

**Statement of Nkechi Taifa¹
Senior Policy Analyst
The Open Society Institute, Washington Office**

before the

**Justice Kennedy Commission
American Bar Association
November 14, 2003**

**Racial Disparities in the U.S. Criminal Justice System:
Can the International Race Convention Provide a Basis for Relief?**

Distinguished Members of the ABA Justice Kennedy Commission, thank you for inviting me to testify today on the issue of racial disparity in the U.S. criminal justice system. I am pleased to provide this statement on behalf of the Open Society Institute, Washington Office.

The Open Society Institute (OSI), a private operating and grantmaking foundation based in New York City, implements a range of initiatives to promote open society by shaping government policy and supporting education, media, public health, and human and women's rights, as well as social, legal, and economic reform. OSI was created in 1993 by investor and philanthropist George Soros to support his foundations in Central and Eastern Europe and the former Soviet Union. Those foundations were established, starting in 1984, to help former communist countries in their transition to democracy. OSI has expanded the activities of the Soros foundations network to other areas of the

¹ The author is also an adjunct professor at Howard University School of Law, currently teaching the seminar, "Racial Disparity in the Criminal Justice System." The substance of this testimony is based on two law review articles by this author, "Cracked Justice: A Critical Examination of Cocaine Sentencing," 27 UWLA L. Rev. 107 (1996); and "Codification or Castration? The Applicability of the International Convention to Eliminate All Forms of Racial Discrimination to the U.S. Criminal Justice System," 40 How.L.J. 641 (1998).

world where the transition to democracy is of particular concern. OSI reestablished a Washington, D.C. office in the aftermath of the terrorist attacks on September 11, 2001, and the shift in U.S. government policies. In addition to a significant focus on civil liberties, our Washington activities reflect OSI's growing concern with globalization and America's role in the world. We also engage in public education on other domestic and international policy issues, including criminal justice reform, human rights, and women's rights.

The paradigm of race as a key influence on the administration of criminal justice in the United States has yet to be appropriately remedied by the courts or Congress, despite the findings of eminent scholars, adept statisticians, and prestigious commissions detailing unwarranted racially disparate results.

Unequal treatment of people of color has been well established at each stage of the criminal justice continuum, from profiling to sentencing. Indeed, many witnesses testifying during these three days of hearings will provide the latest statistics and analyses of this predicament. In his seminal address before the ABA last summer, Justice Kennedy challenged this body to engage in public discourse that will help shape the political will to find more just solutions and humane policies to the inadequacies and injustices of our prison and correctional systems, finding "new ideas, new insights, and new inspiration."²

The purpose of this testimony, therefore, is to advance new inspiration with which to stimulate the political will, through a discourse on the applicability of global human rights standards to domestic law; specifically, the application of Article 5(a) of the

² Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, "Speech at the American Bar Association Annual Meeting" (Aug. 9, 2003; revised Aug. 14, 2003).

international Convention to Eliminate All Forms of Racial Discrimination³ (CERD) to the disparity in penalty between crack and powder cocaine.

Current interpretation of U.S. constitutional law in the prosecution and sentencing of crack cocaine defendants has proven inadequate in providing relief to charges of discrimination. Domestic recognition of global norms -- specifically provisions of the U.S.-ratified CERD -- could eliminate a critical barrier to relief presented by current law and practice.

I commence these comments with the acknowledgement that domestic recognition of international law is a growing movement in the United States, recognizing that expanded protections found in many human rights treaties can be influential in advancing United States law. I then provide an overview of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), focusing on the elements most applicable to the eradication of racism in the U.S. criminal justice system, and scrutinizing a key declaration brought forth by the United States upon ratification.

I next analyze a dilemma which has plagued criminal defense attorneys and public policy advocates for nearly twenty years -- the inability to establish that Congress acted with racially discriminatory intent when it enacted the mandatory minimum crack statutes, and the futility of proving discriminatory motive by prosecutors in decisions of drug charging and jurisdictional venue. Both of these concerns have resulted in inordinately lengthy mandatory sentences disproportionately meted out to African American defendants that are 100 times more severe than sentences for comparable activity by white defendants.

³ International Convention on the Elimination of All Forms of Racial Discrimination *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD]; 140 CONG. REC.

I will show how this requirement to prove intent ignores the subtle nature which characterizes much of 21st century racism, which manifests as not only conscious and intentional discrimination, but in institutional arrangements, often unconscious, as well. I will demonstrate how international jurisprudence is enlightened in this perspective, in that it understands that racism manifests in various forms, allowing intent to be gleaned through actions and impact. The international race convention, which the United States has ratified but not made self-executing, allows laws and practices that have an invidious discriminatory *impact* to be condemned, regardless of specific *intent*, reaching both conscious and unconscious forms of racism.

I conclude by showing how the deficiency with respect to proving intent in U.S. law relative to cocaine sentencing can be remedied by adopting the “effect” standard enunciated in CERD, and recommend that this Commission, in its report and recommendations to the ABA -- 1) strengthen the legitimacy of this analysis by encouraging judges and legislators to embrace this augmented standard found within international law already endorsed by the United States, and 2) encourage the State Department in its next periodic report to the United Nations CERD oversight committee, to directly address the issue of the racial impact of U.S. drug law and enforcement, providing comprehensive information for the international committee’s review.

Domestic Recognition of International Law

Human rights organizations in the United States have begun to include scrutiny of the U.S. within their monitoring apparatuses, and issue reports detailing abuses in

S7634-35 (daily ed. June 24, 1994) U.S. Senate advice and consent (U.S. entered into force Nov. 20, 1994).

American institutions.⁴ More recently, in the criminal justice and other arenas, traditional civil rights and civil liberties groups have also sought to extend their analyses to the international sphere as well, often in collaboration with traditional human rights organizations.⁵ Lawyers in capital cases are increasingly raising legal challenges pursuant to various international treaties and customary international law,⁶ and a myriad of human rights conventions and standards have likewise been analyzed in the context of children in the U.S. juvenile justice system.⁷

Upon the U.S. ratification of the International Covenant on Civil and Political Rights, the former director of Human Rights Watch and current president of the Open Society Institute, Aryeh Neier, stated, “(t)he international human rights cause has achieved a legitimacy comparable to that of the movement for the promotion of rights and liberties domestically.”⁸ He continued optimistically, “despite the Bush Administration’s reservations, declarations, and understandings, the Covenant will, over time, prove valuable in civil liberties litigation in the United States and, conceivably, will

⁴ See e.g., reports of Human Rights Watch, International Human Rights Law Group; Amnesty International USA; Penal Reform International; Lawyers Committee for Human Rights.

⁵ See American Civil Liberties Union conference proceedings, “Human Rights at Home: International Law in U.S. Courts,” www.aclu.org (Oct. 9-11, 2003); Citizens United for the Rehabilitation of Errants (CURE), “Proceedings of International Conference on Human Rights & Prison Reform” (Oct. 6-11, 2001); Women’s Institute for Leadership Development for Human Rights, “Making the Connections: Human Rights in the United States” (2000); Sentencing Project and Human Rights Watch, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (1998); Human Rights Watch, International Human Rights Law Group & NAACP Legal Defense and Educational Fund, “Letter to the Honorable Warren Christopher” (Oct. 27, 1995); Statement of Wade Henderson, Director of the Washington Bureau of the NAACP, “International Convention on the Elimination of All Forms of Racial Discrimination: Hearings Before the Senate Comm. On Foreign Relations,” 103d Cong. 47 (1994); Human Rights Watch & American Civil Liberties Union, “Human Rights Violations in the United States: A Report on U.S. Compliance with the International Covenant on Civil and Political Rights” (1993).

⁶ See Sandra L. Babcock, “International Law in Capital Cases” (Aug. 2003).

⁷ See Rosemary Sarri and Jeffrey Shook, “Human Rights and Juvenile Justice in the United States,” (Univ. of Michigan).

⁸ Aryeh Neier, “Political Consequences of the United States Ratification of the International Covenant on Civil and Political Rights,” 42 DePaul L. Rev. 1233, 1234. (1993).

also be helpful in shaping the decision making of the executive and legislative branches of government.”⁹

The top echelon of the American judiciary has also been vocal in recognizing the importance of integrating international law into domestic jurisprudence. For example, United States Supreme Court Justices Ginsburg, Breyer, Stevens, and Kennedy have recently cited positively to international law, whether in the context of the death penalty,¹⁰ affirmative action,¹¹ or anti-sodomy laws,¹² or in recent interviews and speeches stressing the importance of consultation and guidance regarding selected decisions of foreign courts and the need for comparative analysis in a growing global community.

Justice Breyer, in encouraging lawyers to be proactive in analyzing and referring “relevant comparative material” to the judiciary, clearly signaled the receptivity of the courts to international jurisprudence by acknowledging:

By now, however, it should be clear that the chicken has broken out of the egg. The demand is there. To supply that demand, the law professors, who teach the law students, who will become the lawyers, who will brief the courts, must themselves help to break down barriers ... so that the criminal law professor as well as the international law professor understands the international dimensions of the subject ...¹³

This Commission should heed this clarion call for globalizing the rule of law, and consider this growing framework of analysis in effectuating domestic reform. Indeed, a human rights approach to issues of domestic concern could very well mark the next frontier of advocacy.

⁹ *Id.* at 1235.

¹⁰ *Atkins v. Virginia*, 536 U.S. 304 (2002); 122 S. Ct. 2242 (prohibiting execution of the mentally retarded)

¹¹ *Grutter v. Bollinger*, 539 U.S. ____ (2003); 123 S. Ct. 2325 (upholding use of race in affirmative action)

¹² *Lawrence v. Texas*, 539 U.S. ____ (2003); 123 S. Ct. 2472 (striking down anti-sodomy laws)

Overview of the International Race Convention

The Convention on the Elimination of All Forms of Racial Discrimination has been described as “the most comprehensive and unambiguous codification in treaty form of the idea of the equality of the races.”¹⁴ Important to the analysis in this testimony, the Convention requires the elimination of discrimination not only when there is discriminatory intent, but also where there is unjustified discriminatory effect. It prohibits racial discrimination, defined as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or *effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”¹⁵ (Emphasis added).

The Convention goes on to affirm that “(e) ach State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the *effect* of creating or perpetuating racial discrimination wherever it exists.”¹⁶ (Emphasis added). Finally, Parties to the Convention are legally obligated to eliminate racial discrimination within their borders and are required to enact whatever laws are necessary to ensure the exercise and enjoyment of fundamental human rights free from discrimination.¹⁷

¹³ Stephen Breyer, “The Supreme Court and the New International Law,” The American Society of International Law, 97th Annual Meeting (April 4, 2003).

¹⁴ Egan Schwelb, “The International Convention on the Elimination of Racial Discrimination,” 15 INT’L & COMP. L.Q. 996, 1057 (1966).

¹⁵ CERD, Part 1, Art. 1, cl.1.

¹⁶ CERD, Part 2, Art. 1(c).

¹⁷ *Id.*

The European Union’s Race Equality Directive¹⁸ incorporates anti-discrimination norms found in various European and international instruments, including CERD. The Directive addresses the issue of disparate impact, by prohibiting “indirect discrimination,” which “shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”¹⁹ This Directive is an indication of the growing consensus in concretizing global norms domestically.

The provision within the International Convention on the Elimination of All Forms of Racial Discrimination relating to criminal justice concerns is subsumed within Article 5:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials, or by any individual, group or institution;
- (c) Political rights, in particular the rights to participate in elections – to vote and to stand for election – on the basis of universal suffrage, to take part in the Government, as well as in the conduct of public affairs at any level and to have equal access to public service²⁰

¹⁸ Council Directive 2000/43/EC, adopted by the Council of the European Union on 29 June 2000.

¹⁹ *Id.* at Art. 2(2)(b).

²⁰ CERD, Part 1, Art. 5 (a-c).

Enumerating a panoply of other civil rights encompassing the civil, political, economic, social and cultural spheres, the Convention goes on to state the following:

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.²¹

To ensure that everyone has notice of these provisions: States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnic groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.²²

In 1994 the U.S. ratified the CERD convention, following an unfortunate tradition of ratifying human rights treaties with limiting reservations, understandings and declarations. One limitation issued within the U.S. CERD ratification is a non-self-executing declaration that the Convention will not create rights directly enforceable in U.S. courts, absent implementation of specific legislation. One should not, however, be daunted by the strictures of that limitation. Analogous to the examination of the same declaration in another treaty, Neier states that although the International Covenant on Civil and Political Rights would provide a “stronger source of protection” if implementing legislation were adopted by Congress,²³ “(t)hat the United States has declared that the Covenant is non-self-executing will not prevent the courts or the other

²¹ CERD, Part 1, Art. 6.

²² CERD, Part 1, Art. 7.

²³ Neier, at 1239.

branches of government from shaping their decisions to conform to international standards to which the United States has now proclaimed its adherence.”²⁴

As noted above, one of the key standards within CERD is the condemnation of invidious racially discriminatory effects or impact, regardless of intent. The disparity in sentencing between crack and powder cocaine represents one of the most flagrant examples of a law that, on its face, is neutral, but whose impact is discriminatory. Although the U.S. judicial record is replete with a myriad of legal challenges to the racially disparate impact of the crack-powder cocaine distinction in federal sentencing statutes and guidelines, no federal appellate court has yet to hold the disparity unconstitutional, whether the challenge was equal protection or due process, cruel and unusual punishment or vagueness. This failure is due, in large part, to a rejection by the courts that Congress acted with racially discriminatory intent in differentiating between crack and powder cocaine when enacting the cocaine statutes in 1986 and 1988. The following quote is instructive:

‘I ain’t cheat’n, I’m just lucky.’ Spoken with sincerity, these incredulous words of the professional gambler as he takes the gullible mark’s last dollar are a most telling statement. If the cards are handled correctly, the mark is left stunned in disbelief. To him, the outcome undoubtedly seems unfair, but he cannot prove it. And so it is with the criminal defendant who first encounters the [mandatory minimum crack statutes].²⁵

This scenario aptly illustrates the quandary defense attorneys face in litigating crack cocaine cases -- although the disproportionate impact of the crack statute against African Americans is unmistakable, similar to the dilemma faced by the mark above,

²⁴ *Id.* at. 1237.

²⁵ Michael Lasley, “Disparate Treatment: Mandatory Minimums, the Federal Sentencing Guidelines and African Americans,” reprinted in Taifa, “Cracked Justice: A Critical Examination of Cocaine Sentencing,” 27 *UWLA.L.Rev.* 107 at 144.

racially discriminatory intent has been virtually impossible to prove. The disparity in penalty between crack and powder cocaine represents just one manifestation of racial disparity in the U.S. criminal justice system that could benefit from a human rights construct. Other issues could equally be so examined, however this testimony's focus is on the cocaine disparity. The following examination defines the scope of the issue and its racially disparate impact upon African Americans.

The 100-to-1 Quantity Ratio and Disproportionate Racial Impact

Federal criminal penalties for the possession and distribution of crack cocaine are one hundred times more severe than penalties relating to the exact same amount of powder cocaine.²⁶ Thus, possession of five grams of crack cocaine carries the same penalty as 500 grams of powder cocaine. This is commonly referred to as a “100-to-1 quantity ratio.” For example, if a first time offender tried in federal court is found in possession of five grams of crack cocaine, she would be subject to a mandatory felony sentence of at least five years in prison without parole. Possession of the same amount of powder cocaine, a misdemeanor, requires no prison time. A person convicted of fifty or even 499 grams of powder cocaine would face a maximum penalty of one year in prison. It would take trafficking in 500 grams of powder cocaine to receive the same sentence as one convicted of simple possession of five grams of crack cocaine.

In its Special Report to Congress, the United States Sentencing Commission pronounced that “federal sentencing data leads to the inescapable conclusion that blacks comprise the largest percentage of those affected by the penalties associated with crack

²⁶ 21 U.S.C. Sec. 841(b)(1)(A)(ii)(1994); 21 U.S.C. sec. 841(b)(1)(B)(ii)(1994).

cocaine.”²⁷ Nationwide statistics compiled by the Commission revealed that blacks were more likely to be convicted of crack cocaine offenses, while whites were more likely to be convicted of powder cocaine offenses.²⁸ In 1994, 96.5% of those sentenced federally for crack cocaine offenses were non-white.²⁹ The Commission’s 2000 Source of Federal Sentencing Statistics revealed that 84.2% of blacks were convicted of crack cocaine cases, as compared with 5.7% whites. Asserting that these statistics do “not mean ... that the penalties are racially motivated,”³⁰ the Commission nevertheless found that the high percentage of blacks convicted of crack cocaine offenses is “a matter of great concern.”³¹

This concern was accentuated by a study on federal sentencing policies which disclosed that “between 1986 and 1990 both the rate and average length of imprisonment for federal offenders increased for blacks in comparison to whites,” and that the higher proportion of blacks charged with crack offenses was “the single most important difference [accounting for] the overall longer sentences imposed on blacks, relative to [other groups].”³² Its conclusion, “[i]f legislation and guidelines were changed so that crack and powdered cocaine traffickers were sentenced identically for the same weight of cocaine, this study’s analysis suggests that the black/white disparity in sentences for cocaine trafficking would not only evaporate but it would slightly reverse.”³³

Disparate racial impact is not limited to sentences for crack cocaine, but extends to mandatory minimum sentences in general. Several years prior to its study on cocaine

²⁷ U.S. Sentencing Comm’n Special Report to Congress: Cocaine and Federal Sentencing Policy xi (1995) (issued after a review of cocaine penalties as directed by Pub.L.No. 103-322, Sec. 280006).

²⁸ *Id.* at 156, 161.

²⁹ *See* United States Sentencing Commission, 1994 Annual Rep. 107 (Table 45).

³⁰ *Id.* at xi.

³¹ *Id.* at xii.

³² Douglas C. McDonald & Kenneth E. Carlson, “Sentencing in the Federal Courts: Does Race Matter? The Transition to Sentencing Guidelines, 1986-90,” Summary, at 13 (1993).

³³ *Id.*, at 2.

policy, the Sentencing Commission studied the impact of federal mandatory minimum sentencing provisions in general. The Commission found that 67.7% of black defendants received sentences at or above the mandatory minimum range while only 54% of whites received such a sentence.³⁴ The Commission concluded that the mandatory minimum penalties were being administered in a racially discriminatory manner.³⁵

The Federal Judicial Center published a study of federal sentences which found further disturbing evidence of racial disparities in the administration of mandatory minimum sentences.³⁶ The Center reported that in cases where a mandatory minimum could apply, black offenders were 21% more likely and Hispanic offenders 28% more likely, than whites to receive at least the mandatory minimum prison term.³⁷ Thus, although Congress' stated intention was to reduce arbitrariness and unwarranted disparities in sentencing, the report concluded that mandatory minimums actually increase such problems.³⁸

Despite the statistics on convictions and sentencing described above, there is evidence that African Americans are less involved in crack use than whites. Statistics from the National Institute on Drug Abuse (NIDA) reveal that the greatest number of documented crack users is white.³⁹ Seventy-five percent of those reporting cocaine use in

³⁴ U.S. Sentencing Comm'n Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (1991).

³⁵ *Id.* at ii. The disparate application of mandatory minimum sentences in cases in which available data strongly suggest that a mandatory minimum is applicable appears to be related to the race of the defendant, *where whites are more likely than non-whites to be sentenced below the applicable mandatory minimum ...* This differential application on the basis of race ... reflects the very kind of disparity and discrimination the Sentencing Reform Act, through a system of guidelines, was designed to reduce. (emphasis added).

³⁶ Barbara S. Meierhoefer, "The General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentencing Imposed" (1992).

³⁷ *Id.* at 20.

³⁸ *Id.*

³⁹ See Special Report to Congress: Cocaine, at 38, citing National Institute on Drug Abuse, Overview of the 1991 National Household Survey on Drug Abuse (1991) (NIDA Capsules).

1991 were white; 15% were black, and 10% Hispanic.⁴⁰ Of those reporting crack use in the same year, 52% were white, 38% were black and 10% Hispanic.⁴¹

Although there are larger numbers of documented white cocaine users, national drug enforcement and prosecutorial policies and practices have resulted in the “war on drugs” being targeted almost exclusively at inner-city communities of color. This has caused the overwhelming number of prosecutions to be directed against African Americans.⁴²

Questionable Prosecutorial Discretion

Racial disparities are also found in motions from prosecutors to depart from the sentencing guidelines. Studies have revealed that downward departures are most frequently granted to whites, who receive lower sentences for providing substantial assistance in 25% of their cases, compared to 18.3% of blacks.⁴³ With respect to cocaine cases, nearly 33% of powder cocaine defendants received a departure for substantial assistance, compared to 28% of crack cocaine cases.⁴⁴

⁴⁰ *Id.* at 39.

⁴¹ *Id.*

⁴² Discriminatory enforcement of cocaine laws appears to be part of a pattern of discrimination in the enforcement of the nation’s drug laws in general. See Sam Meddis, *Is the Drug War Racist? Disparities Suggest the Answer is Yes*, USA TODAY, July 23, 1993, at 1A.

Although law enforcement officials say blacks and whites use drugs at nearly the same rate, a USA TODAY computer analysis of 1991 drug arrests found that the war on drugs has, in many places, been fought mainly against blacks ... USA TODAY first studied the issue four years ago and found blacks, about 12% of the population, made up almost 40% of those arrested on drug charges in 1988, up from 30% in 1984. The new analysis, which uses city-by-city racial breakdowns from the 1990 census and arrest data from police agencies that report to the FBI, found that by 1991 the proportion of blacks arrested for drugs increased to 42% *Id.*

⁴³ Special Report to Congress: Cocaine, at 150-54. Departures are the “result of a motion from the government that the defendant provided substantial assistance in the investigation or prosecution of another person.” *Id.* at 150.

⁴⁴ *Id.* at 150, 154.

Prosecutorial discretion in selection of jurisdictional venue has also perpetuated racial disparities in the criminal justice system with respect to cocaine cases. An illustration of this is *U.S. v. Armstrong*, a case involving allegations that federal prosecutors in Los Angeles selectively pursued and charged blacks in crack cocaine cases.⁴⁵ Since the inception of mandatory minimum cocaine laws in 1986 to the advent of the *Armstrong* case, not a single white offender had been convicted of a crack cocaine offense in federal courts serving Los Angeles and its six surrounding counties.⁴⁶ Rather, virtually all white offenders were prosecuted in state court, where they were not subject to that drug's lengthy mandatory minimum sentences.⁴⁷ The impact of the decision to prosecute the black defendants in federal court was significant. In federal court they faced a mandatory minimum sentence of at least ten years and a maximum of life without parole if convicted of selling more than fifty grams of crack. By contrast, if prosecuted in California state court, the defendants would have received a minimum sentence of three years and a maximum of five years.⁴⁸

This selective prosecution pattern is not unique to Los Angeles. An investigative report by the *Los Angeles Times* revealed that:

Only minorities were prosecuted for crack offenses in more than half the federal court districts [handling] crack cases ... No whites were federally prosecuted in 17 states and many cities, including Boston, Denver, Chicago, Miami, Dallas and Los Angeles. Out of hundreds of cases, only one white was convicted in California, two in Texas, three in New York and two in Pennsylvania.⁴⁹

⁴⁵ *United States v. Armstrong*, 21 F.3d 1431 (9th Cir. 1995) (*Armstrong I*), *rev'd on reh'g en banc* 48 F.3d 1508 (9th Cir. 1995) (*Armstrong II*), *rev'd and remanded*, 116 S. Ct. 1480 (1996) (*Armstrong III*).

⁴⁶ Dan Weikel, *War on Crack Targets Minorities Over Whites*, L.A. TIMES, May 21, 1995, at B1.

⁴⁷ *Id.*

⁴⁸ *Armstrong II*, 48 F.3d 1511.

⁴⁹ Weikel, at B1.

In an appeal to the Supreme Court on a discrete issue regarding the scope of discovery to be afforded a defendant, the *Armstrong* defendants did not prevail. The Court held that a defendant who alleges selective prosecution based on race must make a threshold showing that the Government declined to prosecute similarly situated suspects of other races.⁵⁰ Without access to the discovery necessary to demonstrate discriminatory intent, this represents a hollow criteria.

The Difficulty of Proving an Equal Protection Violation

One of the primary challenges to the constitutionality of the disparity in penalty between crack and powder cocaine has been the issue of equal protection. The 14th Amendment's Equal Protection Clause requires that "all persons similarly circumstanced shall be treated alike."⁵¹ A "rational basis test" is applied where there is no indication of a suspect classification based on race, religion, or other constitutionally protected interest.⁵² The "substantial interest test" is used when substantial interests of the state are involved and give rise "to recurring constitutional difficulties."⁵³ The "strict scrutiny test" involves classifications based on factors such as race, which are "constitutionally suspect."⁵⁴ Laws which purposely discriminate against people of color are easily invalidated under the strict scrutiny standard, which requires that classifications based on race must be narrowly drawn to promote a "compelling governmental purpose."⁵⁵

⁵⁰ *Armstrong III*, 116 S. Ct. at 1480 (1996).

⁵¹ *Plyer v. Doe*, 457 U.S. 202, 216 (1982) (citation omitted).

⁵² *See Village of Arlington Hts. v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1976).

⁵³ *Plyer v. Doe*, 457 U.S. at 217.

⁵⁴ *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

⁵⁵ *Id.* at 4.

However, where litigants have brought equal protection challenges to laws codifying crack/powder sentencing disparities, appellate courts have almost universally applied rational basis review, a standard in which the government need only demonstrate a legitimate reason for its action.⁵⁶ Thus, although the disproportionate impact against African Americans of the facially neutral cocaine legislation is evident, racially discriminatory intent has been virtually impossible to prove.

An equal protection violation, however, can also be established by showing that a facially neutral statute is applied in a racially discriminatory way.⁵⁷ Under appropriate circumstances, an inference of discriminatory purpose can be drawn from a statute's disproportionate impact upon a particular group⁵⁸ and, as argued in dissent by Justice Marshall, may also be inferred from the "inevitable or foreseeable impact of a statute."⁵⁹ In *Washington v. Davis*, a case involving race-based employment discrimination, the Supreme Court developed the principle that although the Fifth Amendment's Due Process Clause contains an equal protection component prohibiting the United States from invidious discrimination, it does not follow that a law is unconstitutional solely because it has a racially discriminatory purpose. The Court held, "disproportionate

⁵⁶ International Human Rights Law Group, "U.S. Ratification of the International Convention on the Elimination of All Forms of Racial Discrimination: An Overview of United States Law with Analyses of Potential Reservations, Understandings, and Declarations to the Convention," at 3-4 (1994). *See also* Taifa, "Cracked Justice: A Critical Examination of Cocaine Sentencing," at 144-45; *See e.g.*, *United States v. Clary*, 34 F.3d 709 (8th Cir. 1994); *United States v. Maxwell*, 25 F.3d 1389, 1401 (8th Cir.), *cert denied*, 115 S. Ct. 610 (1994) (racially disparate impact not a basis upon which a court may rely to impose a sentence outside of the applicable guidelines range); *United States v. Angulo-Lopez*, 7 F.3d 1506 (10th Cir. 1993) (following standard set by other circuit courts in rejecting defendant's equal protection challenge under rational basis review); *United States v. Bynum*, 3 F.d 769, 774 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1105 (1994) (explaining that discriminatory impact not proper basis for downward departure); *United States v. Lattimore*, 974 F. 2d 971, 975-76 (8th Cir. 1992) (disparate impact is not an aggravating or mitigating circumstance warranting downward departure from Sentencing Guidelines); *United States v. Harding*, 971 F.2d 410 (9th Cir. 1992).

⁵⁷ *Plyer v. Doe*, 457 U.S. 202, 216 (1982).

⁵⁸ *See Personal Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279-81 (1979).

impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.”⁶⁰

The Court gave additional consideration to the necessity to prove discriminatory intent or purpose as opposed to disparate impact in an equal protection case. In *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, the Court again ruled that a showing of discriminatory intent must first be shown in order to find a “race-neutral” law violative of the Equal Protection Clause when it results in a discriminatory impact.⁶¹ The Court went on to uphold a neutral law – a zoning restriction, which resulted in a disparate impact – racially segregated housing.⁶² The Court, however, established several “circumstantial evidentiary sources” for judicial review of legislative or executive motivation to determine whether a racially discriminatory purpose exists,⁶³ acknowledging that “[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of state action even when the governing legislation appears neutral on its face.”⁶⁴

The Supreme Court reaffirmed its position requiring proof of discriminatory purpose where a law is challenged on equal protection grounds in *Personal Adm’r of Mass. v. Feeney*. In this case of gender-based employment discrimination, the Court highlighted the importance of identifying the discriminatory intent of legislators in order

⁵⁹ *Id.* at 281 (Marshall, J., dissenting). See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

⁶⁰ *Washington v. Davis*, 426 U.S. 229, 242 (1976).

⁶¹ *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

⁶² *Id.*

⁶³ These subjects of inquiry include (1) adverse racial impact of the official action; (2) historical background of the decisions; (3) specific sequence of events leading up to the challenged decision; (4) departures from normal procedure sequence; (5) substantive departure from routine decisions; (6) contemporary statements made by the decision makers; and (7) the inevitability or foreseeability of the consequences of the law. See lower court decision in *United States v. Clary*, 846 F. Supp. at 783.

⁶⁴ *Arlington Heights*, 429 U.S. at 266.

to find a valid equal protection challenge to a law. The Court acknowledged the “objective factors” set forth in *Arlington Heights*, as a “practical” basis for proving discriminatory intent. Yet, the Court went on to hold, “[w]hen the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern ... the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.”⁶⁵ The Court went on to uphold the gender-neutral law which disparately impacted women veterans.

The Role of Institutional Racism

The existence of institutional racism is a key hurdle to remedying racial discrimination in the criminal justice system, given the restrictive manner in which U.S. courts construe the intent requirement in general equal protection analysis involving criminal justice issues. Institutional racism is a theory of racism wherein unwarranted racially disparate treatment is codified within the structural fabric of social institutions and manifests routinely without the need for a discrete actor to overtly perpetuate a discriminatory act. The ABA has recognized this phenomenon in its Summit on Racial and Ethnic Bias in the Justice System as “statutes, rules, policies, procedures, practices, events, conduct and other factors, operating alone or together, that have a disproportionate impact upon one or more persons/people of color.”⁶⁶ The Summit continues by stating, “(o)ur definition therefore rejects the limitations of ‘active’ bias to discrete and provable instances of intentional bigotry ... We view our challenge as

⁶⁵ Feeney, 442 U.S. at 272.

⁶⁶ American Bar Association, “Achieving Justice in a Diverse America: A Summit on Racial and Ethnic Bias in the Justice System, A Preliminary Report and Plan for Action 2 (1994).

extending also to passive bias where it has a systemic effect on the administrative of justice.”⁶⁷

It is clear that few prosecutors, law enforcement officers, or legislators will affirmatively announce, ‘I have the specific intent to discriminate against black people,’ or ‘I specifically targeted African Americans for federal court prosecution where I knew they would be subjected to long mandatory sentences,’ or ‘I specifically voted for penalties for crack cocaine that are 100 times more severe than penalties for powder cocaine because I wanted to insure lengthy incarceration periods for African Americans.’ Yet that level of honest specificity appears to be what interpretation of current law requires.

Scholars have argued, therefore, that the current intent standard “ignores the way racism works”⁶⁸ and because racial inequality can manifest irrespective of the decision-maker’s motive,⁶⁹ the remedy to that inequality must likewise not be dependent upon provable intention conduct. “Sophisticated racists have learned to code their language and not leave behind a paper trail of racism.”⁷⁰ Although cognizable reasons may exist for the courts declining to extend an equal protection remedy beyond cases of provable intentional discrimination,⁷¹ such arguments, no matter how colossal they may appear,

⁶⁷ *Id.* at 3.

⁶⁸ Charles R. Lawrence, “The Id, Ego, and Equal Protection: Reckoning with Unconscious Racism,” 39 *Stan. L. Rev.* 317, (1987); The Justice Collective, “Redefining Discrimination: Using Social Cognition Theory to Challenge the Faulty Assumptions of the ‘Intent Doctrine’ in Anti-Discrimination Law;” Linda Hamilton Krieger, “The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity,” 47 *Stan.L. Rev.* 1161 (1995); Ian Haney Lopez, “Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination,” 109 *Yale L.R.* 1717 (2000).

⁶⁹ Lawrence, “The Id, Ego and Equal Protection,” at 319.

⁷⁰ Richard Drorak, “Cracking the Code: Decoding Colorblind Clues,” 5 *Mich. L. R.* 611 (2000).

⁷¹ Reasons in *Washington v. Davis* include Court would be in the untenable position of having to address “serious questions ... about a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white,” 426 U.S. at 248; *See also* *McClesky v. Kemp*, Justice Powell warned that “if we accepted *McClesky*’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with

should not continue to be allowed as justification to circumscribe justice. Novel analysis must be advanced which will, in time, trigger novel solutions. Current equal protection analysis must not be allowed to incapacitate receptivity to creative solutions. Encouragingly, the United States in its ratification process of CERD, did not make a direct reservation to the Convention's "effects" provisions, despite the fact that under current U.S. constitutional law analysis, there is no affirmative duty to remedy de facto discrimination pursuant to equal protection laws unless a party can establish discriminatory intent.

Conclusion

These comments have demonstrated that current law provides no successful challenge to the disparate impact against African Americans in cocaine sentencing. Guidance from international norms, however, specifically provisions of CERD affirming the importance of discriminatory impact, could eliminate barriers presented by current domestic law and practice with respect to racism in the criminal justice system in general, and the crack/powder cocaine differential in particular. Even if legislation is not actively sought to directly enforce the treaty in U.S. law, one commentator asserts that if international law were used to assist in interpreting constitutional rights, "the right attains greater credence as one that has universal recognition."⁷²

similar claims as to other types of penalty, 481 U.S. 279 (1987); *Hernandez v. New York*, 500 U.S. 352, 374 (1991) (O'Connor, J., concurring – "In *Washington v. Davis* we outlined the dangers of a rule that would allow an equal protection violation on a finding of mere disproportionate effect. Such a rule would give rise to an unending stream of constitutional challenges."

⁷² Lisa Kline Arnett, Comment, "Death at an Early Age: International Law Arguments Against the Death at an Early Age: International Law Arguments Against the Death Penalty for Juveniles," 57 U. Cin. L. Rev. 245, 261 (1988).

This Commission has been chartered to prepare recommendations and a report for consideration by the ABA at its next annual meeting in August 2004. The recommendations and report should 1) urge Congress to remedy unwarranted racial disparity in sentencing between crack and powder cocaine by enacting legislation equalizing the penalties between crack and powder cocaine, at the current penalty level set for powder cocaine. 2) This Commission should urge judges to interpret equal protection analysis in light of CERD's clause abrogating laws with an invidious discriminatory effect, irrespective of proof of intent, enabling the higher standard of strict scrutiny to apply. 3) Finally, this Commission should encourage the State Department, in its next periodic report to the United Nations Committee to Eliminate Racial Discrimination, to directly address the issue of the racial impact of United States drug laws and enforcement,⁷³ and provide detailed information for the Committee's review with respect to U.S. compliance with the "effect" provisions of CERD to insure that there is "equal treatment before the tribunals and all other organs administering justice."⁷⁴

In conclusion, the Race Convention embodies the world community's expression that a universal, international standard against race discrimination is necessary if racial and ethnic bias is to be eliminated. The executive, legislative and judicial branches of government must be challenged to take appropriate measures to ensure that U.S. laws, policies, and practices are in conformity with the dictates of this Convention.

Over 100 years ago, W.E.B. DuBois predicted that the problem of the 20th century would be the problem of the color line. And now, during the 21st century, the problem of

⁷³ See specific recommendations contained within Human Rights Watch, International Human Rights Law Group, NAACP Legal Defense & Educational Fund, "Summary of Concerns about Race Discrimination in the U.S. Criminal Justice System" (1995).

⁷⁴ CERD, Title 1, Art. 5(a).

race in society is still pernicious. Current interpretation of domestic law has proven inadequate in providing relief. The application of international human rights law to U.S. criminal justice jurisprudence could be a pivotal strategy which eradicates racism and its deleterious effects.

###