

**TESTIMONY ON CRIMINAL JUSTICE
FOR THE UNITED NATIONS SPECIAL RAPporteur ON RACISM**

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Thank you for the opportunity to briefly address the relationship between criminal justice and racial discrimination in America. The United States currently has the highest rate of incarceration in the world. Our prison population has grown from 300,000 incarcerated people in the early 1970's to over 2.3 million people behind bars today.¹ Today, 1 out of every 100 adults is imprisoned.² There are nearly six million people in this country whose lives and freedom are constrained because they are on probation or parole.³ This dramatic increase in the use of incarceration is not the result of a corresponding increase in crime, it has instead been caused by the politics of fear and anger, mandatory sentencing, “three strikes laws” and a misguided “war on drugs” that has been primarily directed at the poor and racial minorities. While many of the laws that have been passed are racially neutral as written, many of these laws are enforced in a racially discriminatory manner with devastating consequences for people of color.

One-third of black males born today likely will spend at least some part of their lives behind bars; nearly one-tenth of black males in their twenties already live in prison; and almost one out of three black males in their twenties currently remains in jail, prison, on probation or parole, or otherwise under criminal justice control.⁴ The annual arrest rate among African Americans is more than two and a half times the white rate.⁵ Some scholars have argued that mass imprisonment presents an institutional impediment to progress and equality for African Americans that has historical antecedents in slavery and American racial apartheid laws.⁶ Many states strip people who have been convicted of felonies from voting rights even while they are on probation or parole. Fourteen states permanently bar voting rights for some or all ex-felony offenders unless they are pardoned.⁷ In Alabama, for example, 31% of the black male population has lost the right to vote as a result of criminal justice system disenfranchisement.

The widespread incarceration of people of color has had a profound negative impact on social and cultural norms relating to family and opportunity. Extraordinary increases in the imprisonment of poor and minority women with children has resulted in rising numbers of displaced children and dependents.⁸ In a growing number of poor rural and urban communities, a dispiriting culture of hopelessness and despair has festered into cycles of violence, criminality, and failure. For too many poor citizens and people of color, arrest and imprisonment has become an inevitable and seemingly unavoidable part of the American experience.

There is clear evidence of racial bias in the administration of criminal justice in the United States. In death penalty cases, study after study has found widespread bias against African Americans, Latinos and other racial minorities. Even government studies have found that race of the victim is the greatest predictor of which cases result in capital punishment.⁹ In the United States, nearly 80% of people on death row have been convicted of crimes against white victims although African Americans face much greater risks of homicide and victimization from violent crime.¹⁰

Evidence of disparate treatment of racial minorities can be found for other crimes and at each juncture of the criminal justice process (arrest, filing of charges, pretrial detention, conviction, and incarceration) as systemic decisionmakers (police officers, prosecutors, and judges), who tend to be predominantly white,¹¹ frequently exercise their discretion in ways that disfavor people of color.¹² Even though there is evidence of disproportionately high involvement by African Americans and Latinos in some criminal offense categories, the disparities in arrest, sentencing and incarceration persist even where offender rates are racially proportionate.¹³ For example, people of color are disproportionately represented among those arrested, prosecuted, convicted and sentenced to prison for drug offenses. While African Americans make up 13 percent of the nation's monthly drug users, they represent 35 percent of those arrested for drug possession, 53 percent of those convicted of drug offenses, and 75 percent of those sentenced to prison in this offense category.¹⁴

Evidence of racial bias can be seen in the way juveniles are managed by the criminal justice system. Last year, our project issued a report that revealed there are seventy-three 13- and 14-year-old children in the United States who have been condemned to die in prison as result of sentences of life imprisonment without the possibility of parole.¹⁵ Two-thirds of these kids are children of color. All of the 13-year-old kids condemned to death in prison are black. African Americans constitute only 12% of the U.S. population. The United States is the only country in the world where children this young are prosecuted as adults and sentenced to death in prison.

African Americans, Native people and Latinos are routinely excluded from decisionmaking roles in the criminal justice system. In Alabama death penalty cases alone, courts have found over 25 cases where people facing execution were illegally convicted after prosecutors unlawfully excluded racial minorities from serving on juries.¹⁶ In many more cases, courts have failed to protect the rights of racial minorities. For example, in 2000, Alabama executed Robert Tarver who was illegally convicted after black prospective jurors were barred from jury service in his case. Even after the prosecutor admitted to racial bias jury selection shortly before the scheduled execution, Mr. Tarver was still executed.¹⁷ We

currently represent an African American man named Earl McGahee who is facing execution in Alabama this year. Mr. McGahee was tried by an all-white jury in Selma, Alabama, in a county that is over 60% black. The white prosecutor, who has a history of racial bias against African Americans, illegally excluded every black person qualified for jury service (23 people), justifying his discrimination against black jurors by asserting that they were “of low intelligence.” To date, no court has granted relief and Mr. McGahee is facing his last appeal before a possible execution in the next several months.

Racial bias has also created a presumption of guilt that black and brown people must overcome when they are confronted by police, accused of a crime or tried in a court of law.¹⁸ This presumption of guilt and dangerousness has resulted in horrific police killings of unarmed citizens, mistaken arrest and police brutality, and a shocking number of wrongful convictions of innocent people. Hundreds of innocent people have been exonerated in recent years after being proved innocent as a result of DNA testing or other evidence. I currently represent an African American man named Anthony Ray Hinton who has been on Alabama’s death row for 22 years for a crime he did not commit.¹⁹ He continues to face the threat of execution because of our systemic failure to adequately address racial bias.

There is a serious problem surrounding racial bias in the criminal justice system in this country that urgently needs reform and review.

RECOMMENDATIONS

1. The United States should set as a goal to reduce its prison population by 50% over the next ten years. Such a reduction in the numbers of incarcerated people could easily be achieved without any threat to public safety and would also save the government billions of dollars which could be redirected to crime prevention and assistance to victims of violent crime.
2. Punishment in the United States should conform to international standards and requirements that protect human rights. Where evidence of racial bias and discrimination is evident in sentencing, states and the federal government should intervene to make non-discriminatory sentencing a priority. Imposition of the death penalty and executions should be suspended until significant improvements are made to make sentencing reliable and fair. Life imprisonment without parole sentences should be banned for juveniles in conformity with international law.
3. Claims of racial bias in the administration of criminal justice and during the conduct

of criminal trials should always be adjudicated on the merits and not subject to procedural default or statutes of limitation.

4. States and the federal government should commit to dramatically increasing the number of racial minorities in decisionmaking roles in the criminal justice system.
5. Review and prosecution of incidents of police shootings against unarmed racial minorities should be managed by independent agencies specially trained to evaluate racial bias and abuse of power when allegations of police or prosecutorial misconduct are made.
6. A permanent commission specifically focused on the elimination of racial bias in the administration of criminal justice should be established. This commission should have the authority to restrict federal criminal justice spending and grantmaking to states that tolerate racially discriminatory practices or racially biased enforcement of the criminal law.

There are a number of other recommendations and strategies that could improve the fairness and reliability of criminal justice in the United States for people of color. I hope that the international community will play a helpful role in advocating for the elimination of bias against people of color in the criminal justice system in this country. I greatly appreciate your effort to examine issues of racial bias in the United States. Please feel free to contact us if we can provide any additional information or assistance in your review and thank you for your concern and attention to this very serious issue.

*Bryan Stevenson
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ENDNOTES

1. THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 1 (2005), available at <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>; Press Release, U.S. Dep't of Justice, Bureau of Justice Statistics (Oct. 23, 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/press/p04pr.htm>.
2. Pew Charitable Trust Foundation Report, "One in One-Hundred" (February 2008).
3. Lauren E. Glaze & Seri Palla, *Probation and Parole in the United States, 2004*, BUREAU OF JUSTICE STATISTICS BULLETIN 1 (Nov. 2005), available at www.ojp.usdoj.gov/bjs/pub/pdf/ppus04.pdf.
4. Marybeth Lipp, *A New Perspective on the "War on Drugs": Comparing the Consequences of Sentencing Policies in the United States and England*, 37 LOY. L.A. L. REV. 979, 1022 (2004).
5. D.H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 WIS. L. REV. 413, 454 (2003).
6. See Loic Wacquant, *From Slavery to Mass Incarceration: Rethinking the 'Race Question' in the US*, 13 NEW LEFT REV. 41 (2002).
7. Marc Mauer & Tushar Kansal, *Barred for Life: Voting Rights Restoration in Permanent Disenfranchisement States* (Feb. 2005), available at <http://www.sentencingproject.org/pdfs/barredforlife.pdf>.
8. The number of women serving sentences in state and federal prisons in the United States skyrocketed from 5635 in 1970 to 92,751 in 2003. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 31ST EDITION (2003), available at www.albany.edu/sourcebook. As of 1997, 65% of women incarcerated in state prisons and 59% of women in federal prisons had minor children. More than two-thirds of those mothers lived with their children prior to being incarcerated. In 1999, almost 1.5 million American children had a parent in prison; over half of these children were African-American. Christopher J. Mumola, U.S. Department of Justice, Bureau of Justice Statistics, *Incarcerated Parents and Their Children* 2, 4 (Aug. 2000), available at www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf.
9. Stevenson, DEBATING THE DEATH PENALTY, *Reflections on Race and Capital Punishment in America*, pgs. 76-110 (Oxford Press, 2004).
10. Id.

11. See Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 95 & nn.2-3 (1997) (“Only 3.8 % of all state court judges are African American. Among state trial court judges, only 4.1 % are African American.”); Roscoe C. Howard, *Changing the System from Within: An Essay Calling on More African Americans to Consider Being Prosecutors*, 6 WIDENER L. SYMP. J. 139, 167 (Fall 2000) (“The number of minorities for the government in the criminal justice system are very low. Blacks make up only 4% of the attorneys in the criminal justice system, while only 3% are Hispanic.”); C.J. Chivers, *For Black Officers, Diversity Has Its Limits*, N.Y. TIMES, April 2, 2001, at A1 (although New York City is 25% African American according to 2000 census, police force is 9.2% African American, “proportion of male black supervisors has declined since 1990,” and “five prestigious commands ... are almost all white”); Jodi Wilgoren & Michael Cooper, *Police Trailing Other Cities in Diversity*, N.Y. TIMES, March 8, 1999, at B5 (chart showing racial composition of police forces of New York City, Chicago, Los Angeles and Philadelphia in 1998 and 1999).
12. See, e.g., Eileen Poe-Yamagata & Michael A. Jones, *And Justice for Some* (April 25, 2000), available at <http://www.buildingblocksforyouth.org/justiceforsome/jfs.html> (demonstrating, in context of juvenile justice system, sequential process in which youth of color receive harsher treatment than white youth at each of the stages of the process: arrest, referral to juvenile court, pretrial detention, charging, transfer to adult court, disposition, placement in secure facilities, and incarceration in adult facilities). See also Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 48 (1994).
13. See R.J. Sampson & J.L. Laurisen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, in *ETHNICITY, CRIME AND IMMIGRATION* (Michel Tonry ed., 1997).
14. The Sentencing Project, “Drug Policy and the Criminal Justice System,” updated 2001. Available at www.sentencingproject.org, Sept. 1, 2001.
15. Equal Justice Initiative, “*Cruel and Unusual: Sentencing 13-and 14-Year-Old Children to Die in Prison*,” (Oct. 2007), available at <http://eji.org/eji/childrenprison/deathinprison>.
16. Stevenson, “*Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*,” 41 *Harvard Civil Rights-Civil Liberties Law Review* 339, 347 (Summer 2006).
17. Stevenson, *DEBATING THE DEATH PENALTY, Reflections on Race and Capital Punishment in America*, pgs. 76-110 (Oxford Press, 2004).
18. Stevenson, “*Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*,” 41 *Harvard Civil Rights-Civil Liberties Law Review* 339, 345 (Summer 2006).
19. See Hinton Case, available at <http://eji.org/eji/deathpenalty/wrongfulconvictions/hinton>.