



I. EXECUTIVE SUMMARY

1. This submission addresses the United States' compliance with its human rights obligations with regard to its use of the death penalty. This submission concludes that the United States, in continuing to allow a sentence of death, does not guarantee its citizens adequate protection against cruel and unusual punishment, freedom from discrimination, rights to life, liberty and security of person, due process, and equal protection. It also is failing to provide an adequate remedy for those whose rights are violated.

2. During the United States' last Universal Periodic Review in 2010, the U.S. received 22 recommendations on the death penalty,¹ including many recommendations by countries calling for the U.S. to implement a moratorium on the death penalty.² The U.S. rejected most of these recommendations, including all recommendations calling for a moratorium on the death penalty.³

¹ U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, United States, U.N. Doc. A/HRC/16/11 (4 Jan. 2011), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/100/69/PDF/G1110069.pdf?OpenElement>. Paras. 48-50, 95, 118-135

² U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, United States, U.N. Doc. A/HRC/16/11 (4 Jan. 2011), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/100/69/PDF/G1110069.pdf?OpenElement>. France (92.95), Sweden (92.118), Russian Federation (92.119), United Kingdom, Belgium, Switzerland, Italy, Uruguay, New Zealand, Netherlands (92.120), Cyprus (92.121) Australia, Hungary, Norway (92.122), Slovakia (92.123), Turkey (92.124), Germany (92.125), Ireland, Holy See (92.127), Nicaragua (92.128), Algeria (92.129), Spain, Denmark (92.132); Report of the Working Group on the Universal Periodic Review: United States of America. (Para. 95, 118-135).

³ U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, United States, U.N. Doc. A/HRC/16/11/Add.1 (8 March. 2011), para. 9, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/116/28/PDF/G1111628.pdf?OpenElement>.

The U.S. supported one recommendation by France to identify and eliminate the factors behind racial disparity in the death penalty (U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, United States, U.N. Doc. A/HRC/16/11 (4 Jan. 2011), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/100/69/PDF/G1110069.pdf?OpenElement>. Para. 92.95).

The United States supported three additional recommendations in part including ensuring the death penalty complies with international obligations, ending executions for minors,³ and ending executions for persons with intellectual disabilities (U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, United

3. Thirty-two states, the U.S. federal government, and the U.S. military retain the death penalty. Since the United States' last review before the Council in 2010, the number of states retaining the death penalty has decreased. Three states—Maryland (2013), Connecticut (2012), Illinois (2011)—have since abolished the death penalty. During that same time period, however, 152 inmates were executed nationwide; 70 of those executed – or 46% of the total – were non-white.⁴

4. This report addresses four main issues with regard to the United States' use of the death penalty:

- **Innocence.** The U.S.'s legal system has wrongfully convicted and sentenced innocent persons to death. Since 1973, 146 individuals have been exonerated from death row, and a recent study suggests that if all death-sentenced defendants in the United States remained under sentence of death indefinitely, at least 4.1% would be exonerated. At least 10 individuals have been executed in the U.S. despite strong evidence of their innocence.

When exonerees are released, they face numerous challenges in reintegrating into society including social, economic, and legal hurdles. The right to compensation for wrongful imprisonment varies widely from state-to-state, so exonerees from different states are not guaranteed equivalent compensation. Sixteen retentionist U.S. states do not have compensation laws for wrongfully convicted individuals. In states that do have compensation laws, exonerees often must overcome onerous procedural and eligibility barriers. If they succeed, the compensation they may receive can be meager and fall short of the corollary federal standards.

- **Lethal Injection.** All of the 32 retentionist U.S. states and the U.S. federal government use lethal injection as the primary means of executing prisoners. The traditional three-drug lethal injection procedure has come under constitutional challenge in a number of states for causing cruel and unusual punishment in violation of the Eighth Amendment of the U.S. Constitution. The U.S. Supreme Court held the lethal injection method used by Kentucky does not qualify as cruel and unusual punishment. Since then, several foreign governments and the European Union have restricted the supply of drugs used in executions. As these drugs have become increasingly harder to obtain, U.S. states have turned to other drugs to administer a lethal dose. In turn, pharmaceutical companies have refused to supply these drugs for execution purposes in the United States. In response, states have turned to questionable sources—including compounding pharmacies selling drugs that are not FDA⁵-approved—to obtain the drugs required to administer executions. Several U.S. states have passed secrecy laws to conceal the identities of these drug suppliers, thus allowing states to withhold critical information to detainees seeking assurances about the drugs' quality and effectiveness and barring them from bringing a

States, U.N. Doc. A/HRC/16/11/Add.1 (8 March. 2011), para. 8, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/116/28/PDF/G1111628.pdf?OpenElement>.). The United States refused to exclude persons with mental illnesses from the application of the death penalty and reiterated its continued refusal to abolish the death penalty in its entirety (Ibid, para. 9).

⁴ Citations omitted, citing various sources from the Death Penalty Information Center, www.deathpenalty.org (last visited Aug. 28, 2014).

⁵ Food & Drug Administration (FDA).

legal challenge to the method of execution. Obtaining execution drugs outside of federal regulation increases the risk of tampering and reduced drug efficacy, heightening the risk of cruel or unusual punishment during an execution.

- **Consular Notification.** The United States is a party to the Vienna Convention on Consular Relations (VCCR), and Article 36 requires States Parties arresting or detaining foreign nationals to notify them of their right to communicate with consular officials. The United States has failed many times to comply with its consular notification duties in capital cases, and the International Court of Justice (ICJ) ordered the United States to provide review and reconsideration of the cases of 51 Mexican nationals who had been sentenced to death. To date, the United States has failed to pass implementing legislation to give effect to the ICJ's decision, and in the meantime, Texas has since executed four Mexican nationals who were covered by that ICJ decision. Only a handful of U.S. courts have recognized the availability of judicial remedies for consular notification violations; however, procedural default rules can still bar remedies for foreign nationals who failed to raise the VCCR claim at the right time or in the right way.
- **Puerto Rico.** Puerto Rico has been an abolitionist territory for 85 years, with both constitutional prohibition and historical opposition to capital punishment. However, federal prosecutors aggressively seek the death penalty in Puerto Rico, a territory with a nearly 100% Hispanic population,⁶ at a higher rate than in other states.⁷ The composition of juries in the territory is unfairly skewed, because only those who can speak a significant amount of English may sit on a jury, and those who are unwilling to impose the death penalty are almost certainly stricken despite widespread rejection of capital punishment among Puerto Ricans. Finally, on U.S. states' death rows, Puerto Ricans are overrepresented nationwide.

II. PROTECTION OF HUMAN RIGHTS ON THE GROUND

I. Wrongful Convictions and the Right to an Effective Remedy

5. Wrongful convictions are a grave concern in the United States. **Since 1973, 146 individuals have been exonerated from death row.**⁸ If all death-sentenced defendants in the United States remained under sentence of death indefinitely, at least 4.1% would be exonerated.⁹

6. Available information points to an even **graver concern that there have been at least ten individuals who were likely innocent but executed**, and that additional innocent individuals are at risk of being executed in the future.¹⁰

⁶ Mark Hugo Lopez, Gabriel Velasco, *A Demographic Portrait of Puerto Ricans*, PEW RESEARCH: HISPANIC TRENDS PROJECT, <http://www.pewhispanic.org/2011/06/13/a-demographic-portrait-of-puerto-ricans/> (last visited Sept. 8, 2014).

⁷ See generally FEDERAL DEATH PENALTY RESOURCE COUNSEL, available at https://www.capdefnet.org/FDPRC/pubmenu.aspx?menu_id=94&id=1902 (last visited July 6, 2014).

⁸ *Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row?scid=6&did=110> (last visited Aug. 25, 2014).

⁹ *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES, available at <http://www.pnas.org/content/111/20/7230.full> (last visited Aug. 28, 2014).

7. There are several reasons for wrongful convictions.¹¹ The National Registry lists the following most common causal factors for all exonerations: perjury or false accusation (56%); official misconduct (46%); and mistaken eyewitness identification (38%).¹² According to the Innocence Project, of the 230 people who have been exonerated through DNA testing in the United States, 75% involved eyewitness misidentification.¹³

8. Individuals who are exonerated and released from prison face numerous challenges in rebuilding their lives. Almost all exonerees possess no assets when released, one-third have lost child custody due to their wrongful imprisonment, and many face severe challenges in obtaining employment or housing.¹⁴ A study by the Life After Exoneration Program found that one-half of exonerees reside with their family, and that two-thirds are not economically independent.¹⁵ Securing employment and appropriate housing is difficult for exonerees because expungement of the wrongful conviction from their criminal record is not automatic.¹⁶

9. Many exonerees have spent years in prison while others in their age group have completed their education, acquired job skills, or progressed on career paths.¹⁷ In-prison educational programs are not available to many death row inmates, and they are often denied job training, literacy, and GED classes given their sentence of death.¹⁸

10. In addition to economic and legal needs, exonerees have health care needs as many are affected by institutionalization;¹⁹ Post-Traumatic Stress Disorder affects one-fourth of exonerees.²⁰ Only 10 of the 50 U.S. states' compensation laws provide for social services, and a recent report by The Innocence Project found that just 15 exonerees had accessed these

¹⁰ According to the Death Penalty Information Center, at least ten men with strong evidence of their innocence have been executed. See *Executed But Possibly Innocent*, DEATH PENALTY INFORMATION CENTER, <http://deathpenaltyinfo.org/executed-possibly-innocent> (last visited Aug. 25, 2014). These persons include Troy Davis, Cameron Todd Willingham, Claude Jones, Gary Graham, Leo Jones, David Spence, Joseph O'Dell, Larry Griffin, Ruben Cantu, and Carlos DeLuna.

¹¹ Some of the reasons for wrongful convictions include eyewitness misidentification, poor forensics ("junk science"), false confessions, snitch testimony, government misconduct, and ineffective assistance of counsel. *Causes of Wrongful Convictions*, DEATH PENALTY INFORMATION CENTER,

¹² *Exonerations in 2013*, THE NATIONAL REGISTRY OF EXONERATIONS, 15 (Feb. 4, 2014) 17, available at https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf.

¹³ *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of Misidentification*, THE INNOCENCE PROJECT, at 3, http://www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf (last visited Aug. 25, 2014) [hereinafter *Reevaluating Lineups*].

¹⁴ *Remedies*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=95&Itemid=88 (last visited June 25, 2014).

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 8.

¹⁸ *Facts on Exoneration*, RESURRECTION AFTER EXONERATION, <http://www.r-a-e.org/about/facts-exoneration> (last visited June 25, 2014).

¹⁹ *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 7. "Institutionalization" refers to how prisoners adjust to surviving the hostile living environment conditions of a prison. *Id.*

²⁰ *Remedies*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=95&Itemid=88 (last visited June 25, 2014).

services.²¹ Many lack adequate access to health care, and the problem is exacerbated as exonerees are not automatically eligible for Medicaid.²² Because exonerees often work in short-term or low-paying jobs, they are often not provided health benefits through their employer, either.²³

11. Compensation is not guaranteed to exonerees for wrongful convictions and imprisonment, and it is a process fraught with barriers. Some states have adopted compensation statutes,²⁴ yet they often have restrictions and fall short of adequate reparation. Several of these statutes provide compensation at archaic levels.²⁵ Even when an exoneree successfully obtains compensation, the money may be redirected toward basic needs and legal fees. Kirk Bloodsworth, who was wrongfully imprisoned by the state of Maryland for nine years (two years of which were on death row), applied for and received \$300,000 from the Maryland Board of Public Works. Most of the compensation, however, went toward paying legal fees Kirk Bloodsworth incurred by his wrongful conviction.²⁶

12. In contrast, the U.S. federal government passed The Innocence Protection Act, which grants a maximum of \$100,000 per year for wrongful imprisonment on federal death row.²⁷ The majority of states' compensation laws, however, do not meet the U.S. federal standard of compensation.²⁸ This compensation does not apply to exonerees wrongfully imprisoned by states, yet these individuals are the vast majority of exonerees.

13. State compensation laws also restrict eligibility and may impose filing deadlines,²⁹ some states impose limitations that bar individuals from bringing claims for compensation,³⁰ and

²¹ *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 16. The 15 exonerees may include both death sentenced and non-death sentenced individuals.

²² *Id.* at 8.

²³ *Ibid.*

²⁴ These statutes may variously provide an award based on actual damages, amount of time spent wrongfully accused, targeted aid (such as an education grant or health services), or a capped sum *Compensation Laws*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited June 25, 2014); *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 29.

²⁵ For example, New Hampshire's compensation law grants a maximum award of just \$20,000 regardless of the number of years spent wrongfully imprisoned. (N.H. Rev. Stat. Ann. § 541-B: 14; *see also Compensation Laws*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited June 25, 2014); *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 30.). Texas' legislation grants \$80,000 per year wrongfully imprisoned with no cap, but it bars an exoneree from filing a civil lawsuit. (Tex. Civ. Pract. & Rem. Code § 103.001; Tex. H.B. § 1736; *see also Compensation Laws*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited June 25, 2014); *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 30.)

²⁶ K. Bloodsworth, Personal Communication, Aug. 15, 2013.

²⁷ U.S. Senate, The Innocence Protection Act of 2002, 107th Cong., 2d sess., S.486, March 7, 2001.

²⁸ *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 15.

²⁹ *Compensation Laws*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited June 25,

several states render any exoneree who entered a guilty plea ineligible.³¹ In some states, the exoneree must not have “contributed” to his or her arrest or conviction to be eligible for an award.³² These restrictions do not reflect the factors contributing to wrongful convictions in the first place, such as false confessions.³³

14. Even when exonerees overcome these hurdles and successfully claim compensation, it can take years to receive the money. The average amount of time to obtain state compensation is three years.³⁴ Resurrection after Exoneration reports that exonerees from Louisiana’s prison system receive their possessions and \$10 upon release.³⁵ Glenn Ford was wrongfully imprisoned for more than thirty years before being exonerated. He was given only a debit card worth \$20 upon his release in early 2014. He and his lawyers will file for compensation to which he is legally entitled, but such **compensation is not guaranteed.**³⁶ Albert Burrell was released from Louisiana’s death row after serving 14 years for a crime he did not commit. Upon his release, the state gave Burrell \$10 and a denim jacket that was several sizes too large for him. Burrell has filed for compensation under Louisiana’s compensation law, but was denied compensation on July 17, 2014, 13.5 years after his release.³⁷ The court justified its decision by stating Burrell was unable to show, by clear and convincing evidence, that he was factually innocent of the crime.³⁸ But securing employment, housing, health care, and other basic needs poses an immediate challenge to these exonerees upon their release, and the support (if any) they receive upon release can be woefully inadequate.

2014). For example, in Tennessee and Utah, the deadline to bring a claim is one year. (Tenn. Code Ann. § 9-8-108; Utah Code §§ 78B-9-405, 78B-9-405; *see also Compensation Laws, LIFE AFTER EXONERATION PROGRAM*, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited Sept. 8, 2014).

³⁰ Alabama and Texas’ compensation statutes disqualify anyone with a post-exoneration felony conviction (Tex. Civ. Pract. & Rem. Code § 103.154; Ala. Code § 29-2-159); and Missouri and Montana grant awards only to persons exonerated by DNA (Mo. Rev. Stat. § 650.058; Mont. Code Ann. § 53-1-214. Montana’s compensates a DNA exoneree through educational aid only. Mont. Code Ann. § 53-1-214.).

³¹ *Compensation Laws, LIFE AFTER EXONERATION PROGRAM*, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited Sept. 8, 2014); *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 27 and 29.

³² *Compensation Laws, LIFE AFTER EXONERATION PROGRAM*, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited Sept. 8, 2014); *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 27-31.

³³ For example, disqualification for pleading guilty fails to take into account cases where false confessions led to wrongful convictions; in one study, false confessions constituted nearly 8% of the causes behind wrongful convictions (*Causes of Wrongful Convictions*, DEATH PENALTY INFORMATION CENTER, <http://deathpenaltyinfo.org/causes-wrongful-convictions> (last visited Sept. 8, 2014).

³⁴ *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 17.

³⁵ *Facts on Exoneration, RESURRECTION AFTER EXONERATION*, <http://www.r-a-e.org/about/facts-exoneration> (last visited Sept. 8, 2014).

³⁶ Andrew Cohen, *Glenn Ford’s First Days of Freedom after 30 Years on Death Row*, The Atlantic, March 14, 2014, <http://www.theatlantic.com/national/archive/2014/03/glenn-fords-first-days-of-freedom-after-30-years-on-death-row/284396/>.

³⁷ *Albert Ronnie Burrell v. Louisiana State, Reasons for Judgment*, Case No. 00000042613, Div. B 3d Jud. Dist. Ct., Parish of Union, State of Louisiana, July 17, 2014. C. Lloyd, Personal Communication, Aug. 15, 2013.

³⁸ *Ibid.*

15. Sixteen U.S. states that retain the death penalty have no compensation laws whatsoever for wrongful convictions. Civil litigation is another possibility to obtain compensation where compensation laws do not exist, but this option is unavailable when prosecutors and judges are at fault because of lawsuit immunity.³⁹ The immunity bar is extremely high, particularly after 2011. John Thompson received \$10 and a bus ticket upon exoneration after 18 years in prison, 14 of which were on Louisiana’s death row. He successfully sued the local New Orleans Parish District Attorney’s office for \$14 million, only to have the U.S. Supreme Court overturn the decision by holding the prosecutor’s office could not be held liable in this case.⁴⁰ This decision effectively expanded prosecutors’ immunities against lawsuits for their misconduct, and it also revoked John Thompson’s compensation. Even if an exoneree prevails in his or her civil claim, it can take years and accrue costly litigation fees.⁴¹

II. Lethal Injection Policies and Cruel, Inhuman or Degrading Treatment or Punishment

16. All 32 U.S. states that still retain the death penalty have adopted lethal injection as the exclusive or primary means of implementing capital punishment.⁴²

17. Lethal injection was traditionally administered by injecting a prisoner with three consecutive drugs.⁴³ Proper administration of the first drug should prevent pain⁴⁴ caused by the second and third drugs,⁴⁵ but this was not always the case due to inexperienced technicians administering these drugs. Despite a spate of horrific executions, the U.S. Supreme Court held in 2008 that Kentucky’s three-drug method of lethal injection does not constitute “cruel and unusual punishment” in violation of the Eighth Amendment of the U.S. Constitution.⁴⁶ The Supreme Court ruled that “[s]imply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of ‘objectively intolerable risk of harm’ that qualifies as cruel and unusual [punishment]” under the Eighth Amendment.⁴⁷

18. Although the *Baze* decision did not require a change to the traditional three-drug protocol, **the U.S. lethal injection process has nonetheless faced upheaval over the last several years.** Challenges to other U.S. states’ lethal injection procedures have since been brought in other state

³⁹ *Remedies*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=95&Itemid=88 (last visited Sept. 8, 2014); *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 12.

⁴⁰ *Connick v. Thompson*, 131 S. Ct. 1350 (2011).

⁴¹ *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT, 2009, at 13.

⁴² *Methods of Execution*, DEATH PENALTY INFORMATION CENTER, <http://deathpenaltyinfo.org/methods-execution> (last visited Aug. 25, 2014).

⁴³ (1) sodium thiopental, a “barbiturate sedative that induces a deep, coma-like unconsciousness;” (2) pancuronium bromide, “a paralytic agent that inhibits muscular-skeletal movements and . . . stops respiration;” and (3) potassium chloride, which “interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest.” *Baze v. Rees*, 553 U.S. 35, 44 (2008).

⁴⁴ from the paralysis and cardiac arrest

⁴⁵ *Ibid.*

⁴⁶ *Baze v. Rees*, 553 U.S. 35 (2008). Insert here the language from para. 23

⁴⁷ *Id.* at 50.

courts and, in some cases, have halted executions pending litigation.⁴⁸ Recent upheavals regarding drug sourcing have cast into serious doubt whether states can ensure their lethal injection policies do not constitute cruel and unusual punishment.

19. New policies adopted by foreign governments and regional authorities have hindered U.S. states' ability to procure the drugs necessary to administer lethal injections. In 2010, the UK government issued export restrictions on sodium thiopental after learning the drug was used for executions in the United States.⁴⁹ In early 2011, the Italian government requested that Hospira Inc., the world's largest manufacturer of sodium thiopental, guarantee that any drugs it produced would not be used for executions.⁵⁰ Hospira responded it was unable to guarantee compliance and halted production of sodium thiopental altogether.⁵¹ In December 2011, the European Commission (EC) of the EU tightened restrictions on exporting products that can be used for capital punishment.⁵² The EC's so-called "Torture Goods Regulation" imposes export controls on eight barbiturates⁵³ and reiterates the moral opposition of European governments to capital punishment and their resistance to further the practice in any way.

20. In addition to the policies adopted by foreign governments and the EU, the international business community has also begun taking steps to curtail its role in lethal injections. In February 2011, multinational pharmaceutical company Novartis and its subsidiary Sandoz announced they instructed distributors to stop selling sodium thiopental to other customers who had been importing it into the U.S.⁵⁴ Kayem Pharmaceuticals also stopped selling sodium thiopental,⁵⁵ and a host of other pharmaceutical manufacturers have openly opposed the use of their drugs in executions as well.⁵⁶

21. As U.S. states face growing barriers to obtaining execution drugs, they have begun to turn to unregulated and non-transparent sourcing for lethal injection drugs. As they do so, concerns about whether lethal injection constitutes cruel and unusual punishment have escalated. Some states are obtaining drugs from compounding pharmacies, which produce drugs that are

⁴⁸ See *State-by-State Lethal Injection*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Aug. 25, 2014).

⁴⁹ Dominic Casciana, *US Lethal Injection Drug Faces UK Export Restrictions*, BBC NEWS, Nov. 29, 2010, <http://www.bbc.co.uk/news/uk-11865881?print=true> (last visited Aug. 25, 2014).

⁵⁰ Makkiko Kitamura & Adi Narayan, *Europe Pushes to Keep Lethal Injection Drugs From U.S. Prisons*, BLOOMBERG BUSINESSWEEK, Feb. 7, 2013, <http://www.businessweek.com/articles/2013-02-07/europe-pushes-to-keep-lethal-injection-drugs-from-u-dot-s-dot-prisons> (last visited Aug. 25, 2014).

⁵¹ *Ibid.*

⁵² Ed Pilkington, *Europe Moves to Block Trade in Medical Drugs Used in US Executions*, THE GUARDIAN (Dec. 20, 2011) available at <http://www.guardian.co.uk/world/2011/dec/20/death-penalty-drugs-european-commission> (last visited Aug. 25, 2014).

⁵³ Including sodium thiopental and pentobarbital, Makkiko Kitamura & Adi Narayan, *Europe Pushes to Keep Lethal Injection Drugs from U.S. Prisons*, BLOOMBERG BUSINESSWEEK (Feb. 7, 2013) available at <http://www.businessweek.com/articles/2013-02-07/europe-pushes-to-keep-lethal-injection-drugs-from-u-dot-s-dot-prisons> (last visited Aug. 25, 2014).

⁵⁴ *Ibid.*

⁵⁵ Mandakini Gahlot, *Indian Entrepreneur Refuses to Sell U.S. Lethal Injection Drugs*, NBC NEWS (July 30, 2014), <http://www.nbcnews.com/news/asian-america/indian-entrepreneur-refuses-sell-u-s-lethal-injection-drugs-n168571>.

⁵⁶ Reprieve, *Ethical Statements from Pharmaceutical Firms*, (May 29, 2014) http://www.reprieve.org.uk/publiceducation/2012_03_26_ethical_statements/

not verified by the FDA for their “quality, safety and effectiveness.”⁵⁷ Compounding pharmacies are not regulated by the FDA, and the FDA does not verify the safety or effectiveness of compounded drugs.⁵⁸ Other states are reportedly obtaining drugs from dubious sources. When supplies of sodium thiopental were scarce in 2010, Arizona executed Jeffrey Landrigan with drugs purchased from a pharmaceutical company operating in the back of a London driving school.⁵⁹ Nebraska and South Dakota have turned to questionable Indian drug manufacturers to source their lethal injection ingredients.⁶⁰ When drugs originate from sources outside of federal oversight and regulation, there is a **greater likelihood of tampering, improper labeling, and diminished potency, quality, and efficacy of those drugs**—factors which elevate the risk of a botched execution.⁶¹

22. As U.S. states increasingly turn to questionable sources, several states have adopted secrecy laws to conceal the identity of the drug supplier.⁶² The Georgia State Assembly recently passed a law that classifies the identity of any person or company providing drugs for use in lethal injections as a “state secret.”⁶³ Other states⁶⁴ have also adopted secrecy laws or protocols protecting the identity of their drug sources.⁶⁵ On March 26, 2014, an Oklahoma court struck down the state’s secrecy law, ruling the law violated constitutional rights of due process.⁶⁶ Similar legal objections are being raised in other states out of concern that suppressing these suppliers’ identities allows the state to withhold critical information about the drugs’ effectiveness in executing a person without suffering.⁶⁷

⁵⁷ The Special Risks of Pharmacy Compounding, U.S. Food and Drug Administration, <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm107836.htm> (last visited Aug. 25, 2014).

⁵⁸ U.S. Food and Drug Administration, “*Compounding and the FDA: Questions and Answers*,” <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/PharmacyCompounding/ucm339764.htm> (last visited Aug. 28, 2014).

⁵⁹ Andrew Hosken, *Lethal Injection Drug Sold from UK Driving School*, BBC NEWS (Jan. 6, 2011) available at http://news.bbc.co.uk/today/hi/today/newsid_9342000/9342976.stm (last visited Aug. 25, 2014).

⁶⁰ *Kayem Pharma under fire over supply of lethal injection drug; Lundbeck Company of Denmark also caught up in legal tussle* (June 2, 2011) available at <http://deathpenaltynews.blogspot.co.uk/2011/06/kayem-pharma-under-fire-over-supply-of.html> (last visited Aug. 25, 2014).

⁶¹ A botched execution such as what occurred with Oklahoma’s execution of Clayton Lockett.

⁶² Kathy Lohr, *Where Do Drugs For Lethal Injections Come From? Few Know*, NPR (July 30, 2013) available at <http://www.npr.org/2013/07/30/207026540/where-do-drugs-for-lethal-injections-come-from-nobody-knows> (last visited Aug. 25, 2014); Abby Ohlheiser, *Texas Is Running out of Execution Drugs*, THE ATLANTIC WIRE (Aug. 1, 2013) available at <http://www.theatlanticwire.com/national/2013/08/texas-running-out-execution-drugs/67902/> (last visited Aug. 25, 2014).

⁶³ Ed Pilkington, *Georgia Scrambles For Fresh Supply of Drugs to Execute Death Row Inmate*, THE GUARDIAN, (July 12, 2013) available at <http://www.guardian.co.uk/world/2013/jul/12/georgia-drugs-execute-death-row-inmate> (last visited Aug. 25, 2014).

⁶⁴ including Arkansas, Colorado, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee and Texas

⁶⁵ Abby Ohlheiser, *Texas Is Running out of Execution Drugs*, THE ATLANTIC WIRE (Aug. 1, 2013) available at <http://www.theatlanticwire.com/national/2013/08/texas-running-out-execution-drugs/67902/> (last visited Aug. 25, 2014). *Tennessee Plans Executions in Secret*, THE TENNESSEAN (Mar. 23, 2013), available at <http://www.tennessean.com/story/news/crime/2014/03/23/tennessee-plans-executions-secret/6765403/> (last visited Aug. 25, 2014); *Secrecy Surrounds Execution Drugs in Most States*, THE ASSOCIATED PRESS (Apr. 5, 2014) available at <http://bigstory.ap.org/article/secrecy-surrounds-execution-drugs-most-states> (last visited Aug. 25, 2014).

⁶⁶ *Execution Secrecy Laws Struck Down in Oklahoma and Texas*, EQUAL JUSTICE INITIATIVE (Mar. 28, 2014) available at <http://www.eji.org/node/890> (last visited Aug. 25, 2014).

⁶⁷ *Ibid.*

23. In response to questionable sourcing of lethal injection drugs, Dr. Marc Stern, former assistant secretary of healthcare for the Washington Department of Corrections, resigned rather than comply with the scheduled executions in his state, remarking, “Procurement of the drugs was a direct violation of ethics by the personnel involved...”⁶⁸

24. Essentially, two approaches have emerged in retentionist states’ search for new execution methods given the scarcity of traditionally used lethal injection drugs: **1) some states have adopted new, experimental execution protocols using untested, manufactured drugs; 2) other states have turned to compounded drugs.** Under both approaches, the use of such unchartered means of execution has demonstrably increased the risks of executions constituting cruel and unusual punishment to alarming levels.⁶⁹ The following is a synopsis of recent executions using these new methods:

- a. On October 15, 2013, Florida executed William Happ, the first inmate to be executed using an untested three-drug method using drugs no longer commercially available for purchase by prisons. It was reported the execution took twice as long as under the previous protocol and that Happ experienced severe pain.⁷⁰ The state executed Darius Kimbrough and Askari Muhammad on November 11 and January 7, 2013 in the same manner.⁷¹
- b. The states of Ohio, Louisiana, and Arizona adopted a new, two-drug execution protocol, composed of an untested combination of midazolam and hydromorphone.⁷² Ohio used these drugs to execute Dennis McGuire on January 16, 2014. In a clearly botched execution lasting roughly 25 minutes, McGuire proceeded to violently gasp for breath and otherwise struggle—a condition known as ‘air hunger’.⁷³
- c. On July 23, 2014, Arizona executed Joseph Rudolph Wood III using the same midazolam and hydromorphone protocol.⁷⁴ Wood’s attorneys filed court motions over concerns about the drugs and the Arizona Department of Corrections’ refusal to provide

⁶⁸ Ibid.

⁶⁹ Manny Fernandez, *Executions Stall as States Seek Different Drugs*, N.Y. TIMES (Nov. 8, 2013) available at <http://www.nytimes.com/2013/11/09/us/executions-stall-as-states-seek-different-drugs.html> [hereinafter Fernandez].

⁷⁰ *Florida Murderer Who Raped and Killed Woman is Left Writhing in Agony and Takes Twice as Long to Die as He is Executed Using New Untried Lethal Injection Drug*, DAILY MAIL (Oct. 16, 2013), <http://www.dailymail.co.uk/news/article-2462115/William-Happ-executed-Florida-executes-murderer-using-untried-lethal-injection-drug.html> (last visited Aug. 25, 2014).

⁷¹ Bill Cotterell, *Florida Executes Man with New Lethal Injection Drug*, Reuters, Oct. 15, 2013, <http://www.reuters.com/article/2013/10/16/us-usa-florida-execution-idUSBRE99F00020131016>; *Fla. Executes Man for Illinois Woman’s 1986 Murder*, Associated Press, Oct. 15, 2013, <http://tbo.com/news/crime/happ-to-be-executed-today-for-1986-citrus-county-murder-20131015/>; Death Penalty Information Center, “Execution List 2013,” accessed Feb. 2, 2014, <http://www.deathpenaltyinfo.org/execution-list-2013>; Death Penalty Information Center, “Execution List 2014,” accessed Feb. 2, 2014, <http://www.deathpenaltyinfo.org/execution-list-2014>.

⁷² This is also the back-up protocol in Kentucky.

⁷³ *Ohio Execution Took 25 Minutes with New Drugs*, SKY (Jan. 16, 2014) available at <http://news.sky.com/story/1196057/ohio-execution-took-25-minutes-with-new-drugs> (last visited Aug. 25, 2014).

⁷⁴ Matt Pearce et al., *Arizona Killer Takes 2 Hours to Die, Fueling Lethal-Injection Debate*, L.A. TIMES, July 23, 2014, <http://www.latimes.com/nation/nationnow/la-na-nn-arizona-execution-20140723-story.html>.

information about the origins of the drugs to be used for Wood's execution.⁷⁵ The execution was allowed to proceed without disclosure of the drug sourcing.⁷⁶ Wood was pronounced dead nearly two hours after the drugs' initial administration,⁷⁷ though the lethal injection process normally lasts only 10 or 11 minutes.⁷⁸ During the execution, a reporter reported Wood "gulped like a fish on land. The movement was like a piston: The mouth opened, the chest rose, the stomach convulsed."⁷⁹ At times, Wood made "a snoring, sucking [sound], similar to when a swimming-pool filter starts taking in air, a louder noise than [the reporter] can imitate It was death by apnea. And it went on for an hour and a half. I made a pencil stroke on a pad of paper, each time his mouth opened, and ticked off more than 640, which was not all of them, because the doctor came in at least four times and blocked my view."⁸⁰

- d. In late 2013, Tennessee, North Carolina, and Missouri announced plans to use a one-drug protocol, with Missouri and Tennessee stating their intent to obtain the drug through a compounding pharmacy.⁸¹
- e. On January 9, 2014, Oklahoma carried out its first execution using compounded pentobarbital. Concerns were raised that the execution had miscarried after the final words of the inmate, Michael Lee Wilson were "I feel my whole body burning."⁸² On January 24, Kenneth Eugene Hogan was executed using the same protocol.⁸³
- f. On April 29, 2014, Oklahoma inmate Clayton Lockett died of a heart attack approximately 40 minutes after the state began his execution by administering the first drug in a three-drug protocol the state had not previously used or tested.⁸⁴ Lockett was declared unconscious ten minutes after the administration of the drug; then, according to

⁷⁵ Michael Kiefer, *Reporter Describes Arizona Execution: 2 Hours, 640 Gasps*, ARIZONA REPUBLIC, July 24, 2014, <http://www.azcentral.com/story/news/arizona/politics/2014/07/24/arizona-execution-joseph-wood-eyewitness/13083637/>.

⁷⁶ The Arizona Supreme Court lifted its stay of execution, and the U.S. Supreme Court lifted a stay issued by the U.S. Court of Appeals for the Ninth Circuit. *Ibid.*

⁷⁷ Michael Kiefer, *Reporter Describes Arizona Execution: 2 Hours, 640 Gasps*, ARIZONA REPUBLIC, July 24, 2014, <http://www.azcentral.com/story/news/arizona/politics/2014/07/24/arizona-execution-joseph-wood-eyewitness/13083637/>.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Lucas L. Johnson II, *Tennessee Revises Protocol for Executions*, ASSOCIATED PRESS (Sept. 30, 2013) available at <http://www.memphisdailynews.com/news/2013/sep/30/tennessee-revises-protocol-for-executions>; Anne Blythe, *NC Public Safety Secretary Changes Death Row Execution Protocol*, NEWS AND OBSERVER, (Nov. 5, 2013) available at <http://www.newsobserver.com/2013/11/05/3344126/north-carolina-public-safety-secretary.html>; *Missouri Switches to New Execution Drug*, ASSOCIATED PRESS (Oct. 22, 2013) available at <http://deathpenaltynews.blogspot.com/2013/10/missouri-switches-to-new-execution-drug.html>.

⁸² "I Feel My Whole Body Burning:" *Last Words of a Man Executed by Lethal Injection in Oklahoma*, DAILY MAIL (Jan. 10, 2014) available at <http://www.dailymail.co.uk/news/article-2536976/I-feel-body-burning-Man-executed-lethal-injection-Oklahoma-beating-convenience-store-worker-death-1995.html> (last visited Aug. 25, 2014).

⁸³ *Profile of Kenneth Eugene Hogan's Execution*, Clark County Prosecutor Database, available at <http://www.clarkprosecutor.org/html/death/US/hogan1364.htm> (last visited Aug. 25, 2014).

⁸⁴ *State by State Lethal Injection*, DEATH PENALTY INFORMATION CENTER, available at <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Aug. 25, 2014).

witnesses, he began to nod, mumble and writhe on the gurney and appeared to some witnesses to be having a seizure.⁸⁵ Thirty-three minutes later, Lockett died of a massive heart attack. Oklahoma governor Mary Fallin stayed the execution of Charles Warner, scheduled two hours after Lockett's execution, and ordered a full review of Oklahoma's execution procedures.⁸⁶

25. The lack of available lethal injection drugs also has led some U.S. states to revert to execution methods that previously have been found to constitute cruel and inhuman treatment or punishment. Tennessee enacted a law in May 2014 that will allow the state to execute death row inmates using the electric chair in the event lethal injection drugs are unavailable.⁸⁷

III. Death Penalty and Consular Notification

26. The United States is a party to the Vienna Convention on Consular Relations (VCCR), Article 36(1), which requires parties arresting or detaining foreign nationals to inform such persons without delay of their right to have their consulate notified and, upon the foreign national's request, to so notify the consulate of the arrest or detention without delay.⁸⁸ The consulate has the right to communicate with and have access to the arrested or detained national and to arrange for his or her legal representation.⁸⁹

27. Foreign nationals often face significant disadvantages when interacting with the U.S. criminal justice system—disadvantages that commonly stem from language barriers, cultural barriers, and, at times, geographical barriers to evidence located in their native country that may assist their defense.⁹⁰ Consular officials help these individuals,⁹¹ and their assistance is invaluable when a foreign national faces the death penalty.

28. The United States has failed, to comply with its VCCR consular notification responsibilities regarding foreign nationals in capital cases.⁹² For example, Paraguay,

⁸⁵ *Oklahoma Botches Execution of Clayton Lockett*, DEATH PENALTY INFORMATION CENTER, available at <http://www.deathpenaltyinfo.org/node/5760> (last visited Aug. 25, 2014).

⁸⁶ *Ibid.*

⁸⁷ *Tennessee Brings Back Electric Chair During Lethal Injection Drug Scarcity*, FOX NEWS (May 23, 2014) available at <http://www.foxnews.com/politics/2014/05/23/tenn-brings-back-electric-chair/> (last visited Aug. 25, 2014). Several states allow inmates to choose the electric chair instead of lethal injection, but Tennessee is the first to mandate electrocution when drugs are unavailable. (⁸⁷ Adam Liptak, *Electrocution Is Banned in Last State to Rely on It*, N.Y. TIMES (Feb. 9, 2008) available at http://www.nytimes.com/2008/02/09/us/09penalty.html?_r=0 (last visited Aug. 25, 2014).

⁸⁸ Vienna Convention on Consular Relations, signed Apr. 24, 1963, effective Mar. 19, 1967, 21 U.S.T. 77, 596 U.N.T.S. 262.

⁸⁹ *Ibid.*; see also *Honored in the Breach: The United States' Failure to Observe Its Legal Obligations Under the Vienna Convention on Consular Relations (VCCR) in Capital Cases*, REPRIEVE 2 (2012), available at http://www.reprive.org.uk/static/downloads/2013_02_26_PUB_VCCR_Report_Web.pdf.

⁹⁰ Vienna Convention on Consular Relations, signed Apr. 24, 1963, effective Mar. 19, 1967, 21 U.S.T. 77, 596 U.N.T.S. 262 at 2, 2 n.4.

⁹¹ Consulate officials help by visiting them, communicating with family members, arranging for legal representation, and assisting with investigations and evidence collection within the individual's native country

⁹² See, e.g., MARK WARREN, DEATH PENALTY INFO. CENTER, FOREIGN NATIONALS AND THE DEATH PENALTY IN THE U.S., available at <http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us> (last visited Sept. 8, 2014); *Honored in the Breach: The United States' Failure to Observe Its Legal Obligations Under the Vienna*

Germany, and Mexico have each brought consular notification cases against the United States in the International Court of Justice (ICJ).⁹³ In the 2004 case involving 51 Mexican foreign nationals (*Avena*), the International Court of Justice (ICJ) ordered the United States to provide review and reconsideration of the convictions and sentences of the foreign nationals covered by such judgments.⁹⁴

29. Following the *Avena* decision, the United States withdrew from the optional protocol establishing ICJ jurisdiction over VCCR disputes involving the United States, thereby foreclosing the ability of other countries to pressure the United States to comply with its obligations by bringing cases in the ICJ.⁹⁵

30. The U.S. Supreme Court has held the *Avena* decision is not binding on states without federal legislation,⁹⁶ unless the courts of each retentionist state independently recognize the right of foreign nationals to meaningful judicial review and remedies for VCCR consular notification violations;⁹⁷ to date, however, only state courts in Oklahoma and Nevada have fully applied the ICJ's requirement of 'review and reconsideration.'⁹⁸ **Thus, federal legislation remains the only realistic mechanism to ensure the U.S. complies with its international obligations by providing effective remedies for Article 36 violations in *Avena*.**⁹⁹ In the United States' Fourth Periodic Report to the United Nations Committee on Human Rights, the U.S. asserts it is actively exploring "options for giving domestic legal effect to the *Avena* judgment, including pursuing legislation to implement the *Avena* judgment."¹⁰⁰ Efforts to pass implementing legislation have been unsuccessful. On July 25, 2013 the Senate Appropriations Committee included the implementing language in the fiscal year 2014 Senate Foreign Operations bill 1372 (for the

Convention on Consular Relations (VCCR) in Capital Cases, REPRIEVE 2 (2012), available at http://www.reprive.org.uk/static/downloads/2013_02_26_PUB_VCCR_Report_Web.pdf, *passim*; Bruce Swartz, Deputy Assistant Att'y Gen., Crim. Div., Address Before the S. Judiciary Comm. (July 27, 2011), available at <http://www.justice.gov/criminal/pr/testimony/2011/crm-testimony-110727.html> ("Despite the fact that these [consular notification] obligations already exist, instances in which notification is not provided continue to occur").

⁹⁴ *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 128 (Mar. 31). In *Avena*, the Mexican government alleged that the United States had failed to comply with Article 36 of the VCCR in 52 separate cases involving Mexican nationals who had been convicted and sentenced to death. The ICJ held that the United States had violated the Vienna Convention in 51 of the 52 cases.

⁹⁵ Letter from Condoleezza Rice, U.S. Sec'y of State, to Kofi Annan, Sec'y-Gen. of the U.N. (Mar. 7, 2005).

⁹⁶ *See* *ibid.*

⁹⁷ *See* *id.* at 536–37 (Stevens, J., concurring) (indicating that the states could voluntarily adhere to the mandates set forth in *Avena*).

⁹⁸ *See Torres v. State*, 120 P.3d 1184, 1190 (Okla. Crim. App. 2005) (finding that Torres was actually prejudiced by the failure to inform him of his rights under the VCCR but that no relief was required because the Governor of Oklahoma had already granted him clemency and limited his sentence to life without the possibility of parole); *Gutierrez v. State*, No. 53506, 2012 Nev. Unpub. LEXIS 1317, at *4-6 (Nev. Sept. 19, 2012) (finding Gutierrez "arguably suffered actual prejudice due to the lack of consular assistance" and remanding the case for an evidentiary hearing to determine the matter); *see also* Sandra Babcock, *Nevada's Supreme Court Upholds ICJ Ruling on Consular Rights of Mexicans*, DEATH PENALTY WORLDWIDE (Sept. 25, 2012, 5:04 AM), <http://blog.law.northwestern.edu/cihr/2012/09/nevadas-supreme-court-upholds-icj-ruling-on-consular-rights-of-mexicans.html> (last visited Sept. 8, 2014).

⁹⁹ *See Medellin v. Texas*, 552 U.S. 491, 498 (2008).

¹⁰⁰ Fourth U.S. Report, ¶ 158.

second year in a row). The proposed legislation was remedial rather than preventative, as it focused on remedies for existing violations rather than improving future compliance with Article 36. The legislation died without passage, and the bill that did pass did not contain the consular notification language.¹⁰¹

31. There is a need— independent of the remedial aspects of Article 36 violations under the VCCR—to ensure future compliance with Article 36 going forward. Compliance statistics of VCCR consular notification and access requirements reflect how ineffective the U.S. has been in meeting its obligations. As of April, 11 2014, 138 foreign nationals from 36 different countries currently sit on the death rows of 15 states and the U.S. federal government,¹⁰² with California, Florida, and Texas collectively holding 74% of the reported total.¹⁰³ Death Penalty Information Center (DPIC) reports only seven cases of complete compliance with Article 36 requirements out of more than 160 reported death sentences (including those executed, reversed on appeal, or exonerated and released). Since the ICJ’s 2004 ruling in *Avena*, the United States has executed 10 foreign nationals, only one of whom was informed by authorities upon arrest of his consular rights.¹⁰⁴ No individual state was found to have adequately complied with VCCR consular notification requirements.

32. Three U.S. states have laws that address consular notification rights,¹⁰⁵ but these state measures do not always guarantee foreigners effective access to their consulate and therefore

¹⁰¹ S. 1372, 113th Cong. § 7083 (2013); *see also* H.R. 3547, 113th Cong. (2014). The United States Judicial Conference’s Committee on Rules of Practice and Procedure has proposed amendments to the Federal Rules of Criminal Procedure that would require federal courts to inform foreign nationals of their consular rights at the detainee’s first appearance in court. COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, AND CRIMINAL PROCEDURE, AND THE FEDERAL RULES OF EVIDENCE 202-12 (2012). Amendments to this effect have been pending since 2010. If approved, this rule change would apply to foreign nationals appearing in federal court, but it would not apply in state courts.

¹⁰² *See Reported Foreign Nationals Under Sentence of Death in the U.S.*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us#Reported-DROW> (last visited Sept. 8, 2014).

¹⁰³ *See ibid.*

¹⁰⁴ *Reported Foreign Nationals Under Sentence of Death in the U.S.*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us#Reported-DROW> (last visited Sept. 8, 2014). Of the 10 foreign nationals executed since the *Avena* decision, five were from Mexico, three were from Cuba, one was from Honduras and one was from Jamaica. In seven of the 10 cases, Texas was the executing state. Two of the other cases were in Florida, and one was in Virginia. Only Angel Maturino Resendiz, a Mexican foreign national executed by the State of Texas, reportedly received information regarding consular rights without delay after arrest as required under the VCCR.

¹⁰⁵ California amended its penal code to require notification of consular rights for detained foreigners within three hours of arrest (The Penal Code of California, Arts. 834(c), 851.5.); Oregon mandates police who detain a foreigner for mental illness must inform the foreigner of the right to communicate with his or her consulate, but it has no such guarantee subsequent to criminal arrests, aside from a law enforcement duty to understand the VCCR requirements and the situations in which they would apply (OR.REV.STAT. ch. 426.228 (9)(a), ch. 181.642(2) (2007)); and in 2000, Texas issued a magistrate’s guide to Article 36 requirements, recommending when “foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified” and that courts offer at arraignment “without delay, to notify the foreign national’s consular officials of the arrest/detention” (Office of the Attorney General of Texas, Magistrate’s Guide to Consular Notification under the Vienna Convention (2000), pp. 7-9.).

they do not comply with Article 36.¹⁰⁶ The United States emphasizes its outreach efforts to inform street-level officials of the country's VCCR consular notification obligations.¹⁰⁷ While advancing awareness of consular notification and access is important, such efforts have not resulted, and are not likely to result, in 100% compliance with the United States' obligations. Reliance on voluntary compliance schemes is inadequate.

IV. Puerto Ricans are disproportionately subjected to the death penalty by the United States.

33. Puerto Rico is an abolitionist territory. It abolished the death penalty by statute on April 26, 1929.¹⁰⁸ In 1952, Puerto Rico's Constitution prohibited the death penalty, stating "the right to life . . . is recognized as a fundamental right of man."¹⁰⁹ Puerto Rico became one of the first jurisdictions in the world to constitutionally ban the death penalty.¹¹⁰ Opposition to capital punishment goes beyond its statutes. In a 2013 survey conducted by the largest newspaper in Puerto Rico, 57% of respondents opposed the death penalty for all cases and only 25% of respondents favored it.¹¹¹

34. Despite Puerto Rico's longstanding constitutional prohibition and historical opposition to the death penalty, citizens of Puerto Rico are subject to capital punishment for federal crimes prosecuted by the United States Department of Justice. Pursuant to the political relationship between Puerto Rico and the United States, federal prosecutors are permitted to seek the death penalty for certain crimes committed in Puerto Rico.¹¹² In 1994, the Federal Death Penalty Act was enacted and imposed the death penalty for 60 offenses.¹¹³

35. Federal prosecutors seek the death penalty in Puerto Rico at higher rates than other states. The U.S. District Court for the District of Puerto Rico is one of the most active in certifying death penalty cases, although no death sentences have been imposed. Between 1998

¹⁰⁶ Texas has insisted that procedurally defaulted VCCR claims (where defendants are assumed to have waived their right to object to VCCR violations because of a failure to raise that issue at the appropriate time, stage of proceedings, or using the appropriate procedure) cannot be reviewed, thus foreclosing relief for most death-sentenced foreigners in that state. Florida courts have generally not recognized Article 36 violations as cognizable claims. Florida amended its law in 2001 so the government's failure to provide consular notification "shall not be a defense in any criminal proceeding against any foreign national and shall not be cause for the foreign national's discharge from custody. (FLA.STAT. ch. 901.26 (2008), Arrest and detention of foreign nationals.).

¹⁰⁷ This will supposedly be done via a Consular Notification and Access Manual, training seminars, and other training materials Id. ¶ 159.

¹⁰⁸ See Act of Apr. 26, 1929, No. 42, § 1, 1929 P.R. Laws 232 ("The death penalty is hereby definitively abolished in Porto Rico.") See also Elizabeth Vicens, *Application of the Federal Death Penalty Act in Puerto Rico: A New test for the Locally Inapplicable Standard*, 80 N.Y.U. L. REV. 350 (2005). The last execution in Puerto Rico took place on September 15, 1927.

¹⁰⁹ P.R. CONST. art. II, ss 7.

¹¹⁰ AMNESTY INTERNATIONAL, *Constitutional prohibitions of the death penalty* (Apr. 2005), AI Index: ACT 50/009/2005, available at <http://www.amnesty.org/en/library/asset/ACT50/009/2005/en/d8cfacd2-d50e-11dd-8a23-d58a49c0d652/act500092005en.pdf>

¹¹¹ *Fuerte rechazo a la pena de muerte*, EL NUEVO DÍA (April 10, 2013).

¹¹² *U.S. v. Martinez*, 252 F.3d 13 (1st Cir. 2002).

¹¹³ See Pub. L. 103-322, Title VI, Sections 60001-26 (Sept. 13, 1994), 108 Stat. 1959 (codified at 18 U.S.C. §§ 3591-3598). The federal crimes carrying the threat of capital punishment include murder during a carjacking, during a bank robbery, and while using an illegal weapon, along with various drug-related crimes and espionage or treason.

and September 2012, the Department of Justice authorized the certification of 493 death penalty cases throughout the U.S.¹¹⁴ Of these cases, 25 (or about 5.1%) were in the District of Puerto,¹¹⁵ though Puerto Rico accounts for only one percent of the U.S. population.¹¹⁶ Only six states had higher rates of death penalty case certification, and all have significantly higher populations.¹¹⁷ The likelihood the death penalty is sought in Puerto Rico is 3.5 times greater than in the rest of the United States.¹¹⁸

36. Similar to the rest of the United States,¹¹⁹ ethnic minorities constitute a disproportionate percentage of defendants being prosecuted with the death penalty in Puerto Rico. Of the 25 death penalty prosecutions in Puerto Rico between 1998 and 2012, all defendants were from ethnic minorities.¹²⁰

¹¹⁴ FEDERAL DEATH PENALTY RESOURCE COUNSEL, *Federal Death Penalty* (May 14, 2014), available at https://www.capdefnet.org/FDPRC/pubmenu.aspx?menu_id=94&id=2094 (last visited Sept. 9, 2014).

¹¹⁵ *Ibid.*

¹¹⁶ The estimated population of the United States is approximately 316 million, while the population of Puerto Rico is 3.7 million. UNITED STATES CENSUS BUREAU, *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2013 – 2013 Population Estimates*, available at http://factfinder2.census.gov/faces/nav/jsf/pages/community_facts.xhtml (last visited Sept. 8, 2014).

¹¹⁷ *See generally* FEDERAL DEATH PENALTY RESOURCE COUNSEL, available at https://www.capdefnet.org/FDPRC/pubmenu.aspx?menu_id=94&id=1902 (last visited July 6, 2014).

¹¹⁸ Carmelo Campos Cruz, *Puerto Rico: la dimensión desconocida de la pena de muerte* (June 2013).

¹¹⁹ Seventy-four percent of capital defendants are ethnic minorities. FEDERAL DEATH PENALTY RESOURCE COUNSEL, *Current Stats re. Use of Federal DP* (May 14, 2014), available at https://www.capdefnet.org/FDPRC/pubmenu.aspx?menu_id=94&id=2094 (last visited Sept. 8, 2014).

¹²⁰ *Ibid.*

Name	Race / Ethnic Group
Martinez, Ian Rosario	Hispanic
Colon-Miranda, Andres	Hispanic
Martinez-Velez, David Samuel	Hispanic
Rosario-Rodriguez, Edwin	Hispanic
Valle-Lassalle, Victor Manuel	Hispanic
Marrero, Jose Rodriguez	Hispanic
Gomez, Edsel Torres	Hispanic
Pena-Gonzalez	Hispanic
Nieves-Alonso, Heriberto	Hispanic
Perez, Luis Gines	Hispanic
Perez, Ricardo Melendez	Hispanic
Alejando, Joel Rivera	Hispanic
Martinez, Hector Acosta	Hispanic
Gomez-Olmeda, David	Hispanic
Vlillegas, Hernardo Medina	Hispanic
Roman, Lorenzo Catalan	Hispanic
Ayala-Lopez, Carlos L.	Hispanic
Casey, Lashaun	Black
Burgos-Montes, Edison	Hispanic
Lopez-Matias, Rodney	Hispanic

37. A defendant being prosecuted for a death penalty case in Puerto Rico is not necessarily guaranteed a jury of his peers. Only individuals who can speak, “read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form” can serve as jurors before a federal tribunal.¹²¹ This requirement effectively excludes 80% to 90% of the population of Puerto Rico.¹²² To serve on a jury, one must be willing to impose the death penalty; those who are unwilling are almost invariably stricken, even though Puerto Rico’s Constitution and a majority of its populace do not support the death penalty.¹²³

38. Despite aggressive certification of the federal death penalty, Puerto Ricans have rejected it in all cases. In all 25 cases, no defendant in Puerto Rico has been sentenced to death. During the 2012 campaign, “all of the gubernatorial candidates showed their rejection” of the death penalty and some even participated in public demonstrations.¹²⁴ This ongoing rejection of the death penalty evidences the continued conviction of its people, as enshrined in the Puerto Rico Constitution, that the right to life is a fundamental human right.

III. RECOMMENDATIONS

- U.S. states and the federal government should impose a moratorium on the death penalty because of the risk of causing cruel and inhuman treatment or punishment by lethal injection.
- Federal legislation should be adopted to ensure lethal injections are carried out: (1) via well-tested procedures that do not cause unnecessary pain; (2) with full oversight and transparency of the sourcing and administration of the drugs; and (3) using drugs approved by the U.S. FDA.
- In full compliance of the U.S. Court of Appeals decision in *Cook et al. v FDA et al.*,¹²⁵ the FDA should refuse admission of any drug which is found to violate § 21 U.S.C. 381(a).¹²⁶

Riera-Crespo, Eduardo	<i>Hispanic</i>
Alers-Santiago, Raymond	<i>Hispanic</i>
Candelario-Santana, Alexis	<i>Hispanic</i>
Jimenez-Bencevi, Xavier	<i>Hispanic</i>

¹²¹ 28 U.S.C. § 1865(b) (2006); Act of June 25, 1906, Pub. L. No. 294, ch. 3542, 34 Stat. 466 (defining the qualifications of jurors in the United States District Court for the District of Puerto Rico).

¹²² See generally Jasmine B. Gonzales Rose, *The Exclusion of Non-English-Speaking Jurors: Remediating a Century of Denial of the Sixth Amendment in the Federal Courts of Puerto Rico*, 46 HARV. C.R.-C.L. L. REV. 497; see also U.S. Census Bureau, *Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over for Puerto Rico: 2006-2008* (April 2010), available at <https://www.census.gov/hhes/socdemo/language/> (last visited July 17, 2014).

¹²³ P. R. CONST. art. II, § 7.

¹²⁴ Carmelo Campos Cruz, *supra* note 118.

¹²⁵ See *Cook et al., v. Food and Drug Administration et al.*, case number 12-5176, U.S. Court of Appeals for the D.C. Circuit.

¹²⁶ 21 U.S.C. § 381(a)(1)-(4) states:

- The U.S. should adopt and promote procedures such as those recommended by the American Bar Association and The Innocence Project designed to prevent or mitigate the negative effects of eyewitness misidentifications, including those resulting from cross-racial misidentifications.
- The following recommendations are compiled from The Innocence Project’s report *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*:
 - Require U.S. states to adopt compensation legislation that provides at least \$100,000 per year on death row. This compensation should be untaxed.

(1) such article has been manufactured, processed, or packed under insanitary conditions or, in the case of a device, the methods used in, or the facilities or controls used for, the manufacture, packing, storage, or installation of the device do not conform to the requirements of section 360j (f) of this title, or

(2) such article is forbidden or restricted in sale in the country in which it was produced or from which it was exported, or

(3) such article is adulterated, misbranded, or in violation of section 355 of this title or the importer (as defined in section 384a of this title) is in violation of such section 384a of this title, or prohibited from introduction or delivery for introduction into interstate commerce under section 331 (l) of this title, or

(4) the recordkeeping requirements under section 2223 of this title (other than the requirements under subsection (f) of such section) have not been complied with regarding such article, then such article shall be refused admission, except as provided in subsection (b) of this section. With respect to an article of food, if importation of such food is subject to, but not compliant with, the requirement under subsection (q) that such food be accompanied by a certification or other assurance that the food meets applicable requirements of this chapter, then such article shall be refused admission. If such article is subject to a requirement under section 379aa or 379aa–1 of this title and if the Secretary has credible evidence or information indicating that the responsible person (as defined in such section 379aa or 379aa–1 of this title) has not complied with a requirement of such section 379aa or 379aa–1 of this title with respect to any such article, or has not allowed access to records described in such section 379aa or 379aa–1 of this title, then such article shall be refused admission, except as provided in subsection (b) of this section. The Secretary of the Treasury shall cause the destruction of any such article refused admission unless such article is exported, under regulations prescribed by the Secretary of the Treasury, within ninety days of the date of notice of such refusal or within such additional time as may be permitted pursuant to such regulations, except that the Secretary of Health and Human Services may destroy, without the opportunity for export, any drug refused admission under this section, if such drug is valued at an amount that is \$2,500 or less (or such higher amount as the Secretary of the Treasury may set by regulation pursuant to section 1498 (a)(1) of title 19) and was not brought into compliance as described under subsection (b).. [1] The Secretary of Health and Human Services shall issue regulations providing for notice and an opportunity to appear before the Secretary of Health and Human Services and introduce testimony, as described in the first sentence of this subsection, on destruction of a drug under the sixth sentence of this subsection. The regulations shall provide that prior to destruction, appropriate due process is available to the owner or consignee seeking to challenge the decision to destroy the drug. Where the Secretary of Health and Human Services provides notice and an opportunity to appear and introduce testimony on the destruction of a drug, the Secretary of Health and Human Services shall store and, as applicable, dispose of the drug after the issuance of the notice, except that the owner and consignee shall remain liable for costs pursuant to subsection (c). Such process may be combined with the notice and opportunity to appear before the Secretary and introduce testimony, as described in the first sentence of this subsection, as long as appropriate notice is provided to the owner or consignee. Clause (2) of the third sentence of this paragraph [2] shall not be construed to prohibit the admission of narcotic drugs the importation of which is permitted under the Controlled Substances Import and Export Act [21 U.S.C. 951 et seq.].

- Require U.S. states to adopt legislation that provides for appropriate legal assistance or lawyers' fees associated with filing for compensation.
- Require U.S. states to adopt legislation that provides exonerees with adequate and appropriate services, including housing, transportation, education, physical and mental care, employment assistance, and other services to assist with reintegration.
- The United States should require states to issue an official apology for wrongful convictions.
- Where official immunity presents barriers to accountability, the U.S. should ensure there are adequate and alternate mechanisms to hold prosecutors, judges, and law enforcement accountable when their conduct leads to wrongful convictions.
- Foreign nationals on death row must receive the review and reconsideration of their convictions and sentences mandated by the ICJ's decision in *Avena*. Other foreign nationals should be notified of their consular notification rights in a timely manner as required under Article 36 of the VCCR. The following recommendations, adapted from the American Bar Association, should be considered:¹²⁷
 - The Obama Administration and U.S. Congress should undertake all necessary measures to fully comply with the ICJ *Avena* decision, including by passing implementing legislation. The Obama Administration should also ensure that all individuals on federal death row receive the review and reconsideration mandated under *Avena* in cases where VCCR consular notification and access was not previously accorded under Article 36.
 - The Obama Administration and U.S. Congress should acknowledge the authority of the ICJ to adjudicate disputes over VCCR interpretation and related legal questions. They should take steps to confer binding force on ICJ judgments to which the United States is party.
- The Obama Administration, U.S. Congress, and U.S. states and territories should take measures to ensure compliance with Article 36 requirements. Such measures include adopting legislation that: ensures a detained or arrested foreign national is advised without delay of his right to communicate with his consulate; that the U.S. or U.S. state officer then informs the appropriate official in that agency if the foreign national desires consular communication; and allow a defendant's claim of an Article 36 violation to override procedural default rules that would exclude such claims.
- The Obama Administration, U.S. Congress, and U.S. states and territories should adopt policies and protocols to promote compliance with Article 36, including: making

¹²⁷ The American Bar Association's Sections of Litigation, Criminal Justice, Individual Rights and Responsibilities, and International Law, Death Penalty Representation Project, and Commission on Immigration have adopted these recommendations in a Report to the House of Delegates, available at http://www.americanbar.org/content/dam/aba/migrated/Vienna_Convention_on_Consular_Relations_Article_36__2.authcheckdam.pdf.

advisement of the rights under Article 36 part of booking protocols for foreign nationals; ensuring that judicial officers notify foreign national defendants at a first appearance about their rights under Article 36; disseminating policies and protocols to law enforcement on federal, state, and local levels; training for law enforcement, prosecutors, defense attorneys, and judges on their responsibilities under Article 36; and ensuring that officials conduct mandatory notification for foreign nationals of countries on the mandatory notification list.

- Congress and the Obama Administration should impress upon state authorities the critical importance of the reciprocal rights United States citizens enjoy while in foreign countries that are signatories to the VCCR.¹²⁸ For example, the VCCR consular notification and access rights of U.S. citizens in foreign countries may be jeopardized if other signatories respond to the United States' noncompliance by declining to comply themselves.
- Congress and the Obama Administration should take all steps necessary to prevent national origin discrimination within the United States justice system.
- The United States should not request cases to be certified for the federal death penalty in Puerto Rico and eliminate the application of the Federal Death Penalty Act in this jurisdiction.
- The United States should undertake studies to identify the root causes of ethnic disparities pertaining to the death penalty, including selective prosecution and ethnically disparate sentencing, with the objective of developing means to eliminate ethnic or racial bias in the criminal justice system.
- The United States should adopt all necessary measures, including a moratorium, to ensure that the death penalty is not imposed as a result of ethnic or racial bias on the part of prosecutors, judges, juries or lawyers.
- The United States should adopt all necessary measures, including interpretation services or a waiver of the English language requirement, to allow Spanish-speaking people to serve on juries in Puerto Rico and other territories with majority Spanish-speaking populations, to ensure defendants are sentenced by a jury of their peers and to involve a majority of these populations in the important civic duty of jury service.

¹²⁸ The American Bar Association's Sections of Litigation, Criminal Justice, Individual Rights and Responsibilities, and International Law, Death Penalty Representation Project, and Commission on Immigration have adopted these recommendations in a Report to the House of Delegates, available at http://www.americanbar.org/content/dam/aba/migrated/Vienna_Convention_on_Consular_Relations_Article_36__2.authcheckdam.pdf.