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**DISCRIMINATORY IMPACT OF
MANDATORY MINIMUM SENTENCING
IN THE FEDERAL CRIMINAL JUSTICE SYSTEM
OF THE UNITED STATES OF AMERICA**

Written testimony submitted by
the American Civil Liberties Union (ACLU), Charles Hamilton Houston Institute for
Race and Justice, Criminal Justice Policy Foundation, International Citizens United for
Rehabilitation of Errants (CURE), Justice Policy Institute, Law Enforcement Against
Prohibition, Lawyers' Committee for Civil Rights Under Law, Leadership Conference on
Civil Rights, National Association for the Advancement of Colored People (NAACP),
NAACP Legal Defense and Educational Fund (LDF), National Black Police Association,
Open Society Policy Center, Penal Reform International, and the Sentencing Project —
all non-governmental participating organizations of the Justice Roundtable, a broad
network of advocacy groups seeking reform of the U.S. justice system.

This testimony is being delivered before the Inter-American Commission on Human
Rights on behalf of the Justice Roundtable by Charles J. Ogletree, the Jesse Climenko
Professor of Law and founder and Executive Director of The Charles Hamilton Houston
Institute for Race and Justice.

Recommendations

The Justice Roundtable urges the Inter-American Commission on Human Rights to determine whether the United States government is violating international law and norms protected under the American Declaration of Rights and Duties of Man (“American Declaration”) by the implementation as well as the application of mandatory minimum sentences in a discriminatory manner. Specifically, the Justice Roundtable requests that the Commission consider the application of these laws in relation to the following human rights norms protected by the American Declaration: (1) the right to equal protection of the law, (2) the right to a fair trial, and (3) the right to due process.

Should the Commission conclude that the United States is indeed in violation of these norms, we request that the Commission:

- Provide the United States government with a legal analysis explaining the basis for the Commission’s finding.
- In view of this analysis, we encourage the Commission to issue guidelines to the United States to assist the US government in bringing its laws into compliance with the American Declaration.
- We further request that the Commission incorporate its analysis and associated guidance in a subsequent Commission Report.

Discriminatory Impact of Mandatory Minimum Sentences in the United States

Introduction

The Justice Roundtable is a broad network whose mission is 1) to promote fairness and equality in all areas of the criminal justice system; 2) to reduce the over reliance on incarceration in the United States; 3) to minimize the counter-productive consequences of criminal convictions; and 4) to conform domestic criminal justice policies to international human rights doctrine. The participants in the Justice Roundtable pursue this mission through education and advocacy to influence public policy, and through public and legislative discussion of criminal and civil justice reform. The coalition's ultimate goal is to build safe and healthy communities that respect the civil and human rights of all.

Under the OAS Charter, the provisions of the American Declaration on the Rights and Duties of Man (American Declaration) bind the United States, as a member state of the Organization of American States. The Justice Roundtable declares that mandatory minimum sentences violate protected rights found in the American Declaration—specifically, the right to equal protection of the law, the right to a fair trial, and the right to due process. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), further elaborates on the provisions of the American Declaration and, as such, the Commission should look to its provisions for guidance as well.

Background

A mandatory minimum sentence is a punishment—usually a prison term for an offense that a legislative body requires a court to impose upon a finding of guilt. In federal crimes, the overwhelming majority of the mandatory minimum sentences are imposed for offenses involving drugs or weapons. Depending on the finding of one fact—such as a quantity of drugs, or the proximity of a firearm to the offense—Congress has mandated that the sentence be at least 5, 10, 15, 20 years or more. Commonly these long sentences are imposed on low level, nonviolent offenders. In most cases, judges are barred from considering any factors which mitigate the culpability of the offender. The result has been the imposition of inordinately harsh sentences, which apply regardless of the defendant's role in the offense.

Mandatory minimum sentences were enacted in the United States as early as 1790 for capital crimes.¹ Having gained political popularity as part of the trend toward harsher criminal sanctions in recent decades, mandatory minimum sentences are now routinely enacted in federal and state law. Despite the political support for mandatory sentences, observers from the judiciary to human and civil rights organizations have consistently

expressed concern about the economic, social and racial implications of mandatory minimum sentences. In 1993, former United States Supreme Court Chief Justice William H. Rehnquist noted that mandatory sentences are “perhaps a good example of the law of unintended consequences.”² In a powerful speech before the American Bar Association in August 2003, United States Supreme Court Justice Anthony M. Kennedy questioned the fairness and effectiveness of many criminal justice policies, including mandatory minimum sentences.³ Justice Kennedy stated:

. . . I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences . . . In too many cases, mandatory minimum sentences are unwise and unjust. Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts. There is debate about this, but in my view a transfer of sentencing discretion from a judge to an Assistant U. S. Attorney, often not much older than the defendant, is misguided. Often these attorneys try in good faith to be fair in the exercise of discretion. The policy, nonetheless, gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.

Mandatory Minimum Sentences in the Federal Criminal Justice System

In the 1970s, observers of the American judicial system were increasingly concerned with the widespread disparity in sentencing. With very broad discretion, judges imposed widely varying sentences for similar offenses. In many jurisdictions, a judicially imposed sentence was subject to substantial modification by a parole authority. A movement to reform sentencing culminated in the enactment of the Sentencing Reform Act of 1984 (SRA). The goals of the SRA were to reduce unwarranted disparity among defendants with similar records guilty of similar conduct, and increase certainty and fairness. The legislation created the United States Sentencing Commission, an independent expert panel in the judiciary given the responsibility of producing federal sentencing guidelines and monitoring the application of the guidelines.⁴ A political motivation for the creation of the U.S. Sentencing Commission was to address the public concern that judges were imposing insufficient sentences by reducing their discretion.

Shortly after the enactment of the SRA, Congress soon began to enact new mandatory minimum sentences.⁵ From 1984 to 1990, Congress passed a number of mandatory minimum penalties primarily aimed at drugs and violent crime.⁶ Lawmakers thought that by enacting these mandatory penalties it would deter crime by creating fixed and lengthy prison terms.⁷ However less than 10 years after passing many of the mandatory penalties, members in Congress familiar with criminal justice issues began to realize how these sentences were inconsistent with the objectives of the SRA.⁸

The most notorious law passed in the wake of the SRA that exemplified Congress’ revived interest in mandatory sentences was the crack cocaine penalty. Crack

cocaine (commonly known as “crack”) emerged in Miami and Los Angeles between 1984 and 1985. Crack is easily prepared by mixing powder cocaine (cocaine hydrochloride), baking soda (sodium bicarbonate), and water and then heating on a stovetop or in a microwave oven. The reaction creates a hard material similar to a rock – crack cocaine.⁹ Applying a hot flame can vaporize crack and a large volume of cocaine vapor can be inhaled into the lungs and very quickly enter the bloodstream and go to the brain.

By 1986, crack was widely available in large U.S. cities and relatively inexpensive. Powder cocaine was sold in gram or half gram quantities, for \$50-\$100. Crack was sold as some number of chips or rocks, commonly in small vials, for \$5-\$20. Like the introduction of inexpensive gin to London in the mid eighteenth century, there was a substantial increase in the relatively small population using the drug, and the appearance of devastating consequences. Police in the U.S. traditionally tolerated vice markets in economically depressed neighborhoods, disproportionately identified as the homes of people of color. With a rapid increase in the use of crack over several years from 1984 to 1986, many myths about the properties of “crack” were established in the popular culture. For example, crack was thought to be so much more addictive than powder cocaine that it was “instantly” addicting. It was said to cause especially violent behavior in those who used the drug. It was said to destroy the maternal instinct leading to the abandonment of children. It was said to be a unique danger to developing fetuses and it was said that a generation of “crack babies” would plague the nation’s cities for their lifetimes.

Such dramatic claims were widely repeated in the news media. As a result of the enormous fear of crack, many in Congress said that the existing sentences for drug violations were inadequate to deal with the dangers of this new drug. In June 1986, the nation was stunned by the death of University of Maryland basketball star Len Bias, who was African American and died of a drug and alcohol overdose three days after being drafted by the Boston Celtics of the National Basketball Association. Many in the media and public jumped to the conclusion that Bias died of a crack overdose.¹⁰ Significantly motivated by Bias’ death, Congress quickly enacted the 1986 Anti-Drug Abuse Act. In large part this law was passed based on the notion that America’s inner cities were being devastated by the infiltration of crack cocaine. However, it was later revealed, during the trial of the person accused of supplying Bias with drugs, that he actually died of a powder cocaine overdose.¹¹ By the time the truth about Bias’ death was discovered, Congress had already passed the harsh discriminatory crack cocaine law.

This law established in the Controlled Substances Act new mandatory prison terms of five-years and ten-years for trafficking offenses based upon proof that a modest quantity of drugs was involved. These were mandatory prison sentences for first-time drug offenders. For example, the five-year minimum penalty (with a maximum of up to 40 years) is triggered if the offense involved at least 500 grams of powder cocaine or as little of 5 grams of crack cocaine (the weight of two pennies) and the ten-year mandatory sentence by 5000 grams of powder or 50 grams of crack cocaine.¹² There was no scientific basis for concluding that crack was 100 times more harmful than powder cocaine.

In 1988, Congress intensified its war against crack cocaine by passing the Anti-Drug Abuse Act of 1988. The 1988 Act created a five-year mandatory minimum and twenty-year maximum sentence for simple possession of five grams or more of crack cocaine.¹³ The maximum penalty for simple possession of any amount of powder cocaine or any other drug remains at one year in prison.

A 1994 crime bill directed the United States Sentencing Commission to submit a report to Congress on cocaine sentences.¹⁴ In a 1995 report, the Sentencing Commission concluded that while there were important distinctions between the two forms of the same drug, and while those distinctions may have warranted higher penalties for crack cocaine than powder cocaine, it could not recommend a differential as great as the 100:1 ratio.¹⁵ Several months later, the Sentencing Commission submitted to Congress proposed legislation and amendments to its sentencing guidelines, which would equalize the penalties between crack and powder cocaine possession and distribution.¹⁶ On October 30, 1995, Congress rejected the proposed amendment to the sentencing guidelines¹⁷ and directed the Commission to make further recommendations regarding the powder and crack cocaine statutes and guidelines that did not advocate parity.

In April of 1997, in response to a congressional request, the Sentencing Commission issued a second report urging the elimination of the 100:1 ratio. The Commission recommended that Congress reduce the current 500-gram trigger for the five-year mandatory minimum sentence in powder cocaine offenses to a level between 125 and 375 grams and that it increase the five-gram trigger in crack cocaine offenses to between 25 and 75 grams—resulting in a 5:1 ratio.¹⁸ Congress made no changes to the sentencing structure despite the Commission's recommendations. Once again, in 2002 the Sentencing Commission had hearings with a wide range of experts who overwhelmingly concluded that there is no valid scientific or medical distinction between powder and crack cocaine. After the 2002 hearings, the Sentencing Commission issued a new report on crack and powder cocaine disparities and once again found that the 100:1 ratio between the drugs was unjustified, but recommended that Congress raise the trigger quantity for crack cocaine to at least 25 grams and not lower the trigger quantity for powder cocaine.¹⁹ Once again, Congress passed no changes to the cocaine sentencing law.

Twenty years after the enactment of the 1986 Act many of the myths associated with crack cocaine have been dispelled. In 1996, a study published by the Journal of American Medical Association (JAMA) found that the physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of powder or crack.²⁰ The study showed evidence of the potential for greater abuse and dependence when cocaine is smoked or injected (as with crack) than when cocaine is inhaled (as with powder).²¹ The study concluded that although crack cocaine has been linked with crime to a greater extent than powder cocaine, many of these crimes are associated with the addiction to cocaine. Therefore, people who are incarcerated for the sale or possession of cocaine (whether powder or crack) are better served by treatment than prison.²² In addition, the media stories of crack-addicted mothers giving birth to “crack babies” that appeared in the late 1980s are now considered greatly exaggerated.²³

Discriminatory Impact of Mandatory Minimums

By 1990, Congress was beginning to have second thoughts about the wisdom of mandatory sentences, and it directed the Sentencing Commission to study mandatory minimums and to report on their effects. In August 1991, the Commission completed an in-depth study on mandatory minimum sentences and concluded that non-whites are much more likely to receive these sentences and that these sentences are being applied in a discriminatory manner.²⁴ African Americans and Hispanics were more likely than whites to be sentenced to at least the minimum sentence in cases where a mandatory minimum prison term could be applied, the Federal Judicial Center reported.²⁵ Although Congress intended to reduce the disparities and arbitrariness of the federal sentencing system the report concluded that mandatory minimums actually added to these problems.

The legal distinction between crack and powder cocaine remains the most disturbing example of the discriminatory impact of mandatory minimum sentences. In 2002, African Americans constituted more than 80 percent of the people sentenced under the harsh federal crack cocaine laws and served substantially more time in prison for drug offenses than did whites,²⁶ despite the fact that more than two-thirds of crack cocaine users in the United States are white or Hispanic.²⁷ In 2004 the United States Sentencing Commission said, “[r]evising the crack cocaine thresholds would [do more to] reduce the [sentencing] gap than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system.”²⁸

Perhaps more troubling than the sheer number of African Americans and Hispanics who are in federal prison as a result of the crack cocaine law is data suggesting racial disparity in the application of mandatory minimum sentences. The average sentence for a crack cocaine offense in 2003 (123 months) was three and a half years longer than the average sentence for an offense involving the powder form of the drug (81 months). The difference between the average time African American offenders serve in prison versus white offenders increased by 77 percent, compared to an increase of 28 percent for white drug offenders from 1994 to 2003 for drug offenses largely due to mandatory minimum sentences.²⁹ African Americans now serve virtually as much time in prison for a drug offense (58.7 months) as whites do for a violent offense (61.7 months).³⁰ The fact that African American and Hispanic defendants received the mandatory sentences twenty percent more often than white defendants whose behavior warranted a mandatory minimum sentence further supports the racially discriminatory impact of mandatory minimum penalties.³¹

More specifically, federal and state drug laws and policies over the past twenty years have had devastating and disparate effect on African American and Hispanic women. In 2003, 58 percent of all women in federal prison were convicted of drug offenses, compared to 48 percent of men.³² The growing number of women who are incarcerated disproportionately impacts African American and Hispanic women. African American women’s incarceration rates for all crimes, largely driven by drug convictions, increased by 800 percent from 1986 to 2001, compared to an increase of 400 percent for

women of all races for the same period.³³ Mandatory sentencing laws prohibit judges from considering the many reasons women are involved or remain silent about a partner or family member's drug activity such as domestic violence and financial dependency. Sentencing policies, such as mandatory minimums often subject women who are low-level participants, to the same or harsher sentences as the major dealers in a drug organization.³⁴

Mandatory Minimum Sentences Violate the American Declaration of the Rights and Duties of Man

The discriminatory impact of the U.S. government's application of mandatory minimum sentences violates the American Declaration's protections of equality under the law, due process of the law and a fair trial. Article II of the American Declaration states that all persons have a right to equality under the law.³⁵ While it has not been legally established that Congress had any discriminatory intent when enacting mandatory minimum laws, the discriminatory impact in the application of this law is clear. Over 80 percent of individuals prosecuted by the U.S. government under the crack cocaine mandatory minimum laws are African American, despite the fact that only one-third of crack cocaine users are African American. Research studies that have concluded that non-whites are more likely than whites to receive mandatory terms in prison provide additional evidence that the right to equal protection under the law pursuant to the American Declaration is violated by the application of mandatory minimum sentences.³⁶

Article XXVI of the American Declaration establishes the right to due process and specifically prohibits individuals from receiving cruel and unusual punishment.³⁷ When determining whether an individual's Eighth Amendment right against cruel and unusual punishment has been violated under the U.S. Constitution, courts often look to whether the sentence is disproportionate to the crime.³⁸ Mandatory minimum penalties adopted by Congress in 1986 and 1988 are among the most severe in the country.³⁹ In many cases involving mandatory minimum sentences, such as those involving low-level offenders and women, the sentences are completely disproportionate to the crime committed.⁴⁰ In many cases low-level offenders receive the same or harsher sentences than the principals in a drug trade. These low-level drug offenders, many of them women, have had their due process rights violated under the American Declaration.

Finally, Article VIII of the American Declaration gives every person a right to a fair trial. Mandatory sentences are so long in many cases they effectively preclude an accused from undertaking the risk of going to trial. The choice between a trial that might result in a conviction carrying a certain a mandatory sentence of 20 or 30 years and a guilty plea with a term of 5 years, in essence is no choice. When accused persons are given these options, it effectively deprives them their right to a trial to show that the government could not prove its case, or that the accused's culpability was nonexistent or minor. In fiscal year 2002, 97.0 percent of the 25,361 federal drug trafficking cases were resolved by a guilty plea.⁴¹ One of the most important attributes of a fair trial is when an objective fact finder, whether a judge or a jury, concludes based on the evidence that a person is guilty of a crime. Because prosecutors have the power to deter the accused

from exercising their right to a fair trial by application of mandatory sentencing schemes the right to a fair trial guaranteed under the American Declaration is being violated.

A component of a fair trial is individualized justice, specifically, an individualized sentence by the court. As Justice Anthony Kennedy and other observers have pointed out, mandatory minimum sentences take away from the court the power to determine and impose a sentence, and transfer that power to prosecutors. Prosecutors decide which of a range of charges to bring, carrying a range of potential sentences, including the long mandatory sentences. Prosecutors retain the power to plea bargain by offering defendants plea agreements that avoid the mandatory penalty. Because in the application of mandatory minimum sentencing schemes prosecutors have the power to determine the ultimate sentence that can be imposed, the right to a fair trial guaranteed under the American Declaration is being violated.

Studies have shown that this discretion results in a disparity in sentencing outcomes based largely on race of the defendant and quality of defense attorney.⁴² In 1999, 39 percent of those receiving mandatory sentences were Hispanic, 38 percent were African American, and 23 percent were white.⁴³ Although in 1999 African Americans and Hispanics were only 24.7 percent of the population, they comprised 77 percent of those who received mandatory minimum sentences and nearly 90 percent of the individuals given mandatory life sentences by the U.S. government.⁴⁴ Based on these statistics, it is clear that a disproportionate number of African Americans and Hispanics are being incarcerated pursuant to mandatory minimum sentences in the U.S.; therefore their right to a fair trial guaranteed under the American Declaration is being violated.

Mandatory Minimum Sentences Violate the International Convention on the Elimination of All Forms of Racial Discrimination

The disparity in penalty 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 this testimony has outlined the unmistakable discriminatory impact of the crack statute against African Americans, federal appellate courts to date have failed to find that the U.S. Congress acted with racially discriminatory intent, pursuant to popular interpretation of current equal protection law. This failure is due, in large part, to the courts' unwillingness to traverse beyond scrutiny of specific intentional conduct to include a consideration of the subtle nature of 21st century racism, which rarely leaves behind an overt paper trail. As one scholar expressed:

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 were 100 times more severe than penalties for the same amount of powder cocaine because I wanted to insure lengthy incarceration periods for African Americans.' Yet this

level of honesty specificity appears to be what interpretation of current intent law in the criminal sphere requires.⁴⁵

It has been argued therefore, that the intent standard governing U.S. law ignores the way racism works⁴⁶ and because racial inequality can manifest irrespective of the decision-maker's motive,⁴⁷ the remedy to the inequality must likewise not be dependant upon traditionally provable intentional conduct.

International jurisprudence is enlightened in this perspective, in that it understands that racism manifests in various forms, allowing specific intent to be gleaned through actions as well as impact. The International Convention on the Elimination of All Forms of Racial Discrimination (“Race Convention”), which the U.S. ratified in 1994,⁴⁸ allows laws and practices that have an invidious discriminatory impact to be actionable, regardless of specific intent, reaching both conscious and unconscious forms of racism.

U.S. ratification of the Race Convention followed a tradition of ratifying human rights treaties with limiting reservations, understandings and declarations. One limitation with respect to this Convention is a non-self-executing declaration—that the Race Convention will not create rights directly enforceable in U.S. courts absent implementation of specific legislation. U.S. courts and legislatures, however, should not be daunted by the strictures of that declaration. Although the Race Convention would provide a stronger source of protection if implementing legislation were adopted by Congress, the fact that the treaty is non-self-executing should not prevent a court from shaping its analysis in conformity with an international standard to which the U.S. is a party and which embodies the world community's expression of a universal standard against race discrimination.

Recommendations

The Justice Roundtable urges the Inter-American Commission on Human Rights to determine whether the United States government is violating international law and norms protected under the American Declaration of Rights and Duties of Man (“American Declaration”) by the implementation as well as the application of mandatory minimum sentences in a discriminatory manner. Specifically, the Justice Roundtable requests that the Commission consider the application of these laws in relation to the following human rights norms protected by the American Declaration: (1) the right to equal protection of the law, (2) the right to a fair trial, and (3) the right to judicial protection against violations of fundamental rights. Should the Commission conclude that the United States is indeed in violation of these norms, we request that the Commission provide the United States government with a legal analysis explaining the basis for the Commission's finding. In view of this analysis, we encourage the Commission to issue guidelines to the United States to assist the U.S. government in bringing its laws into compliance with the American Declaration. We further request that the Commission incorporate its analysis and associated guidance in a Commission Report.

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- ¹ U.S. Sentencing Commission, Special Report to the Congress: Mandatory Minimums Penalties in the Criminal Justice System, at 6 (1991). Hereinafter “Mandatory Minimum Report.”
- ² William H. Rehnquist, Luncheon Address (June 18, 1993), in U.S. Sentencing Commission, *Drugs & Violence In America: Proceedings of the Inaugural Symposium on Crime and Punishment in the United States: June 16-18, 1993*, Washington, D.C. (1993). Quoted In Barbara S. Vincent & Paul J. Hofer, Federal Judiciary Center, *The Consequences Of Mandatory Minimum Prison Terms: A Summary Of Recent Findings 1* (1994).
- ³ Anthony M. Kennedy, American Bar Association (ABA) Address (August 9, 2003) at the ABA Annual Meeting August 9-10, 2003 San Francisco, CA (2003).
- ⁴ *Pub. L. No. 98-473*, 98 Stat. 1987. The law established the United States Sentencing Commission and directed it to promulgate a system of detailed, mandatory sentencing guidelines prescribing the appropriate form and severity of punishment for offenders convicted of federal crimes.
- ⁵ Mandatory Minimum Report, *supra* note 1 at 9.
- ⁶ *Id.* at 5.
- ⁷ Hatch, Orrin G., *The Role Of Congress In Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, And The Search For A Certain and Effective Sentencing System*, 28 Wake Forest L.Rev. 185, 195 (1993).
- ⁸ *Id.*
- ⁹ Craig Reinerman and Harry G. Levine (editors), *Crack in America: Demon Drug, and Social Justice*, at 2 (1997).
- ¹⁰ U.S. Sentencing Commission, Special Report to the Congress: Cocaine And Federal Sentencing Policy I, at 123 (1995).
- ¹¹ *Id.*
- ¹² *Id.*
- ¹³ *Pub. L. No. 100-690*, 102 Stat. 4181 (1988).
- ¹⁴ *Pub. L. No. 103-322* (1994). The 1994 Act addressed many criminal law issues, one of which was the 100:1 ratio. Section 280006 of the 1994 Act directly addresses the ratio and the mandated cocaine penalty study.
- ¹⁵ *Id.* *supra* note 10 Chapter 8.
- ¹⁶ See Amendments to the Sentencing Guidelines for the United States Courts, 60 Fed. Reg. 25074, amend. No. 5 (proposed May 10, 1995).
- ¹⁷ *Pub. L. No 104-38*, §1, 109 Stat. 334 (1995).
- ¹⁸ U.S. Sentencing Commission, Special Report To The Congress: Cocaine And Federal Sentencing Policy II, at 2 (1997).
- ¹⁹ U.S. Sentencing Commission, Special Report To The Congress: Cocaine And Federal Sentencing Policy III, at viii (2002).
- ²⁰ D. K. Hatsukami; M. W. Fischman, *Crack cocaine and cocaine hydrochloride. Are the differences myth or reality?* *Journal of American Medicine*, Nov. 1996.
- ²¹ *Id.*
- ²² *Id.*
- ²³ *Id.* *supra* note 18 at 22.
- ²⁴ *Id.* *supra* note 1 at iii.
- ²⁵ Barbara S. Meierhoefer, *The General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentencing Imposed*, p. 20 (1992).
- ²⁶ U.S. Sentencing Commission, *Sourcebook* (2002), Table 34.
- ²⁷ Substance Abuse and Mental Health Services Administration, *2004 National Survey on Drug Use and Health, Population Estimates 1995* (Washington, D.C.: Sept. 2005), Table 1.43a.
- ²⁸ United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* (Nov. 2004), p. 132.
- ²⁹ Bureau of Justice Statistics [BJS], *Compendium of Federal Justice Statistics, 1994* (Washington, DC: March 1998) Table 6.11, p. 85 and BJS, *Compendium of Federal Justice Statistics, 2003* (Washington, DC: Oct. 2004) Table 7.16, p. 112.
- ³⁰ *Compendium of Federal Justice Statistics, 2003* (Oct. 2004), Table 7.16, p. 112.

³¹ Id. supra note 25.

³² Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online*, (30th ed. 2002).

³³ Marc Mauer, Cathy Potler & Richard Wolf, *Gender and Justice: Women, Drugs, and Sentencing Policy*, The Sentencing Project (Nov. 1999).

³⁴ Caught in the Net: The Impact of Drug Policies on Women and Families, March 2005 p. 4, at http://www.aclu.org/images/asset_upload_file743_23513.pdf.

³⁵ American Declaration of the Rights and Duties of Man, April 1948. Article II. All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

³⁶ Id. supra at 25.

³⁷ Id. Article XXVI. Every accused person is presumed to be innocent until proved guilty. Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

³⁸ *U.S. v. Kinsey*, 843 F.2d 383 (9th Cir.1988). “The final clause [of the Eight Amendment] prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed. *Solem v. Helm*, 63 U.S. 277, 284, 103 S.Ct. 3001, 3006, 77 L.E.d.2d 637 (1983). A court’s proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. *Id.* at 292, 103 S.Ct. at 3011.”

³⁹ *Drug Policy And The Criminal Justice System*, Sentencing Project (2001)

⁴⁰ Id. supra at 34.

⁴¹ U.S. Sentencing Commission, *2002 Sourcebook of Federal Sentencing Statistics*, Table 11, p. 24.

⁴² Marc Mauer, *Race to Incarcerate New Press*. (July 1999), pp. 129-132.

⁴³ Testimony of John Steer, vice chair, U.S. Sentencing Commission, before the House Governmental Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources, May 11, 2000.

⁴⁴ Id. Hispanics comprised 44 percent of those subject to five-year mandatory sentences in 1999, 37 percent of the 10-year mandatory sentences, 20 percent of the 20-year mandatory sentences and 8 percent of the mandatory life sentences. African American defendants made up 30 percent of those subject to five-year mandatory sentences in 1999, 43 percent of the 10-year mandatory sentences, 60 percent of the 20-year mandatory sentences and 80 percent of the mandatory life sentences.

⁴⁵ “Racial Disparities in the U.S. Criminal Justice System: Can the International Race Convention Provide a Basis for Relief?” Statement of Nkechi Taifa before the Justice Kennedy Commission, American Bar Association, November 14, 2003.

⁴⁶ 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).

⁴⁷ Lawrence, “The Id, Ego and Equal Protection,” at 319.

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