/2: Eritrea, Ethiopia, Switzerland Sentence for worst crime bumped up by 1–4 years: Sweden Sentence enhanced, but capped at 15 years, or life (which is 20 years): Macedonia Sentence enhanced by 1/2 or 2/3, capped at 30 years: Uruguay Sentence capped at 1/2 more than max sentence for most severe crime: Hungary, Bulgaria, Iceland Sentenced for most serious crime enhanced by 1/3 or 1/2 and capped at 35 years or life: Malta Sentence enhanced up to “special maximum” with supplements added: Romania</p>

The problem of multiple sentences in the United States is under recognized, leading to lengthy consecutive sentences that are out of step with the seriousness of the crimes. Consecutive sentencing amounting to a time span exceeding a lifetime is in effect the equivalent of life without parole sentencing, depriving the offender of review for rehabilitation.

4. MANDATORY MINIMUM SENTENCES

“I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.”

U.S. Supreme Court Justice Anthony Kennedy²⁷⁸

Mandatory minimum sentences provide “one size fits all” punishments that do not permit consideration of the individual circumstances of the crime, the offender, their past history, or other considerations traditionally reserved for the legal decision maker. Mandatory minimums are issued upon a conviction of a designated crime which then triggers a statutory

²⁷⁸ U.S. Supreme Court Justice Anthony Kennedy, Address at American Bar Association Annual Meeting (Aug. 9, 2003) (transcript available at <http://www.abanow.org/2003/08/speech-by-justice-anthony-kennedy-at-aba-annual-meeting/>).

minimum sentence that must be given, regardless of the surrounding circumstances. In these situations, judges are deprived of the ability to tailor punishments in individual cases. This can result in excessively harsh punishments that judges would not have applied given the latitude to choose otherwise.²⁷⁹ By not allowing judicial discretion, a defendant who kills their abuser after years of ongoing abuse will receive the same sentence as an individual who commits pre-meditated murder with complete disregard for his or her victim. Legislatures frequently enact these types of laws in response to public outrage in the wake of a high profile case.²⁸⁰

In civil law and mixed law countries, judges impose sentences within a range of minimum and maximum terms established by statute for each crime. As a result, the vast majority of countries surveyed for this report provide for a minimum penalty upon conviction. What distinguishes these countries' penalties from sentences in the United States is the presence of judicial discretion, the relative leniency of the minimums, and the absence of an ability to "stack" penalties, which leads to lengthy consecutive sentences.²⁸¹

MANDATORY MINIMUMS IN THE UNITED STATES

The national debate in the United States with regard to mandatory minimum sentencing is a complex one.²⁸² Proponents believe that it allows for certainty and uniformity in sentencing, provides leverage to law enforcement, and deters crime.²⁸³ Opponents argue against the fundamental injustice in treating unlike offenders in a like manner, and the disproportionate sentences that frequently result. The U.S. Supreme Court has held that mandatory death penalties are unconstitutional in part because the mandatory nature of the sentence fails to take into account the character of the defendant and his or her record.²⁸⁴ The same problem exists with any mandatory sentence. A survey conducted by the U.S. Sentencing Commission found that 62% of federal judges interviewed felt that mandatory minimum sentences were too high for all offenses.²⁸⁵ The U.S. Sentencing Commission has conducted four major studies on mandatory minimums and ultimately recommended changes to the federal minimums in order to address their inequitable application.²⁸⁶ Other vocal opponents include the American Bar Association, which has urged Congress to repeal all mandatory minimum sentences as they are inconsistent with the goals that sentences be "both uniform among similarly situated offenders and proportional to the crime that is the basis of the conviction."²⁸⁷

In the United States, legislatures at the state and federal level have increasingly stepped in to remove judicial discretion in sentencing and to provide mandatory sentencing requirements. While this limits judicial discretion, it creates wide discretion for the prosecution.²⁸⁸ A prosecuting attorney's unique prerogative to charge an offender with crimes that trigger man-

279 U.S. SENTENCING COMMISSION, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES (2010), available at http://www.ussc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf

280 FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 1-6 (Oxford University Press 2001).

281 See discussion on stacking in the section on consecutive sentences in this report.

282 See June 2010 Ed. Federal Sentencing Reporter, 22 FED. SENT. R. 297.

283 Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 67 (2009).

284 Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (the Court stated that "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.")

285 U.S. SENTENCING COMMISSION, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES Table 1 (2010), available at http://www.ussc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf

286 U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2011).

287 Karen J. Mathis, ABA statement to Congressional Hearing on Mandatory Minimum Sentencing Laws, 2 (July 3, 2007) at http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/crimlaw/2007jul03_minimumsenth_l.authcheckdam.pdf; Testimony of James E. Felman on behalf of the ABA before the U.S. Sentencing Commission for the hearing on mandatory minimums, (Feb. 16, 2012) (transcript available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_16_ABA-FELMAN.pdf).

288 H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 65-676 (2011).

datory minimums can lead to the disparate results across jurisdictions that are a hallmark of mandatory minimums. This has had a disproportionate impact on African American men, who are more than twice as likely to face a mandatory minimum charge as a white man.²⁸⁹

In an important shift from mandatory sentencing, the U.S. Supreme Court's decision in *U.S. v. Booker* rendered the U.S. Federal Sentencing Guidelines advisory.²⁹⁰ *Booker* was a Sixth Amendment case which struck down a provision of the federal sentencing statute that required judges to impose a sentence with the range set by the guidelines.²⁹¹ As a result, there has been an increase in federal judges sentencing below the minimum range set in the sentencing guidelines.²⁹² Nonetheless, Congress maintains the ability to enact federal mandatory minimum sentences. In 2011, the U.S. Sentencing Commission issued a report to Congress analyzing the impact of federal mandatory minimum sentences in which the Commission highlighted key problem areas including overly severe sentences, disproportionate impact on minorities, and jurisdictional disparities in application.²⁹³ In addition, the Commission found that statutes carrying mandatory minimum penalties have increased, apply to more offenses, require longer terms, and are used more often than they were 20 years ago.²⁹⁴

Sentences for non-violent crimes carrying mandatory minimums have resulted in increased incarceration rates, overburdening an already taxed system. In 2010, 83% of 73,239 convictions analyzed by the U.S. Sentencing Commission were for immigration, drugs, firearms, and fraud offenses. Of these convictions, more than a quarter, or almost 20,000, required mandatory minimum sentences.²⁹⁵ Sentences for drug crimes especially have contributed to high incarceration rates. The U.S. Department of Justice's Bureau of Justice Statistics found that federal drug offenders' cases remained the most prevalent at adjudication and sentencing, in prison, and under supervision.²⁹⁶

The federal crack cocaine sentencing framework over the past 20 years exemplifies the problem of harsh sentences handed out to thousands of individuals, ultimately creating a disproportionate impact on similarly situated offenders. The type of substance and quantity set the sentence length, regardless of the fact that the crime of possession or trafficking was essentially the same. Prior to 2010 sentencing reforms, the trafficking of five grams of crack cocaine (roughly the size of a packet of sugar) was punished with a mandatory five years in prison with no parole eligibility.²⁹⁷ The same sentence was imposed for trafficking of 500 grams of powder cocaine.²⁹⁸ Because it took 100 times more powder cocaine than crack cocaine to trigger the same statutory mandatory minimum penalties, this penalty structure was commonly referred to as the "100-to-1 drug quantity ratio."²⁹⁹ First-time simple possession of more than five grams of crack cocaine triggered a mandatory five year sentence while the statutory penalty range for first-time simple possession of powder cocaine, regardless of the quantity, was not punishable by more than one year of imprisonment.³⁰⁰ There is no mandatory minimum sentence for *possession* of powder cocaine. In addition, the sentencing scheme disproportionately affected African Americans who make up 79%

289 M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Charging and its Sentencing Consequences*, U. MICH. & ECON. Working Paper 3 (2012).

290 *U.S. v. Booker*, 543 U.S. 220 (2005).

291 *Id.*

292 U.S. SENTENCING COMMISSION, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 78-79 (2006).

293 U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 345-348 (2011).

294 *Id.* at xxvi.

295 *Id.* at 121. ("More than one-quarter of the cases in which an offender was sentenced in fiscal year 2010 (27.2%, n=19,896) involved a conviction of an offense carrying a mandatory minimum penalty. More than half (53.4, n=10,605) of the 19,896 offenders convicted of an offense carrying a mandatory minimum penalty remained subject to the mandatory minimum penalty at sentencing.")

296 U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS 1 (2009).

297 U.S. SENTENCING COMMISSION, ANALYSIS OF THE IMPACT OF GUIDELINE IMPLEMENTATION OF THE FAIR SENTENCING ACT OF 2010 IF THE AMENDMENT WERE APPLIED RETROACTIVELY 2 (2011).

298 *Id.* at 2.

299 *Id.* at 2.

300 *Id.* at 3.

of federal crack cocaine offenders.³⁰¹

In 2010, Congress passed the Fair Sentencing Act (FSA) which raised the mandatory minimum trigger for crack cocaine trafficking from five grams to 28 grams, in effect, reducing the 100-1 ratio of crack/powder cocaine to 18-1.³⁰² The FSA also removed the mandatory minimum for first-time possession of crack cocaine, putting it on par with powder cocaine. The U.S. Sentencing Commission adjusted their sentencing guidelines in accordance with the FSA and subsequently made them retroactive. Approximately 12,040 individuals were made eligible for a reduced sentence, with an average reduction of 37 months.³⁰³ Unfortunately, those who were sentenced under the federal mandatory minimum as opposed to the sentencing guidelines will not be able to benefit from the FSA retroactively (see section below on retroactive application of law) due to the fact that Congress failed to explicitly make the FSA retroactive.³⁰⁴

Most U.S. states have some type of mandatory sentencing scheme. While some states have failed to adjust their laws since the initial rush of mandatory sentencing law enactments in the 1980s and 1990s, many states have shifted away from “one size fits all” sentencing schemes due to their inefficacy and disproportionate impacts.³⁰⁵ In 2009, New York began the process of reforming their infamous Rockefeller Drug which had required lengthy sentences and statutory limits on plea bargaining.³⁰⁶ New Jersey repealed their drug-free zone mandatory minimums in 2010.³⁰⁷ In November 2009, Rhode Island repealed all mandatory minimum sentencing laws for drug offenses that had previously required 10 and 20-year sentences, even for possession offenses.³⁰⁸

*In Florida, Scott Earle, a first time offender heavily addicted to prescription painkillers, received a mandatory minimum sentence of 25 years for trafficking 365 pills of the prescription drug Percocet. He will be in his 60s when he is released.*³⁰⁹

Many states and the federal government utilize safety valves that permit a judge to sentence below the mandatory minimum sentence in specific circumstances. Safety valves are important mechanisms that are intended to prevent injustices under mandatory sentencing laws; unfortunately, they are usually narrowly written and ultimately do not provide judges with the necessary discretion to ensure just outcomes. The federal safety valve is extremely narrow and only applies to certain drug offenders.³¹⁰ The federal safety valve allows judges to avoid imposing the mandatory minimum sentence in certain drug offenses for first-time, low-level, non-violent offenders provided they fully disclose all information and evidence to the government.³¹¹ One of the five criteria of the safety valve requires that “the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense.”³¹² This shifts the decision-making to prosecutors because the ultimate judgment of whether a defendant is eligible for protection from the mandatory minimum

301 U.S. SENTENCING COMMISSION, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 34 (2010), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/SBTOC10.htm

302 Fair Sentencing Act of 2010, 124 Stat. 2372 (2010).

303 U.S. SENTENCING COMMISSION, ANALYSIS OF THE IMPACT OF GUIDELINE IMPLEMENTATION OF THE FAIR SENTENCING ACT OF 2010 IF THE AMENDMENT WERE APPLIED RETROACTIVELY 10 (2011).

304 See section on Retroactive Application of Ameliorative Law in this report.

305 Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 69 (2009).

306 *Id.* at 69, 76.

307 *N.J. Senate Amendment to Section 1 of P.L.1987, c.101 (C.2C:35-7)*, FAMILIES AGAINST MANDATORY MINIMUMS, available at <http://www.famm.org/Repository/Files/NJ%20Bill%20S1866%20--%20passed.pdf>

308 *Summary of Mandatory Minimum Reforms in the States*, FAMILIES AGAINST MANDATORY MINIMUMS, available at <http://www.famm.org/StateSentencing.aspx>

309 Jeff Gore, *Tallahassee Reconsiders Mandatory Minimums*, ORLANDO WEEKLY, Mar. 31, 2011, <http://orlandoweekly.com/news/tallahassee-reconsiders-mandatory-minimums-1.1125874>

310 18 U.S.C. §3553(f) (2010).

311 18 U.S.C. §3553(f) (2010).

312 18 U.S.C. § 3553(f)(5) (2010).

is left in the hands of prosecutors and law enforcement.

INTERNATIONAL LAW AND STANDARDS ON MANDATORY MINIMUMS

Mandatory minimum sentences have not been directly addressed under international law. This is likely due to the fact that the mandatory minimums used in the majority of countries have not resulted in disproportionate sentences. The Human Rights Committee did express concern over mandatory imprisonment legislation in Western Australia and the Northern Territory. It indicated that the mandatory laws lead “in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes committed” and are incompatible with a number of articles in the ICCPR.³¹³ Australia’s Northern Territory introduced mandatory sentences for property offences in 1997 and quickly repealed the law in 2001.³¹⁴ Subsequent research found a disproportionate impact on the indigenous population who made up 73% of those who received a mandatory sentence.³¹⁵ Mandatory minimums circumvent the goal of rehabilitation, as enshrined in Article 10(3) of the ICCPR, by requiring punishments that are more retributive and fail to take into account the individualized nature of the crime and the opportunity for rehabilitation.³¹⁶ In addition, the European Court of Human Rights’ 2012 decision in *Vinter* (see section on Life Without Parole Sentences in this report) articulated some of the concerns regarding mandatory sentences including the fact that they remove the opportunity to present mitigating and special circumstances at sentencing and tie the hands of the court.³¹⁷

COMPARATIVE COUNTRY INFORMATION ON MANDATORY MINIMUMS

Of 168 countries surveyed, 137 countries have a minimum sentence requirement. This is a hallmark of many civil law systems, which establish sentencing ranges for each crime. While most countries have mandatory minimums, many of them allow lowering the minimum for mitigation purposes. Thirty-one countries do not have minimums or they allow for judicial discretion to lower the sentence below the established minimum.

The severity of mandatory minimums in the United States is more profound when contrasted with other countries. Under U.S. federal law, a criminal defendant who is convicted of possession of 1 kilogram of heroin, or 5 kilos of cocaine will receive a mandatory 10 year sentence, while the same offender in Britain would receive no more than 6 months’ imprisonment in a British summary trial.³¹⁸

In 1987, the Supreme Court of Canada found a mandatory minimum sentence of 7 years for importing narcotics to constitute cruel and unusual punishment under Section 12 of the Charter of Rights and Freedoms.³¹⁹ The Court ultimately concluded that, “[t]he seven-year minimum sentence is not *per se* cruel and unusual but it becomes so because it must be imposed regardless of the circumstances of the offence or the offender. Its arbitrary imposition will inevitably result in some cases in a legislatively ordained grossly disproportionate sentence.”³²⁰

Most of the countries surveyed had mandatory minimum sentences for murder but a sampling of countries from the U.N.’s

313 U.N. Human Rights Comm., *Report of the Human Rights Committee*, 74, U.N. Doc. A/55/40 (2000).

314 NORTHERN TERRITORY OF AUSTRALIA, OFFICE OF CRIME PREVENTION, MANDATORY SENTENCING FOR ADULT PROPERTY OFFENSES: THE NORTHERN TERRITORY EXPERIENCE I (2003) available at http://www.nt.gov.au/justice/policycoord/DOCUMENTS/statistics/mandatory_sentencing_nt_experience_20031201.pdf#search=%22mandatory%22

315 *Id.* at 2-3.

316 International Covenant on Civil and Political Rights, *supra* note 10, art. 10(3).

317 *Vinter*, *supra* note 13, para 93.

318 Lipp, *supra* note 18, at 1014.

319 *R. v. Smith*, [1987] S.C.R. 1045 (Can.)

320 *Id.* at 1047.

Western European and Others Group (WEOG), of which the United States is a member, demonstrates the range of sentences that countries apply to murder. None of them require sentences as harsh as the United States.

MANDATORY MINIMUM SENTENCE FOR FIRST-DEGREE MURDER (COUNTRIES FROM THE WESTERN EUROPEAN AND OTHERS GROUP OF THE U.N.)

No mandatory minimum (judicial discretion to impose sentence): Malta, Netherlands³²¹

0-5 years: Denmark (5 yrs), Germany (5yrs), Iceland (5yrs), Switzerland (5 yrs)³²²

6-10 years: Andorra (10 yrs), Austria (10 yrs), Liechtenstein (10 yrs), Norway (6 yrs)³²³

11-15 years: Portugal (12 yrs), Spain (15 yrs), Sweden (13 yrs)³²⁴

16-20 years: Italy (20 yrs), San Marino (16 yrs)³²⁵

21-30 years: France (30 yrs)³²⁶

Life with parole: Australia, Belgium, Canada, Finland, Greece, Ireland, Luxembourg, Monaco, New Zealand, Turkey, United Kingdom³²⁷

Life without parole: United States³²⁸

The United States is one of only nine countries that punish offenders with both the death penalty and life without parole. Of the sampling from their peers in the WEOG designation, the United States is the only country to require life without parole sentences for murder. The harshness of this penalty structure is compounded by its mandatory nature. Mandatory minimum sentences are especially problematic when they are for the most severe sanctions. Without the ability to introduce mitigating factors at sentencing or to allow a judge to take the full circumstances under consideration in making a decision, penalties will arise that do not take into account the nuances of an individual crime and the characteristics of the offender. One size fits all punishments undermine the concept of justice at a basic level.

B. JUVENILE JUSTICE

“The susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult.”

U.S. Supreme Court Justice Anthony Kennedy³²⁹

A separate and distinct juvenile justice system has long been a part of the United States’ criminal law framework, encom-

321 Malta Penal Code art. 21, 211; Netherlands Penal Code art. 289

322 Denmark Criminal Code art. 237; Germany Criminal Code art. 212; Iceland Penal Code art. 211; Switzerland Penal Code art. 111

323 Andorra Penal Code art. 102; Austria Penal Code art. 75; Liechtenstein Penal Code art. 75; Norway Penal Code art. 233

324 Portugal Penal Code art. 132; Spain Penal Code art. 139; Sweden Penal Code Chapter 13, sec. 1

325 Italy Penal Code art. 575, San Marino Penal Code art. 150

326 France Criminal Code art. 221

327 Australia; Belgium Penal Code art. 394; Canada Criminal Code art. 235; Finland Criminal Code Ch. 21 sec. 2, Greece Penal Code art. 299; Ireland Criminal Justice Act art. 2; Luxembourg Penal Code art. 394; Monaco Penal Code art. 229; New Zealand Sentencing Act 2002 art. 86E; Turkey Penal Code art. 81; United Kingdom Murder (Abolition of Death Penalty) Act 1965.

328 18 U.S.C. § 1111 (solely an analysis of federal law for purposes of this chart).

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

passing a century-long understanding that children³³⁰ are fundamentally different from adults.³³¹ Opening in 1899 in Chicago, the first juvenile court was created for the purpose of rehabilitating delinquent children.³³² The foundation of this juvenile justice system was based on a welfare model, where juvenile courts were protectors of the best interests of the child.³³³ The United States has come a long way from the original welfare orientation of juvenile justice, and, since the early 1980s, a model focused on the best interests of the offender has been replaced with a system geared towards incapacitation and punishment.³³⁴

There are currently at least 92,000 juveniles in detention in the United States for crimes they committed when they were as young as 12.³³⁵ Many juveniles in the U.S. are facing extremely long term sentences.³³⁶ This high incarceration of America's juveniles can be attributed in part to three factors: the low age of criminal liability, the ease with which children are transferred to adult court and tried as adults, and the severity of the sentences assigned to children.

First, the age at which a child can receive criminal sanctions, known as the minimum age of criminal responsibility, plays a large role in determining why so many children in the United States serve time behind bars, either in a juvenile detention facility or an adult prison. In the United States, the majority of states (33 states) and the District of Columbia set no age of criminal liability, allowing children of any age to be tried criminally.³³⁷ The remaining 17 states set limits on the age of criminal liability; however all of these limits allow children under the age of 10 to be tried criminally.³³⁸ In contrast, 49 countries around the world have an age of criminal liability set below 10.³³⁹

Secondly, once criminal prosecution has begun against the child, the United States allows for children to be transferred out of juvenile court and into adult court.³⁴⁰ These transfer provisions allow a juvenile to be tried, where there is no reference to the age of offender, and no mitigation of the sentence of the offender³⁴¹ based on their minority.³⁴² As such, juveniles are prosecuted and sentenced to adult sanctions.

Finally, if found guilty of a crime, juveniles in the United States are subject to disproportionately long sentences. Juveniles can receive life and life without parole sentences for crimes they committed, sentences other countries around the world reserve solely for adult offenders.³⁴³ The United States is currently the only country in the world to have children serving JLWOP sentences, and therefore the only country in the world to lock up children for the rest of their lives.³⁴⁴

330 For purposes of this report, children are considered those under the age of 18.

331 Frances P. Reddington, Lynn S. Urban & Melissa Conn, *Canada and the United States: A Comparison of the Approach to Juvenile Crime*, 2006 J. INST. JUST. INT'L. STUD. 241, 241 (2006).

332 *Id.*

333 *Id.* at 242.

334 *Id.*

335 The total number of juveniles serving such sentences is not known. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, Table 6.9.2008, available at: <http://www.albany.edu/sourcebook/pdf/t692006.pdf>. In 2006 there were 92,854 juveniles in residential facilities, many of whom were awaiting a trial date or sentencing. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, Table 6.40, available at: <http://www.albany.edu/sourcebook/pdf/t640.pdf>. In 2003 there were 4,095 prisoners under the age of 18 in state and private correctional facilities. These numbers do not reflect the number of juveniles who continue to serve their sentences when they are no longer 18 and become part of the statistics for the adult prison population.

336 For this section, "long" is considered a sentence of 25 years to life, or longer.

337 CIPRIANI, *supra* note 19, at 221-222.

338 *Id.*

339 Refer to Appendix for country citations, and see the section entitled "Minimum Age of Criminal Responsibility" below for a further analysis.

340 Ellen Marrus & Irene Merker Rosenberg, *After Roper v. Simmons: Keeping Kids Out of Adult Criminal Court*, 42 San Diego L. Rev. 1151 (2005).

341 At the time that this report was written, two cases *Miller v. Alabama* and *Jackson v. Hobbs*, were awaiting decision before the Supreme Court (docket numbers 10-9646 and 10-9647). One of the issues on cert is the constitutionality of sentencing practices for juvenile life without parole (JLWOP) that do not consider mitigating circumstances ("Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old as a result of a mandatory sentencing scheme that categorically precludes consideration of the offender's young age or any other mitigating circumstances?") *Jackson v. Hobbs*, No. 10-9647, *cert. granted*, Questions Presented. Although the case discusses JLWOP and the applicability of sentencing to 14 year olds, the case could have wider ramifications for mandatory sentencing once a juvenile has been transferred to adult court.

342 David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) To Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1563 (2004).

343 De la Vega & Leighton, *supra* note 21, at 983. Country practices regarding JLWOP has been updated by the research conducted for this report as well as in: Brief for Amnesty International, et al. as Amici Curiae Supporting Petitioners, *Miller v. Jackson*, (2012) (Nos. 10-9647, 10-9647), WL 174238. For country specifics see the section of this report entitled "Juvenile Life Without Parole" and refer to the Appendix.

344 De la Vega & Leighton, *supra* note 21, at 983.

Children are tried from a young age, and then are treated as adults when they enter the system. Because of such treatment, children receive disproportionately long punishments that lack a rehabilitative purpose. This pattern of incarceration violates the human rights of individual children.

I. MINIMUM AGE OF CRIMINAL RESPONSIBILITY

“Their own vulnerability and comparative lack of control over their immediate surroundings means juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.”

U.S. Supreme Court Justice Anthony Kennedy³⁴⁵

The minimum age of criminal responsibility (MACR) refers to the age at which a person becomes subject to the penalties provided by the criminal law, an age that varies depending on the country.³⁴⁶ Setting an age of criminal liability recognizes that children under a certain age are not capable of committing crimes because they do not possess the same mental capacity and moral competence as adults. Establishing the age of criminal liability is crucial since it determines the age at which a child will face punitive sanctions for their actions.

Limiting the rights and responsibilities of children through MACR limits reflects a global understanding that juveniles lack the maturity of adults. Accordingly, all countries place age restrictions on a wide range of activities, including marriage, purchasing alcohol, voting, working and contracting, and driving. The age of criminal liability should therefore reflect that certain age groups should not be punished for crimes that they are wholly unable to comprehend. Juveniles have long been viewed as categorically different because parts of the brain continue to mature through adolescence.³⁴⁷ As a result, children are susceptible to negative outside influences that drive their behaviors, such as increased impulsivity, lack of deference to adults, and environmental factors.³⁴⁸

Because of their ability to change based on outside influences, children have consistently been understood to have the greatest possibility of rehabilitation—over time they mature into understanding moral right from wrong. A 5-year-old would generally not be held criminally liable for his actions both because of his diminished capacity and because of the assumption that he would mature and change over time; legally setting an age of criminal liability captures these ideas.

MINIMUM AGE OF CRIMINAL RESPONSIBILITY IN THE UNITED STATES

The age of criminal liability in the United States is legislated by both state and federal law. States can set their own age of criminal liability for crimes that fall under states law, while the federal government can set a separate age for federal crimes.³⁴⁹ In the United States 33 states set no age of criminal liability, allowing for a child of any age to be prosecuted criminally.³⁵⁰ The possibility of this happening was recognized by the U.S. Supreme Court in *Graham v. Florida*, when it stated “[f]or example, under Florida law a child of any age can be prosecuted as an adult for certain crimes and can be sentenced to life without parole. The State acknowledged at oral argument that even a 5-year-old, theoretically, could receive such a sentence under the letter of the law.”³⁵¹

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

346 Lisa Micucci, *Responsibility and the Young Person*, 11 CAN. J.L. & JURIS. 277 (1998).

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

348 Roper v. Simmons, 543 U.S. 551, 569 (2005).

349 CIPRIANI, *supra* note 19, at 221 n.161 (the federal age of criminal liability was not available at the time that this report was written).

350 CIPRIANI, *supra* note 19, at 221-222.

351 Graham v. Florida, 130 S.Ct. 2011, 2026 (2010). The use of the word “theoretically” denotes that in practice juvenile of such a young age are not actually prosecuted criminally. Despite this, the lack of a fixed age of criminal responsibility means that there is no guarantee that a young child will not be

MINIMUM AGE OF CRIMINAL RESPONSIBILITY	STATE
No Minimum Age of Criminal Responsibility (Theoretically 0)	AL, AK, CT, DE, DC, FL, GA, HI, ID, IL, IN, IA, KY, ME, MI, MO, MT, NE, NJ, NV, NH, NM, ND, OH, OK, OR, RI, SC, TN, UT, VA, WV, WY 33 states total
Age of Criminal Liability for Specific Crimes, All Other	CA (doli incapax ³⁵² test for ages 0 – 14), PA (10 for specific crimes), Crimes Have No Set Age of Criminal Liability VT (10 for specific crimes) 3 states total
Minimum Age of Criminal Responsibility of 6 years	NC 1 state total
Minimum Age of Criminal Responsibility of 7 years	MD, MA, NY 3 states total
Minimum Age of Criminal Responsibility of 8 years	AZ, WA 2 states total
Minimum Age of Criminal Responsibility of 10 years	AR, CO, KS, LA, MN, MS, SD, TX, WI ³⁵³ 9 states total

INTERNATIONAL LAW AND STANDARDS ON MINIMUM AGE OF CRIMINAL RESPONSIBILITY

International laws and standards have consistently required that an age of criminal liability be set uniformly throughout the country, and that this age represent when a child has the adequate mental capacity and moral competence to be punished for their crimes.³⁵⁴

The Convention on the Rights of the Child (CRC), to which every country in the world except the United States, Somalia, and South Sudan is a party, specifically states that countries must establish a minimum age below which children shall be presumed not to have the capacity to infringe the law.³⁵⁵ The Committee to the Convention of the Rights of the Child, the independent body tasked with overseeing implementation of this convention, further elaborated that countries should not set the age of criminal liability “at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.”³⁵⁶ Based on understandings in juvenile development, the Committee found that “States parties are encouraged to increase their lower minimum age of criminal responsibility to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level.”³⁵⁷ No state in the United States currently meets the suggested 12-year mini-

prosecuted in the future.

352 CIPRIANI, *supra* note 19, at 42-43 (*Dolci Incapax* is a legal presumption that children between the MACR and a higher age are not capable of bearing criminal responsibility. The presumption can be rebutted through evidence of a child’s maturity and understanding. If it is rebutted, the child can be prosecuted and the case proceeds, if not, the child cannot be held criminally responsible).

353 *Id.* at 221-222.

354 U.N. Convention on Rights of the Child art. 40(3)(a), GA Res 44/25, Annex, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter CRC]. Committee on the Rights of the Child, *General Comment No. 10: Children’s Rights in Juvenile Justice*, para. 33, UN Doc. CRC/C/GC/10 (April 25, 2007).

355 CRC, *supra* note 354, art. 40(3)(a).

356 Committee on the Rights of the Child, *General Comment No. 10: Children’s Rights in Juvenile Justice*, para. 32, UN Doc. CRC/C/GC/10 (April 25, 2007).

357 *Id.*

mum age of criminal liability.³⁵⁸

Although the Committee identified 12 as the minimum age for criminal liability, it strongly urged that countries adopt a higher age for determining criminal responsibility.³⁵⁹ Raising the age of criminal liability to 14 or 16 “contributes to a juvenile justice system which, in accordance with Article 40(3)(b)³⁶⁰ of the CRC, deals with children in conflict with the law without resorting to judicial proceedings, providing that the child’s human rights and legal safeguards are fully respected.”³⁶¹ The Committee additionally required that state parties set an age of criminal liability that does not allow, by way of exception, the use of a lower age.³⁶²

COMPARATIVE COUNTRY INFORMATION ON MINIMUM AGE OF CRIMINAL RESPONSIBILITY³⁶³

International practice shows that countries across the world have set a minimum age of criminal responsibility to ensure that juveniles under a certain age cannot be tried criminally. Although the age set by the MACR varies depending on the country and the region, 98% of countries surveyed ensure that there is a MACR.³⁶⁴ Additionally, 64% of countries ensure that their age of criminal liability is 12 or greater, as suggested by the Committee on the Rights of the Child.³⁶⁵

QUICK STATS ON THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY AROUND THE WORLD

Percentage of Countries where the MACR is 12 or above: 64%

Percentage of Countries where the MACR 10 or above: 76%

Average Age of Criminal Responsibility: 12

Source: Refer to Appendix for country citations.

358 CIPRIANI, *supra* note 19, 221-222 (see above analysis under “Minimum Age of Criminal Responsibility in the United States”).

359 Committee on the Rights of the Child, *supra* note 356, at para. 33.

360 CRC, *supra* note 354, art. 40(3): “State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions, specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular (b) Wherever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.”

361 Committee on the Rights of the Child, *supra* note 356, at para. 33.

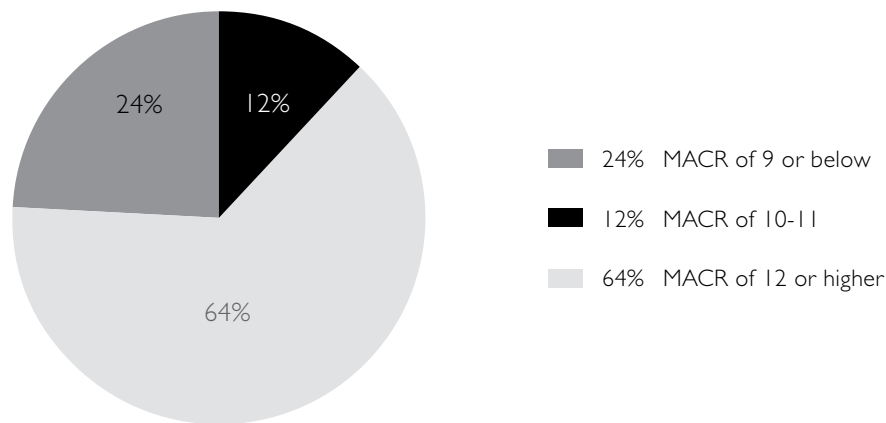
362 *Id.* at para. 34.

363 Researchers could not locate statutory or case law text determining the MACR in Mozambique.

364 Refer to Appendix for country citations.

365 Refer to Appendix for country citations.

MINIMUM AGE OF CRIMINAL RESPONSIBILITY AMONG COUNTRIES SURVEYED



Refer to Appendix for country citations.

International practice and General Comment from the Committee on the Rights of the Child suggest that the United States is an outlier in its determination of the age of criminal liability. While international treaties require that there be a minimum age of criminal liability, the United States has 33 states that set no such requirement. Such practices violate provisions of the CRC, and go against international practice.

Additionally, 17 states that set a MACR allow for an age of criminal liability under the age of 12; international treaty comments urge that the MACR be set at 12 and the majority of countries around the world already adhere to this standard.

2. JUVENILES TRIED AS ADULTS

“Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children.”

Committee on the Rights of the Child³⁶⁶

Juveniles represent a distinct and separate class of individuals who have diminished culpability. This has long been recognized in the laws of countries around the world, which have consistently passed laws that prohibit children from marrying, contracting, or drinking. A child’s diminished capacity has traditionally been recognized in the criminal justice system through the creation of juvenile penal codes, juvenile courts, punishments specific to rehabilitating juveniles, and separate juvenile detention facilities. A juvenile justice system is, in effect, “a state sanctioned recognition that there is and ought to be a difference between the criminal adjudication of adults and children.”³⁶⁷ This represents an understanding that juveniles

366 Committee on the Rights of the Child, *supra* note 356, at para. 11.

367 Jenny E. Carroll, *Rethinking the Constitutional Criminal Procedure of Juvenile Transfer Hearings: Apprendi, Adult Punishment, and Adult Process*, 61 HASTINGS L.J. 175, 209 (2009).

are fundamentally different from adults and that their criminal proceedings should accommodate their difference.

Age protections and rehabilitative goals are not advanced when juveniles are tried as adults. This occurs when the child can be transferred to an adult court, and all the protections that would apply because of his or her age are taken away: for purposes of the trial and sentencing the child is an adult. As such, being tried as an adult encompasses two violations: first, the offender's age and status as a minor is not considered at trial *and*, second, the punishment is not mitigated upon conviction—resulting in the offender being subjected to adult punishments at sentencing.

JUVENILES TRIED AS ADULTS IN THE UNITED STATES

The United States allows juveniles to be tried in adult courts.³⁶⁸ By virtue of the transfer to adult court, juveniles are subject to adult punishments and in nearly all states are incarcerated in adult institutions.³⁶⁹ Three procedures exist in the United States that effectively transfer a juvenile to adult court, stripping away any protections that a juvenile court would offer. One such transfer mechanism is through judicial waiver, where a judge makes the determination that the child should be tried in adult court.³⁷⁰

While the exact requirements for a judicial waiver can depend on the state,³⁷¹ the juvenile court judge is making the decision whether a child should face adult penalties and adult incarceration based on a prosecutorial motion.³⁷² Currently, 45 states and the District of Columbia allow for judicial transfers.³⁷³

The second mechanism available in the United States for trying a juvenile in adult court is a prosecutorial waiver, where a state prosecutor can file the case directly in criminal court, *without* the case ever being seen in juvenile court.³⁷⁴ Although minimum threshold requirements must be met,³⁷⁵ direct filing eliminates many of the due process protections afforded by juvenile courts by leaving the decision directly to the prosecutor's discretion. Prosecutorial direct-file laws exist currently in 14 states and the District of Columbia.³⁷⁶

The third and final way that juveniles are tried in adult court is through a legislative waiver. Under this transfer mechanism, the state legislature has codified the charges that require a prosecutor to charge a juvenile in adult court.³⁷⁷ Despite these legislative requirements, prosecutors will inherently retain their power to decide if the child should be tried in adult court, since they determine with what crime to charge the juvenile.³⁷⁸ Statutory transfer laws are in effect in 29 states.³⁷⁹

368 Kent v. United States, 383 U.S. 541 (1966). Morris Kent was tried in adult court for housebreaking, robbery and rape. The Supreme Court upheld his transfer as constitutional as well as his sentence of 30 to 90 years in prison.

369 David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) To Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1563 (2004).

370 Ellen Marrus & Irene Merker Rosenberg, *After Roper v. Simmons: Keeping Kids Out of Adult Criminal Court*, 42 SAN DIEGO L. REV. 1151, 1175 (2005).

371 Some states require that the factors established in the Supreme Court case *Kent v. United States*- *supra* note368- be met while others give judges complete discretion to transfer so long as evidence supports the decision. Barry C. Field, *The Juvenile Court meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. Crim. L. & Criminology 471 (1987). The majority of states, however, require that the juvenile be of a certain age and charged with certain offenses, in order to be transferred. This, in effect, is almost a mandatory transfer will little to no discretion. *See, e.g.*, 705 ILL. COMP. STAT. ANN. 405/5-805 (2)(3) (2005).

372 Ellen Marrus & Irene Merker Rosenberg, *After Roper v. Simmons: Keeping Kids Out of Adult Criminal Court*, 42 SAN DIEGO L. REV. 1151, 1172 (2005).

373 H.N. Snyder & M. Sickmund, U.S. DEP'T. OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 186-187* (2006).

374 Ellen Marrus & Irene Merker Rosenberg, *After Roper v. Simmons: Keeping Kids Out of Adult Criminal Court*, 42 San Diego L. Rev. 1151, 1176 (2005).

375 *See, e.g.*, FLA. STAT. ANN. § 985.557 (West Supp. 2005). In Florida a prosecutor can only directly file for a child who is 14 to 15 years of age and commits specific crimes, such as arson, sexual battery, robbery, kidnapping, aggravated child abuse, aggravated assault, aggravated stalking, murder, manslaughter.

376 H.N. SNYDER & M. SICKMUND, U.S. DEP'T. OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 186-187* (2006).

377 Ellen Marrus & Irene Merker Rosenberg, *After Roper v. Simmons: Keeping Kids Out of Adult Criminal Court*, 42 San Diego L. Rev. 1151, 1177 (2005).

378 *Id.* at 1177-1178.

379 H.N. SNYDER & M. SICKMUND, U.S. DEP'T. OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 186-187* (2006).

It is important to note that in the United States, transfer to an adult court brings an adult sentence.³⁸⁰ This means that the age of the offender is also not considered at sentencing, and that a juvenile is *de facto* treated as an adult throughout the entire trial and sentencing process.³⁸¹ The United States remains one of only a handful of countries in the world where a juvenile remains a minor for all other legal purposes, but is treated as an adult in the criminal justice system.³⁸²

SERVING ADULT TIME IN ADULT PRISONS

As a consequence of being tried as an adult and sentenced to an adult sentence is serving time in an adult prison. As such, the overwhelming majority of juveniles serve time before and after trial in adult facilities where they are at risk of sexual and physical assault. In the case of Evan Miller, a fourteen-year-old sentenced as an adult, incarceration in an adult facility resulted in an attack by an older inmate. Evan was stabbed nine times.

Source: THE SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS, FINDINGS FROM A NATIONAL SURVEY 19 (2012).

INTERNATIONAL LAW AND STANDARDS ON JUVENILES TRIED AS ADULTS

The International Covenant on Civil and Political Rights requires that the age of the offender and his or her status as a juvenile be considered in criminal proceedings. Additionally, customary international law prohibits extreme sentencing against juveniles, requiring that the sentence be for the shortest amount of time possible.

Under Article 14(4) of the ICCPR “in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.”³⁸³ Additionally, the ICCPR requires that an individual’s status as a minor be taken into account in sentencing; Section 10(3) explicitly states that “juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”

This treaty embodies an understanding that juveniles have diminished culpability because of their young age. The Committee on the Rights of the Child has consistently emphasized the psychological differences between juveniles and adults in its elaborations of treaty obligations.³⁸⁴ The Committee noted that because juveniles differ from adults, the rehabilitative goal of punishment is best promoted through distinct juvenile justice systems and penal codes.³⁸⁵

Transferring a juvenile to an adult court to receive an adult sentence violates the ICCPR’s requirements that the offender’s status as a juvenile be considered. By virtue of the transfer, the offender’s age is not considered throughout any of the proceedings; the offender is viewed as an adult and is not subject to sentencing that would promote rehabilitation.

A norm is considered customary international law when it is a widespread, constant and uniform state practice compelled by legal obligation that is sufficiently long enough to establish the norm, although there may be a few uncertainties or

380 David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) To Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1563 (2004).

381 *Id.*

382 See the section below entitled “Comparative Country Information on Juveniles Tried as Adults” and refer to Appendix for country citations.

383 The United States has filed a reservation to this article of the ICCPR: “(5) That the policy and practice of the United States are generally in compliance with and supportive of the Covenant’s provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14.” Office of the United Nations High Comm’r for Human Rights, ICCPR Declarations and Reservations, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en, (last visited Apr. 10, 2012). Despite this reservation, international practice, as seen below, shows that this reservation is out of line with international norms.

384 Committee on the Rights of the Child, *supra* note 356, at para. 10.

385 *Id.*

contradictions in the practice during this time.³⁸⁶ The International Court of Justice noted that “a very widespread and representative participation in [a] convention might suffice of itself” to show customary international law as long as “[s]tates whose interests were specially affected” participated.³⁸⁷ Once customary international law has been established, that rule generally applies to all nations.³⁸⁸

The prohibition against treating like adults through the criminal process is so widespread that it has reached the level of customary international law. Of the countries surveyed, 84% (or 118 countries) require that the offender’s status as a juvenile be taken into consideration at some point during the criminal trial.³⁸⁹ The widespread understanding and practice of treating juveniles as juveniles is constant and uniform across the countries surveyed. The *opinio juris* requirement of customary international law, that countries are acting in accordance to perceived international requirements, is served by the mandate of IICPR article 14(4). As such, the practice of treating a juvenile as an adult is contrary to customary international law, and is prohibited.

COMPARATIVE COUNTRY INFORMATION ON JUVENILES TRIED AS ADULTS³⁹⁰

International practice demonstrates that the overwhelming majority of countries treat juvenile offenders differently from adults when they face criminal proceedings. Many countries flatly prohibit transfer to adult court in any form, thereby ensuring that the offender is tried as a juvenile in a juvenile court.³⁹¹

Many countries do not have separate juvenile courts or facilities, either due to a lack of resources or because so few juveniles pass through the criminal justice system to receive sanctions that a separate court is impractical.³⁹² Despite this lack of a system, these countries have made it clear through their laws that special juvenile protections will apply when trying juveniles.³⁹³

Some countries do allow juveniles to be transferred into adult court, notably for particularly heinous crimes,³⁹⁴ or when they are being tried with an adult and severing the cases would result in injustice.³⁹⁵ Despite this, the vast majority (84%) of countries that allow juveniles to be tried in adult courts still require that protections be in place to ensure that juveniles are still treated as such.³⁹⁶ These protections vary but include requiring that provisions of the juvenile code apply at trial,³⁹⁷ that the juvenile be transferred back to juvenile court for sentencing,³⁹⁸ or that the juvenile receive a sentence different from an adult when sentenced in adult court.³⁹⁹

386 De la Vega & Leighton, *supra* note 21, at 1014 n.160.

387 North Sea Continental Shelf Cases (FRG v. Denmark; FRG v. Netherlands) 1969 I.C.J. 3, paras. 73-74.

388 De la Vega & Leighton, *supra* note 21, at 1014 n.161 (2008). The exception is if a country has continually and persistently objected to that rule.

389 See the section below entitled “Comparative Country Information on Juveniles Tried as Adults” and refer to Appendix for country citations.

390 There were 53 countries for which researchers could not locate statutory or case law text confirming if juveniles could be transferred to adult court. They are: Andorra, Barbados, Belarus, Burkina Faso, Cape Verde, Dominica, Democratic People’s Republic of Korea, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Grenada, Guinea Bissau, Guyana, Honduras, Iran, Jamaica, Jordan, Kiribati, Kuwait, Liberia, Libya, Lithuania, Malawi, Mauritius, Monaco, Morocco, Mozambique, Namibia, Nicaragua, Nigeria, Oman, Panama, Paraguay, Qatar, Republic of Congo, Saint Kitts and Nevis, Saint Lucia, Saint Vincent, Sao Tome, San Marino, Somalia, South Africa, Suriname, Syria, Tajikistan, Trinidad and Tobago, Turkmenistan, Tuvalu, United Arab Emirate, Vanuatu, Yemen, Zambia.

391 See, e.g., Albania Criminal Procedure Code, art. 81. In Albania even if the juvenile is tried with an adult, they remain in juvenile court.

392 See, e.g., Jaan Sootak, *Juvenile Criminal Law*, JURIDICA INTERNATIONAL (last visited Apr. 10, 2012), <http://www.juridicainternational.eu/juvenile-criminal-law>. Sweden’s welfare based system results in few children passing through the justice system. See also, UNICEF, *Vietnam Overview*, <http://www.unicef.org/vietnam/overview.html> (last visited Apr. 10, 2012). Whereas Vietnam’s lack of juvenile courts may be based on a lack of finances- Vietnam’s Gross National Income was \$1, 010 in 2009 and it had a human development index of 0.572 in 2009.

393 See, e.g., Georgia Penal Code arts. 641 and 89, which mandates that the age of offender and their mental capacity be ascertained at trial.

394 Barbara Stando-Kawecka, *Continuity in the Welfare Approach: Juvenile Justice in Poland*, in INTERNATIONAL HANDBOOK OF JUVENILE JUSTICE 357 (Josine Junger-Tas & Scott H. Decker eds. 2006).

395 See Serbia Judicial Authorities and Juvenile Criminal Proceedings art. 51.

396 Refer to Appendix for country citations, and see below for chart.

397 See, e.g., Croatia Juvenile Courts Act art. 60.

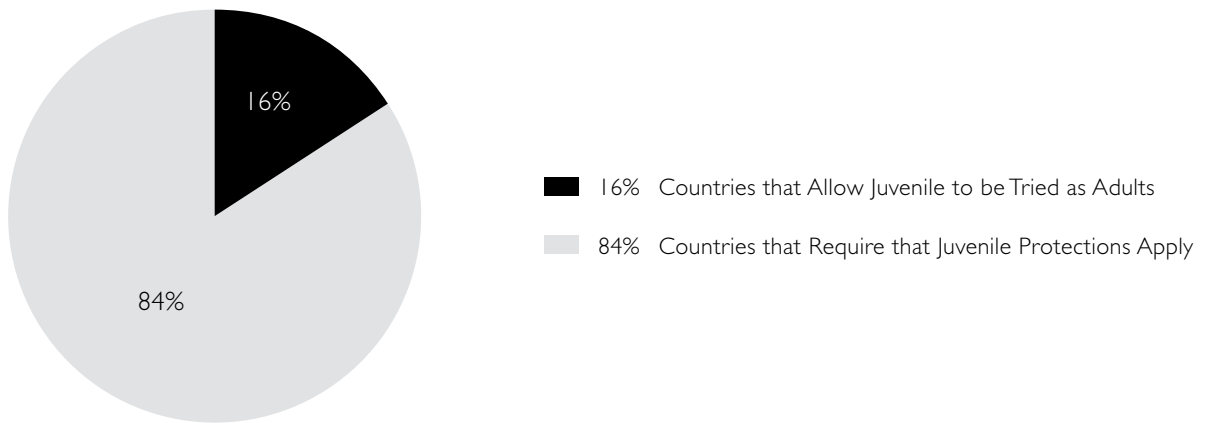
398 See, e.g., Ghana Juvenile Justice Act of 2003 sec. 18.

399 See, e.g., Ukraine Code of Criminal Procedure of Ukraine art. 439 and 433.

QUICK STATS ON TRANSFER ISSUES

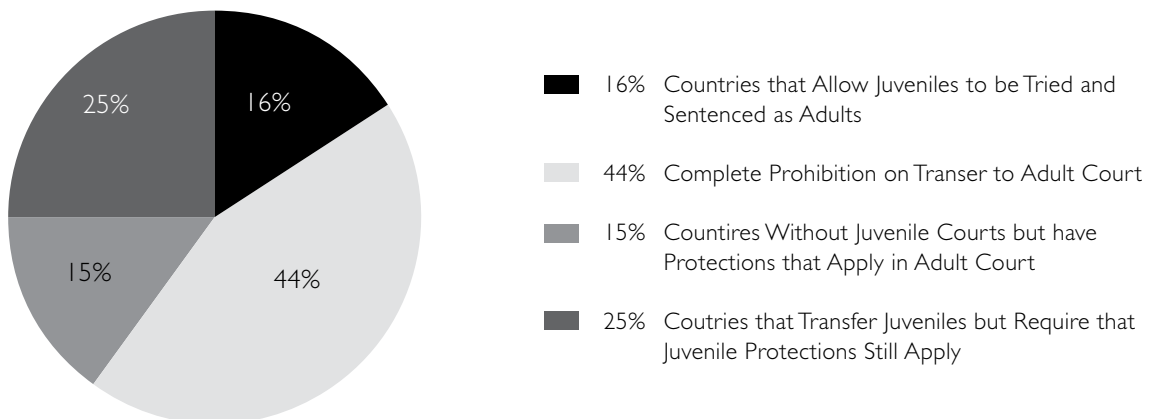
Total Countries Surveyed: 140
 Total Countries that Account for the Age of the Offender at Trial: 118
 Percentage of Countries that Account for the Age of the Offender at Trial: 84%
 Number of Countries that try and sentence juveniles as adults: 22
 Percentage of Countries that try and sentence juveniles as adults: 16%
 Source: Refer to Appendix for country citations.

JUVENILES TRIED AS ADULTS



Refer to Appendix for country citations.

JUVENILES TRANSFERRED TO ADULT COURT



Refer to Appendix for country citations.

The United States remains an outlier in its juvenile prosecution practices by eliminating any consideration of the offender’s status as a minor. It is among the 16% of countries worldwide that try and sentence children as adults. Despite international consensus to the contrary, the United States persists in treating juveniles as adults throughout both the trial and the sentencing, resulting in thousands of children serving adult-length sentences.

3. LONG JUVENILE SENTENCING

“Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time; unless we are to abandon the moral commitment embodied in the Eight Amendment, proportionality review must never become effectively obsolete.”

U.S. Supreme Court Justice John Paul Stevens⁴⁰⁰

Once juveniles enter the criminal justice system, they are subject to criminal sanctions and imprisonment. Juvenile sentencing should reflect the principle of rehabilitation and diminished capacity: because juveniles are less emotionally and psychologically developed, they are less accountable for their actions.⁴⁰¹ Long sentences do not promote a rehabilitative end since they confine juveniles to decades behind bars, and often prohibit any rehabilitative programming.⁴⁰² As such, juveniles should be subject to different sentences than adults, and these sentences should promote rehabilitation and potential re-entry into society.

LONG JUVENILE SENTENCING IN THE UNITED STATES

Once juveniles in the United States are transferred to adult court, they are subject to adult sentences, which make them subject to longer sentences in harsher conditions than in juvenile facilities.⁴⁰³ Many states follow mandatory sentencing guidelines; under these stringent requirements, if a juvenile defendant is found guilty of an offense, he *must* be sentenced to a specific term of imprisonment, without any discretion at sentencing.⁴⁰⁴

Following the 2005 Supreme Court decision in *Roper v. Simmons*, the United States abolished the death penalty as applied to juveniles.⁴⁰⁵ Currently, the maximum sentence that a juvenile can receive in the United States is life without parole,⁴⁰⁶ a sentence that can never be reviewed and ensures that the offender will die in prison.⁴⁰⁷ The combination of transferring juveniles to adult courts and mandatory sentencing schemes has resulted in child offenders across the United States serving life without parole sentences.⁴⁰⁸ It is currently estimated that the United States has 2,594 juveniles serving life without parole sentences.⁴⁰⁹

400 *Graham v. Florida*, 130 S. Ct. 2011, 2036 (2010).

401 Committee on the Rights of the Child, *supra* note 356, at para. 10.

402 THE SENTENCING PROJECT, *THE LIVES OF JUVENILE LIFERS, FINDINGS FROM A NATIONAL SURVEY* 23 (2012). This can include GRE classes, therapy and group sessions.

403 David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) To Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1563 (2004).

404 *See, e.g.*, FLA. STAT. ANN. § 775.082 (West 2005 and Supp. 2008), which requires a sentence of life without parole for anyone convicted of murder.

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

406 *See, e.g.*, 730 ILL. COMP. STAT. ANN. 5/5-8-1 (West 2007), which notes that for first degree murder, the individual can be sentence to life without parole.

407 De la Vega & Leighton, *supra* note 21, at 983.

408 *See, e.g.*, IOWA CODE ANN § 232.45(6)(a) (West 2006); IOWA CODE ANN. §902.1(West 2003) which state, respectively that the juvenile court may waive jurisdiction over a child as young as 14 and that there be a mandatory LWOP sentences upon conviction for “Class A Felony.”

409 *Sentencing Juveniles*, N.Y. TIMES, Apr. 20 2011, <http://www.nytimes.com/interactive/2011/04/20/us/juveniles.html>. However, a 2009 Human Rights Watch Report states that 2, 570 youth offenders are serving a JLWOP sentence. HUMAN RIGHTS WATCH, *WORLD REPORT 2009: EVENTS OF 2008* 538 (2009).

INTERNATIONAL LAW AND STANDARDS ON LONG JUVENILE SENTENCING

A life without the possibility of parole sentence for a juvenile is prohibited by international law. Article 37(a) of the CRC expressly forbids sentencing children under the age of 18 to a life sentence without the possibility of parole.⁴¹⁰ Further, the ICCPR requires that an individual’s status as a minor be taken into account in sentencing; Section 10(3) explicitly states that “juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”⁴¹¹

This principle is once again expressed in CRC Section 37(b) where it mandates that “the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”⁴¹² The treaty embodies the understanding that juveniles should be subject to different punishments as adults because of their minority.

COMPARATIVE COUNTRY INFORMATION ON LONG JUVENILE SENTENCING⁴¹³

International practice reflects the idea that juveniles should be sentenced to shorter terms than adults, and with the aim of rehabilitation. The majority of countries prescribe sentences for juvenile offenders to a maximum of 25 years, and only the United States has juvenile offenders serving sentences that offer no hope of release.⁴¹⁴

QUICK STATS ON JUVENILE SENTENCING

Countries Surveyed: 164

Countries with Determinate Sentences for Juveniles: 127 countries (78%)

Countries with a Sentence that is 25 Years or Less for Juveniles: 92 countries (56%)

Countries without JLWOP on the Books: 151 countries (93%)

Countries that have Children Serving a Life Without Parole Sentence: 1 (0.6%)

410 CRC, *supra* note 354, art. 37(a).

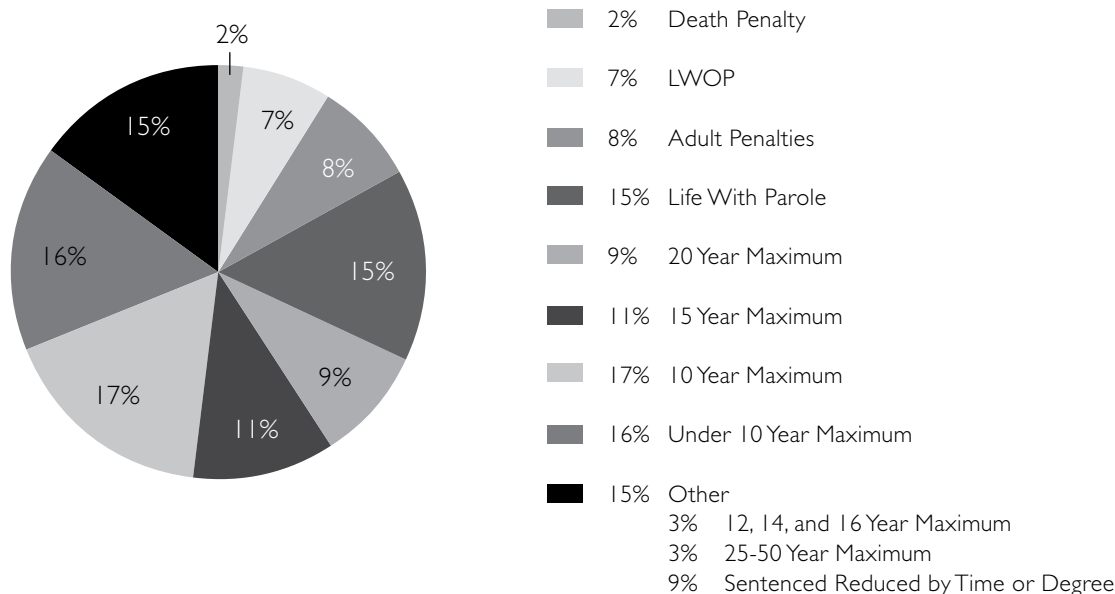
411 ICCPR, *supra* note 10, art. 10(3).

412 CRC, *supra* note 354, art. 37(b).

413 For purposes of this report, the maximum juvenile sentence is determined using the maximum sentence that a juvenile can receive based on how the country defines juvenile. For example, in Haiti the age of majority is 16 so the maximum sentence is for those under the age of 16. Haitian Penal Code art. 50. In France the age of majority is 18 and the maximum listed is therefore for those under the age of 18. France Penal Code arts. 122-128. Additionally the majority of these numbers were calculated based on the maximum sentence that a juvenile can obtain when tried as a juvenile. Refer to the Appendix for specifics for each country for the age calculation.

414 There were 30 countries for which researchers could not locate statutory or case law text confirming the maximum sentence a juvenile can receive. Those countries are: Andorra, Burkina-Faso, Equatorial Guinea, Gambia, Greece, Grenada, Guinea-Bissau, Guyana, Israel, Jamaica, Jordan, Kuwait, Liberia, Lithuania, Malawi, Mauritius, Mozambique, Namibia, New Zealand, Nigeria, Papua New Guinea, Republic of Congo, Sao Tome, Seychelles, Suriname, Syria, Timor-Leste, Trinidad and Tobago and Turkmenistan.

JUVENILE MAXIMUM SENTENCES



Refer to Appendix for country citations.

The United States continues to sentence their children to grossly excessive sentences that do not provide for any rehabilitation, and often remove the possibility of any form of re-entry into society. As such, the United States remains out of line with international practice and international treaty norms.

JUVENILE LIFE WITHOUT PAROLE

“From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”

U.S. Supreme Court Justice Anthony Kennedy⁴¹⁵

A sentence of life without parole eliminates any possibility that the offender will be released. When such a sentence is applied to juveniles, it eliminates any chance that the child will be able to reform and mature over time and can be rehabilitated.

Currently a child in the United States can receive a sentence of life without parole in 45 states.⁴¹⁶ Generally, children in the United States receive life without parole sentences after they have been transferred to an adult court and are tried and sentenced as an adult.⁴¹⁷ In 2010, the U.S. Supreme Court ruled in *Graham v. Florida* that juveniles cannot be sentenced to life without parole for non-homicide crimes; however juveniles can still receive LWOP for felony-murder⁴¹⁸ and other homicide crimes.⁴¹⁹

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

416 De la Vega & Leighton, *supra* note 21, at 1031-1044. Every state except Alaska, Colorado, Kansas, Kentucky, New Mexico, Oregon and D.C. allow for a sentence of life without parole for a juvenile.

417 David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) To Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1563 (2004). *Roper v. Simmons*, 543 U.S. 1067 (2005).

418 Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 404 (2011). Felony-murder is the legal principle where the participant of a felony is held liable for any killings that occur during the course of the felony, even if they personally did not pull the trigger.

419 *Graham v. Florida*, 130 S. Ct. 2011 (2010). Additionally, at the time that this report was written, two cases *Miller v. Alabama* and *Jackson v. Hobbs*, were awaiting decision before the Supreme Court (docket numbers 10-9646 and 10-9647). One of the issues on cert is the constitutionality of sentencing 14 year

A juvenile life sentence without possibility of parole is expressly prohibited by international law and treaties: Article 37(a) of the Convention on the Rights of the Child (CRC) forbids sentencing children under the age of 18 to a life sentence without the possibility of release.⁴²⁰

A sentence of JLWOP additionally violates customary international law since it is a *jus cogens* norm. Customary international law⁴²¹ regulates state practice when it becomes a *jus cogens* norm: a practice which has been “universally accepted and recognized by the international community of states as a whole as [...] norm[s] from which no derogation is permitted and which can be modified only by [...] subsequent norm[s] of general international law having the same character.”⁴²² Once a *jus cogens* norm has been established, the norm is applicable to all nations regardless of their objections to the practice.⁴²³

The prohibition of a JLWOP sentence has reached the level of a *jus cogens* norm: (1) the prohibition of such a sentence is general international law as codified in multiple treaties,⁴²⁴ (2) the prohibition of JLWOP is accepted by the international community of States as the United States is the only country in the world to have children serving a JLWOP sentence,⁴²⁵ (3) the requirement that JLWOP not be imposed on children is immune from derogation since, in addition to being prohibited by the CRC, other treaty bodies have clarified that the sentence is prohibited by law, even for the United States; the community of nations has condemned the practice and called for its abolition; and all other countries that have used the sentence have stopped and (4) there is no emerging norm that contradicts the current norm as the prohibition has reached near universal acceptance.⁴²⁶

DE FACTO LIFE WITHOUT PAROLE

Although not a JLWOP sentence, juveniles in the United States have been subject to extremely long sentences. Some of these sentences are for such long durations that they amount to life without parole—as was the case with Bobby Bostic who was sentenced to 241 years in prison.

Following the landmark decision in Graham v. Florida, juvenile life without parole for non-homicide crimes is no longer allowed. As those who received a JLWOP sentence for a non-homicide crime are re-sentenced, the issue of de facto LWOP has become a problem as individuals are receiving 70 year long sentences. Such long sentences can still guarantee that the individual will die in prison.

Source: Letter from Bobby Bostic, to Dana Isaac, Attorney/Project Director, Project to End Juvenile Life Without Parole (Feb. 22, 2012) (on file with University of San Francisco School of Law Center for Law and Global Justice).

olds life without parole (JLWOP). An additional issue reviewed by the court is the affect of felony-murder on a JLWOP sentence (“Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old who did not personally kill the homicide victim, did not personally engage in any act of physical violence toward the victim, and was not shown even to have anticipated, let alone intended, that anyone be killed?). *Jackson v. Hobbs*, No. 10-9647, cert. granted, *Questions Presented*. Although the case is framed around the applicability of these issues to fourteen-year-olds, the case could have wider ramifications for felony-murder convictions for juveniles of all ages.

420 Art. 37, Convention on the Rights of the Child, U.N. G.A. res 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167 Convention, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990.

421 For an analysis of customary international law, see the section entitled “International Law and Standards on Juveniles Tried as Adult” above.

422 De la Vega & Leighton, *supra* note 21, at 1014.

423 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, art. 53 (1969). This differentiates *jus cogens* norms from international law since, despite persistent objections to the practice, the country will still be bound by the practice.

424 Refer to Appendix for country citations.

425 Refer to Appendix for country citations.

426 De la Vega & Leighton, *supra* note 21, at 1014-1015. Brief for Amnesty International et al. as Amici Curiae Supporting Petitioners, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (No. 08-7412), 2009 WL 2219304.

The United States remains the only country in the world to sentence a juvenile to life without parole in practice. Eight countries have been identified as having laws that could allow for a sentence of JLWOP;⁴²⁷ however there are no known cases of the sentence being imposed.⁴²⁸ Additionally, four countries have ambiguous language regarding JLWOP;⁴²⁹ however, since there are no known cases of juveniles being sentenced, it can be determined that the country does not practice the sentence. As such, there is only one country in the world with a child serving an LWOP sentence.

ANTHONY JONES

Anthony Jones was 17 when he planned and participated in the robbery of a Michigan market. Jones struck the store owner, but fled when the altercation escalated and was no longer at the store when his co-defendant fatally shot the owner. Although Mr. Jones did not pull the trigger, under the doctrine of felony-murder, where anyone who commits a felony is responsible for any deaths, Jones was sentenced to life without parole.

After an appeal following the U.S. Supreme Court's decision 2 years prior in Graham v. Florida rendering JLWOP for non-homicide crimes unconstitutional, Jones was re-sentenced to life with the possibility of parole after spending 33 years behind bars. Jones' was the first post-Graham re-sentencing that has not been challenged. Hundreds of offenders sentenced as juveniles still wait for their own resentencing.

Source: Rex Hall Jr., *Juvenile Lifer Anthony Jones Can Have Case Heard By Parole Board, Kalamazoo Judge Orders*, M LIVE, Feb. 06, 2012, http://www.mlive.com/news/kalamazoo/index.ssf/2012/02/juvenile_lifer_anthony_jones_s.html. John Barnes, *Juvenile Lifer Anthony Jones May One Day Walk, But Fate Of Others Left Unanswered*, M LIVE, Feb. 07, 2012, http://www.mlive.com/news/index.ssf/2012/02/juvenile_lifer_anthony_jones_m.html

C. PROSECUTION IN DUAL SOVEREIGN STATES

Most criminal systems around the world have a constitutional provision outlawing double jeopardy or a *ne bis in idem* (or *non bis in idem*) provision, which prohibits successive prosecutions of the same person for the same crime. The right to protection from double jeopardy and *non bis in idem* provisions are found in nearly all national constitutions.⁴³⁰

Double jeopardy and *non bis in idem* differ from each other slightly in scope and application.⁴³¹ Double jeopardy usually applies within a given legal system and not between different legal systems.⁴³² *Non bis in idem* is a right that protects defendants from successive prosecutions or punishment for the same conduct, irrespective of the prosecuting system.⁴³³ Coun-

427 These countries are Antigua and Barbuda, Argentina, Australia, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands and Sri Lanka. The sentence has not been given in practice, presumably under these countries' obligations under the CRC. Refer to Appendix for country citations.

428 De la Vega & Leighton, *supra* note 21, at 990. This has been updated by the research conducted for this report as well as in Amnesty International, et al. as Amici Curiae Supporting Petitioners, *Miller v. Alabama* (2012) (No. 10-9646), 2012 WL 174238.

429 These countries are Zambia, Sierra Leone, Tonga and the Bahamas. The sentence has not been given in practice, presumably under these countries' obligations under the CRC. Refer to Appendix for country citations.

430 Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 255 (1993). See, e.g., Ant. & Barb. Const. ch. II, § 15(5); Bah. Const. ch. III, § 20(5); Bangl. Const. pt. III, § 35(2); Barb. Const. ch. III, § 18(5); Belize Const. ch. II, § 6(5); Bots. Const. ch. II, § 10(5); Can. Const. pt. I, § 11(h); Costa Rica Const. tit. IV, art. 42; Dominica Const. ch. I, § 8(5); Dom. Rep. Const. tit. II, § I, art. 8(2)(h); Eq. Guinea Const. tit. III, art. 20(19); Fiji Const. pt. 1, ch. 2, § 11(5); Gam. Const. ch. III, § 20(5); F.R.G. Const. tit. IX, art. 103(3); Gren. Const. ch. I, § 8(5); Guy. Const. pt. II, tit. I, § 144(5); Hond. Const. tit. III, ch. II, art. 95; India Const. pt. III, § 20(2); Jam. Const. ch. III, § 20(8); Japan Const. ch. III, art. 39; Kenya Const. ch. V, § 77(5); Kiribati Const. ch. II, § 10(5); Korea (Republic of) Const. ch. II, art. 13(1); Liber. Const. ch. III, art. 21(h); Madag. Const. tit. II, art. 42; Malay. Const. pt. II, § 7(2); Malta Const. ch. IV, § 39(9); Mauritius Const. ch. II, § 10(5); Mex. Const. tit. I, ch. I, art. 23; Namib. Const. ch. 3, art. 12(2); Nauru Const. pt. II, § 10(5); Nepal Const. pt. III, § 14(2); Nicar. Const. tit. IV, art. 34(9); Nig. Const. ch. IV, § 35(8); Pak. Const. pt. II, ch. I, § 13(a); Papua N.G. Const. pt. III, div. 3, subdiv. B, § 37(8); Para. Const. ch. V, art. 64; Peru Const. ch. IX, art. 233(11); Phil. Const. art. IV(22); Port. Const. pt. I, § II, ch. I, art. 29(5); St. Chris.-Nevis Const. ch. II, § 10(5); Sierra Leone Const. ch. III, § 23(9); Sing. Const. pt. IV, § 11(2); Solom. Is. Const. ch. II, § 10(5); Swaz. Const. ch. II, § 10(5); Tonga Const. pt. I, cls. 12, 22(8); Uganda Const. ch. III, § 15(5); U.S. Const. amend. V; Venez. Const. tit. III, ch. III, § 60(8); Zambia Const. pt. III, § 20(5); Zimb. Const. ch. III, § 18(6).

431 See, Bassiouni, *supra* note 430 at 288.

432 *Id.* at 288-289.

433 *Id.*

tries also differ as to when jeopardy attaches.⁴³⁴ Constitutional and treaty provisions generally do not go into the specifics of when jeopardy attaches or in which circumstances successive prosecutions are permissible.⁴³⁵ Some approaches limit double punishment but not repeated prosecution.⁴³⁶

The United States is one of only 26 countries with a federal system, and one of only a few countries with a federal criminal system, in which federal and state jurisdictions have their own penal codes, criminal courts, and prison systems.⁴³⁷ Under the United States' "dual sovereignty" doctrine, a person can be tried by both a federal court and a state court for the same crime.

DUAL SOVEREIGNTY IN THE UNITED STATES

The Fifth Amendment of the U.S. Constitution states that no citizen can be "twice put in jeopardy of life or limb" for "the same offense." The Double Jeopardy Clause has a long and distinguished history.⁴³⁸ It is recognized as "the oldest of all the Bill of Rights guarantees," and some form of the double jeopardy clause has been found in the law of Athens, the Roman Republics, English common law, and early American colonial law.⁴³⁹

However, because state courts and federal courts represent distinct sovereigns, under the "dual sovereignty" doctrine, a defendant can be tried and acquitted in state court and then subsequently tried again for the same crime in a federal court or vice versa. The U.S. Supreme Court ruled in *Bartkus v. Illinois* that offenses against different sovereigns are not the "same offense" for double jeopardy purposes.⁴⁴⁰ The Court allowed state authorities to prosecute a person who had previously faced federal prosecution for the same offense. The Court in *Abbate v. United States* held conversely that federal authorities could prosecute a person who had previously faced state prosecution.⁴⁴¹ In fact, the dual sovereignty doctrine allows for re-prosecution by state authorities of defendants tried before federal courts, re-prosecution by federal authorities of defendants tried before state courts, and re-prosecution by state authorities of defendants tried before the courts of another state, such as in the case of crimes transacted over multiple states, including cross-border kidnappings or inter-state wire transfers.⁴⁴²

The reasoning is that a single act can give rise to two distinct offenses: one against the state and one against the United States or another state.⁴⁴³ The Double Jeopardy Clause protects defendants from double prosecution for the *same offense*; in the U.S., the prosecution of these offenses against different sovereigns is not barred by the Double Jeopardy Clause.

The U.S. Department of Justice, as a matter of policy, recommends restraint when pursuing prosecution of individuals after state judgments though there have been exceptions in highly publicized cases.⁴⁴⁴ For example, two out of four Los Angeles police officers accused of beating Rodney King in 1991 were acquitted in state courts, only to then be convicted in federal court.⁴⁴⁵ However, because this is a policy rather than a legal limitation on federal prosecutors, it lacks enforceability and therefore does little to remove ambiguity as to whether a defendant will endure successive prosecutions.

434 *Id.*

435 *Id.*

436 *Id.* at 289.

437 *Federalism by Country*, FORUM OF FEDERATIONS, http://www.forumfed.org/en/federalism/by_country/index.php (last accessed Apr. 10, 2012) (discounting Sudan as a federal state because South Sudan has become an independent country).

438 Michael A. Dawson, Note, *Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L. J. 281, 282 (1992).

439 *Id.*

440 *Bartkus v. Illinois*, 359 U.S. 121 at 124, 128-129 (1959).

441 *Abbate v. United States*, 359 U.S. 187 (1959).

442 Dawson, *supra* note 438, at 282.

443 *Id.*

444 *Dual and Successive Prosecution Policy ("Petite Policy")*, in United States Attorney's Manual, 9-2.031 (1997) (limiting federal prosecutions after state prosecutions except in presence of "compelling interests"), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.031 (last visited Apr. 12, 2012).

445 Doug Linder, *The Trials of Los Angeles Police Officers' in Connection with the Beating of Rodney King*, University of Missouri-Kansas City (2001), <http://law2.umkc.edu/faculty/projects/ftrials/lapd/lapdaccount.html> (last visited Apr. 10, 2012).

Twenty-three states have passed legislation limiting the dual sovereignty doctrine.⁴⁴⁶ Thirteen states impose a limitation on prosecutions of offenses arising out of the same conduct previously subject to federal prosecution.⁴⁴⁷ Another seven restrict the dual sovereignty doctrine by limiting double prosecution for the same offense, not for the same conduct.⁴⁴⁸

The one exception to the doctrine of dual sovereignty—the so-called “sham prosecution exception”—requires defendants to prove that one sovereign so dominated the conduct of another that the second was not acting independently.⁴⁴⁹ This exception requires more than mere cooperation of law enforcement between two sovereigns, but the Supreme Court has not defined what level of cooperation would constitute a sham prosecution.⁴⁵⁰

INTERNATIONAL LAW AND STANDARDS ON DUAL SOVEREIGNTY

Under the International Covenant on Civil and Political Rights, “No one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”⁴⁵¹ The United States filed an understanding stating that it interpreted this article as applying only to those acquitted and retried by the same governmental unit.⁴⁵² Australia, Germany, Mexico, Nigeria are all parties to the same treaty but did not file similar understandings, some indication that they do not support dual sovereignty doctrines.⁴⁵³ The Federated States of Micronesia, which recognizes dual sovereignty doctrine for drug crimes, is not a party to the ICCPR.⁴⁵⁴

Nearly every regional human rights instrument prohibits double jeopardy. The European Convention codifies individuals’ non-derogable right to not be tried twice, except when “there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.”⁴⁵⁵ The American Convention on Human Rights also bans “a new trial for the same cause.”⁴⁵⁶ Similar provisions exist in the Arab Charter on Human Rights,⁴⁵⁷ the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,⁴⁵⁸ and the Charter of Fundamental Rights of the European Union.⁴⁵⁹

The United Nations also discourages the dual sovereignty doctrine in relations between countries. The U.N. General Assembly Resolution on a Model Treaty on the Transfer of Proceedings in Criminal Matters states,

446 Dawson, *supra* note 438, at 294 n.94.

447 Dawson, *supra* note 438, at 294 n.95.

448 Dawson, *supra* note 438, at 294 n.96.

449 See, Christina G. Woods, *The Dual Sovereignty Exception to Double Jeopardy: An Unnecessary Loophole*, 24 U. BAT. L. REV. 177, 188 (1994).

450 See, 21 Am. Jur. 2d Criminal Law § 370 (1998). *United States v. Guzman*, 85 F.3d 823 (1st Cir. 1996), cert. denied, 117 S. Ct. 537 (1996) (the First Circuit held in *Guzman*, that the defendant must proffer evidence that the dual sovereignty rule should not apply “because one sovereign was a pawn of the other, with the result that the notion of two supposedly independent prosecutions is a mere sham.”); See Woods, *supra* note 449 at 188; *U.S. v. Felix*, 503 U.S. 378, 386 (1992) (the Supreme Court held that “[m]ere overlap between two prosecutions does not establish a double jeopardy violation.”)

451 International Covenant on Civil and Political Rights, *supra* note 10, art. 14(7).

452 U.N. Treaty Collection, *ICCPR Declarations and Reservations*, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec (“The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause.”); David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 42 DEPAUL L. REV. 1183, 1200-1201 (1993) (criticism was muted during these hearings, with one view presented by the Lawyers’ Committee for Human Rights, pushing for a prohibition on successive prosecutions and another, represented by the International Human Rights Law Group asking that it allow second federal prosecutions only to remedy unsatisfactory prosecutions of civil rights violations at the local level.)

453 U.N. Treaty Collection, *ICCPR Declarations and Reservations*, available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec.

454 U.N. Treaty Collection, *ICCPR Declarations and Reservations*, available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec.

455 Protocol No. 7 to Convention for the Protection of Human Rights and Fundamental Freedoms art. 4, Nov. 22, 1984, 1525 U.N.T.S. 195, E.T.S. No. 117.

456 Organization of American States, *American Convention on Human Rights* art. 8(4), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123

457 Arab Charter on Human Rights art. 19, May 22, 2004 (entered into force March 15, 2008).

458 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (adopted in 2001) (“No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”).

459 Charter of Fundamental Rights of the European Union, art. 50, Dec. 7, 2000, C 364/1.

Upon acceptance by the requested State of the request to take proceedings against the suspected person, the requesting State shall provisionally discontinue prosecution, except necessary investigation, including judicial assistance to the requested State, until the requested State informs the requesting State that the case has been finally disposed of. From that date on, the requesting State shall definitely refrain from further prosecution of the same offense.⁴⁶⁰

Another provision of the same model treaty states that “[w]hen criminal proceedings are pending in two or more States against the same suspected person in respect of the same offense, the States concerned shall conduct consultations to decide which of them alone should continue the proceedings.”⁴⁶¹ The U.N. General Assembly Resolution on a Model Treaty on Mutual Assistance in Criminal Matters allows a country to deny assistance to another if “[t]he request relates to an offense that is subject to an investigation or prosecution in the requested State or the prosecution of which in the requesting State would be incompatible with the requested State’s law on double jeopardy.”⁴⁶²

COMPARATIVE COUNTRY INFORMATION ON DUAL SOVEREIGNTY

Countries’ penal statutes almost always include a *ne bis in idem* provision outlawing double jeopardy.⁴⁶³ In several federal countries, including Australia and Germany, dual sovereignty doctrine is not recognized.⁴⁶⁴

Australia’s courts recognize the common law pleas of *autrefois acquit* or *autrefois convict*.⁴⁶⁵ These pleas bar any subsequent indictment on the basis that the defendant has previously been either acquitted or convicted for the same crime.⁴⁶⁶ The national laws and provincial laws both outlaw successive criminal trials by the other.⁴⁶⁷

In Germany, the Federation and the Lander (states) have concurrent legislative power over criminal law, but the Federation preempts state statutes.⁴⁶⁸ The country’s basic law provides that “no one may be punished for the same act more than once in pursuance of general penal legislation.”⁴⁶⁹

In Canada, as in the United States, a person can be prosecuted by both the state and federal government.⁴⁷⁰ Canada’s provinces each have their own criminal courts and criminal laws, but the federal government regulates the same conduct that the provinces do.⁴⁷¹ Canada has a substantial body of federal criminal law but the burgeoning body of concurrent provincial

460 G.A. Res. 45/118, art. 10, U.N. Doc. A/RES/45/118 (Dec. 14, 1990).

461 *Id.* at art. 13.

462 G.A. Res. 45/117, art. 4, U.N. Doc. A/RES/45/117 (Dec. 14, 1990).

463 Erin M. Cranman, *The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right?*, 14 EMORY INT’L L. REV. 1641, 1644 (2000).

464 *Id.* at 1648 (though not a federalist country, the UK disallows successive prosecutions. In England, double jeopardy is barred by common law and statutory provisions); Criminal Procedure Act, 52 & 53, Vict. C. 63, § 33 (1851) (Eng.) (the law states, “Where an act or omission constitutes an offense under two or more Acts, or both under an Act and at common law ... the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be punished twice for the same offense.”); *Connelly v. Director of Public Prosecutions*, [1964] AC 1254 (the House of Lords held that the doctrine of issue estoppel applied to criminal cases and that a second prosecution for a charge is prohibited when it should have been presented in the first indictment).

465 Jeffrey S. Raynes, *Federalism vs. Double Jeopardy: A Comparative Analysis of Successive Prosecutions in the United States, Canada, and Australia*, 5 CAL. W. INT’L L. J. 399 (1974).

466 *Id.* at 399-400.

467 Criminal Code Act, 1899, §17 (Queensl.) (there are similar provisions in state codes); Criminal Procedure Act, 2004, §126(3) (W. Austl.); Criminal Code Act, 1924, §11 (Tas.); Criminal Code Act, 2009, §§18-20 (N. Terr.); Criminal Procedure Act, 1986, §156 (N.S.W.); Crimes Act, 1958, §394 (Vict.); Criminal Law Consolidation Act, 1935, §285 (S. Austl.); Crimes Act, 1900, §283 (Aust. Cap. Terr.); *See generally* Vicki Waye & Paul Marcus, 18. TUL. J. INT’L & COMP. L. 335, 354 (2010); Raynes, *supra* note 465, at 419.

468 Grundgesetz [Constitution] [GG] art. 72 § 1; Taryn A. Merkl, Note, *The Federalization of Criminal Law and Double Jeopardy*, 31 COLUM. HUM. RTS. L. REV. 175, n.32 (1999).

469 Grundgesetz art. 103 § 3.

470 Raynes, *supra* note 465, at 399.

471 Raynes, *supra* note 465, at 413.

law has increased the risk of double jeopardy.⁴⁷² The Canadian Constitutional Court held that prior acquittal of a Dominion, or federal, charge does not preclude prosecution by a province for the same acts.⁴⁷³ Despite this risk, double prosecutions in reality are very rare.⁴⁷⁴

The Federated States of Micronesia have a federal drug statute that provides that a conviction by another jurisdiction is not a bar to subsequent prosecution: “If a violation of this chapter [the Controlled Substances Act] is a violation of a federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the same act is not a bar to prosecution in the Trust Territory.”⁴⁷⁵

The United States, Canada, and Micronesia are the only countries known to researchers to allow successive prosecutions by state and federal systems. Many of the policy reasons for protecting people against double jeopardy are violated by the dual sovereignty doctrine, including the individual’s interest in finality and defense from capricious prosecutorial discretion.

D. RETROACTIVE APPLICATION OF AMELIORATIVE LAW

“A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law. Nothing is to be gained by imposing the more severe penalty after such a pronouncement [of lesser penalties]; the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance.”

The California Supreme Court⁴⁷⁶

Legislatures are tasked with delineating crimes and their corresponding penalties. As societies evolve, penal theories change. As a result, legislation may be passed which provides for a lesser punishment for a given crime than a previous legislature had mandated. Under international law, the decrease in penalty must apply retroactively to benefit the offender.⁴⁷⁷ The principle behind this legal theory is that if a change in law results in a lesser penalty, an offender should not have to suffer a worse fate than an individual who by chance committed the same type of crime subsequent to the change in law. Fairness dictates that an individual should receive the benefit of a legislature’s progressive change of heart and be given the same punishment as someone who commits the same crime in a future moment in time.

Legal traditions have consistently prohibited the retroactive application of law that changes the legal status of an individual after the commission of a crime. This is known as “[n]ullum crimen nulla poena sine praevia lege poenali: no one is to be convicted or punished without a pre-existing criminal law in force.”⁴⁷⁸ The U.S. Constitution specifically prohibits these types of ex post facto laws in Article I, Section 9. Internationally, this prohibition is often combined with its logical corollary, which is the principle of retroactive application of beneficial or ameliorative law.⁴⁷⁹ This principle is known as *lex mitior*, or the mercy doctrine, where laws are applied *in mitius* or “mildly.” Retroactive amelioration requires that a law apply retroactively when it benefits the offender. If a change of law reduces a given penalty, it should apply to all offenders who have been affected by the law. This should potentially include those who have already received their punishment and

472 Keith S. Rosenn, *Federalism in the Americas in Comparative Perspective*, 26 U. MIAMI INTER-AM. L. REV. 1, 19-20 (1994).

473 Rex v. Kissick [1942] 3 D.L.R. 431.

474 Taryn A. Merkl, Note, *The Federalization of Criminal Law and Double Jeopardy*, 31 COLUM. HUM. RTS. L. REV. 175, 182n.32 (1999) (more recent updates were not found).

475 “Trust Territory Controlled Substances Act.” (P.L. No. 5-110.), §299.

476 In re Estrada, 63 Cal.2d 740, 745 (1965).

477 International Covenant on Civil and Political Rights, *supra* note 10, art. 15.

478 Scoppola v. Italy (No. 2), App. No. 10249/03, Eur. Ct. H.R. (2009).

479 KENNETH S. GALLANT, *THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW* 273 (2009).

are serving their sentence.

RETROACTIVE APPLICATION OF AMELIORATIVE LAW IN THE UNITED STATES

In the United States, statutes are generally understood to operate prospectively, or to come into effect in the future.⁴⁸⁰ Nonetheless, exceptions may be made for statutes that provide an ameliorative or beneficial change. This is blocked in many cases by the insertion of a saving clause which prevents the application of the common law rule of abatement.⁴⁸¹ The common law rule requires the termination of all pending prosecutions following a legislatively mandated change to a statute unless there is express legislative intent that indicates otherwise.⁴⁸² The purpose of the saving clause is to stop the automatic termination of ongoing prosecutions and to retain the punishment in the original statute, particularly following a statutory amendment in which the penalty is increased and thus constitutionally barred.⁴⁸³ Due to the general language of the saving clauses, they also serve to bar defendants from receiving the benefits of legislative changes that lessen penalties. A saving clause that explicitly makes an exception for ameliorative changes would serve to remedy the injustice of having an entire class of offenders tied to a sentence that a legislature has subsequently found to be unjust or no longer appropriate.⁴⁸⁴

Federal law prevents retroactive application of a law unless specifically mandated by the legislature.⁴⁸⁵ The U.S. Sentencing Commission, on the other hand, is statutorily authorized to decide whether to retroactively apply a reduction within the recommended sentencing range.⁴⁸⁶ Sentencing courts are precluded by statute from applying a guideline amendment retroactively unless the Commission had specifically designated such amendment for retroactive application.⁴⁸⁷ An example of these divergent approaches is the Fair Sentencing Act (FSA). Following the decision by the U.S. Sentencing Commission to make the changes to crack cocaine sentencing guidelines retroactive, the Commission chair, Judge Patti B. Saris stated that;

In passing the Fair Sentencing Act, Congress recognized the fundamental unfairness of federal cocaine sentencing policy and ameliorated it through bipartisan legislation. Today's action by the Commission ensures that the longstanding injustice recognized by Congress is remedied, and that federal crack cocaine offenders who meet certain criteria established by the Commission and considered by the courts may have their sentences reduced to a level consistent with the Fair Sentencing Act of 2010.⁴⁸⁸

This statement reflects an understanding of the fundamental injustice of applying different penalties to the same category of offenders once the legislature has decided that a certain penalty is unjust. Nonetheless, this outlook was not reflected in Congress' decision to remain silent on retroactivity for offenders sentenced to mandatory minimums under the federal statute. While it is clear that those sentenced and serving time for mandatory crack cocaine minimums will not benefit from the FSA (they are different than those sentenced under federal sentencing guidelines) there is a circuit split as to whether

480 S. David Mitchell, *In With the New, Out With the Old: Expanding the Scope of Retroactive Amelioration*, 37 AM. J. CRIM. L. 1, 5 (2009).

481 *Id.* at 5.

482 Mitchell, *supra* note 480.

483 *Id.* at 7.

484 *Id.* at 43-44.

485 1 U.S.C.A. § 109. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

486 28 U.S.C. § 994(u).

487 18 U.S.C. § 3582(c)(2).

488 Press Release, U.S. Sentencing Commission, U.S. Sentencing Commission Vote Unanimously to Apply Fair Sentencing Act of 2010 Amendment to the Federal Sentencing Guidelines Retroactively (June 30 2011) http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20110630_Press_Release.pdf

the FSA should apply to sentencing after the date of implementation (August 3, 2011) or only to conduct after that date.⁴⁸⁹ The U.S. Supreme Court will address the issues of FSA retroactivity in *Dorsey v. United States* and *Hill v. United States* in the spring of 2012.⁴⁹⁰

States have different approaches to retroactivity. Some have statutes that provide for retroactive amelioration, while others leave it to the discretion of the legislature. California's Supreme Court has found that legislative intent to make ameliorative changes retroactive can be imputed.⁴⁹¹ Illinois, Iowa, Kentucky, New Hampshire, New Jersey, Ohio, Texas, Vermont, Virginia, and West Virginia all have statutes that provide for beneficial changes of law to apply prior to final judgment.⁴⁹² Other states that do not have such a provision leave this decision up to the legislatures. In 2006, the Colorado Legislature repealed a 1991 law that created life sentences without parole for juveniles.⁴⁹³ The Legislature, however, explicitly did not make it retroactive for the 48 people in Colorado who are serving sentences of more than 40 years or life in prison without parole for crimes committed during the 15-year window before the change in laws.⁴⁹⁴ This results in arbitrary outcomes for the 48 juvenile offenders who had the bad luck to commit their crimes during the 15-year window. They will remain ineligible for parole, even though the Colorado Legislature has decided that a life without parole sentence for a juvenile offender is too harsh. Another example is New Mexico, which abolished the death penalty in 2009 because, according to the Governor, it was an imperfect system with potential for injustice.⁴⁹⁵ New Mexico's Legislature replaced the death penalty with life without parole sentences in 2009 but did not make it retroactive for the two individuals still on death row.⁴⁹⁶ This means that the two defendants who received death sentences could ultimately be executed despite the Legislature's decision that the death penalty has no place in the New Mexican criminal justice system.

In the absence of a specific legislative mandate, the California Supreme Court has found that legislative intent to apply ameliorative changes retroactively can be implied. "This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology . . ."⁴⁹⁷ When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act.⁴⁹⁸ The Court condemned a purely retributive approach but stopped short of imputing the legislative intent to apply ameliorative changes retroactively to offenders in the post-conviction phase. In *People v. Rossi*, the California Supreme Court held retroactive amelioration should apply in pending criminal proceedings and prior to final disposition in front of the court with final authority.⁴⁹⁹ In both the California Supreme Court cases, the Court makes clear that a failure to apply such changes retroactively is driven by invalid penological justifications. Yet, the Court states that retroactive application of the beneficial law ends upon final conviction. This would mean that those prisoners who have exhausted their appeals would be left to serve their sentence without benefiting from a statutory penalty reduction unless specifically mandated by the Legislature. Under the Court's own reasoning, allowing post-conviction offenders to continue serving these sentences would be motivated by vengeance.

489 Memorandum to Federal Prosecutors from Attorney General Eric Holder, Application of the Statutory Mandatory Minimum Sentencing Laws for Crack Cocaine Offenses Amended by the Fair Sentencing Act of 2010, (July 15th, 2011), available at http://www.fd.org/pdf_lib/Holder%20FSA%20memo%207.15.11.pdf

490 *Dorsey v. United States* (11-5683); *Hill v. United States* (11-5721). Both cases were accepted for the U.S. Supreme Court's October 2011 term, available at <http://www.scotusblog.com/case-files/dorsey-v-united-states/>

491 In re Estrada, *supra* note 476, at 745.

492 S. David Mitchell, *In With the New, Out With the Old: Expanding the Scope of Retroactive Amelioration*, 37 Am. J. Crim. L. 47 (2009).

493 H.B. 06-1315, 65th Gen. Assem., Reg. Sess. (Colo. 2006).

494 *Id.*

495 *Death Penalty is Repealed in New Mexico*, N.Y. TIMES, March 18, 2009 <http://www.nytimes.com/2009/03/19/us/19execute.html>

496 *Two Remain on New Mexico's Death Row*, KRQE.COM, Jan 20 2011, <http://www.krqe.com/dpp/news/local/central/two-remain-on-new-mexico's-death-row>

497 In re Estrada, *supra* note 476, at 745.

498 *Id.*

499 *People v. Rossi*, 18 Cal.3d 295 (1976).

INTERNATIONAL LAW AND STANDARDS ON RETROACTIVE APPLICATION OF AMELIORATIVE LAW

The international treaty law governing retroactive amelioration is explicit and clear. The major governing human rights treaties allow an offender to benefit from a change in law that imposes a lighter penalty than the one in existence at the time the offense was committed. Article 15 of the ICCPR, to which the United States is a party, contains a provision that prohibits criminal ex post facto laws noting however, “[i]f, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.”⁵⁰⁰ The United States is one of 167 countries that are party to the ICCPR.⁵⁰¹ The ICCPR sets the main legal framework for the *lex mitior* principle under which the countries of the world have fashioned their constitutions and penal codes. There has been little dispute from the international community about this section of Article 15. Germany attached a reservation indicating that a lighter penalty would not be provided in certain instances. Nonetheless, Germany enshrines the right to retroactive application of ameliorative law prior to final judgment in its criminal code.⁵⁰² Italy and Trinidad and Tobago specified that this right would only apply to cases still in progress or prior to a final judgment. The United States is the only country that has attached a reservation indicating that this section of the Article would not apply under any circumstance. The reservation states “[t]hat because U.S. law generally applies to an offender the penalty in force at the time the offence was committed, the United States does not adhere to the third clause of paragraph 1 of article 15.” However, Article 4(2) of the ICCPR lists this Article as non-derogable, which means that it may not be reduced in any way. In addition, this provision is the relevant *opinio juris*, or legal obligation, under which this principle may constitute customary international law. Customary international law requires widespread, constant and uniform state practice compelled by legal obligation that is sufficiently long enough to constitute a norm.⁵⁰³ As a result, the fact that the United States has attached a reservation to Article 15 is not dispositive as to whether this specific provision should apply to the United States under international law.

Article 9 of the American Convention on Human Rights, signed and ratified by 24 countries belonging to the Organization of American States, contains virtually the same provision as the ICCPR, “[i]f subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit there from.”⁵⁰⁴ Article 49 of the Charter of Fundamental Rights of the European Union, which codifies the rights of European Union citizens, also contains the same language: “[i]f, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.”⁵⁰⁵

The Rome Statute of the International Criminal Court governs the international crimes of genocide, crimes against humanity, and war crimes. One hundred and twenty of the world’s nations are party to it. Article 24 § 2 of the Rome Statute states that “[i]n the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.”⁵⁰⁶ In the case of *Scoppola v. Italy*, the European Court of Human Rights (ECtHR) established the rule of retroactive amelioration as applied to all states parties to the European Charter of Human Rights when they held that:

Article 7 § 1 of the Convention [Convention for the Protection of Human Rights and Fundamental Freedoms] guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is

500 International Covenant on Civil and Political Rights, *supra* note 10, article 15.

501 International Covenant on Civil and Political Rights, *supra* note 10.

502 Refer to Appendix for country citations, Germany Crim. Code Section 2(3).

503 De la Vega & Leighton, *supra* note 21, at 1014 n.160 (2008).

504 Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, art. 9.

505 Charter of Fundamental Rights of the European Union, art. 49, Dec. 7, 2000, C 364/1.

506 Rome Statute of the International Criminal Court, *supra* note 129, art. 24(2).

embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant.⁵⁰⁷

The Court found that non-retroactivity should apply only to laws which prescribe a harsher penalty than the one in existence at the time the offense was committed.

In the case of *Berlusconi and Others*, the Court of Justice of the European Union, the highest court in the European Union in terms of EU law, held that the principle of the retroactive application of the more lenient penalty formed part of the constitutional traditions common to the member States.⁵⁰⁸ The Criminal Division of the French Court of Cassation took note of the European Court of Justice decision regarding the retroactive application of a more lenient penalty and found that Article 15 of the ICCPR takes precedence over French law in this regard.⁵⁰⁹

The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has also held that the principle of the applicability of the more lenient criminal law (*lex mitior*) applied to its statute, stating that “[i]n sum, properly understood, *lex mitior* applies to the Statute of the International Tribunal. Accordingly, if ever the sentencing powers conferred by the Statute were to be amended, the International Tribunal would have to apply the less severe penalty.”⁵¹⁰

COMPARATIVE COUNTRY INFORMATION ON RETROACTIVE APPLICATION OF AMELIORATIVE LAW

Of 193 countries surveyed, 129 have incorporated some type of provision requiring retroactive implementation of a lesser penalty into their constitution and/or their criminal codes (67%). Some countries apply the right only before a final conviction is reached (prior to the end of the appeals process). Other countries only apply it if the offense is completely decriminalized. Forty-two countries have not codified a specific provision related to retroactive amelioration but are states parties to the ICCPR, which provides for retroactive application of law when it benefits the offender in Article 15. The United States is the only country that is a party to the ICCPR and has placed a reservation stating that it would not adhere to the *lex mitior* section of Article 15.⁵¹¹ Therefore, the United States is one of only 22 countries to withhold this right to its citizens (11%).

The global reality is that most countries in the world consider positive retroactive application of a change in law to be a basic and fundamental human right. The majority of the countries of the world contain constitutional or statutory provisions that allow an imprisoned offender to benefit when the law changes in a way as to reduce the penalty applicable to their crime. Most of the remaining countries are party to the ICCPR which requires that this right be respected. International law and practice indicate that this is a right that should be provided for in all cases.

507 Scoppola v. Italy (No. 2), App. No. 10249/03, Eur. Ct. H.R. (2009).

508 Court of Justice of the European Union, C-387/02, C-391/02 and C-403/02, Berlusconi and Others, 2005, E.C.R. I-03565.

509 Scoppola v. Italy (No. 2), App. No. 10249/03, Eur. Ct. H.R. (2009).

510 Dragan Nikolic, Case No. IT-94-2-A, (Int'l Crim. Trib. for the Former Yugoslavia Feb. 2005).

511 U.N. Treaty Collection, *ICCPR Declarations and Reservations*, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I4&chapter=4&lang=en#EndDec

BENEFICIAL CHANGE IN LAW APPLIED RETROACTIVELY (98):	Albania, Algeria, Andorra, Angola, Argentina, Armenia, Austria, Azerbaijan, Bahrain, Belarus, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Canada, Cape Verde, Chile, China, Colombia, Comoros, Costa Rica, Croatia, Cuba, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Eritrea, Estonia, Ethiopia, France, Georgia, Guatemala, Guinea, Guinea-Bissau, Haiti, Honduras, Hungary, Iran, Iraq, Israel, Japan, Kazakhstan, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Madagascar, Mauritania, Mongolia, Montenegro, Morocco, Mozambique, New Zealand, Nicaragua, Niger, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines (except recidivists), Republic of Congo, Republic of Korea, Republic of Moldova, Romania, Rwanda, Russian Federation, San Marino, Sao Tome and Principe, Senegal, Serbia, Slovakia, Slovenia, South Africa, Spain, Switzerland, Tajikistan, Thailand, The former Yugoslav Republic of Macedonia, Timor-Leste, Tunisia, Ukraine, Uruguay, Uzbekistan, Venezuela, Viet Nam
BENEFICIAL CHANGE APPLIED ONLY PRIOR TO FINAL CONVICTION (COUNTRIES MARKED WITH "D" WILL APPLY BENEFICIAL CHANGES AFTER FINAL CONVICTION IF DECRIMINALIZED COMPLETELY) (26):	Afghanistan (D), Belgium, Cameroon (D), Finland, Germany, Greece (D), Iceland (D), Italy (D), Jordan, Kenya, Kuwait (D), Lebanon, Luxembourg, Maldives, Malta, Monaco, Netherlands, Norway, Poland (D), Portugal (D), Qatar (D), Somalia (D), Sudan, Syrian Arab Republic (D), Togo, United Arab Emirates (D)
BENEFICIAL CHANGE APPLIED ONLY IF OFFENSE IS DECRIMINALIZED (5):	Central African Republic, Chad, Cote D'Ivoire, Gabon, Yemen
NO PROVISION FOUND BUT PARTY TO THE ICCPR WITHOUT RESERVATION TO THIS PRINCIPLE (42):	Australia, Bangladesh, Belize, Benin, Botswana, Cyprus, Dominica, Equatorial Guinea, Gambia, Ghana, Grenada, Guyana, India, Indonesia, Ireland, Jamaica, Lesotho, Malawi, Mali, Mauritius, Mexico, Namibia, Nauru, Nepal, Nigeria, Saint Vincent and the Grenadines, Samoa, Saudi Arabia, Seychelles, Sierra Leone, Sri Lanka, Suriname, Swaziland, Sweden, Tanzania, Trinidad and Tobago, Turkey, Turkmenistan, Uganda, United Kingdom, Zambia, Zimbabwe
NO PROVISION FOUND (22):	Antigua and Barbuda, Bahamas, Barbados, Bhutan, Brunei Darussalam, Fiji, Kiribati, Malaysia, Marshall Islands, Micronesia, Myanmar, Oman, Pakistan, Saint Kitts and Nevis, Saint Lucia, Singapore, Solomon Islands, South Sudan, Tonga, Tuvalu, United States of America, Vanuatu

SECTION III: RECOMMENDATIONS

IN LIGHT OF THE ABOVE, THE CENTER FOR LAW AND GLOBAL JUSTICE RECOMMENDS:

- In view of how infrequently LWOP is used around the world, review the validity of life without parole sentences; consider heightened restrictions for its use, such as only when it is an alternative to the death penalty.
- Explore ways to shorten sentences while ensuring public safety by analyzing sentencing and parole policies that have been driving prison population growth and considering reduction of criminal sentencing practices like mandatory minimums, consecutive sentences, and recidivism statutes.
- Abolish mandatory minimums and push for sentencing commissions to develop guidelines to reduce sentencing disparities and that allow judges the discretion to sentence an offender based on the complete circumstances of the individual case within available sentencing guidelines.
- Pass legislation to make the Fair Sentencing Act fully retroactive so it applies to those still imprisoned under a law that has been deemed unjust.
- For the U.S. federal government and those states that do not explicitly provide for retroactive application for ameliorative law, enact statutes that allow for an automatic retroactive implementation when a defendant's penalty will be lessened. States that have such statutes but do not apply them to post-conviction defendants should expand the scope of these provisions.
- Encourage the federal government to make state funding contingent on compliance with federal changes to the justice system.
- Look to better practices for programs that promote rehabilitation through social and psychiatric services for adults and juveniles.
- Educate district attorneys at both the state and federal level about the implications of transferring juveniles to adult court and educate states on the dangers of allowing for such transfers.

- Encourage states to adopt or increase their ages of criminal responsibility to at least 12 years of age.
- Educate state and the federal government to abolish juvenile life without parole.
- Pass legislation that ensures that children under the age of 18 are incarcerated solely in juvenile prisons, or are kept segregated from the adult prison population.

FOR JUDGES IN FEDERAL AND STATE COURTS

- Take into consideration international legal standards, comparative legal benchmarks, and international treaties in disproportionate sentence challenges.
- Treat offenses as the same if they are too similar to warrant inferring that the legislature intended consecutive terms.
- Consider rehabilitative options such as social, psychiatric services, or drug treatment to a greater degree than punitive prison sentences.
- Consider sentences that are rehabilitative when resentencing juveniles after successful appeals post-*Graham*.
- Look to alternatives in the juvenile court system for punishing juvenile offenders rather than transferring the offender to adult court.

FOR CRIMINAL DEFENSE ATTORNEYS AND POLICY NGOS WORKING ON CRIMINAL JUSTICE AND SENTENCING:

- When mounting challenges to disproportionate sentences, consider international human rights norms applicable to the United States and cite international legal standards and comparative legal benchmarks.
- Collaborate with human rights groups to present findings to international human rights treaty bodies on U.S. non-compliance with treaty obligations.

FOR U.S. STATE AND FEDERAL CORRECTIONS OFFICIALS:

- Collect information to understand how long sentences have been increasing prison populations.
- Track the number of juveniles in the prison system, and keep consistent records of juveniles who began in the juvenile system and have been transferred to the adult system.

FOR NON-U.S. ADVOCATES WORKING ON SENTENCING LAWS AND PRACTICES:

- Consider international and comparative benchmarks in working on sentencing reform. Train legal professionals on international standards in criminal sentencing.

- Document states' non-compliance with treaty obligations for international human rights treaty bodies; encourage your own and other countries to comply with international treaty obligations and international norms on extreme sentencing practices.
- For attorneys in Europe, consider another case challenging mandatory life without parole sentences as violating Article 3 of the European Convention on Human Rights.
- Oppose extradition of clients to countries that use life without parole sentences.

Country	Life without parole sentences	Recidivism statutes	Concurrent or consecutive offenses from same act	Minimum Age of Criminal Responsibility	Transfer to Adult Court	Juvenile Maximum Sentence	Retroactive ameliorative law
Afghanistan	No, Criminal Code, arts. 97, 99-100	Yes, considered an aggravating factor; Criminal Code, art. 152	Consecutive, capped at 20 years; Criminal Code, art. 158	12, Procedural Law for Dealing with Children in Conflict with the Law, art. 5	No, Procedural Law for Dealing with Children in Conflict with the Law, arts. 26, 28	12-16; 1/3 of the regular sentence; 16-18; 1/2 of the regular sentence; Procedural Law for Dealing with Children in Conflict with the Law, art. 39	Yes, prior to final judgment or if decriminalized, Criminal Code, art. 21
Albania	Yes, Criminal Code, art. 65	No, but ineligible for parole; Criminal Code, art. 64	Concurrent; Criminal Code, arts. 55-56	14, 16 (for criminal contravention); Criminal Code, art. 2	No, Criminal Procedure Code, art. 81	Half of the sentence; Criminal Code, art. 51	Yes, Criminal Code, art. 3
Algeria	No, Penal Code, art. 60	Yes, Penal Code, arts. 54-55	Concurrent; Penal Code, art. 34	13, Penal Code, art. 50	Yes, Criminal Procedure Code, arts. 249, 447, 451	13-18; 20 years, otherwise half the sentence; Penal Code, art. 50	Yes, Penal Code, art. 2
Andorra	No, Penal Code, arts. 35, 58	Yes, considered an aggravating factor; Penal Code, art. 30	Consecutive, capped at 30 years; Penal Code, art. 58	12, Llei qualificada de la jurisdicció de menors, de modificació de la Justícia, 1999, art. 3	Unknown	Unknown	Yes, Penal Code, art. 7
Angola	No, Constitution, art. 66	Yes, Penal Code, arts. 73-74	Consecutive, capped at 30 years; Penal Code, arts. 43, 47	14, Penal Code, art. 17	No, Penal Code, art. 17 (6-8)	Under 16; 3 years, 16-18; penalties are reduced to 1/3 the max; Penal Code, art. 17	Yes, Penal Code, art. 2
Antigua and Barbuda	No, Penal Code, arts. 15(1), 81	Unknown	Unknown	8, Laws of Antigua and Barbuda, Ch. 229, art. 3	Yes, Laws of Antigua and Barbuda, Ch. 229, arts. 18, 19, 30, CRC/C/15/Add.247, 3 November 2004, para. 68, 69	Detained as long as the Governor-General directs; JWOP; Laws of Antigua and Barbuda, Ch. 229, art. 3; CRC/C/28/Add.22, 9 December 2003, para. 286	No, Penal Code, art. 15(4)
Argentina	Yes, Penal Code, arts. 14, 80(7), 124, 142, 170	Yes, considered an aggravating factor and ineligible for parole; Penal Code, arts. 14, 40-41, 50-53	Concurrent; Penal Code, art. 56	16, Ley 22.278 (1980)	No, Ley 22.278 (1980)	JWOP; Penal Code, art. 14 and Ley 22.278 (1980)	Yes, Penal Code, art. 2
Armenia	No, Penal Code, art. 76	Yes, considered an aggravating factor; Penal Code, art. 22	Consecutive, capped at 15 years or life; Penal Code, art. 66	14 for specific crimes; otherwise 16; Criminal Code, art. 24	No juvenile courts; but sentencing protections apply; Assessment of Juvenile Justice Reform Achievements in Armenia, UNICEF Regional office for Central and Eastern Europe/Commonwealth of Independent States, Jan. 2010	10 years; Penal Code, arts. 60, 89	Yes, Penal Code art. 13
Australia	Yes, New South Wales: Crimes Act 1900, sec. 19A(2); Crimes (Sentencing Procedure Act) sec. 102; Victoria: Sentencing Act 1991, sec. 11(1), 109; South Australia: Criminal Law (Sentencing) Act 1988, sec. 32(1), (5)(ab),(c), 32A; Western Australia: Sentencing Act 1995, sec. 90; Tasmania: Sentencing Act 1997, sec. 18; Northern Territory: Sentencing Act 1995, sec. 53A; Australian Capital Territory: Crimes (Sentencing) Act 2005, sec. 65(4)	Yes, In at least some jurisdictions, New South Wales Habitual Criminals Act of 1957	Federal: Concurrent or consecutive; Crimes Act 1914, sec. 19	10, all states, Gregor Urbas, The Age of Criminal Responsibility, The Australian Institute of Criminology (Nov. 2000), available at http://www.aic.gov.au/documents/0/0/A%7B00A92691-0908-47BF-9311-01AD743F01E1%7Dti181.pdf (last visited Apr. 10, 2012)	Yes, Lynn Atkinson, Juvenile Justice in Australia in Juvenile Justice Systems 36-37 (John A. Winterdyk ed., Canadian Scholar's Press 1997)	JWOP in one state, other states vary, Gregor Urbas, The Age of Criminal Responsibility, The Australian Institute of Criminology (Nov. 2000), Judge JM. Robertson, Sentencing Options for Juveniles (June 17-18, 1999)	No
Austria	No, Penal Code, art. 46(6)	Yes, Penal Code, arts. 23, 31, 33, 39	Concurrent; Penal Code, art. 28	14, however imprisonment only imposed on kids 16 or older; Administrative Penal Act, secs. 4(2), 58(2)	No, Karin Bruckmuller, Austria: A Protection Model, international Handbook of Juvenile Justice 277 (Jungler-Tas & Decker eds. 2006)	Sentence is cut in half; Administrative Penal Act, sec. 20; Karin Bruckmuller, Austria: A Protection Model, in International Handbook of Juvenile Justice 277 (Jungler-Tas & Decker eds. 2006)	Yes, Penal Code, art. 1(2)
Azerbaijan	No, Criminal Code, arts. 57, 76	Yes, considered an aggravating factor; Criminal Code, arts. 61-65	Concurrent; Criminal Code, art. 66	14 for specific crimes; otherwise 16; Criminal Code, art. 20	No juvenile courts; but juvenile protections apply; Criminal Code, art. 86; Criminal Procedure Code, arts. 429, 431; Child Charity News; Azerbaijan Envisions Juvenile Justice System, SOS Children's Villages Canada (Sep. 27, 2011), available at http://www.soschildrensvillages.org/doc/news/2011/news71310.pdf , (last visited Apr. 10, 2012)	10 years; Criminal Code, art. 85.5	Yes, Criminal Code, art. 10

Country	Life without parole sentences	Recidivism statutes	Concurrent or consecutive sentences for multiple offenses from same act	Minimum Age of Criminal Responsibility	Transfer to Adult Court	Juvenile Maximum Sentence	Retrospective ameliorative law
Bahamas	No, Natarino McKenzie, Courts Can't Stipulate Length of Life Sentence before Parole, The Tribune, Nov. 18, 2010, at 14	Unknown	Unknown	7 if discernment, otherwise 12, Penal Code, Ch. 84, sec. 91	Yes, Children and Young Persons, Ch. 97, sec. 7	Detained "at her majesty's pleasure," sentence reviewed every 3 years, Children and Young Persons, Ch. 97, sec. 41	Unknown
Bahrain	No, Penal Code, arts. 49, 51-52	Yes, Penal Code, arts. 79-80	Concurrent, Penal Code, arts. 65-66	There is no age of criminal responsibility; age of majority is 15, Criminal Code, art. 32; World Organization Against Torture's report: The Rights of the Child in Bahrain, Juvenile Justice Panel, available at http://www.juvenilejusticepanel.org/resource/items/OM/OMCTAltRepRChildBahrain02EN.pdf (last visited Apr. 10, 2012)	No, World Organization Against Torture's report: The Rights of the Child in Bahrain, Juvenile Justice Panel, available at http://www.juvenilejusticepanel.org/resource/items/OM/OMCTAltRepRChildBahrain02EN.pdf (last visited Apr. 10, 2012)	No cap in practice 10 years, Criminal Code, arts. 70-71; World Organization Against Torture's Report: The Rights of the Child in Bahrain, Juvenile Justice Panel, available at http://www.juvenilejusticepanel.org/resource/items/OM/OMCTAltRepRChildBahrain02EN.pdf (last visited Apr. 10, 2012)	Yes, Penal Code, art. 1
Bangladesh	No, Penal Code, arts. 55, 57	Yes, Penal Code, art. 75	Concurrent, Penal Code, art. 71	9, age of majority is 16, Penal Code, arts. 83-84	No, although in practice yes, UNICEF, Juvenile Justice in South Asia, Improving Protection for Children in Conflict with the Law 65-66, available at http://www.unicef.org/rosa/Juvenile_Justice_in_South_Asia.pdf (last visited Apr. 10, 2012)	Adult Penalties, no death penalty, no ILWOP; The Children Act, sec. 51	Unknown
Barbados	Unknown	Unknown	Unknown	11, age of majority is 16, CRC/C/15/Add.103 24 August 1999, sec. 29	Unknown	"Her Majesty's Pleasure;" Juvenile Offender's Act, art. 14	Unknown
Belarus	No, Criminal Code, arts. 48, 58, 90	Yes, Criminal Code, arts. 64, 65, 69, 70	Concurrent, Criminal Code, arts. 71-72	14 for specific offenses, otherwise 16, Criminal Code, art. 10	Unknown	10 years, Criminal Code, art. 23	Yes, Criminal Code, art. 9
Belgium	No, Law of March 5, 1998 on Parole, art. 2	No, must serve minimum percentage of sentence, Law of March 5, 1998 on Parole, art. 2	Concurrent, Penal Code, art. 61	18, Report by the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, on his visit to Belgium 15-19 December 2008, Thomas Hammarberg, Council of Europe: Commissioner for Human Rights, Report of the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, on his visit to Belgium 15-19 December 2008 (2008)	No, Law of April 8, 1965 on Youth Protection, Handling of Juveniles who Committed Acts Constituting a Crime, and Compensation for Torts Caused by such Acts, sec. 4	If sentenced at 16, must stay in an educational facility until 23 if ordered by a judge. Otherwise released at 18, Law of April 8, 1965 on Youth Protection, Handling of Juveniles who Committed Acts Constituting a Crime, and Compensation for Torts Caused by such Acts, arts. 36, 37; Penal Code, art. 12	Yes, prior to final judgment, Penal Code, art. 2
Belize	No, Prisons Act, Chapter 139, sec. 267; ABA Rule of Law Initiative, Assessment of Juvenile Justice in Belize, sec. 37	Yes, Criminal Code, Chapter 101, sec. 48; Crime Control and Criminal Justice Act, Chapter 102, sec. 20	Concurrent (consecutive only for subsequent crimes), Indictable Procedure Act, Chapter 96, sec. 161 (2000)	9, CRC/C/65/Add.29 (13 July 2004)	Juvenile Courts only in Belize City, otherwise no juvenile courts, Concluding Observations: Belize, Committee on the Rights of the Child, 38th Sess., at 70, U.N. Doc. CRC/C/15/Add.252 (March 31, 2005)	18-20 years without parole, Indictable Procedure Act, Ch. 96, sec. 146(2); CRC/C/65/Add.29 July 13, 2004	Unknown
Benin	No, Penal Code, art. 7	Yes, Penal Code, arts. 56-58	Unknown	Under 13 can only get educational measures, general presumption if under 16, Penal Code, art. 66; Ordinance No 69-23 PR/MJL of July 10, 1969	Yes, juveniles may be tried in adult court if they turn 18 before the trial is over and there is an adult co-defendant; Ordinance No 69-23 PR/MJL of July 10, 1969, art. 14-4	20 years instead of life or death, otherwise half the sentence, Ordinance No 69-23 PR/MJL of July 10, 1969 on Trial of Offenses Committed by Juveniles Under 18, Penal Code, art. 32	Unknown
Bhutan	Unknown	Unknown	Unknown	10, Penal Code, sec. 114	No juvenile courts; but protections apply; Penal Code, sec. 213	Half of the adult sentence, Penal Code, secs. 115-116	Unknown

Country	Life without parole sentences	Recidivism statutes	Concurrent or consecutive sentences for multiple offenses from same act	Minimum Age of Criminal Responsibility	Transfer to Adult Court	Juvenile Maximum Sentence	Retroactive ameliorative law
Bolivia	No, Criminal Code, arts. 66, 118	Yes, Criminal Code, arts. 41, 43	Concurrent, Criminal Code, arts. 44-46, 118	12, Criminal Code, art. 5	Yes, for juveniles over age 17, Código de Niño, Niña y Adolescente [Children and Adolescent Code], art. 225	12-14; 3 years, 14-16; 5 years, 17-18; adult maximums, Código de Niño, Niña y Adolescente [Children and Adolescent Code], art. 251; Constitution, art. 23; Penal Code, art. 27(1)	Yes, Constitution, art. 123
Bosnia and Herzegovina	No, Penal Code, art. 44	No, considered at sentencing, Penal Code, art. 49	Concurrent, Penal Code, arts. 53-54	14, Penal Code, art. 8	Yes, Penal Code, arts. 345-346	10 years, Penal Code, art. 96	Yes, Constitution, art. II(2) – Incorporating the ECHR
Botswana	No, Prisons Act 1980, sec. 85(c)	Yes, for stealing and armed robbery, Penal Code, arts. 281, 304	Concurrent or consecutive, Criminal Procedure Act, sec. 300	8, 14 if did not have sufficient understanding, Penal Code, Ch. 801, sec. 13	No, only tried in juvenile court, Penal Code Ch. 2804; Children's Act, secs. 83-85	No death penalty, but can be sentenced to "im-prisonment that the court deems appropriate," Penal Code, Ch. 2804; Children's Act, secs. 88-89	No
Brazil	No, Constitution, art. 5 (XLVII)	Yes, Penal Code, art. 110	Consecutive, capped at 30 years, Penal Code, art. 56-1	18, Penal Code, art. 27; Estatuto da Criança e do Adolescente [Children and Adolescents Statute], art. 104	No, Penal Code, art. 27	3 years; Estatuto da Criança e do Adolescente [Children and Adolescents Statute], art. 121	Yes, Penal Code, art. 83
Brunei Darussalam	Yes, Criminal Code, art. 53(2)	Yes, Criminal Code art. 73	Unknown	7, Children and Young Persons Order of 2006, sec. 2	Yes, Children and Young Persons Order of 2006, sec. 10	"His Majesty's Pleasure" with mandatory review once a year, Children and Young Persons Order of 2006, secs. 238, 45(1), (3), (5)	No
Bulgaria	Yes, Criminal Code, art. 38a	Yes, Criminal Code, art. 29	One sentence issued, but it is enhanced, and capped, Criminal Code, art. 23	14, Criminal Code, art. 32	Yes, Criminal Code, art. 394	12 years, Criminal Code, art. 63	Yes, Criminal Code, art. 2
Burkina Faso	No, Penal Code, art. 9	Yes, Penal Code, art. 84	Concurrent, Penal Code, art. 6	13, Penal Code, art. 74	Unclear Law No 010/93/ADP on the Organization of the Judiciary, arts. 64, 71	Unclear	Yes, Penal Code, art. 2
Burundi	Yes, Penal Code, arts. 45, 127, 136	Yes, Penal Code, art. 115-116	Concurrent, Penal Code, arts. 110-111	13, Penal Code, Décret-loi n° 1/6 du 4 avril 1981 portant réforme du code pénal, art. 14	There appear to not be any juvenile courts: A bill has been drafted to create them, but it not yet enacted Diane Crittin, Traitement de la délinquance juvenile au Burundi, Blog Cooperation, (Jan. 21, 2011), available at http://blogcooperation.be/2011/01/21/traitement-de-la-delinquance-jvenile-au-burundi/ (last visited Apr. 10, 2012); Committee on the Rights of the Child Considers Report of Burundi, ReliefWeb (Sep. 16, 2010), available at http://reliefweb.int/node/367879 (last visited Apr. 10, 2012).	10 years, Penal Code, art. 29	Yes, Penal Code, art. 4
Cambodia	No, Penal Code, arts. 512-513	Yes, Penal Code, arts. 83-85	Concurrent, Penal Code, art. 137	14, Penal Code, arts. 38-39	No juvenile courts; Children's Rights International, Legal Aid of Cambodia (LAC) juvenile justice project in the Battambang region, available at http://www.childjustice.org/index.php?option=com_content&view=article&id=74/legal-aid-of-cambodia-lac-juvenile-justice-project-in-the-battambang-region&catid=97/conferences-and-initiatives-&Itemid=64 (last visited April 8, 2012)	20 years, Penal Code, art. 160	Yes, Penal Code, arts. 10-11
Cameroon	No, Penal Code, art. 693	Yes, Penal Code, art. 88	Concurrent, Penal Code, art. 51	10, Penal Code, art. 80	Yes, Criminal Procedure Code, art. 713	10 years, Penal Code, art. 87	Yes, prior to final judgment or if decriminalized, Penal Code, art. 4
Canada	No, Criminal Code, art. 745	Yes, Criminal Code, art. 753	Concurrent or consecutive, Criminal Code, arts. 226, 718.2	12, Nicholas Bala & Julian CV; Roberts, Canada's Juvenile Justice System: Promoting Community-Based Responses to Youth Crime, in International Handbook of Juvenile Justice 39 (Junge-Tas & Decker eds., 2006)	Yes, Nicholas Bala & Julian CV; Roberts, Canada's Juvenile Justice System: Promoting Community-Based Responses to Youth Crime, in International Handbook of Juvenile Justice 44 (Junge-Tas & Decker eds., 2006)	Life with the possibility of parole, Nicholas Bala & Julian CV; Roberts, Canada's Juvenile Justice System: Promoting Community-Based Responses to Youth Crime, in International Handbook of Juvenile Justice 57-58 (Junge-Tas & Decker eds., 2006)	Yes, Constitution, art. 11

Country	Life without parole sentences	Recidivism statutes	Concurrent or consecutive sentences for multiple offenses from same act	Minimum Age of Criminal Responsibility	Transfer to Adult Court	Juvenile Maximum Sentence	Retroactive ameliorative law
Cape Verde	No, Constitution, art. 31	Yes, Penal Code, art. 88	Consecutive, capped at 25 years, Penal Code, art. 31	16, CRC/C/11/Add.23, 9 Jan. 2001, para. 59	Unknown	8 years, Cape Verde, CRC/C/11/Add.23, 9 Jan. 2001, para. 184	Yes, Penal Code, art. 2
Central African Republic	No, Criminal Procedure Code, art. 426	Yes, Penal Code, arts. 41-42	Concurrent, Criminal Procedure Code, art. 224	15, Criminal Procedure Code, arts. 232-233	No, only tried in juvenile court, Criminal Procedure Code, art. 231	Half the adult sentence, max of 20 years of penal labor, Criminal Procedure Code, arts. 232-233	Yes, but only if crime is repealed in entirety, Criminal Procedure Code, art. 6
Chad	No, Criminal Procedure Code, arts. 502-505	Yes, Penal Code, art. 56	Concurrent, Penal Code, arts. 40-41	13, Penal Code, art. 52	No, Law No 007/PR/99, art. 1	Half the adult sentence or max of 10 years without parole, Penal Code, arts. 2, 30, 52, Criminal Procedure Code, arts. 419-422	Yes, but only if crime is repealed in entirety, Constitution, art. 22
Chile	No, Criminal Code, art. 32	Yes, considered an aggravating factor, Criminal Code, art. 12(16)	Concurrent, Criminal Code, arts. 74-75	14, Ley N° 20.084, arts. 3, 58	No, Ley N° 20.084, arts. 1-3	16 years and younger; 5 years, between 16-18; 10 years, Ley N° 20.084, art. 18	Yes, Constitution, art. 19(3)
China	Yes, Penal Code, art. 81	Yes, Penal Code, art. 65	Concurrent, Penal Code, art. 69	14, Penal Code, art. 17	No, Law on Preventing Juvenile Delinquency, art. 45; Email from Yang Xu, University of Turin, to author (Feb. 17, 2011) (on file with author)	Life sentence, Email from Yang Xu, University of Turin, to author (Feb. 17, 2011) (on file with author)	Yes, Penal Code, art. 12
Colombia	No, Constitution, art. 34; Criminal Code, art. 37	No, Criminal Code, art. 319	Consecutive, capped at 60 years, Criminal Code, art. 31	14, Código de la Infancia y de la Adolescencia [Juvenile Code], art. 139	No, Código de la Infancia y de la Adolescencia [Juvenile Code], art. 139	14-18; 8 years, Código de la Infancia y de la Adolescencia [Juvenile Code], art. 187	Yes, Criminal Code, art. 6
Comoros	Yes, Law No 81-08 of 1981 Organizing Parole, art. 2	Yes, Penal Code, arts. 41-42	Concurrent, Penal Code, art. 5	13, Penal Code, art. 51	No, Law of December 31, 2005 on the Protection of Youth and on Juvenile Justice, art. 4	20 years, otherwise half the sentence, Penal Code, art. 51	Yes, Penal Code, art. 50
Costa Rica	No, Constitution, art. 40; Penal Code, art. 64	Yes, Penal Code, art. 78	Consecutive, capped at 50 years, Penal Code, art. 76	12, Ley de Justicia Penal Juvenil [Juvenile Justice Law], art. 1	No, Ley de Justicia Penal Juvenil [Juvenile Justice Law], art. 28	12-15; 10 years, 15-18; 15 years, Ley de Justicia Penal Juvenil [Juvenile Justice Law], art. 131	Yes, Penal Code, arts. 12-13
Cote D'Ivoire	No, Penal Code, art. 689	Yes, Penal Code, art. 125	Concurrent, Penal Code, art. 122	13 for criminal charges, 10 for measures of protection, Penal Code, art. 116	No, those under 18 cannot be transferred, Criminal Procedure Code, art. 756	20 years, 16 or older can receive adult sentences, Penal Code, art. 114, Criminal Procedure Code, art. 758	Yes, but only if crime is repealed in entirety, Penal Code, art. 19
Croatia	No, Penal Code, arts. 53, 55	Yes, considered at sentencing, Penal Code, art. 56	Concurrent, Penal Code, art. 61	14, Penal Code, art. 10	Yes, but juvenile code still applies, Juvenile Courts Act, art. 60	10 years, Juvenile Courts Act, art. 24	Yes, Penal Code, art. 3
Cuba	Yes, Penal Code, art. 30	Yes, Penal Code, art. 55.1	Consecutive, capped at 30 years, Penal Code, arts. 56-1, Chapter III, 10-1, 11-1	16, Penal Code, art. 16.1	Yes, Penal Code, art. 17.1	JLWOP; Penal Code, art. 30.1	Yes, Penal Code, art. 3.1
Cyprus	No, Prison Law of 1996, secs. 14A(1), 14B(1); Kafkaris v. Cyprus, Eur. Ct. H.R., application no. 21906/04, Feb. 12, 2008	Yes, considered at sentencing, Prison Law of 1996, 14H(2); Kafkaris v. Cyprus, Eur. Ct. H.R., application no. 21906/04, Feb. 12, 2008	Concurrent or consecutive, Prison Law of 1996, sec. 14B(1); Kafkaris v. Cyprus, Eur. Ct. H.R., application no. 21906/04, Feb. 12, 2008	14, age of majority is 16, Despina Kyprianou, The Role of the Cyprus Attorney General's Office in Prosecutions: Rhetoric, Ideology and Practice, in Juvenile Justice Systems in Europe: Current Situation and Reform Developments 226 & 240 (Frieder Dunkel et al. eds, 2010)	Yes, but some protections still apply, Despina Kyprianou, The Role of the Cyprus Attorney General's Office in Prosecutions: Rhetoric, Ideology and Practice, in Juvenile Justice Systems in Europe: Current Situation and Reform Developments 226 & 240 (Frieder Dunkel et al. eds, 2010)	Her Majesty's pleasure, Criminal Code, sec. 27	No, Constitution, art. 12
Czech Republic	No, Criminal Code, provision 62	Yes, Criminal Code, provisions 41-42	Concurrent, Criminal Code, provision 35	15, Criminal Code, art. 11	No, Council of Europe, Czech Republic: Criminal Justice System, available at http://www.coe.int/t/09/hl/cooperation/ccpe/opinions/travaux/OP_5_Question_Rep_tcheque.pdf (last visited April 8, 2012)	Sentence cut in half, max 10 years, Criminal Code, art. 79	Yes, Criminal Code, provision 16
Democratic People's Republic of Korea	No, Penal Code, arts. 30, 54	Yes, considered an aggravating factor, Penal Code, art. 39	Consecutive, capped at 15 years, Penal Code, art. 30	14, Penal Code, art. 11, Criminal Procedure Code, art. 53	Unclear	Adult sentences served in education centers, no death penalty, Penal Code, arts. 29, 40, 49; Criminal Procedure Code, arts. 62-64, 66, 67; United Nations Committee on the Rights of the Child, Jan. 12-30, 2009, para. 237-38, Democratic People's Republic of Korea State Report U.N. Doc. CRC/C/PRK/4 Jan. 23, 2009	Yes, Penal Code, art. 9

Country	Life without parole sentences	Recidivism statutes	Concurrent or consecutive offenses from multiple acts	Minimum Age of Criminal Responsibility	Transfer to Adult Court	Juvenile Maximum Sentence	Retroactive ameliorative law
Democratic Republic of the Congo	No, Penal Code, art. 35	Yes, Penal Code, art. 14	Concurrent, Penal Code, art. 20	There is no set age. Don Cipriani, Children's Rights and the Minimum Age of Criminal Responsibility 100 (Ashgate, 2009)	No, Decree of December 6, 1950 on Delinquent Youth, art. 9	20 years after 21st birthday, Decree of December 6, 1950 on Delinquent Youth, arts. 1, 8	Yes, Constitution, art. 17
Denmark	No, Criminal Code, secs. 38, 41	Yes, considered an aggravating factor, Criminal Code, sec. 81	Concurrent, Criminal Code, sec. 88	15, Criminal Code, sec. 15	No juvenile courts, but are tried as juveniles, Robert Winkler, A Comparative Criminology Tour of the World, San Diego State University, available at http://www-rohan.sdsu.edu/faculty/rwinklow/europe/denmark.html (last visited Apr. 10, 2012); Criminal Code, sec. 82	8 years, Criminal Code, sec. 33	Yes, Criminal Code, sec. 3
Djibouti	No, Penal Code, art. 598	Yes, Penal Code, arts. 62-63	Concurrent, Penal Code, art. 57	13, Penal Code, art. 32	No juvenile courts, but juvenile specific protections apply, Penal Code, arts. 497-500	Half of those for adults, Penal Code, art. 32	Yes, Penal Code, art. 5
Dominica	Unknown	Unknown	Unknown	12, Children and Young Persons Act, sec. 3	Unknown	Can be sentenced "at the President's Pleasure," can include JLWOP, CRC/C/15/Add.238, 30 June 2004, sec. 46	Unknown
Dominican Republic	No, Penal Code, art. 487	Yes, Penal Code, arts. 56-57	Unknown	13, age of majority is 16, Ley 136-03, art. 223	No, Ley 136-03, art. 221	5 years, Ley 136-03, art. 339	Yes, Constitution, art. 47; Penal Code, art. 36
Ecuador	No, Penal Code, arts. 53, 87	Yes, Penal Code, art. 80	Consecutive, capped at 35 years, Penal Code, art. 81	12, Código de la Niñez y Adolescencia [Children and Adolescents Code], arts. 4, 308	No, Código de la Niñez y Adolescencia [Children and Adolescents Code], art. 305	4 years, Código de la Niñez y Adolescencia [Children and Adolescents Code], art. 370(3)	Yes, Constitution, art. 76; Penal Code, art. 2
Egypt	No, Penal Code, arts. 74-75	Yes, Penal Code, arts. 49-54	Concurrent, Penal Code, art. 32	7, Juvenile Code, art. 94	Yes, Juvenile Code, art. 122	10 years, Juvenile Code, art. 112	Yes, Penal Code, art. 5
El Salvador	No, Constitution, art. 27; Criminal Code, arts. 85-86	Yes, ineligible for parole, Criminal Code, arts. 16, 92(A)	Consecutive, capped at 75 years, Criminal Code, arts. 70-71	12, Ley Penal Juvenil [Juvenile Penal Code], Art. 2	No, Criminal Code, art. 17	7 years, Ley Penal Juvenil [Juvenile Penal Code], art. 15	Yes, Constitution, art. 21
Equatorial Guinea	Unknown	Unknown	Unknown	16, CRC/CSR990, 31 Jan 2005, para. 18	Unknown	Unknown	Unknown
Eritrea	No, Penal Code, art. 112	Yes, Penal Code, art. 726	One sentence issued, but it is enhanced and capped, Penal Code, art. 189	9, Penal Code, art. 52	Unclear	10 years, Penal Code, art. 173	Yes, Penal Code, art. 6
Estonia	No, Penal Code, sec. 77	Yes, Penal Code, sec. 199	Concurrent, Penal Code, sec. 63(1)	14, Penal Code, sec. 87	No, Criminal Procedure Code, secs. 216, 201	10 years, Penal Code, sec. 45	Yes, Penal Code, sec. 5
Ethiopia	No, Penal Code, art. 112	Yes, Penal Code, art. 726	One sentence issued, but it is enhanced and capped, Penal Code, art. 189	9, Penal Code, art. 52	Unclear	10 years, Penal Code, art. 173	Yes, Penal Code, art. 6
Fiji	No, Penal Code, sec. 44	Yes, Penal Code, sec. 62	Concurrent or consecutive, Penal Code, sec. 24(4)	10, Ordinance No. 12 of 1969, art. 14; Juveniles Act, art. 29	Yes, Juveniles Act, art. 21	"Detention during the Governor-General's pleasure," JLWOP, Penal Code, sec. 25, 30, 31	No
Finland	No, Criminal Code, Chapter 2c, sec. 10	Yes, Criminal Code, Chapter 2c, sec. 11; Chapter 6, sec. 5	Consecutive, capped at 20 years or life, Criminal Code, Chapter 2c, sec. 4; Chapter 7, sec. 1	15, Ch. 3, Criminal Code, sec. 4	No juvenile court, Liith Houseman, Reducing Reliance on Incarceration in Texas: Does Finland Hold Answers?, 46 Tex. Int'l L.J. 209, 222-223 (2010)	Under the age of 21, conditional release after serving 10 years if has life imprisonment, all other offenses if under 21 conditional release if serve half of the sentence for the offense, Criminal Code secs. 5, 10	Yes, prior to final judgment, Criminal Code, Chapter 3, sec. 2
France	No, Decision no. 93-334 DC 20 January 1994 of the Conseil Constitutionnel, paras. 12-13; Criminal Procedure Code, art. 729	Yes, must serve minimum percentage of sentence, Criminal Procedure Code, art. 729	Concurrent, Criminal Procedure Code, arts. 132-3	10, imprisonment only at 13, Penal Code, Art. 122-8	No, La France à la Loupe, Juvenile Justice in France, published by Le Ministère des Affaires Étrangères et Européennes, summarizing L'Ordonnance n 45-174 du 2 Février 1945 Relative à L'Enfant Délinquant (May 2008)	Juveniles 13-16: half the sentence for adults, Juveniles 16-18 can receive an adult sentence, La France à la Loupe, Juvenile Justice in France, published by Le Ministère des Affaires Étrangères et Européennes, summarizing L'Ordonnance n 45-174 du 2 Février 1945 Relative à L'Enfant Délinquant (May 2008)	Yes, Criminal Procedure Code, art. 112-1

Country	Life without parole sentences	Recidivism statutes	Concurrent or consecutive sentences for multiple offenses from same act	Minimum Age of Criminal Responsibility	Transfer to Adult Court	Juvenile Maximum Sentence	Retrospective ameliorative law
Gabon	No, Penal Code, art. 228	Yes, Penal Code, arts. 33-34	Concurrent, Penal Code, art. 7	13, Penal Code, art. 59	Yes, Penal Code, art. 58	No death Penalty, but other adult sanctions, Penal Code, art. 60	Yes, but only if crime is repealed in entirety, Penal Code, art. 5
Gambia	Unknown	Yes, but only for rogues and vagabonds and theft, Penal Code, secs. 167, 262.	Concurrent or consecutive, Penal Code, sec. 29(4)	12, Children's Act of 2005, sec. 209	Unknown	Unknown	No
Georgia	No, Criminal Code, art. 72	Yes, must serve minimum percentage of sentence, Criminal Code, art. 58	Consecutive, capped at 30 years, Criminal Code, arts. 50, 59-60	14, Criminal Code, art. 33	No juvenile courts, but juvenile protections apply, Code of Criminal Procedure, arts. 640, 641, 654; Criminal Code, art. 89	15 years, Criminal Code, art. 88	Yes, Criminal Code, art. 3
Germany	No, BVerfGE 45, 187; Criminal Code, sec. 57a	Yes, considered at sentencing, Criminal Code, sec. 46	Concurrent, Criminal Code, sec. 52(2)	14, Criminal Code, sec. 19	Yes, Youth Courts Law, secs. 33, 103	10 years, Youth Courts Law, sec. 18	Yes, prior to final judgment, Criminal Code, sec. 2
Ghana	Yes, Prisons Service Decree (NPRCD 46) 1972, sec. 34	Yes, Criminal Procedure Code, sec. 300	Concurrent or consecutive, Criminal Procedure Code, secs. 301, 303	12, Penal Code, sec. 26	Yes, Penal Code, secs. 16-18	3 years, Penal Code, sec. 46	No, Constitution, art. 107
Greece	No, Penal Code, art. 105	Yes, Penal Code, arts. 89-90	Concurrent, Penal Code, art. 94	Technically under the law no one under 18 has criminal responsibility, but kids aged 13-18 can be put into a juvenile detention center, Callope D. Spinelli & Aglaia Tsitsoura, The Emerging Juvenile Justice System in Greece, in International Handbook of Juvenile Justice 316, 316, 320 (Jungfer-Tas & Decker eds., 2006)	No, Callope D. Spinelli & Aglaia Tsitsoura, The Emerging Juvenile Justice System in Greece, in International Handbook of Juvenile Justice 316, 316 (Jungfer-Tas & Decker eds., 2006)	Unknown	Yes, prior to final judgment or if decriminalized, Penal Code, art. 2
Grenada	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown
Guatemala	No, Penal Code, art. 44	Yes, Penal Code, arts. 23-24, 33	Consecutive, capped at 50 years, Penal Code, art. 69	13, Decree 23/03	No, Email from Ruben Rivas Pereda, UNICEF Oficial de Proteccion de Niñez, to author, (Nov. 23, 2011, 09:52am PST) (on file with author)	6 years, Colective de Derechos de Infancia y Adolescencia, Sentencias a Prisión Perpetua a Personas Menores de 18 Años, available at http://www.colectivoinfancia.org.ar/V2/es/perpetua.php (last visited Apr. 10, 2012)	Yes, Penal Code, art. 2
Guinea	No, Penal Code, art. 785	Yes, Penal Code, arts. 43-47	Concurrent, Penal Code, art. 6	13, Penal Code, art. 66	No, Penal Code, art. 698	13-16; 10 years, Penal Code, art. 66; 16-18; 20 years, Penal Code, art. 67	Yes, Penal Code, art. 5
Guinea Bissau	No, Penal Code, arts. 38, 41	Yes, Penal Code, arts. 67-68	Consecutive, capped at 30 years, Penal Code, arts. 41, 75	16, CRC/C/3/add.63, 26 Jul 2001, para. 136	Unknown	Unknown	Yes, Penal Code, art. 3
Guyana	Unknown	Unknown	Unknown	10, CRC/C/15/Add.224; 26 February 2004, sec. 55	Unknown	Unknown	Unknown
Haiti	No, Penal Code, art. 55	Unknown	Concurrent, Criminal Procedure Code, art. 297	13, age of majority is 16, Penal Code, art. 50	No, Decree of November 20, 1961	Under 13, no criminal sentence; Over 13; max sentence is 8 years, Penal Code, art. 51	Yes, Constitution, art. 51
Honduras	No, Penal Code, art. 76	Yes, considered at sentencing, Penal Code, arts. 28-29	Consecutive, capped at 30 years, Penal Code, art. 35	12, Penal Code, art. 23	Unknown	8 years, Colective de Derechos de Infancia y Adolescencia, Sentencias a prisión perpetua a personas menores de 18 años, available at: http://www.colectivoinfancia.org.ar/V2/es/perpetua.php (last visited Apr. 10, 2012)	Yes, Constitution, art. 9
Hungary	Yes, Penal Code, sec. 47	Yes, Penal Code, sec. 97	One sentence issued, but it is enhanced and capped, Penal Code, sec. 85	14, Criminal Code, sec. 23	No, Maria Hertzog & Ferenc Ifk, Comparative Juvenile Justice: An Overview of Hungary, in Juvenile Justice Systems 314-315 (John Winterdyk ed., 1997)	16 and older: 15 years, Under 16: 10 years, Criminal Code, sec. 110	Yes, Criminal Code, sec. 2
Iceland	No, Penal Code, arts. 34, 40	Yes, Penal Code, arts. 70-72	One sentence issued but it is enhanced and capped, Penal Code, art. 77	15, Penal Code, art. 14	No juvenile courts, separate laws used, UN, ESCOR, 30th Sess., 16th mg., UN Doc. E/C.12/2000/SR.16, May 26, 2003	16 years, Penal Code, art. 34	Yes, prior to final judgment or if decriminalized, Penal Code, art. 2

Country	Life without parole sentences	Recidivism statutes	Concurrent or consecutive sentences for multiple offenses from same act	Minimum Age of Criminal Responsibility	Transfer to Adult Court	Juvenile Maximum Sentence	Retroactive ameliorative law
India	No, Code of Criminal Procedure, secs. 432, 433A	Yes, Penal Code, art. 48A	Concurrent, Penal Code, art. 71	7, if discernment, otherwise 12, UNICEF, Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law 73 (2006)	No, although not always done in practice, UNICEF, Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law 76 (2006)	No life imprisonment or death penalty, but no set cap. Death Penalty could apply in the provinces of Jammu and Kashmir; UNICEF, Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law 78 (2006)	No, Penal Code, art. 20
Indonesia	Unknown	Yes, Penal Code, arts. 467, 486, 488	Consecutive, capped at 1/3 more than maximum or life, Penal Code, arts. 65 -67	8, 12 for detention, Criminal Code, art. 5 paras. 1-3	No, but slow implementation, International Juvenile Justice Conservatory, Legal Assistance for Children in Conflict With The Law, Indonesia, available at http://www.ojjj.org/legal/situation.php?c=2&p=84 (last viewed Apr. 10, 2012); Children in Indonesia: Juvenile Justice, Communication Section UNICEF Indonesia (June, 2010) available at http://www.unicef.org/indonesia/UNICEF_Indonesia_Juvenile_Justice_Fact_Sheet_June_2010.pdf (last viewed Apr. 10, 2012)	10 years; Juvenile Court Act (Law No. 3 year 1997), art. 26	Yes, Penal Code, art. 1
Iran	No, Penal Code, sec. 39	No	Concurrent, Penal Code, sec. 24	9 for girls, 15 for boys, Penal Code art. 49; Civil Code art. 1210, Note 1	Unknown	Death penalty; UN, Doc. A/HRC/WG.6/7/IRN/1 paras. 59, 91 Nov. 18, 2009	Yes, Penal Code, sec. 6
Iraq	No, Penal Code, para. 87, but see Coalition Provisional Authority 31	Yes, Penal Code, paras. 139-140, 331	Concurrent, Penal Code, paras. 141-143	7, Penal Code, para. 64	No, Law on Criminal Proceedings, para. 235	15 years at a school for Young Offenders; can be transferred to prison from there once reach the age of 30. Penal Code, paras. 72, 74, 76	Yes, Penal Code, para. 2
Ireland	No, Criminal Justice Act 1960, sec. 2; J. Paul McCutcheon & Gerard Coffey, Report into Determination of Life Sentences, Centre for Criminal Justice, School of Law, Sept. 2006 at 2	Yes, must serve minimum percentage of sentence, Criminal Justice Act 2007, sec. 25	Concurrent or consecutive, Policies: Concurrent Sentencing-Advic, http://www.advic.ie/policies/concurrent.asp (last visited April 3, 2012)	10 or 12 for murder; manslaughter; or rape, all others art. 129	No, Children Act 2001, sec. 132	Adult Sentences; Children Act 2001, sec. 96	No
Israel	Yes, Conditional Parole Law, 5761-2001, art. 30A	No	Concurrent, Penal Code, secs. 45-46, 58	12, Penal Law, 5737-1977, secs. 34f; LSI Special Volume (5737-1977) and sec. 2(3)	No, Leslie Sebba, Menachem Horowitz & Ruth Geva, European Institute for Crime Prevention and Control Affiliated with the United Nations, Israel: Criminal Justice Systems in Europe and North America 22 (2003)	Unknown	Yes, Penal Code, art. 5
Italy	No, Penal Code art. 176; Corte cost. Sentenza, Sept. 27 1987, nr. 274 Foro Italia, I, 2333	Yes, Penal Code, art. 99	Consecutive, capped at 30 years, Penal Code, arts. 73, 78	14, Penal Code, art. 97	No, Ch. 7: Umberto Gatti & Alfredo Verde, Comparative Juvenile Justice: An Overview of Italy, in Juvenile Justice Systems 177-178 (John A. Winteryk ed., 1997)	2/3 of adult sentence, Umberto Gatti & Alfredo Verde, Comparative Juvenile Justice: An Overview of Italy, in Juvenile Justice Systems 179, 185-186 (John A. Winteryk ed., 1997)	Yes, prior to final judgment or if decriminalized, Penal Code, art. 2
Jamaica	No, Penal Code, arts. 3(1)(C), 6(4-5)	Unknown	Concurrent or consecutive, Penal Code, art. 6	12, Child Care and Protection Act sec. 63	Unknown	Unknown	No
Japan	No, Penal Code, art. 28	Yes, Penal Code, arts. 56-57	Concurrent, Penal Code, art. 54	14, Penal Code, art. 41	Yes, but juvenile protections still apply, Juvenile Act, Act No. 168 of 1948, art. 20; Email from Takuya Ito, Second Secretary, Permanent Mission of Japan, to author (Nov. 16, 2011, 06:10pm PST) (on file with author)	15 years; Juvenile Act of Japan, Act No. 168 of 1948, art. 51	Yes, Penal Code, art. 6
Jordan	No, Penal Code, arts. 14-20	Yes, Penal Code, arts. 101-102	Concurrent, Penal Code, art. 72	7, Juveniles Act art. 36	Unknown	Unknown	Yes, prior to final judgment or if decriminalized, Penal Code, art. 6

Country	Life without parole sentences	Recidivism statutes	Concurrent or consecutive sentences for multiple offenses from same act	Minimum Age of Criminal Responsibility	Transfer to Adult Court	Juvenile Maximum Sentence	Retroactive ameliorative law
Kazakhstan	Yes, Penal Code, art. 48	Yes, Penal Code, arts. 13, 54	Concurrent, Penal Code, art. 58	14 for specific offenses, otherwise 16, Criminal Code, art. 15	No, some areas do not have juvenile courts but juvenile protections still apply, Code of Criminal Procedure, Ch. 5, art. 49; Ch. 7, art. 3; UNICEF Regional Office for Central and Eastern Europe/Commonwealth of Independent States, Assessment of Juvenile Justice Reform Achievements in Kazakhstan 20 (2009)	12 years, Criminal Code, art. 79	Yes, Constitution, art. 77(3)(5)
Kenya	Yes, Prisons Act, chapter 90, sec. 46(1)(f)	Yes, Criminal Procedure Code table, p. 136	Concurrent or consecutive, Criminal Procedure Code, sec. 14	8, 12, if had discernment, Penal Code, art. 14	Yes, Children's Act, secs. 73, 184	Detained at the President's pleasure, Penal Code, art. 25	Yes, prior to final judgment, Constitution, art. 50
Kiribati	No, Parole Board Amendment Act, sec. 3, Amendment of sec. 11	Yes, Penal Code, secs. 168, 254, 295	Concurrent or consecutive, Penal Code, sec. 9	10, Penal Code, art. 14	Unclear, Penal Code, art. 39	No maximum indicated in law	No
Kuwait	Unknown	Yes, Penal Code, art. 85	Concurrent, Penal Code, art. 84	7, Penal Code art. 18	Unknown	Unknown	Yes, prior to final judgment or if decriminalized, Penal Code, arts. 14-15
Kyrgyzstan	No, Penal Code, art. 49	Yes, Penal Code, art. 58	Concurrent or consecutive, Penal Code, art. 59	14 for specific offenses, otherwise 16, Penal Code, art. 18(1)	No juvenile courts, although new law is being worked on, UNICEF Regional Office for Central and Eastern Europe/Commonwealth of Independent States, Assessment of Juvenile Justice Reform Achievements in Kyrgyzstan 2 (2011); Email from Elena Zaichenko, Project Officer, Child Protection United Nations Children's Fund, to author (Nov. 21, 2011, 12:38pm PST) (on file with author)	10 years, Penal Code, art. 82(4)	Yes, Penal Code, art. 7
Lao People's Democratic Republic	Yes, Penal Code, art. 47	Yes, Penal Code, arts. 11, 37, 41	Concurrent, Penal Code, art. 40	15, Penal Code, art. 17	No juvenile courts, Child Rights International Network, Lao People's Democratic Republic: Children's Rights References in the Universal Periodic Review (April 5, 2010)	15 years, Penal Code, art. 47	Yes, Penal Code, art. 5
Latvia	No, Criminal Code, sec. 61	Yes, considered and aggravating factor, Criminal Code, sec. 48	Consecutive, capped at 20 years, Criminal Code, sec. 50	14, Criminal Code, sec. 11	No juvenile court, but separate proceedings, Criminal Procedure Law, sec. 391	10 years, Criminal Code, sec. 65	Yes, Criminal Code, sec. 5
Lebanon	Unknown	Unknown	Concurrent, Penal Code, art. 205	7, Child Rights International Network, Lebanon: Children's Rights References in the Universal Periodic Review (Nov. 16, 2010)	No, Law No 422 of June 6, 2002, on the Protection of Delinquent Juveniles and Endangered Youth of Lebanon, art. 2; Code of Criminal Procedure, art. 243	15 years, Law No 422 of June 6, 2002, on the Protection of Delinquent Juveniles and Endangered Youth of Lebanon, art. 15	Yes, prior to final judgment or if decriminalized, Penal Code, art. 8
Lesotho	Yes, Criminal Procedure and Evidence Act, sec. 344A	Yes, Criminal Procedure and Evidence Act, sec. 346	Concurrent or consecutive, Criminal Procedure and Evidence Act, sec. 343	10 if discernment, otherwise 14, Children's Protection and Welfare Bill of Lesotho, art. 83	Yes, Children's Protection and Welfare Bill of Lesotho, art. 138	3 years if tried in juvenile court. Max under adult penal code if transferred is 20 years, Children's Protection and Welfare Bill of Lesotho, art. 166	No
Liberia	Yes, Act to Amend Chapters 14 and 15 Sub-Chapter(C), Title 26 of the Liberian Code of Laws Revised, sec. 15.34	Yes, Penal Code, sec. 50.6	Concurrent, Liberian Code of Laws Revised, sec. 31.6, Penal Code, sec. 10.5	7, Juvenile Court Procedural Code sec. 11.11	Unknown	Unknown	Yes, Penal Code, sec. 1.3
Libyan Arab Jamahiriya	Unknown	Yes, Penal Code, art. 97	Concurrent, Penal Code, art. 76	14, Penal Code, art. 81	Unclear	Sentence is reduced to 1/3 the adult sentence, Penal Code, art. 81	Yes, Penal Code, art. 2
Liechtenstein	No, Penal Code, sec. 46	Yes, Penal Code, secs. 23, 39	Concurrent, Penal Code, sec. 28	14, Email from Victoria Chisholm, Advisor to the Permanent Mission of the Principality of Liechtenstein to the United Nations, to author (Dec. 6, 2011, 12:44pm PST) (on file with author)	No, Email from Victoria Chisholm, Advisor to the Permanent Mission of the Principality of Liechtenstein to the United Nations, to author (Dec. 6, 2011, 12:44pm PST) (on file with author)	Over 16; 15 years, Under 16; 10 years, Email from Victoria Chisholm, Advisor to the Permanent Mission of the Principality of Liechtenstein to the United Nations, to author (Dec. 6, 2011, 12:44pm PST) (on file with author)	Yes, Penal Code, sec. 1

Country	Life without parole sentences	Recidivism statutes	Concurrent or consecutive sentences for multiple offenses from same act	Minimum Age of Criminal Responsibility	Transfer to Adult Court	Juvenile Maximum Sentence	Retroactive ameliorative law
Lithuania	Yes, Penal Code, arts. 51, 77	Yes, Penal Code, arts. 27, 56	Consecutive, capped at 20 years or life, Penal Code, art. 63	14, Penal Code, sec. 13	Unknown	Unknown	Yes, Penal Code, art. 3
Luxembourg	No, Penal Code, art. 100	Yes, Penal Code, art. 54	Concurrent, Penal Code, arts. 61(1), 62	18. Calls to raise age of criminal responsibility rejected, BBC News, Mar. 13, 2010. http://news.bbc.co.uk/2/hi/uk_news/8565619.stm	No, Law of August 10, 1992, on the Protection of the Youth, art. 2	20 years, new amendment was just introduced that would lower it to 10 years. Sentence starts once the juvenile reaches 18, Law of August 10, 1992, on the Protection of the Youth, arts. 3, 4	Yes, prior to final judgment, Penal Code, art. 2
Madagascar	No, Criminal Procedure Code, art. 574	Yes, Penal Code, art. 56; Criminal Procedure Code, art. 574	Concurrent, Criminal Procedure Code, art. 95	13, Ordinance 62-038 of September 19, 1962, on the Youth Protection, art. 45	No, Ordinance 62-038 of September 19, 1962 on the Youth Protection, art. 38; Criminal Procedure Code, art. 163	13-16; 20 years, Ordinance 62-038 of September 19, 1962, on the Youth Protection, art. 45; 16-18; adult sentences, but no death penalty, Ordinance 62-038 of September 19, 1962, on the Youth Protection, art. 46	Yes, Criminal Procedure Code, art. 2
Malawi	No, Prisons Bill 2003, sec. 53(1)(b); Jamil Ddamulira Mujuzi, Why the Supreme Court of Uganda Should Reject the Constitutional Court's Understanding of Imprisonment for Life, 8 Afr. Hum. Rts. J., 163, 174 (2008)	Yes, for idle and disorderly persons, rogue and vagabond, and theft, Penal Code, arts. 180, 184, 278, 290	Concurrent or consecutive, Penal Code, Chapter 701, art. 35; Criminal Procedure and Evidence Code, sec. 12	7 if discernment, otherwise over 12, Penal Code, Ch. IV, art. 14	Unclear	Unknown	No
Malaysia	No, Criminal Code, art. 57	Yes, Criminal Code, art. 75	Concurrent, Criminal Code, art. 71	10 if discernment, otherwise 12, Penal Code secs. 82-83	Yes, but juvenile provisions apply, Farah Nini Dusuki, CRIN, Implementation of Article 12 in Juvenile Justice System in Malaysia 13, 17 (2006); Child Act 2001, sec. 11(5)	No cap, sentence be reviewed every year; no death penalty, Child Act 2001, secs. 96-97	No, Criminal Code, art. 7
Maldives	No, Criminal Code, art. 16	Unknown	Unknown	7 for Sharia's offenses, otherwise 14, Rules Relating to the Conduct of Judicial Proceedings (No. 6), Section 289(3) as amended, UNICEF Regional Office for South Asia, Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law 87 (2006)	No, although slow to implement, UNICEF Regional Office for South Asia, Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law 87 (2006)	Adult penalties; Rules Relating to the Conduct of Judicial Proceedings (No. 6) Ministry of Justice, 2003, as amended, secs. 289 (3) (c), 289 (15) (18); Ministry of Justice Circular 4/88 (6-4-88) and Presidential Administrative Directive I-F/21/88/62, sec. 289 (20)	Yes, prior to final judgment, Criminal Code, art. 59
Mali	No, Law No 85-42/AN-RM June 28, 1985, art. 26	Yes, Penal Code arts. 15-17	Concurrent, Criminal Procedure Code, art. 306	13, Penal Code, art. 23	No, Law No. 01-081 of August 24, 2001	20 years or half the sentence, Penal Code, art. 23	No
Malta	Yes, Penal Code, art. 493	Yes, Penal Code, art. 50	One sentence issued, but it is enhanced, and capped, Criminal Procedure Code, art. 347	9 if acted with mischievous discretion, otherwise 14, Penal Code, art. 35	Yes, Penal Code, arts. 28(c)(3); Juvenile Court Act, secs. 2, 11	Crime is reduced by 1 or 2 degrees if the juvenile is between 14-16, Penal Code art. 37	Yes, prior to final judgment, Penal Code, art. 27
Marshall Islands	Yes, Penal Code, art. 190	Yes, considered at sentencing, Penal Code, art. 182	Unknown	10, age of majority is 16, Penal Code art. 107; Juvenile Procedure Act, art. 302	No juvenile courts; Juvenile Procedure Act, art. 305	No maximum listed in penal code	No, Penal Code, art. 191
Mauritania	No, Criminal Procedure Code, art. 625	Yes, Penal Code, art. 50	Concurrent, Penal Code, art. 5	7 for protection measures, 15 for criminal sanctions, Gabrielle Chazy, Defence for Children International, 51st Session of the UN Committee on the Rights of the Child: Information Notes on the UN Committee on the Rights of the Child: Information Notes on Juvenile Justice related Issues 13 (2009)	No juvenile courts; but juvenile specific protections apply, Gabrielle Chazy, Defence for Children International, 51st Session of the UN Committee on the Rights of the Child: Information Notes on Juvenile Justice related Issues 13 (2009)	20 years or half the sentence, Penal Code, art. 61	Yes, Penal Code, art. 59; Criminal Procedure Code, art. 6

Country	Life without parole sentences	Recidivism statutes	Concurrent or consecutive sentences for multiple offenses from same act	Minimum Age of Criminal Responsibility	Transfer to Adult Court	Juvenile Maximum Sentence	Retroactive ameliorative law
Mauritius	No, Criminal Procedure (Amendment) Bill VIII of 2007, sec. 3	Yes, Penal Code, sec. 13	Consecutive permitted only for rape (capped at 20 years) and aggravated robbery (capped at 30 years), Penal Code, secs. 49, 301A	14, Penal Code, arts. 44, 45	Unclear	Unknown	No
Mexico	No, Penal Code, art. 25; Suprema Corte de Justicia de la Nación (SCJN), Contradiccion de Tesis 11/2001-PI, entre las sustentadas por el Primer y Cuarto Tribunales Colegiados en Materia Penal del Primer Circuito, Mexico City, Oct. 2, 2001	Yes, Penal Code, arts. 20-21, 65	Consecutive, capped at 70 years, Penal Code, art. 64	12, Dammert, Lucia, Zuniga & Liza, Prisons: Problems and Challenges for the Americas (Flasco ed. 2009) citing Law for the Protection of the Rights of Children and Adolescents, D.O. May 29, 2000	No, Ley de Justicia Para Adolescentes Para El Distrito Federal [Law of Justice for Adolescents for the Federal District], art. 4	Sentence is cut in half, but it cannot exceed 7 years, Penal Code, art. 56	No
Micronesia	No, Federal: Crimes, Title 11, Chapter 12, art. 1204; Chuuk State: Criminal Code, sec. 6012; Kosrae State: Criminal Code, sec. 64901; Yap State: Penal Code, sec. 1112	Yes, considered at sentencing, Chuuk State: Criminal Code, sec. 6003; Kosrae State: Criminal Code, sec. 64901; Yap State: Penal Code, sec. 1103	Concurrent or consecutive, Plais v. FSM, 4 FSM Intrm. 153, 155 (App. 1989)	10, 14 for federal crimes; Chuuk State, Chuuck State Law sec. 301A; 10, 14 for federal crimes; Yap State, Yap State Code sec. 110; Yap State Code sec. 1207; 16 in Kosrae State, Kosrae State Law sec. 64802	No juvenile court, Code of Criminal Procedure, sec. 1104	No maximum indicated in law	No, Federal: Crimes, Title 11, Chapter 1, art. 102; Chuuk State: Criminal Code, sec. 13.101; Kosrae State: Criminal Code, sec. 13.101; Yap State: Penal Code, sec. 102
Monaco	No, Penal Code, art. 409	Yes, Penal Code, arts. 38-40	Concurrent, Criminal Procedure Code, art. 347	No set age, but can be held in custody starting at the age of 13; Thomas Hammarberg, Council of Europe: Commissioner for Human Rights, Report of the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, following his visit to Monaco on 20-21 October 2008, para. 10 (2008)	Unclear	20 years for serious offenses; Thomas Hammarberg, Council of Europe: Commissioner for Human Rights, Report of the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, following his visit to Monaco on 20-21 October 2008, paras. 2, 10 (2008)	Yes, prior to final judgment, Penal Code, art. 4
Mongolia	No, Penal Code, arts. 17.5, 52	Yes, considered an aggravating factor and must serve certain percentage of sentence, Penal Code, arts. 24, 52.11, 72.4	Concurrent, Penal Code, arts. 19, 57	14 for specific offenses, otherwise 16 (age of majority), Penal Code, art. 21	No juvenile court, but protections still apply, Criminal Procedure Law, arts. 364, 365, 369	15 years, Penal Code, art. 52	Yes, Penal Code, art. 12.1
Montenegro	No, Criminal Code, arts. 33, 35-37	Yes, Criminal Code, art. 44	Consecutive, capped at 30 years, Criminal Code, art. 48	16 for imprisonment, Criminal Code, arts. 80-81	No juvenile court, but juveniles are tried separately, Criminal Procedure Code, arts. 471-472	10 years, Criminal Code, art. 101	Yes, Constitution, art. 34
Morocco	No, Penal Code, arts. 49, 59	Yes, Penal Code, arts. 155-157	Concurrent, Penal Code, art. 118	12, Criminal Procedure Code, arts. 458, 473	Unknown	15 years, Criminal Procedure Code, art. 493; Penal Code, arts. 13, 162	Yes, Penal Code, art. 6
Mozambique	No, Penal Code, art. 55	Yes, Penal Code, arts. 34, 100	Consecutive, capped at 30 years, Penal Code, arts. 73, 102	Unclear; Statute of Legal Aid to Minors, art. 16; CRC/C/41/Add.11, 14 May 2001	Unknown	Unknown	Yes, Penal Code, art. 6
Myanmar	No, Criminal Code, arts. 57-59; Criminal Procedure Code, arts. 401-402; Prisoners Act, art. 33	Yes, Criminal Code, art. 75	Concurrent, Criminal Code, art. 71	7 with discernment, otherwise 12, Criminal Code, arts. 82-83	No, although slow to implement, CRIN; Myanmar: Children's Rights Reference in the Universal Periodic Review (2011); The Child Law, arts. 40-41, 44	10 years, The Child Law, art. 71	No, Criminal Code, art. 30(a)

Country	Life without parole sentences	Recidivism statutes	Concurrent or consecutive offenses from same act	Minimum Age of Criminal Responsibility	Transfer to Adult Court	Juvenile Maximum Sentence	Retroactive ameliorative law
Namibia	Yes, Criminal Procedure Act of 2004, sec. 307(1)(f), but see <i>S v Nehemia Tjijo</i> , 4/9/91 unreported, quoted in <i>S v Tcoelb</i> 1996 (1) SACR 390 (Nm5)	Yes, Criminal Procedure Act of 2004, secs. 309, 315	Concurrent or consecutive, Criminal Procedure Act of 2004, sec. 310	7, R.F. Zimba & E. Zimba, Windhoek, UNICEF and the Ministry of Women Affairs and Child Welfare, Review of the compliance of Namibian Domestic Legislation to the Convention on the Rights of the Child (2004)	Unknown	Unknown	No
Nauru	No, Criminal Justice Act, sec. 34(3); Criminal Justice (Amendment) Act 2009, Amendment of sec. 34 of the principal Act, sec. 4	Yes, Criminal Code Amendment Act of 1914, sec. 3 amending 659A, sec. 6 amending 659D	Concurrent or consecutive, Criminal Procedure Act, sec. 9	7, Criminal Code Act, sec. 29	No juvenile courts; Criminal Code Act, sec. 678	No maximum indicated, Criminal Code Amendment Ordinance 1952, sec. 655	No, Constitution, art. 81(b)
Nepal	No, Criminal Code Bill, 2011, sec. 41	Yes, Criminal Code Bill, 2011, art. 43	Unknown, but in any event: capped at 30 years, Criminal Code Bill, 2011, sec. 41	10, age of majority is 16, Children's Act, sec. 11, UNICEF, Regional Office for South Asia, Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law (2006)	Yes, UNICEF, Regional Office for South Asia, Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law 83, 86 (2006)	10-14; six months, 14-16 half the adult sentence, Children's Act, sec. 12, UNICEF, Regional Office for South Asia, Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law (2006)	No
Netherlands	Yes, Penal Code, art. 31(1)	Yes, Penal Code, art. 10	Consecutive, capped at 20 years, Penal Code, art. 10	12, Josine Junger-Tas, Youth Justice in the Netherlands, 31 Crime J. 293, 327 (2004)	Yes, Josine Junger-Tas, Youth Justice in the Netherlands, 31 Crime J. 293, 327 (2004)	6 years; Josine Junger-Tas, Youth Justice in the Netherlands, 31 Crime J. 293, 327 (2004)	Yes, prior to final judgment, Penal Code, art. 1
New Zealand	Yes, New Zealand Sentencing Act 2002, sec. 86E	Yes, New Zealand Sentencing Act 2002, sec. 86A-1	Concurrent or consecutive, New Zealand Sentencing Act 2002, secs. 23, 83	10 if discernment, otherwise 14, Crimes Act of 1961, secs. 21-22	Yes, Children, Young Persons, and Their Families Act 1989, No. 24, sec. 272	Unclear	Yes, New Zealand Bill of Rights Act 1990, sec. 25(g)
Nicaragua	No, Penal Code, art. 52	Yes, considered an aggravating factor; Penal Code, art. 36	Consecutive, capped at 30 years, Penal Code, art. 82	13, Dammert, Lucia, Zuniga & Liza, Prisons: Problems and Challenges for the Americas (Fiasco ed. 2009) citing Law 287 (1998)	Unknown	6 years, Colective de Derechos de Infancia y Adolescencia, Sentencias a prisión perpetua a personas menores de 18 años, Colectivo, available at http://www.colectivoinfancia.org.ar/V2/es/pepetuaphp (last visited Apr. 10, 2012)	Yes, Penal Code, art. 2
Niger	No, Criminal Procedure Code, art. 671	Yes, Penal Code, arts. 56-59	Concurrent, Penal Code, art. 55	13, Ordinance No 99-11 of May 14, 1999, art. 7	Yes, Ordinance No 99-11 of May 14, 1999, art. 9	30 years, Penal Code, arts. 46, 47	Yes, Constitution, art. 16
Nigeria	Yes, Gilbert da Costa, 'New Nigeria Law Would Give Kidnappers Life Term Imprisonment,' VOA, May 9, 2009	Yes, J. Nnamdi Aduba, 'Some Mitigating and Aggravating Factors in Nigerian Sentencing Practice,' 1991	Concurrent or consecutive, Nigeria Criminal Procedure Act, sec. 380; Nigeria Sharia Criminal Procedure Code, sec. 23; J. Nnamdi Aduba, 'A Review of Consecutive and Concurrent Sentencing Practice in Nigeria,' 1991	Nothern States: 7, Southern States, 7, Others: Based on Puberty; Penal Code art. 50; Criminal Code art. 30; CRC/C/70/Add.24/Rev.2, 2004	Unknown	Unknown	No, Constitution, sec. 36(4)(8), 36(4)(12)
Norway	No, Penal Code, secs. 17, 39	Yes, Penal Code, sec. 61	Consecutive, capped at twice sentence for most serious offense, Penal Code, sec. 62	15, General Civil Penal Code, sec. 46	No juvenile system, juvenile protections still apply, Council of Europe, Youth Policy in Norway 60 n.18 (2004)	Judge's Discretion, General Civil Penal Code, sec. 55	Yes, prior to final judgment, Penal Code, sec. 3
Oman	No, Penal Code, art. 76	Yes, Penal Code, arts. 115-116	Concurrent, Penal Code, art. 89	13 to be imprisoned, Penal Code, arts. 104-105	Unknown	10 years, Penal Code, arts. 106-107	No

Country	Life without parole sentences	Recidivism statutes	Concurrent or consecutive sentences for multiple offenses from same act	Minimum Age of Criminal Responsibility	Transfer to Adult Court	Juvenile Maximum Sentence	Retrospective ameliorative law
Pakistan	No, Criminal Code, art. 55	Yes, Criminal Code, art. 75	Concurrent, Criminal Code, art. 71	Under law, 7 if discernment otherwise 12; Federally Administered Tribal Areas on the Areas determined by puberty; Criminal Code, arts. 82-83, UNICEF Regional Office for South Asia, Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law 93-94 (2006)	No, although implementation has been slow, UNICEF Regional Office for South Asia, Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law 106 (2006)	Death penalty in federally administered areas, UNICEF Regional Office for South Asia, Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law 97 (2006)	No, Constitution, art. 12
Palau	Yes, National Code, Title 17, sec. 4205	Yes, considered at sentencing, National Code, Title 17, sec. 3102	Concurrent or consecutive, National Code, Title 17, sec. 4205	10 if discernment, otherwise sec. 106	No juvenile courts, 34 National Code Annotated, sec. 6104	No maximum indicated	Yes, specifically for parole, National Code, Title 18, sec. 10.187, 1220
Panama	No, Penal Code, art. 52	No	Consecutive, capped at 50 years, Penal Code, art. 52	12 for rehab, 14 for imprisonment, Dammert, Lucia, Zuniga & Liza, Prisons: Problems and Challenges for the Americas (Flasco ed., 2009), Law 40 on the Special Regime of Juvenile Criminal Responsibility (1999), Law No. 46 which amends articles in Law 40 (1999); Email from Annelie Urriola Vargas, Counselor; Permanent Mission of Panama to the United Nations, to author (Nov. 23, 2011, 09:25am PST) (on file with author)	Unknown	12 years, Email from Annelie Urriola Vargas, Counselor; Permanent Mission of Panama to the United Nations, to author (Nov. 23, 2011, 09:25am PST) (on file with author)	Yes, Penal Code, art. 14
Papua New Guinea	No, Criminal Code, art. 615	Yes, Criminal Code, arts. 606, 609-610	Concurrent (except for prison escape), Criminal Code, art. 20	7 if discernment, or 14, Criminal Code, sec. 30	Yes, but juvenile code still applies, Juvenile Courts Act of 1991, secs. 17-18	Unknown	Yes, Constitution, art. 37(7); Criminal Code, art. 11(2)
Paraguay	No, Penal Code, art. 38	No	Concurrent, Penal Code, art. 70	14, Código de la Niñez y la Adolescencia y Leyes Complementarias [Children and Adolescents Code and Complementary Laws], Ley no. 1680, art. 236	Unclear	8 years, Código de la Niñez y la Adolescencia y Leyes Complementarias [Children and Adolescents Code and Complementary Laws], Ley no. 1680, art. 207	Yes, Penal Code, art. 5
Peru	No, Penal Code, art. 29	No	Concurrent, Penal Code, art. 50	12, Código de los Niños y Adolescentes, [Children and Adolescents Code], arts. I, IV	No, Código de los Niños y Adolescentes, [Children and Adolescents Code], arts. 191-192	6 years, Código de los Niños y Adolescentes [Children and Adolescents Code], art. 195	Yes, Penal Code, art. 7
Philippines	No, Criminal Code, art. 27	Yes, Criminal Code, arts. 14, 62(5)	Consecutive, capped at 40 years, Criminal Code, art. 70	9 if discernment, or 15, if they did not have the maturity to understand the nature of their act, The Revised Penal Code, art. 12; Republic Act No. 9344, sec. 6	No, if no juvenile court in area tried in adult court but with juvenile protections, Republic Act No. 9344, secs. 4, 32	9-15; crimes is lowered by 2 degrees, 15-18; lowered by 1 degree, Revised Penal Code arts. 80 and 68	Yes, except for recidivists, Criminal Code, art. 22
Poland	No, Penal Code, art. 78	Yes, Penal Code, art. 64	Concurrent, Penal Code, art. 11	15 for specific offenses, otherwise 17 (age of criminal majority) Penal Code, art. 10	Yes, Barbara Stando-Kawecka, Continuity in the Welfare Approach; Juvenile Justice in Poland in International Handbook of Juvenile Justice (Jungler-Tas & Decker eds., 2006)	2/3 of the sentence for adults or max 25 years, Penal Code, art. 10; Barbara Stando-Kawecka, Continuity in the Welfare Approach; Juvenile Justice in Poland in International Handbook of Juvenile Justice 355 (Jungler-Tas & Decker eds., 2006)	Yes, prior to final judgment or if decriminalized, Penal Code, art. 4
Portugal	No, Constitution, art. 29(4)	Yes, Penal Code, arts. 76, 83	Consecutive, capped at 25 years, Penal Code, art. 77	16, Penal Code, art. 19	No, Penal Code, art. 9	Unknown	Yes, prior to final judgment or if decriminalized, Constitution, art. 29; Penal Code, art. 2

Country	Life without parole sentences	Recidivism statutes	Concurrent or consecutive sentences for multiple offenses from same act	Minimum Age of Criminal Responsibility	Transfer to Adult Court	Juvenile Maximum Sentence	Retroactive ameliorative law
Qatar	No, Penal Code, art. 61	Yes, Penal Code, art. 95	Concurrent, Penal Code, art. 84	7, age of majority is 16, Penal Code, art. 53	Unknown	10 years, Penal Code, art. 20; Juvenile Code, art. 19	Yes, prior to final judgment or if decriminalized, Penal Code, art. 9
Republic of Congo	No, Penal Code, art. 638	Yes, Penal Code, arts. 56-57	Unknown	13, Criminal Procedure Code art. 686	Unknown	Unknown	Yes, Penal Code, art. 6
Republic of Korea	No, Penal Code, art. 72	Yes, Penal Code, art. 35	Concurrent, Penal Code, art. 40	14, Penal Code, art. 9	No, Juvenile Act, art. 3	15 years, Juvenile Act, art. 59	Yes, Penal Code, art. 1
Republic of Moldova	No, Penal Code, art. 91	Yes, Penal Code, arts. 77, 82	Consecutive, capped at 25 years, Penal Code, arts. 70, 84	14 for specific offenses, otherwise 16, Penal Code, art. 21	No juvenile court, but juveniles are tried separately, Criminal Procedure Code, arts. 474-476	15 years, Penal Code, art. 70	Yes, Penal Code, art. 10
Romania	No, Penal Code, art. 139	Unknown	One sentence issued, but it is enhanced, and capped, Penal Code, art. 48	14 if discernment, otherwise 16, Penal Code, art. 113	Yes, but juvenile code still applies, Criminal Procedure Code, arts. 483, 485-486	15 years, Penal Code, art. 123	Yes, Penal Code, arts. 6-8
Russian Federation	No, Penal Code, art. 79	Yes, Penal Code, art. 68	Consecutive, capped at 30 years or life, Penal Code, art. 70	14 for specific offenses, otherwise 16, Penal Code, art. 20	Yes, but juvenile code still applies, Criminal Procedure Code, arts. 421-422, 154	Sentence cut in half for grave offenses, Penal Code, art. 88	Yes, Penal Code, art. 10
Rwanda	No, Penal Code, arts. 134-135	Yes, Penal Code, art. 85	Concurrent, Penal Code, art. 92	14, Penal Code, art. 77	No, Criminal Procedure Code, art. 192	20 years or half the sentence, Penal Code, art. 77	Yes, Penal Code, art. 100
Saint Kitts and Nevis	Unknown	Unknown	Unknown	8, Juvenile Act, art. 3	Unknown	"Detention during the Governor-General's pleasure" with occasional review, Offences Against the Person Act art. 3(1); Greene Browne v The Queen, Privy Council, Appeal No. 3 of 1998	Unknown
Saint Lucia	No, Penal Code, arts. 1140, 1149	Unknown	Concurrent or consecutive, Penal Code, art. 1107	12, if discernment, otherwise 16, Penal Code, art. 26	Unknown	Life Imprisonment, CRC/C/15/Add.258, September 2005, sec. 72	Unknown
Saint Vincent and the Grenadines	Unknown	Unknown	Unknown	8, Juveniles Act, Ch. 168, sec. 3; Criminal Code Ch. 124, sec. 12	Unknown	JLWOP/CRC/28/Add.18, 10 October 2001, para. 128	Unknown
Samoa	No, Prisons Parole Board Act, art. 10; Prisons Act, sec. 39A-B	No	Concurrent or consecutive, Criminal Procedure Act, sec. 114	10, Young Offenders Act, sec. 3	Yes, Young Offenders Act, sec. 6(5-6)	No maximum indicated in law, Young Offenders Act, sec. 16	No, Constitution, art. 10
San Marino	No, Penal Code, arts. 61, 81, 103	Yes, Penal Code, arts. 91, 93	Concurrent, Penal Code, art. 110	12, Penal Code, art. 10	Unknown	Sentence is reduced by 1 or 2 degrees, Penal Code, art. 10	Yes, Penal Code, art. 3
Sao Tome and Principe	No, Constitution, art. 37	Unknown	Unknown	17, Penal Code, art. 42; Statute on Judicial Assistance for Minors, arts. 15, 16	Unknown	Unknown	Yes, Penal Code, art. 36
Saudi Arabia	Unknown	Unknown	Unknown	Based on physical signs of puberty, Human Rights Watch, Adults Before Their Time: Children in Saudi Arabia's Criminal Justice System, sec. IV (2008)	Technically no, only tried in adult court if determined to be an adult based on signs of puberty, Human Rights Watch, Adults Before Their Time: Children in Saudi Arabia's Criminal Justice System, sec. IV (2008)	Death Penalty, Human Rights Watch, Adults Before Their Time, Children in Saudi Arabia's Criminal Justice System, sec. IV (2008)	Unknown
Senegal	No, Criminal Procedure Code, art. 699	Yes, Penal Code, arts. 42-43	Concurrent, Penal Code, art. 5	13, Penal Code, art. 52	No, Criminal Procedure Code, arts. 565-566	20 years or half the sentence, Penal Code, art. 52	Yes, Penal Code, art. 51
Serbia	No, Penal Code, arts. 45-46	Yes, considered an aggravating factor, Penal Code, art. 55	Consecutive, capped at 40 years, Penal Code, art. 60	14, Penal Code, art. 4	Yes, but juvenile code still applies, The Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles of Serbia, arts. 42, 46, 51-52	10 years, The Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles of Serbia, art. 29	Yes, Constitution, art. 197
Seychelles	Yes, Prisons Act, sec. 30	Yes, considered at sentencing, Seychelles v. Jse, Supreme Court of Seychelles, Criminal Side No. 75 of 2010	Concurrent or consecutive, Criminal Procedure Code, sec. 9(1); Penal Code, sec. 36	7, but can only be imprisoned at 14, Penal Code, art. 15; Childrens Act, art. 94(1)	Yes, Childrens Act, art. 93(1)	Unknown	No

Country	Life without parole sentences	Recidivism statutes	Concurrent or consecutive sentences for multiple offenses from same act	Minimum Age of Criminal Responsibility	Transfer to Adult Court	Juvenile Maximum Sentence	Retrospective ameliorative law
Sierra Leone	Yes, Keir Starmer, Theodora A. Christou, Human Rights Manual and Sourcebook for Africa, British Institute of International and Comparative Law, Bar Human Rights Committee of England and Wales at 867; interview with Sierra Leonean lawyer, Oct. 18, 2011.	Enhancements for recidivism in practice, not statute, interview with Sierra Leonean lawyer, Oct. 18, 2011.	Unknown	14, Child Rights Act, art. 70	Yes, Child Rights Act, art. 210; Rachel Harvey, The Children and Armed Conflict Unit, Juvenile Justice in Sierra Leone (2000)	JLWOP Rachel Harvey, The Children and Armed Conflict Unit, Juvenile Justice in Sierra Leone (2000)	No
Singapore	No, Criminal Code, arts. 53, 237-238	Yes, Criminal Code, art. 75	Concurrent, Criminal Code, art. 71	7, age of majority is 16, Children and Young Persons Act, sec. 2	Yes, Children and Young Persons Act, sec. 33	Adult sentences, 20 years, Children and Young Persons Act, secs. 37-38	No, Constitution, art. 11
Slovakia	Yes, Penal Code, art. 67	Yes, Penal Code, arts. 37, 38	Concurrent, Penal Code, sec. 41	15, Email from Alexandra Drakova, Advocacy and Education for Development Manager, UNICEF Slovensko, to author (Nov. 30, 2011, 3:40 PST) (on file with author)	No juvenile courts, but juvenile protections still apply, Code of Criminal Procedure, secs. 292, 296; Email from Alexandra Drakova, Advocacy and Education for Development Manager, UNICEF Slovensko, to author (Nov. 30, 2011, 3:40 PST) (on file with author)	15 years, Email from Alexandra Drakova, Advocacy and Education for Development Manager, UNICEF Slovensko, to author (Nov. 30, 2011, 03:40pm PST) (on file with author)	Yes, Penal Code, art. 2
Slovenia	No, Penal Code, art. 37; Dirk Van Zyl Smit, "Outlawing Irreducible Life Sentences: Europe on the Brink?" 23 Fed. Sent. Rep. 39, 40 (2010)	Yes, Penal Code, art. 46	Consecutive, capped at 30 years, Penal Code, art. 47	16 for detention, Penal Code, arts. 71-72	Yes, but juvenile code still applies, Criminal Procedure Act, arts. 456-457	10 years, Penal Code, art. 89	Yes, Constitution, art. 28
Solomon Islands	Yes, Prisons Act, Remission of sentence LN 10/1979, sec. 114	No	Concurrent or consecutive, Criminal Procedure Code, secs. 8-9	8 if discernment, otherwise 12, Penal Code, art. 14	Yes, Juvenile Offenders Act, art. 4; Penal Code, art. 36	JLWOP Juvenile Offenders Act, arts. 12, 13, 16	No, Constitution, art. 10
Somalia	No, Penal Code, art. 151	Yes, Penal Code, art. 124	Consecutive, capped at 30 years, Penal Code, art. 133	14, The Juvenile Courts and Reformatories Law 1970, art. 1	Unknown	30 years, Penal Code, arts. 60, 119	Yes, prior to final judgment or if decriminalized, Penal Code, art. 2
South Africa	No, Correctional Services Act 111 of 1998, sec. 73; Criminal Procedure Act, 2768, Nkosi & Others v S [2002] JOL 10209 (SCA)	Yes, Criminal Law Amendment Act, 105 of 1997, sec. 51	Concurrent or consecutive, Criminal Procedure Act, sec. 280	10, under 15 presumed to lack criminal capacity, but can be rebutted, Child Justice Act 75 of 2008, art. 7	Unclear, although Children's Act will always apply to the child, Child Justice Act 75 of 2008, arts. 63, 49	25 years, Child Justice Act 75 of 2008, art. 77	Yes, Constitution, art. 35(3)(n)
South Sudan	Unknown	Yes, Penal Code, sec. 77	Concurrent or consecutive, Code of Criminal Procedure, sec. 23	10, 14 if did not have the maturity, under 16 cannot be imprisoned, Penal Code Act, arts. 65, 49	Yes, Code of Criminal Procedure, art. 15	Over 16, adult sentences but parole or early release mechanism, Penal Code Act, art. 67; Code of Criminal Procedure, art. 24	No
Spain	No, Penal Code, arts. 76, 90	Yes, considered an aggravating factor, Penal Code, art. 22	Consecutive, capped at 40 years, Penal Code, art. 76	14, Cristina Rechea Alberola & Esther Fernandez Molina, Continuity and Change in the Spanish Juvenile Justice System, in International Handbook of Juvenile Justice 326-327 (Junger-Tas & Decker eds., 2006)	No, Cristina Rechea Alberola & Esther Fernandez Molina, Continuity and Change in the Spanish Juvenile Justice System, in International Handbook of Juvenile Justice 326-327 (Junger-Tas & Decker eds., 2006)	10 years, Cristina Rechea Alberola & Esther Fernandez Molina, Continuity and Change in the Spanish Juvenile Justice System, in International Handbook of Juvenile Justice 342 (Junger-Tas & Decker eds., 2006)	Yes, Penal Code, art. 2
Sri Lanka	No, Penal Code, art. 222	Yes, Penal Code, art. 68	Concurrent or consecutive, Penal Code, art. 16	8 if discernment, otherwise 12, age of majority is 16, Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law 105 (2006), available at http://www.unicef.org/rossa/juvenile_justice_in_south_asia.pdf	Yes, Children and Young Person's Ordinance, sec. 5(c)	"Detained at the President's pleasure" JLWOP Penal Code No. 2 of 1883 as amended, sec. 53.	No, Constitution, art. 10(13)

Country	Life without parole sentences	Recidivism statutes	Concurrent or consecutive offenses from same act	Minimum Age of Criminal Responsibility	Transfer to Adult Court	Juvenile Maximum Sentence	Retroactive ameliorative law
Sudan	No, Sudan Criminal Act, 1991, sec. 33(1); Sudan Criminal Procedure Act, 1991, sec. 208-209	Yes, Criminal Act 1991, secs. 39, 41	Concurrent, Criminal Act 1991, sec. 40	7, or whenever signs of puberty appear, Criminal Act 1991, sec. 9	Technically no, those who are tried in adult court have been found to be adults under Sharia's law through signs of puberty, Criminal Act 1991, sec. 3	Death for specific offenses, Criminal Act 1991, sec. 27	Yes, prior to final judgment, Criminal Act 1991, sec. 4(2)
Suriname	Unknown	Unknown	Unknown	10, Code of Criminal Procedure, art. 56, para. 1	Unknown	Unknown	Unknown
Swaziland	No, Constitution, art. 15(3); Criminal Procedure and Evidence Act, secs. 320, 322, 333	Unclear, can be detained at His Majesty's pleasure, Criminal Procedure and Evidence Act, sec. 302	Concurrent or consecutive, Criminal Procedure and Evidence Act, sec. 300	14, Criminal Procedure and Evidence Act, sec. 296(2)	No Juvenile Justice System, RATT-ESA, The African Report on Child Wellbeing, How Child-Friendly are African Governments?, Swaziland 2 (2011)	Detained at Majesty's Pleasure for death penalty offenses, Criminal Procedure and Evidence Act, sec. 296(2)	No
Sweden	Yes, Penal Code, Chapter 26, sec. 6; Catherine Appleton & Brent Grover, The Pros and Cons of Life Without Parole, 47 Brit. J. Criminology 597, 608 (2007)	Yes, Penal Code, Chapter 26, sec. 3; Chapter 29, sec. 4	One sentence issued, but it is enhanced, and capped, Penal Code, Chapter 26, sec. 2	15, Penal Code, sec. 6	No juvenile system, juvenile protections still apply, Jerzy Sarnacki & Felipe Estrada, Keeping the Balance Between Humanism and Penal Punitivism: Recent Trends in Juvenile Delinquency and Juvenile Justice in Sweden in International Handbook of Juvenile Justice 491-492 (Jungert-As & Decker eds., 2006); Email from Ida Nyberg, Assistant Attache (Legal Affairs) for the Permanent mission of Sweden to the United Nations, United Nations, to author (Nov. 29, 2011, 03:42pm PST) (on file with author)	14 years, Penal Code (Law 1988:942), Ch. 32; Ch. 30, sec. 5; Ch. 29, sec. 7	No
Switzerland	No, Penal Code, arts. 56, 62, 64	Yes, considered at sentencing, Penal Code, art. 47	One sentence issued, but it is enhanced, and capped, Penal Code, art. 49	10, detention only imposed on juveniles 15 or older; Federal Office of Justice, The Execution of Sentences and Measures in Switzerland; An Overview of the System and Execution of Sentences and Measures in Switzerland for Adults and Juveniles (Feb. 2010)	No, Federal Office of Justice, The Execution of Sentences and Measures in Switzerland. An Overview of the System and Execution of Sentences and Measures in Switzerland for Adults and Juveniles (Feb. 2010)	15-year-olds: 1 year; 16 or over: 4 years; Federal Office of Justice, The Execution of Sentences and Measures in Switzerland, An Overview of the System and Execution of Sentences and Measures in Switzerland for Adults and Juveniles (Feb. 2010)	Yes, Penal Code, art. 2
Syrian Arab Republic	Unknown	Yes, Penal Code, art. 251	Concurrent, Penal Code, art. 204	10, Juveniles Act No 18 of 1974, arts. 2 and 30	Unknown	Unknown	Yes, prior to final judgment or if decriminalized, Penal Code, arts. 2-4
Tajikistan	Yes, Penal Code, art. 76	Yes, Penal Code, arts. 21, 66	Consecutive, capped at 25 years, Penal Code, art. 67	14 for specific crimes, otherwise 16, Penal Code, art. 23	Unknown	15 years, Penal Code, art. 88	Yes, Constitution, art. 20; Penal Code, art. 13
Tanzania	Yes, Prisons Act (Cap. 34 of 1967), sec. 49, (1); Parole Boards Act (Act 25 of 1994), sec. 4(a)	Yes, Penal Code, sec. 298	Concurrent or consecutive, Penal Code, sec. 36; Criminal Procedure Act, sec. 168	7, 12, if discernment, Penal Code, art. 15; Children and Young Persons Act, art. 17	Yes, Juvenile Courts Act, sec. 283(1)	Detained at President's pleasure, Penal Code, secs. 22, 26	No, Constitution, art. 13 (6)(c)
Thailand	Unknown	Yes, Criminal Code, sec. 92	Concurrent, Criminal Code, sec. 90	14 for detention, Criminal Code, secs. 73-74	No, Duangporn Ukris, Juvenile Justice System in Thailand, 2	50 years, Criminal Code, sec. 18	Yes, if final judgment already issued, must petition court, Criminal Code, sec. 3
The former Yugoslav Republic of Macedonia	No, Penal Code, arts. 35, 36	Yes, considered at sentencing, Penal Code, art. 39	One sentence issued, but it is enhanced, and capped, Penal Code, art. 44	16 for detention, Penal Code, arts. 6(a), 72	Yes, but juvenile code still applies, Code of Criminal Procedure, art. 442	10 years, Penal Code, art. 87	Yes, Penal Code, art. 3
Timor-Leste	No, Constitution art. 32; Criminal Code, annex 1	Yes, Criminal Code, arts. 53-54	Consecutive, capped at 30 years, Criminal Code, art. 36	16, Criminal Code, art. 16	No, Criminal Code, art. 20	Unknown	Yes, Constitution, art. 31
Togo	No, Criminal Procedure Act, arts. 17, 511	Yes, Penal Code, arts. 9, 10	Consecutive, capped at 20 years or double the maximum of the highest sentence, Penal Code, art. 8	13, Criminal Procedure Code, art. 456	Yes, Criminal Procedure Code, art. 456	Half the sentence, cannot exceed 6 years; Criminal Procedure Code, arts. 467, 474-475	Yes, prior to final judgment, Penal Code, art. 1

Country	Life without parole sentences	Recidivism statutes	Concurrent or consecutive sentences for multiple offenses from same act	Minimum Age of Criminal Responsibility	Transfer to Adult Court	Juvenile Maximum Sentence	Retroactive ameliorative law
Tonga	No, Criminal Offences, arts. 198-200	Unknown	Unknown	7 if discernment, otherwise 12, Criminal Offenses, art. 16	No, Magistrate's Court Act, sec. 86	"Detention at His Majesty's pleasure," JLVOP; over 15 death penalty, Criminal Offences, art. 91	No, Constitution, art. 20
Trinidad and Tobago	Unknown	Unknown	Unknown	8 years, UNICEF, Juvenile Justice in the Caribbean: A Rights Approach to Children in the Juvenile Justice System (2000)	Unknown	Unknown	Unknown
Tunisia	No, Criminal Procedure Code, arts. 353-355	Yes, Penal Code, arts. 47-48	Concurrent, Penal Code, art. 54	13, Penal Code, art. 43	No, Code of Protection of the Child, art. 71	10 years, Penal Code, art. 43	Yes, Constitution, art. 13
Turkey	Yes, Penal Code, arts. 47(1), 48(1), 82(1); "Turkey Agrees to Death Penalty Ban," BBC, Jan. 9, 2004	Yes, considered at sentencing, Penal Code, art. 58	Concurrent, Penal Code, art. 44	12, Penal Code, art. 31(1)	No, UNICEF, Assessment of Juvenile Justice Reform Achievements in Turkey 20 (2009)	8 years, Penal Code, art. 31(2), (3)	No
Turkmenistan	Unknown	Unknown	Unknown	8, UNICEF, Juvenile Justice in Turkmenistan Fact Sheet (2011)	Unknown	Unknown	Unknown
Tuvalu	No, Prisons Act, sec. 49	No	Concurrent or consecutive, Penal Code, sec. 27; Criminal Procedure Code, sec. 9	10 if discernment, otherwise 14, Penal Code, sec. 14	Unclear, Penal Code, sec. 9	No maximum indicated in law	No
Uganda	No, Prisons Act of 2006, secs. 84(1), 86(3); Tigo v. Uganda, Supreme Court of Uganda, Criminal Appeal 8 of 2009, May 10, 2011	Yes, for rogue and vagabond and person found with intent to commit felony, Penal Code, arts. 168, 273, 300	Concurrent or consecutive, Trial on Indictments Act of 1971, sec. 2(2)	12, Children's Act, art. 88	Yes, but remanded for sentencing, Children's Act, arts. 93, 100	3 years, Children's Act, art. 94	No
Ukraine	Yes, Criminal Code, arts. 64, 81	Yes, considered at sentencing, Criminal Code, arts. 34-35	Consecutive, capped at 25 years or life, Criminal Code, art. 71	14 for specific offenses, otherwise 16, Criminal Code, art. 22	Yes, but juvenile provisions still apply, Code of Criminal Procedure, arts. 433, 439	15 years, Criminal Code, art. 102, as amended by Law No 270-VI (270-17) of 15.04.2008	Yes, Criminal Code, art. 5
United Arab Emirates	Unknown	Yes, Penal Code, arts. 106-108, 134	Concurrent, Penal Code, art. 87	7 years old, Penal Code, art. 63	Unknown	15 years, Penal Code, art. 68	Yes, prior to final judgment or if decriminalized, Penal Code, art. 13
United Kingdom of Great Britain and Northern Ireland	Yes, Criminal Justice Act 2003, sec. 269(4), Schedule 21, para 4(1) and (2), Schedule 22, para 3; Winter and Others v United Kingdom, Applications nos. 66069/09 and 130/10 and 3896/10, Strasbourg, Jan. 17, 2012	Yes, Powers of Criminal Courts (Sentencing) Act 2000, sec. 109	Concurrent or consecutive, See, e.g., R v O'Brien and others [2006] EWCA Crim 1741; R v O'Halloran [2006] EWCA Crim 3148; R v C and others [2007] EWCA Crim 680	England, Wales and Northern Ireland: 10; Scotland: 8, John Graham & Colleen Moore, Beyond Welfare Versus Justice: Juvenile Justice in England and Wales in International Handbook of Juvenile Justice 72-73 (Junger-Tas & Decker eds., 2006); The Criminal Justice (Children) Northern Ireland Order 1998, art. 3	England and Wales: Yes; Scotland: Yes; Northern Ireland: Yes; John Graham & Colleen Moore, Beyond Welfare Versus Justice: Juvenile Justice in England and Wales in International Handbook of Juvenile Justice 463-465 (Junger-Tas & Decker eds., 2006); The Criminal Justice (Children) Northern Ireland Order 1998, arts. 27, 28	England and Wales: Adult penalties; Northern Ireland: Imprisonment can be for as long as the court finds necessary, but it cannot be life without parole or death penalty, John Graham & Colleen Moore, Beyond Welfare Versus Justice: Juvenile Justice in England and Wales in International Handbook of Juvenile Justice 88 (Junger-Tas & Decker eds., 2006); Michele Burman et al., The End of an Era?: Youth Justice in Scotland in International Handbook of Juvenile Justice 441 (Junger-Tas & Decker eds., 2006); The Criminal Justice (Children) Northern Ireland Order 1998, art. 45	No
United States of America	Yes, see report section on Life without Parole	Yes, see report section on Recidivist/Habitual Offender statutes	Concurrent or consecutive, see report section on consecutive sentences	0, 6, 7, 8, 10 depending on the state, Don Cipriani, Children's Rights and the Minimum Age of Criminal Responsibility 221-222, (Ashtgate, 2009)	Yes, David O. Brink, Immaturity, Normative Competence, and Juvenile Transfer: How (Not) To Punish Minors for Major Crimes, 82 Tex. L. Rev. 1555, 1563 (2004)	JLVOP; Commis de la Vega & Michelle Leighton, Sentencing Our Children to Die in Prison: Global Law and Practice, 42 USF L. Rev. 983, 990 (2008)	No, see report section on Retroactive Ameliorative Law
Uruguay	No, Penal Code, arts. 68, 131	Yes, Penal Code, arts. 48-49, 108-109, 123	One sentence issued, enhanced capped, Penal Code, art. 54	13, Código de la Niñez y la Adolescencia [Children and Adolescents Code], Ley 17.823, art. 74	No, Código de la Niñez y la Adolescencia [Children and Adolescents Code], Ley 17.823, art. 67	5 years, Código de la Niñez y la Adolescencia [Children and Adolescents Code], Ley 17.823, art. 91	Yes, Penal Code, arts. 12, 15

Country	Life without parole sentences	Recidivism statutes	Concurrent or consecutive sentences for multiple offenses from same act	Minimum Age of Criminal Responsibility	Transfer to Adult Court	Juvenile Maximum Sentence	Retroactive ameliorative law
Uzbekistan	Yes, Penal Code, art. 73	Yes, Penal Code, art. 34	Concurrent or consecutive, Penal Code, art. 59	13. Email from Chrissie Gale, Child Protection Specialist, UNICEF office in Tashkent, to author (Nov. 18, 2011, 10:59pm PST) (on file with author)	No juvenile system. Email from Chrissie Gale, Child Protection Specialist, UNICEF office in Tashkent, to author (Nov. 18, 2011, 10:59pm PST) (on file with author)	15 years; Penal Code, art. 86; Email from Chrissie Gale, Child Protection Specialist, UNICEF office in Tashkent, to author (Nov. 18, 2011, 10:59pm PST) (on file with author)	Yes, Penal Code, art. 13
Vanuatu	No, Correctional Services Act, sec. 51; Penal Code, arts. 45-46	No	Concurrent, Penal Code, art. 39	10, Penal Code, art. 17	Unknown	Not specified, but eligible for parole after 8 years; Penal Code, art. 38; Correctional Service Act, art. 51	No
Venezuela	No, Constitution, art. 44(3)	Yes, Penal Code, arts. 100-101	Consecutive, capped at 30 years; Penal Code, arts. 88, 94	12, 15 unless act is done with discernment; Penal Code, art. 69	No, Ley Organica para la Proteccion del Niño y del Adolescente [Organic Law of Child and Adolescent Protection], arts. 526-527	12-14; 2 years; 15-18; 5 years; Ley Organica para la Proteccion del Niño y del Adolescente [Organic Law of Child and Adolescent Protection], art. 628	Yes, Constitution, art. 24; Penal Code, art. 2
Viet Nam	No, Criminal Code, arts. 3(4), 34, 38	Yes, Criminal Code, art. 49	Consecutive, capped at 30 years or life; Criminal Code, art. 50	14, but the age of majority is 16; Criminal Code, arts. 12, 68	No juvenile courts; but protections apply; Criminal Code, art. 302	16-18; 18 years; 14-16; 12 years; Criminal Code, arts. 69, 74	Yes, Criminal Code, art. 7
Yemen	No, Penal Code, art. 39	Yes, Penal Code, art. 298	Concurrent or consecutive; Penal Code, arts. 110-111	7; Republican Decree for Law No 12 for the Year 1994 Concerning Crimes and Penalties, art. 31	Unclear; Republican Decree for Law No 12 for the Year 1994 Concerning Crimes and Penalties, art. 31	10 years; Republican Decree for Law No 12 for the Year 1994 Concerning Crimes and Penalties, art. 31	Yes, but only if crime is repealed in entirety; Penal Code, art. 4
Zambia	No, Penal Code, art. 41	Yes, Penal Code, art. 305	Concurrent, Penal Code, art. 36	8, 12, if no discernment; Penal Code, sec. 14	Unknown	Detained for the President's pleasure, JLWOR; Penal Code, sec. 25	No
Zimbabwe	Yes, Criminal Procedure and Evidence Act (ch 9:07), sec. 344A	No	Concurrent or consecutive; Criminal Procedure Code, sec. 343	7 if discernment, otherwise 14; Criminal Code, secs. 6-7	No, but, if no juvenile court tried in adult court as a juvenile, Children's Protection and Adoption Act, secs. 3-4	No death penalty; juveniles can get adult sentences; Email from Anthony Nolan, Child Protection Specialist, UNICEF, to author (Dec. 5, 2011, 10:44pm PST) (on file with author); Email from Caleb Mutandwa, Programmes Director Justice for Children Trust, to Author (Dec. 9, 2011, 04:19am PST) (on file with author)	No

CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT

With almost 2.3 million prisoners, the United States has the highest incarceration rate in the world. Three decades of “tough-on-crime” initiatives have burdened the legal system and prisons themselves. New laws have increased the likelihood and length of prison sentences including mandatory minimum sentences, three strikes laws, increased use of life without parole sentences, and stacking punishments through consecutive sentences. Juvenile offenders are frequently transferred to adult court where they receive lengthy adult sentences, potentially at almost any age. Changes in sentencing laws that could benefit offenders and alleviate the pressure on the prison system are not automatically applied retroactively. This combination of punitive sentencing practices creates a system where more people are in prison for longer periods than ever before. This system-wide focus on retributive laws and practices has resulted in a penal system out of step with the rest of the world.

Cruel and Unusual, a report produced by the USF School of Law’s Center for Law and Global Justice, is an in depth study of the world’s sentencing laws and international human rights law. Research indicates that the United States is in the minority of countries to sentence people to life in prison without the possibility of parole and among only 21% of countries that allow uncapped consecutive sentences for multiple crimes arising out of the same act. The United States is one of 16% of countries that allow juveniles to be tried and sentenced as adults. While 67% of the world’s countries require a change of law that benefits offenders to be applied retroactively, the U.S. is not one of them. The United States is one of three countries that allow a defendant to be tried by both the federal and state government for the same crime. U.S. sentencing practices as a whole are far harsher than the rest of the world.

The University of San Francisco School of Law has a long tradition of educating students to be effective lawyers with a social conscience, high ethical standards, and a global perspective. USF School of Law supports cutting edge scholarly research and activism advancing social justice causes, such as co-author Professor Connie de la Vega’s amicus brief, cited by the U.S. Supreme Court in the landmark case of *Roper v. Simmons* which abolished the juvenile death penalty. The Center for Law and Global is a focal point of the law school’s commitment to international justice and globally-minded legal education. The Center’s work includes the Project to End Juvenile Life Without Parole and its coordination with de la Vega on international law arguments cited in the 2010 Supreme Court decision prohibiting juvenile life without parole sentences for non-homicide crimes in *Graham v. Florida*. Professor de la Vega and the Frank C. Newman International Human Rights Clinic continue to raise these issues at the United Nations and with the U.S. Supreme Court. The Center’s previous report, *Sentencing Our Children to Die in Prison*, examines juvenile life without parole sentences from an international human rights and comparative law perspective.



Center for Law and Global Justice

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