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Using International Human Rights Law to Combat Racial Discrimination in the U.S. Criminal Justice System.

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USING INTERNATIONAL HUMAN RIGHTS LAW TO COMBAT RACIAL DISCRIMINATION IN THE U. S. CRIMINAL JUSTICE SYSTEM

TERRENCE ROGERS*

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I. INTRODUCTION

> The favorite culprits for high [B]lack prison rates include a biased legal system, draconian drug enforcement, and even prison itself. None of these explanations stands up to scrutiny. The [B]lack incarceration rate is overwhelmingly a function of [B]lack crime. Insisting otherwise only worsens [B]lack alienation and further defers a real solution to the [B]lack crime problem.[1]

The above quotation illustrates the main argument in opposition to the assertion that racial discrimination exists in the U.S. criminal justice system. Supporting this argument are the statistics from the federal Bureau of Justice Statistics stating that the homicides committed by African-Americans occurred at a rate of more than seven times that of Caucasians.[2] "From 1976 to 2005, [B]lacks committed over [fifty-two] percent

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1. Heather Mac Donald, *Is the Criminal-Justice System Racist?*, CITY J., Spring 2008, at 12, *available at* http://www.city-journal.org/2008/18_2_criminal_justice_system.html. For an understanding of Black alienation see Mark Satin, *John McWhorter's Perscription for Black America: Stop "Therapuetic Alienation Now!,* RADICAL MIDDLE NEWSLETTER (July 15, 2006), http://www.radicalmiddle.com/x_mcwhorter.htm (revieiwing John McWhorter's book WINNING THE RACE: BEYOND THE CRISIS IN BLACK AMERICA (2005)).

2. *Homicide Trends in the U.S.*, BUREAU OF JUSTICE STATISTICS, http://bjs.ojp.usdoj.gov/content/homicide/race.cfm (last revised Oct. 22, 2011) (data concerns homide rates from 1976–2005); Mac Donald, *supra* note 1.

> For [W]hites, the homicide offending rate began at 4.9 in 1976 and rose to 6.4 in 1980. The rate then decreased, reaching 3.5 in 2000, before increasing to 3.6 in 2001, where it remained constant until 2002. After 2002, it fell to 3.5 in 2003, before increasing to 3.6 in 2004. Then the rate dropped to 3.5 in 2005. For [B]lack, the homicide offending rate began at 46.6 in 1976 and fell to 44.4 in 1977. The rate then increased, reaching 51.4 in 1980, before decreasing to 33.1 in 1984. After 1984, it rose to 51.4 in 1991, before decreasing to a low of 24.1 in 2004. Then the rate increased to 26.5 in 2005. For other races, the homicide offending rate began at 4.6 in 1976 and increased to 4.8 in 1977. Then the rate fell to 3.8 in 1978, before increasing, reaching 7.0 in 1980. Then it decreased to 2.7 in 2004, before rising to 2.8 in 2005.

Homicide Trends in the U.S., *supra*.

of all murders" that occurred in the United States.[3] Furthermore, studies have shown that across a range of crimes, parity exists between the race of assailants identified by victims and arrest rates, implying that, barring any evidence of latent racism in crime victims' reports, the high arrest rate of certain races is not biased.[4]

Countering the argument cited above is the claim that unequal treatment of various minorities pervades each stage of the U.S. criminal justice system, as reflected in buy-and-bust operations, racial profiling, street sweeps, and other police activities that have targeted people in low-income communities populated mainly by minorities.[5] This argument states that a cyclical, self-perpetuating aspect to the treatment of certain minorities exists in the American criminal justice system, stemming from the perception by enforcement officers and decision-makers in the process that minorities commit most crimes and that most crimes are committed by minorities.[6] While empirically false, these perceptions have directed a disproportionate amount of law enforcement attention on minorities, in turn leading to disproportionate arrests of minorities, ultimately resulting in racial disparities in incarceration rates.[7] These claims are also bolstered by statistical studies stating that of the more than two million adults imprisoned in the United States at one time, about 70% are non-Whites,[8] and that though African-Americans make up only about 13% of the U.S. population, they represent nearly 50% of the adult population in federal, state, and local prisons and jails.[9] Another study shows

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3. Heather Mac Donald, *supra* note 1; *Homicide Trends in the U.S, supra* note 2.

4. Heather Mac Donald, *supra* note 1. This statistic is based on a 1978 report conducted in eight cities and review data on robbery and aggrevated assault. *Id.*

5. DRUG POLICY ALLIANCE, CRIME & PUNISHMENT: THE U.S. CRIMINAL JUSTICE SYSTEM AND PUNITIVE DRUG LAWS 1 (2002).

6. *Id.*

7. *Id.*

8. Angela Y. Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, CORPWATCH (Sept. 1, 1998), http://www.corpwatch.org/article.php?id=849. On June 30, 2007 state and federal prision authorities maintained jurisdiction over 1,595,034 adults, and had custody of over 2.3 million. WILLIAM J. SABOL & HEATHER COUTURE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON INMATES AT MIDYEAR 2007 1 (June 2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pim07.pdf. Minorities (Black and Hispanic) make up 57.6% of the total number of inmante population, although 63% can be categorized as non-White. *Id.* at 7 tbl.9. Black males ages thirty to thirty-four were incarcerated at the highest rate, 10,688 for every 10,000 residents. *Id.* at tbl.10.

9. *African-Americans and the Criminal Injustice System*, PRISON ACTIVIST RES. CTR., www.prisonpolicy.org/scans/racism.pdf (last visited Oct. 17, 2011). In looking at the most recent data, according to the U.S. Census Bureau, as of 2010 the percentage of Blacks in the United States is 12.6% and the the most recent statistics from the Bureau of Justice Statistics places the number of Blacks in the prision system at just over 39%. *USA Quick Facts from the Census Bureau*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/States/00000.html (last revised Oct. 13, 2011); WILLIAM J. SABOL & HEATHER C. WEST,

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that African-American men have a 32% chance of spending time in prison in their lifetimes, while Hispanic men have a 17% chance, contrasted with Caucasian males, who have only a 6% chance.[10]

Such statistical studies are routinely used by those who argue that racial discrimination does indeed exist in, if not permeate, the U.S. criminal justice system; but when the U.S. Supreme Court held in *McCleskey v. Kemp*[11] that such a claim would have no limit given its basis, proponents of racial discrimination in the U.S. criminal justice system were dealt a severe blow.[12] Debates have consistently rejected arguments claiming that these studies should have an effect on individual cases,[13] making it difficult to prove that racial discrimination exists in the American criminal justice system, rendering possible remedies even more unattainable.

Today, the debate goes on. Some argue that the war on drugs, resulting in a significant surge in arrests and incarcerations over the past four decades, has disproportionately affected African-Americans.[14] Others counter that even if more African-Americans are arrested and prosecuted on drug charges than Caucasians, the number associated with the disparity—about five thousand additional arrests per year—is insignificant in relation to the disproportionality of the prison population related to African-Americans.[15] Furthermore, the statistics stating that African-Americans have committed fifty-two percent of all murders within American borders from 1976 to 2005 should be reviewed in the context of a few questions: Have all murders in this period been solved? Were African-Americans disproportionately targeted in investigations of murders? Were all African-Americans who were convicted of murder in this time period rightfully convicted? This last question goes to the heart of the

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BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON INMATES AT MIDYEAR 2008 17 tbl.17 (Mar. 2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pim08st.pdf.

10. THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PRISONERS (2011), *available at* http://www.sentencingproject.org/doc/publications/publications/inc_factsAboutPrisons_Jun2011.pdf.

11. 481 U.S. 279 (1987).

12. McCleskey v. Kemp, 481 U.S. 279, 312–13 (1987) (holding that use of the Baldus study, which showed a racial disparity in sentencing, was insufficient to support petitioner's claims of "a constitutionally significant risk of racial bias"); Jonathan D. Glater, *Race Gap: Crime vs. Punishment*, N.Y. TIMES, Oct. 7, 2007, *available at* 2007 WLNR 19666687.

13. Glater, *supra* note 12. Prosecutors and resarchers agree that "statistics cannot possibly capture the whole story . . . ." *Id.*

14. Bill Quigley, *Fourteen Examples of Racism in Criminal Justice System*, HUFFINGTON POST (July 26, 2010, 7:45 AM), http://www.huffingtonpost.com/bill-quigley/fourteen-examples-of-raci_b_658947.html (supporting the proposition that the U.S. justice system is racist). The author discusses the statistics surrounding stops, arrests, bail, legal representation, sentencing, and parole terms. *Id.* He finds that at each step of the process minorities are subject to bias. *Id.*

15. Mac Donald, *supra* note 1.

debate as to whether racial discrimination is a driving force within the U.S. criminal justice system, and that debate goes and on, and on, and on.

In fact, this debate seemingly has no end, leading to the question: How can one solve a problem if there is no agreement that the problem even exists? Equally problematic is that even if there is agreement that the problem exists, what is the solution? Author Jerome G. Miller states that when he finished the first draft of his book, his editor had one comment: the final chapter was too pessimistic, offering too few solutions as to how problems should be addressed.[16] "If you don't have any suggestions for future policy," his editor said, "why write the book?"[17] That question applies to this piece as well as to an even broader issue: if the problem of racial discrimination can't be demonstrated, why write about it at all? On the other hand, if the problem of racial discrimination in the U.S. criminal justice system can be shown to exist, an even larger task is at hand: what are the solutions?

One statement is clear: given the disproportionate representation of minorities in various stages of the American criminal justice system, *some* kind of problem exists. What exactly that problem is, and whether or not the problem has been correctly characterized is consistently debated. One thing can be agreed on: A problem does exist and therefore some consideration should be given to the problem. When considering the bleakness of Jerome Miller's belief as to the difficulty of fashioning a solution to the problem through working within the confines of the U.S. criminal justice system, the answer seems to be: Look elsewhere, outside of the United States.

Part II of this Article describes the roots of international human rights law as related to the prohibition of racial discrimination in general, fol-

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16. JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM 235 (1996). Francis Sandiford writing a review of the book for the *Library Journal* stated:

> The title of this volume is a military term that means "find the enemy and eliminate it." This is exactly what Miller, cofounder of the National Center on Institutions and Alternatives, says the American justice system is doing to African[-]American males. Drawing on statistics and examples from the criminal justice system, Miller concludes that crimes committed by [B]lack men are treated by the courts with unnecessary severity. He also points out racial bias in the war on drugs and in public housing, as well as the consequences of the "bell curve" and other genetic research. Voluminous notes and references back up his Statements. His book should be valuable reading for social workers and criminal justice students as well as general readers.

Search and Destroy: African-American Males in the Criminal Justice System, AMAZON.COM, http://www.amazon.com/Search-Destroy-African-American-Criminal-Justice/dp/0521743818/ref=sr_1_1?ie=UTF8&qid=1319297223&sr=8-1 (last visited Oct. 22).

17. MILLER, *supra* note 16, at 235 (1996). Miller responded by stating that "[t]he truth is, I don't have many suggestions- and those I do have, aren't likely to be taken." *Id.*

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lowed by a discussion of racial discrimination as it has existed in American society. Part III sets out various examples of racial discrimination to illuminate how the problem can play out, from wrongful accusations to the courtroom. These examples will be presented in an effort to explain the statistics that are often quoted, followed by a summary of some of those statistics designed to show which minorities are affected. The foundations of racial discrimination in U.S. law will then be discussed in Part IV which includes more statistics and examples showing the extent of the problem in the criminal justice system. Part V presents potential domestic solutions, including those that have already been tried and those which offer hope. Finally, the role of evolving international human rights law will be examined in Part VI, adding to the pool of potential solutions and showing that the most effective solutions may be in this realm. A look to the future concludes this piece.

II. Racial Discrimination in General

Under international human rights law, racial discrimination has been prohibited since the worldwide human rights movement in the post-World War II era.[18] In the decades that followed, United Nations member countries have at various times joined forces to take actions to protect the citizens of the world from racial discrimination. Multiple treaties which deal directly with the problem, established monitoring mechanisms[19] and put in place courts in which persons or States can be held accountable for violations of the prohibitions against racial discrimination.[20] Many countries saw their citizens engage in racial discrimination for decades, if not centuries, in the years leading up to World War II and

18. *E.g.,* Economic and Social Council Res. E/4393, Official Records, May 8-June 6, 1967, U.N. GAOR 42d Sess., Supp. No. 1, E/RES/1235(XLII) (June 6, 1967); International Covenant on Economic, Social and Cultural Rights, G.A. Res 2200 (XXI), U.N. Doc. A/RES/2200(XXI) (Dec. 19, 1966); International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. Doc. A/RES/2200(XXI) (Dec. 19, 1966); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. Doc. A/RES/2106(XX) (Dec. 21, 1965); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

19. There are two types of mechanisms for monitoring human rights violation in the United Nations. *United Nations Human Rights Monitoring Mechanisms*, UN.ORG, http://www.un.org/rights/HRToday/hrmm.htm (last visited Oct. 22, 2010). The first mechanism is specific treaty bodies, which are considered as the conventional mechanism, such as the Human Rights Committee (HRC) and the Committee on Racial Discrimination (CERD). *Id.* These bodies work to monitor and implement the provision of established treaties. *Id.* The second mechanism is "extra-conventional" mechanisms which allow for a "more flexible response to serios human rights violations." *Id.*

20. One such court is the International Court of Justice, "one of the six principal organs of the United Nation." *The Court*, INT'L COURT OF JUSTICE, http://www.icj-cij.org/court/index.php?p1=1 (last visited Oct. 22, 2011).

had done nothing about it, and some governments even condoned or participated in the acts of discrimination. While the atrocities of World War II served to jolt the world into taking action against racial discrimination, many of the nations that joined forces within the United Nations to begin to formally address the problem and attempt to eradicate it have continued to see their citizens victimized by racial discrimination in many facets of life, from the arenas of education, employment, and housing to the court system and the halls of justice.

A. *Racial Discrimination in the United States*

The United States has its own inglorious history of racial discrimination. From the time that the first European settlers staked their claim and built their homesteads in what was then known as the New World in the early 1600s, the people whose descendants would eventually become the citizens of the United States of America engaged in various forms of racial discrimination, most horrifically in the practice of enslaving the peoples of Africa[21] and in their treatment of Native Americans.[22] Since the 1950s, members of minority races have faced discrimination in many areas of life, purely because of their racial origin.[23] Thus, for decades after the beginnings of the worldwide human rights movement in which the countries of the globe now take part, the United States—despite its presence on the world front as an enforcer of democratic freedom[24]—many minority citizens have continued to face various forms of discrimination based on their race. One of these areas is the U.S. criminal justice system.

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21. While slavery was abolished by the Thirteenth Amendment to the United States Constitution, the stuggle for African-American equality persisted throughout what was known as the Reconstruction era. Erica Mirehouse, Comment, *Minority Voting Rights: Is Cumulative Voting a Valid Remedy for Violations of the Voting Rights Act or An Impermissible Tactic to Advance Racial Politics?*, 14 SCHOLAR 521, 526 (2011). During this time Southerners created Black Codes to replace the previous Slave Codes. *Id.* at __ n.27.

22. The plight of Native Americans is most dramatically seen in the example of the Trail of Tears conducted under the Presidency of Andrew Jackson. *See* Everett Saucedo, Comment, *Curse of the New Buffalo: A Critique of Tribal Sovereignty in the Post-IGRA World*, 3 SCHOLAR 71, 72 n.2 (2000) (detailing the events surrounding the Trail of Tears).

23. One example is the internment of Japanese-Americans during World War II. Art Alcausin Hall, *There is a Lot to be Repaired Before We Get to Repairations: A Critique of the Underlying Issues of Race that Impact the Fate of African-American Reparations*, 2 SCHOLAR 1, 14 (2000).

24. Such examples include participation in the Korean Conflict of the 1950s, the Vietnam War of the 1960s and 70s, and the current conflict in Iraq. For a discussion on the United States as the defender of democracy see Sean M. Lynn-Jones, *Why the United States Should Spread Democracy,* Discussion Paper 98-07, Cntr. for Sci. & Int'l Affairs, Harvard University (March 1998), *available at* http://belfercenter.ksg.harvard.edu/publication/2830/why_the_united_States_should_spread_democracy.html.

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Martin Luther King Jr., a civil rights advocate, saw the struggle for civil rights in the United States as a subset of the struggle for human rights in the world.[25] In fact, he advocated for the rights of all people, regardless of race, color, or national origin—rights which were and are considered human rights on the international stage.[26] Integral to those rights are those rights given to a person accused of a crime. Here, many nations have failed and continue to fail to protect and preserve those rights, including the United States, as evidence shows that racial discrimination against many minority races amongst its citizens still exists today. Given that Martin Luther King Jr. saw the U.S. civil rights movement within the context of an overall human rights movement, he probably would not be surprised to see how the international human rights system and international human rights law can potentially be used to combat racial discrimination in the U.S. criminal justice system.

B. *International Human Rights Law in the Battle Against Racial Discrimination*

The United Nations General Assembly adopted The Universal Declaration of Human Rights as a non-binding resolution on December 10, 1948.[27] Since that time, nations have attempted, with varying degrees of effort and success, to abide by its principles and adhere to its mandates. Fifty-six nations, including the United States, were members of the United Nations at the time of the Declaration's adoption.[28] Since its signing approximately 150 additional nations have joind the U.N. and have been held by the world to its standards.[29]

Several components of the Declaration purport to protect individuals against racial discrimination. Article 1 of the Declaration states: "All human beings are born free and equal in dignity and rights."[30] Article 2 states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[31] Article 7 states: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in

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25. THOMAS F. JACKSON, FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR., AND THE STRUGGLE FOR ECONOMIC JUSTICE 1 (2007).

26. *Id.*

27. Universal Declaration of Human Rights, *supra* note 18.

28. *Id.*

29. Tai-Heng Cheng, *The Universal Declaration of Human Rights at Sixty: Is It Still Right for the United States?*, 41 CORNELL INT'L L.J. 251, 253 (2008).

30. Universal Declaration of Human Rights, *supra* note 18, at ¶ 1.

31. *Id.* at ¶ 2.

violation of this Declaration and against any incitement to such discrimination."[32] Article 8 states: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[33] Article 9 states that "[n]o one shall be subject to arbitrary arrest, detention or exile,"[34] and Article 10 proclaims that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."[35] Article 11 further cements the protections of the individual in the criminal justice system: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."[36]

Three additional Articles contained in the Declaration—Articles 16, 22, and 26—reference protections against either race or discrimination.[37] Perhaps it is sufficient to say that nearly every Article of the Declaration begins with the phrase: "*Everyone* has the right."[38] The Declaration as a

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32. *Id.* at ¶ 7.
33. *Id.* at ¶ 8.
34. *Id.* at ¶ 9.
35. Universal Declaration of Human Rights, *supra* note 18, at ¶ 10.
36. *Id.* at ¶ 11.
37. *Id.* at ¶¶ 16, 22, 26.

> Article 16. (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
>
> . . .
>
> Article 22. Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.
>
> . . .
>
> Article 26. (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. (3) Parents have a prior right to choose the kind of education that shall be given to their children

Id.

38. Universal Declaration of Human Rights, *supra* note 18 (emphasis added).

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whole simply does not tolerate the exclusion of anyone from any right of man.

Since the ground-breaking adoption of the Declaration, two other milestone achievements have taken place to complete the defining protection of individual's rights in every nation: the drafting of, and the adoption by, the United Nations of the International Covenant on Civil and Political Rights (ICCPR) and of the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[39] Together with the Declaration on Human Rights, these three documents have become known as the International Bill of Human Rights.[40] The creation of these human rights instruments, so necessary to the advancement of the human rights movement, is perhaps the most prominent contribution to the wellbeing of mankind ever made by the United Nations.[41] And yet, where does the world today stand in measurement against these standards of human rights? And where, in particular, does the United States stand?

The drafters of the United Nations Charter in the post-World War II era were no doubt aware of the importance of their endeavor, the goal of which was to save nations of the world from future world wars.[42] However, they most likely did not imagine that they were also in the process of inventing an international human rights law system.[43] Furthermore, by doing so, another part of the U.N. charter—Article 2, paragraph 7—raised a question as to whether issues related to the enforcement of

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39. High Comm'r for Human Rights, *On the Occasion of the 62nd Session of the Commission on Human Rights* 4 (Mar. 27, 2006), http://www.treatycouncil.org/PDF/HC.OPENING.FINAL.pdf.

40. *Id.*

41. *Id.*

42. U.N. Charter pmbl. The preamble, signed June 26,1945 State four aims:

- save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
- to promote social progress and better standards of life in larger freedom

Id.

43. U.N. High Commissioner for Human Rights, *supra* note 39. The High Commissioner Stated:

> [T]he Commission [on Human Rights] has built the framework for international human rights protection and has steadily continued to set standards on a wide range of human rights issues. The past [sixty] years have seen the establishment of a far-reaching, broadly encompassing normative framework in which many rights have been clearly articulated and enshrined as universal legal entitlements.

human rights among its members was excluded from its agenda.[44] However, as many mechanisms exist within the realm of the international human rights law system, not only within the United Nations but beyond, a focus can and should be placed on various national systems to correct their wrongs and bring them in-line with the agendas first articulated by the Universal Declaration of Human Rights. One of those national systems is the criminal justice system, and one of those agendas is the elimination of racial discrimination therein.

III. Examples of Racial Discrimination in the U.S. Criminal Justice System

Racial discrimination in the criminal justice system in the United States manifests itself in many forms. All too frequently, the effects of this type of discrimination are seen in the processes of initiating criminal charges against defendants, of attempting to select an impartial jury of peers, of striving to give these defendants a fair trial, and subsequent appeals. Despite attempts to cleanse our criminal justice system of such deleterious effects—and despite our claims that the system is so cleansed, i.e., that the law is blind to prejudices—those who are a part of the criminal justice system have not managed to accomplish this task. Countless examples of racial prejudice exist, permeating the processes noted above, despite the hallowed nature of these processes. Indeed, the ability of people to rid themselves and society of all traces of racial prejudice has arguably always been questionable, leading to a possible conclusion that so long as different races exist, racial prejudice will exist and will put its mark on all human endeavors. Justice systems throughout the world have been no exception to this sad proposition, and minorities will continue to be subject to injustice in the criminal justice system, both in the United States and abroad unless *something* is done about it.

A. *Wrongful Accusations*

With respect to criminal charges, racial prejudice can come into play both in charging an individual with a crime based on the race of the victim, or based on the race of the accused. Examples of how these dynamics work in the U.S. criminal justice system are illustrative. In one infamous case, a African-American man named Willie Bennett was arrested under suspicion of murdering a pregnant Caucasian woman and her unborn baby in Boston, Massachusetts in October of 1989.[45] The vic-

44. U.N. Charter art. 2, para. 7 (prohibiting the U.N. from intervening in issues that lie within the domestic jurisdiction of a nation).

45. Michael L. Radelet et al., In Spite of Innocence: Erroneous Convictions in Capital Cases 3–5 (1992) (detailing the facts of Willie Bennett's arrest as an

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tim's husband, a Caucasian man named Charles Stuart, had been shot in the stomach at the same time that his wife had been shot in the face and killed.[46] He described the assailant as being African-American, six feet tall, and approximately thirty years of age, certainly a general description entailing no specifics that might otherwise help police narrow down the search for the murderer.[47] As the case drew the attention and scrutiny of the nation through the news media, Boston police concentrated their investigation efforts on public housing projects in the area surrounding the street on which the killing had taken place.[48] The residents of these housing projects were mainly African-Americans and other minorities.[49] Two weeks after the murder, police arrested Bennett for a traffic violation.[50] Noting his previous criminal record, that he was thirty-nine years old, and that he was African-American, the police decided to show a photo of Bennett to Stuart, and to arrange a lineup containing Bennett for Stuart to view.[51] Stuart claimed that Bennett looked most like the gunman who shot and killed his wife, leaving the nation and the Boston police to feel comfortable that they had their suspect, even though no other corroborative evidence was given.[52] As it turned out, Bennett didn't look at all like the killer: the killer wasn't African-American, but Caucasian, and the killer turned out to look very much like Charles Stuart, the husband.[53]

Early in the following January after Carole Stuart's brother implicated Charles Stuart in the killing of his wife and unborn child, Stuart committed suicide, rather than face charges for the crime.[54] Thus ended the ordeal of an innocent Black man charged with a crime he didn't commit based on a flimsy description and a police-aided identification.[55] The racial discrimination that occurred in Bennett's case is easy to see: for Stuart, it was all too easy to deflect attention away from himself by falsely accusing an African-American man for his own crime; no one questioned the credence of his claim. Also, law enforcement authorities did not hesitate to obtain the identification of a person who had become a suspect based on the fact that he fit a description covering millions of people and

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example of how a suspect's race can draw a conclusion of guilt when they are in fact innocent).

46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. RADELET ET AL., *supra* note 45.
51. *Id.*
52. *Id.*
53. *Id.*
54. Bryan K. Fair, *Using Parrots to Kill Mockingbirds: Yet Another Racial Prosecution and Wrongful Conviction in Maycomb*, 45 ALA. L. REV. 403, 423 (1994).
55. *Id.*

happened to be driving in the area of the killing. Would the same have occurred if the identified perpetrator was a Caucasian man?[56] If this hypothetical is revised to make the victims African-American, does such a false identification become even less likely to have any perceived credence?

Examples of wrongful accusation, arrest, or detainment tend to drift from people's minds, as the victim of such indignation is viewed as being somehow exonerated or cleansed of the accusation. Some may even go so far as to point out that in the Willie Bennett case, the criminal justice system worked. Willie Bennett, however, was still clearly a victim of racial bias in the criminal justice system, given the flimsy basis of his detainment and the complicity of the police in so quickly helping to bolster a growing fabrication. His emotional anguish and frustration at being an innocent man accused of a crime that got him national attention, and the associated feeling of disenfranchisement were the prices he paid for being a African-American man in the wrong place at the wrong time.[57]

B. *Racial Discrimination in the Jury Selection Process*

While wrongful accusations, wrongful convictions, the denial of appeals, and sentencing based on racial prejudice are more dramatic types of racial discrimination in the criminal justice system[58]—racial prejudice also comes into play in more subtle ways, such as in jury selection.[59] This is equally as damaging to victims as the types of behaviors condoned or conducted by law enforcement authorities and prosecutors, and lead more directly to false accusations and wrongful convictions. The reason is because it can have the same result, even without the more overt behaviors such as aiding in false identifications, coercing confessions, withholding evidence, and the like.[60] It can be insidious to the process of

56. For one, I cannot see the Boston Police doing the same had the false description been of a Caucasian man of slightly above-average height and in his thirties. Would police have shown the photo of every Caucasian man who loosely fit this description, who had a criminal record, and who happened to be stopped for a traffic infraction near the site of the crime to the fraudulent victim and then been satisfied as to the suspect's probable guilt with no other corroborative evidence? I think not.

57. RADELET ET AL., *supra* note 45, at 5. Upon hearing that the murderer may have been Stuart himself Bennett Stated, "his life had 'been ruined and no one is willing to take responsibility.'" *Id.*

58. As they often lead to severe emotional distress, loss of liberty, and possibly even loss of life.

59. *See generally* Samuel R. Sommers & Phoebe C. Ellsworth, *An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201 (2001) (detailing White juror bias against minority defendants).

60. *Id.* at 202–03.

seeking justice, as it is often undetectable or difficult to prove.[61] For example, if a person is convicted based on racial bias on the part of a jury or even outright application of racial hatred, regardless of whether or not any racial animus has affected the investigation or prosecutorial process, the result is the same: an innocent person is convicted, solely on the basis of race.[62] This type of bias can infiltrate a jury due to the very composition of a given community, or the subset of people who have been summoned for potential jury selection.[63] Often, however, racial bias can affect a jury's decision as a result of careful use of the jury selection process, including the peremptory challenge.[64]

Difficult to measure, the selection of a jury based on racial factors is a prevalent practice in the United States because of the existence of the peremptory challenge in the jury selection process.[65] A close look at the peremptory challenge shows why. *Merriam-Webster's Dictionary* defines "peremptory" as "not providing an opportunity to show cause why one should not comply,"[66] and "peremptory challenge" as "a challenge (as of a juror) made as of right without assigning any cause."[67] *Barron's Law Dictionary* defines the word "peremptory" in the legal sense as "absolute, conclusive, final, positive, not admitting of question or appeal."[68] *Barron's Law Dictionary* elaborates further on the concept, defining "peremptory challenge" as "challenges which may be made without any specific reason or cause. The right to a peremptory challenge is not intended to enable a party to select particular jurors but to exclude from the jury persons whom he is unable successfully to challenge for cause."[69] As such, the peremptory challenge, as originally created and used, became a means by which a juror could be stricken from a jury for *any* reason, and that strike could not be questioned. Thus, the justice system created a legal means by which the same underlying racial prejudice that led to abuses of the system, which would be subject to penalty if uncovered, now offered the same type of people a legal means by which to effect the desired results of their hatred. That was true until the law be-

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61. *Id.*

62. *Id.*

63. Emily C. Jeffcott & Mikal C. Watts, *What's Required to Remedy Juror Discrimination? A Brief Discussion on* Batson *and its Available Remedies*, 13 SCHOLAR 615, 615–16 (2011).

64. *Id.* at 616.

65. *Id.*

66. *Peremptory – Definition*, MERRIAM-WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/peremptory (last visited Oct. 17, 2007).

67. *Peremptory Challenge – Definition*, MERRIAM-WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/peremptory-challenge (last visited Oct. 17, 2007).

68. BARRON'S LAW DICTIONARY 372 (5th ed. 2003).

69. *Id.* at 73 (internal citation omitted).

gan to change the meaning of the peremptory challenge as practically applied, in an effort to curb such abuses.[70]

In the United States today, using peremptory challenges to strike jurors solely for the purpose of excluding certain members of a race is a violation of an individual's constitutional right to equal protection under the law.[71] This law began to take shape in 1965 in the Supreme Court case *Swain v. Alabama*,[72] in which the petitioner moved to quash his indictment and void his jury based on allegations of discrimination in the jury selection process.[73] In *Swain*, the petitioner demonstrated underrepresentation of his race in the venire—the pool of prospective jurors—as compared with the overall population of eligible jurors in the community.[74] Petitioner pointed to the fact that no African-American man had ever served on a grand or petit jury in the Circuit Court of Talladega County, Alabama as a clear indication of how the use of peremptory strikes had been perverted into a scheme to deny African-Americans equal protection of the law.[75] Although the Court did rule in favor of the state in the case, it did not rule on the constitutionality of the peremptory strike system in Talladega County, thus opening the door for a future challenge.[76] Thus, the implication in the Court's decision was that if a petitioner could establish a pattern of purposeful discrimination in the jury selection process of a given case, a violation of equal protection would exist.[77]

Then, in 1986 in *Batson v. Kentucky*,[78] the United States Supreme Court articulated the procedure for establishing a prima facie case for purposeful discrimination in the exercise of peremptory challenges.[79] The defendant must first show that he belongs to a specific racial group.[80] Defendant must also show that the exercise of peremptory challenges re-

70. Jeffcott & Watts, *supra* note 63, at 616.

71. Batson v. Kentucky, 476 U.S. 79 (1986).

72. 380 U.S. 202 (1965).

73. Swain v. Alabama, 380 U.S. 202, 203 (1965). Swain, a Black man, was convicted of rape by an all-White jury in Alabama and was sentenced to death. *Id.* at 204–06. In his petition, he asserted that 26% of the people eligible for jury duty in the jurisdiction of his trial were Black, and yet only 10%–15% of the venires were Black. *Id.* at 206.

74. *Id.* at 206.

75. *Id.*

76. *Id.* at 228 (Harlan, J., concurring) (emphasizing that the Court did not decide this constitutionality issue).

77. *See generally Swain*, 380 U.S. 202 (discussing elements necessary to prove purposeful discrimination).

78. 476 U.S. 79 (1986).

79. Batson v. Kentucky, 476 U.S. 79, 80 (1986).

80. *Id.*

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moved members of the defendant's race from the venire.[81] Finally, the opponent of the peremptory challenge must show "that such facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on account of their race."[82] Upon the defendant establishing his or her prima facie case to rebut the assumption of discrimination, the prosecution must show "a neutral explanation for challenging [B]lack jurors."[83]

The enduring result of *Batson* is this process of evaluating claims of racial discrimination in the jury selection process. However, means still exist to circumvent the underlying justice that the *Batson* court was seeking to enforce. Specifically, so long as the prosecutor can come up with a plausible reason for striking a juror, the strike will be allowed, even if they were motivated by racial prejudice.[84]

The entire debate and legal battle over the issue of using peremptory strikes in a racially discriminatory manner implies that racial discrimination can and does exist in the jury system; otherwise members of one race would not expend any effort to ensure that members of that race sat on the juries deciding their cases or struck members of a race from a jury in order to win a case for their clients. In a race-neutral society, the racial makeup of a jury in a trial would have no bearing on the verdict.[85] And so, as we strive to put in place laws to check and balance our criminal justice system in the United States and to prevent racially discriminatory practices within it, at the same time, we must necessarily acknowledge its existence.

C. *Wrongful Convictions*

When racial animus by members of the criminal justice system leads to a wrongful conviction; the accused can face damaging and life altering consequences.[86] A primary illustratration is the case of Clarence Brandley.[87] In the town of Conroe, Texas in 1981, Brandley was convicted of

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81. *Id.*

82. *Id.*

83. *Id.*

84. *Batson,* 476 U.S. at 80. The prosecutor cannot exclude members of a specific race on grounds that they may be sympathetic to the defendant because of shared ancestry; instead the prosecutor must be able to provide a race-neutral explanation that addresses the specific case to be tried. *Id.*

85. *Cf.* Sommers & Ellsworth, *supra* note 59 (arguing that race of the defendant does in fact play a primary role in the juries determination of guilt).

86. *See* Fair, *supra* note 54, at 427–31 (1994) (indicating the ways that negative circumstances and racial animus interact, often leading to wrongful convictions).

87. *Id.*

raping and murdering sixteen-year-old Cheryl Fergeson.[88] Fergeson disappeared from the halls of Conroe High School just prior to the start of a volleyball game.[89] About two hours after the game, her body was found inside the school's auditorium by two janitors, Henry Peace and Clarence Brandley; Brandley was the supervising janitor and the only Black janitor on the staff.[90] The two janitors quickly became the first suspects in the case and shortly thereafter, Brandley became the only suspect.[91] According to Peace, one of the first officers who interviewed them stated "[o]ne of the two of you is going to hang for this," and then turned to Brandley, used a racial slur and said, because of Brandley's race, "[y]ou're elected."[92] Despite passing a polygraph exam, Brandley was arrested and charged with capital murder only one week after the crime.[93]

The police based their case against Brandley on two pieces of evidence found on the victim's clothes: strings similar to those from a janitor's mop and hair samples that were allegedly similar to Brandley's, though they were never tested.[94] In addition, Peace, who actually discovered the body first, told authorities that Brandley had suggested repeatedly that he should closely inspect the auditorium.[95] It was upon this weak, circumstantial evidence that Brandley was arrested.[96]

Brandley's next stop was an appearance before an all-White grand jury.[97] Unable to produce a corroborated alibi as to his whereabouts when Fergeson disappeared, he was indicted for murder.[98] He then faced another all-White jury at his first trial, which ended in a hung jury; the lone holdout for a not-guilty verdict was continuously harassed during

88. Brandley v. State, 691 S.W.2d 699, 701 (Tex. Crim. App. 1985); RADELET ET AL., *supra* note 45, at 125.

89. *Brandley*, 691 S.W.2d at 701; RADELET ET AL., *supra* note 45, at 120.

90. *Brandley*, 691 S.W.2d at 701–02; RADELET ET AL., *supra* note 45, at 120–21.

91. RADELET ET AL., *supra* note 45, at 120.

92. *Id.* at 121, 131. "A criminal justice system that acquiesces in this kind of racial animus is not worthy of respect. Brandley's conviction should have been presumptively invalid upon proof of the officer's statement. The statement reflects the environment that produced Brandley's conviction." Fair, *supra* note 54, at 428.

93. RADELET ET AL., *supra* note 45, at 120. Both Brandley and Peace were given polygraphy tests two days after the murder. *Id.* With pressure on the police to make an arrest prior to the start of the school year, a decision to arrest Brandley was made quickly. *Id.*

94. *Id.* at 122.

95. *Brandley*, 691 S.W.2d at 702.

96. *Id.* at 699 (stating the the conviction was based on circumstantial evidence); Fair, *supra* note 54, at 428.

97. RADELET ET AL., *supra* note 45, at 123.

98. *Id.* In his first trial Brandley testified that "'he sat around smoking and listening to the radio when he should have been working.'" But his "apparent[ ] causual attitude . . . made him look untrustworthy." *Id.*

deliberations for siding with a Black person.[99] In Brandley's second trial, three of the other four janitors on duty the day of the rape and murder provided testimony supporting each other's alibis and asserted that only Brandley held keys to the auditorium.[100] Brandley was convicted of murder and subsequently sentenced to death.[101]

After Brandley's intial sentencing, new evidence, witnesses, facts, and the biases of the Conroe justice system came to the attention of Brandley's lawyers.[102] As Brandley's attorneys began preparing his appeal, they discovered that a majority of the three hundred exhibits used during his second trial had mysteriously disappeared, including the hair samples that were used against him but never tested.[103] Four years later, Brandley's appeal was denied, and he was given his first execution date: January 16, 1986.[104] His lawyers then sought a writ of habeas corpus, which was granted, providing him with a stay of execution.[105]

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99. *Id.* at 124. The individual juror who refused to find Brandley guilty later indicated that when his vote became public he faced continuous harassment. *Id.*

100. *Brandley,* 691 S.W.2d at 702 (stating that they waited over forty-five minutes for Brandley to arrive with the keys to let them into the building); RADELET ET AL., *supra* note 45, at 121–23.

101. *Brandley*, 691 S.W.2d at 701.

102. *See Ex parte* Brandley, 781 S.W.2d 886 (Tex. Crim. App. 1989) (detailing the rampant injustice of the investigation and prosecution of Mr. Brandley).

103. RADELET ET AL., *supra* note 45, at 125. The disappearance occurred while in the custody of the prosecution and could have helped to prove Brandley innocent. *Id.* In all 166 of the 309 exhibits were gone. *Id.*

104. *Id* at 126.

105. *Ex parte Brandley*, 781 S.W.2d at 894. A woman named Brenda Medina came forward from a town near Conroe, Texas, and stated that her estranged common-law husband, James Dexter Robinson, had committed the rape and murder of which Brandley had been convicted. RADELET ET AL., *supra* note 45, at 126–27. When she spoke to a prosecutor about the case, however, the prosecutor dismissed her as not believable and consequently did not give the defense her information. *Id.* at 127. In addition to Ms. Medina's statement the testimony of the other janitors began to change. *Id.* One of them, John Sessum, who had testified at the first trial but not the second, recanted his testimony during the habeas corpus proceeding. *Ex parte Brandley*, 781 S.W.2d at 888. Sessum now claimed that he had seen one of the other janitors, Gary Acreman, speaking with Fergeson just before the rape and murder, and Acreman had threatened him not to tell anyone about this fact. *Id.* Adding further support to Acreman's involvement, Acreman's father-in-law, Edward Payne, told the court that Acreman had informed him where Fergeson's clothes were hidden on the night of the crimes. RADELET ET AL., *supra* note 45, at 127. When he reported the information to the district attorney's office, Payne was told that the office "was not interested," and Payne asserts that he was threatened to "keep his goddam mouth shut!" *Id.* Despite Robinson's dismissal from his job as a janitor at Conroe High School one month earlier, Acreman finally admitted that he saw him on school grounds the day of the murder. *Ex parte Brandley*, 781 S.W.2d at 922 n.10. Ms. Medina also testified that Robinson had told her that he had committed a murder and was going to have to leave

After garnering national attention, Brandley started to head down a path to freedom.[106] In February of 1987, about one thousand people marched in Conroe to protest the injustice to which Brandley had been subjected to for five years.[107] Shortly therafter, John Sessum (one of the other janitors on duty the day of the murder) stated that he'd seen Gary Acreman (a janitor also present) and James Robinson (a former Conroe High janitor) with Fergeson, and that he'd heard the victim's cries coming from a bathroom.[108] Sessum made a videotaped statement and after being shown the tape, Acreman accused Robinson of the crime and claimed to have witnessed Robinson disposing of Fergeson's clothes in the dumpster.[109] Apparently this new evidence created enough doubt in the minds of the court that Brandley was granted another stay of execution, just six days before his scheduled execution date of March 20, 1987.[110] On June 30, 1987 the Texas Court of Criminal Appeals granted Brandley's habeas petition, which eventually led to his release.[111] After six long years of injustice at the hands of a racially prejudiced criminal justice system, Clarence Brandley was free.

D. *Racial Discrimination in Sentencing*

Racial discrimination is perhaps most evident in sentencing. The Supreme Court considered this issue in *McCleskey v. Kemp* in 1987. In *McCleskey*, the petitioner appealed his case after a jury convicted him (a Black man) of murdering a White policeman during a planned armed robbery.[112] After the verdict was affirmed by the Supreme Court of

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town, which he had done by the next morning, leaving behind blood-stained sneakers. *Id.* at 888 n.2.

106. Fair, *supra* note 54, at 430. A made-for-television movie was created to convey Brandley's misfortunes. WHITEWASH: THE CLARENCE BRANDLEY STORY (Paramount Network Television Productions 2007).

107. RADELET ET AL., *supra* note 45, at 129.

108. *Ex parte Brandley*, 781 S.W.2d at 888.

109. *Id.* at 889.

110. RADELET ET AL., *supra* note 45, at 131.

111. *Id.* at 132–33. Judge Berchelman writing for the court stated:

> Although any of these incidences alone might not support applicant's claim, there can be no doubt that the cumulative effect of the investigative procedure, judged by the totality of the circumstances, resulted in a deprivation of applicant's right to due process of law by suppressing evidence favorable to the accused, and by creating false testimony and inherently unreliable testimony. Accordingly, applicant's conviction must be reversed.

Ex parte Brandley, 781 S.W.2d at 894.

112. McCleskey v. Kemp, 481 U.S. 279, 283–84 (1987). The trial court, following the recommendation of the jury, sentenced the defendant to death based on the finding of two aggravating circumstances, and that no evidence of mitigating circumstances was presented by the defendant in the punishment phase of his trial. *Id.* at 285.

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Georgia, and the U.S. Supreme Court twice denied certiorari,[113] the accused filed for a writ of habeas corpus in the United States District Court for the Northern District of Georgia, claiming that Georgia's capital sentencing process was "administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments."[114] The court dismissed the habeas corpus petition, holding that the statistical study proffered by the petitioner did not demonstrate a violation of his Eighth Amendment rights and additionally dismissed, as flawed, the methodology of the study presented by the petitioner to prove his case with regard to his Fourteenth Amendment claim.[115] Again, on appeal, the decision of the lower court was affirmed, this time by the United States Court of Appeals for the Eleventh Circuit, which assumed that the statistical study was valid.[116] Finally, on certiorari, the Supreme Court affirmed, holding that the statistical evidence presented was not sufficient to support the inference that the decision makers in this specific case acted with a discriminatory purpose or with any racial bias, and that the study was not sufficient to prove either Equal Protection Clause violations or Eighth Amendment violations as to the adoption by the state of its capital punishment statute, or its application.[117] The message was clear: proving the existence of racial discrimination in a system is not the same as proving that racial discrimination came into play in any given case.

Although the Court did not formally acknowledge the existence of racial bias in Georgia's administration of its death penalty, Justice Scalia came as close as possible in his memorandum to his fellow members of the Supreme Court prior to the issuance of the Court's *McCleskey* decision. In his memo, Justice Scalia made it clear that he disagreed with the premise that the inferences drawn from the statistical study presented in *McCleskey* were necessarily weakened by the fact that every trial and every jury is unique.[118] As a result, his memo has spawned debate that continues to this day as to the ramifications of his views in attempts to cleanse the criminal justice system of racial discrimination and what it means that Justice Scalia acknowledged its existence.[119] Certainly one man's learned opinion on the matter is not definitive—and it did not change the course of the legal system's rulings on such challenges, as he

113. *Id.* at 285–86.

114. *Id.* at 286.

115. *Id.* at 287–89.

116. *Id.* at 90.

117. *McCleskey*, 481 U.S. at 291, 297, 319.

118. Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia's* McCleskey *Memorandum*, 45 MERCER L. REV. 1035, 1038 (1994).

119. *Id.* at 1039–40.

ended up voting with the majority in the ultimate opinion that went against the petitioner—but it can be viewed as illustrative of the existence of the problem and its ramifications on the seeking of remedies.[120] For example, if the study at issue in *McCleskey*, or any similar study reported in the future, could convince the justices of the Court as to its validity and reliability as a social science, then a strong case of intentional discrimination could be inferred in cases like *McCleskey*.[121]

E. *Racial Discrimination in the Appellate System and the U.S. Supreme Court*

As shown above, racial discrimination can take place in the U.S. criminal justice system during the investigation process, the trial process, and the appellate process. Even in the case of Clarence Brandley, in which the appellate part of the criminal justice system appeared to have worked, we are left to wonder why, in the face of the earlier evidence presented to the court; Brandley wasn't given a new trial much sooner. In fact, if not for the national publicity of his case, Brandley, in all likelihood, probably never would have been freed. Just as in his case, modern studies have shown that the large majority of wrongful convictions have been corrected through the efforts of people external to our criminal justice system, such as private detectives, journalists, family members of the accused, or organizations that assist with overturning decisions of wrongly convicted individuals,[122] and not as a result of an appellate system that is able to right the racial bias of the lower courts. The *McClesky* decision discussed above is an example of the failure of the appellate process to correct the effects of racial discrimination.

However, even where the Supreme Court has rendered rulings favorable to the elimination of racial discrimination in the criminal justice system, these are still demonstrative of the failures of the appellate system to correct racial bias. In 1972, the Court in *Furman v. Georgia*[123] rendered invalid all then-in-effect state death penalty statutes.[124] In the opinion, three of the eight ruling justices, each writing separate opinions,

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120. *Id.*

121. *See id.* at 1038 (providing that Justice Scalia recognizes the human condition as susceptible to "irrational sympathies and antipathies, including racial," which could possibly allow a study to influence judges and prosecutors).

122. Fair, *supra* note 54, at 431.

123. 408 U.S. 238 (1972) (per curiam).

124. Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam); Shandrea P. Solomon, *National Consensus, Retributive Theory, and Foundations of Justice and Morality in Eighth Amendment Jurisprudence: A Response to Advocates of the Child Rape Death Penalty Statue in* Kennedy v. Louisiana, 13 SCHOLAR 583, 587–89 (2011) (discussing the Courts decision in *Furman* and the evolution of the Court's stance on the death penalty).

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stated that they believed that existing state statutes allowed juries to impose the death penalty on the basis of race, a clear violation of the Equal Protection Clause.[125] Thus, these three justices were in effect saying that appellate oversight was inadequate to correct for racial injustice in administering the death penalty. Subsequent steps were taken by the Supreme Court[126] and by state legislatures to alleviate this problem,[127] and as a result, some measure of racial discrimination may have been removed from the criminal justice system. However, the Court hears cases at its discretion and generally only takes on about one percent of the cases for which writs of certirorari have been filed.[128] *Furman* was one instance which showed that the Court deemed that racial discrimination had been at play in the criminal appellate system and the lower courts and took steps to address it—but how many cases among the other ninety-nine percent have gone unheard?

The Court's 1996 *United States v. Armstrong*[129] ruling provides an example of its own contribution to racial discrimination in the criminal justice system. In *Armstrong*, a multitude of African-American defendants in a California district court moved to dismiss a case of drug trafficking against them on the grounds that they were selected for prosecution by the government because of their race.[130] When the district court ordered the government to provide a list of similar cases over the previous three years and to identify the race of the defendants and the selection criteria for prosecuting those cases, California responded by asking the court to reconsider its discovery order, arguing that the defendants in the case did not provide any evidence of discrimination by providing evidence purporting to show why the defendants had been selected for prosecution.[131] Because California did not comply with the discovery order, the district court dismissed the case against Armstrong.[132] The Ninth Circuit affirmed en banc, holding that proof elements in a selective-prosecution

125. *Furman*, 408 U.S. at 240, 256–57 (Douglas, J., concurring) (per curiam); *id.* at 293–95 (Brennan, J., concurring) (per curiam); *id.* at 364–66, 367–69 (Marshall, J., concurring) (per curiam).

126. *See generally Furman*, 408 U.S. 238 (1972) (per curiam) (holding that certain cases in Georgia and Texas that came before the Court, involving the imposition of death as a penalty, were unconstitutional).

127. Fair, *supra* note 54, at 435. Some state legislatures responded by "codif[ying] specific aggravating factors, at least one of which had to be present before a death sentence could be imposed." *Id.*

128. *Frequently Asked Questions*, SUPREME COURT OF THE U.S., http://www.supremecourt.gov/faq.aspx#faqgi9 (last visited Oct. 17, 2011).

129. 517 U.S. 456 (1996).

130. United States v. Armstrong, 517 U.S. 456, 459 (1996).

131. *Id.* at 459–60.

132. *Id.* at 461.

claim do not require a defendant to show that the government failed to prosecute the similarly situated.[133] However, despite this ruling, the Supreme Court held that in a case where a defendant claims prosecution is based on race, the defendant must show that the government decided not to prosecute similarly situated suspects of other racial backgrounds.[134]

Although acknowledging due process protection against prosecution based on arbitrary classifications such as race or religion, the Court held that for a selective-prosecution claim to be successful the plaintiff must show that the policy of the prosecutor's office had a discriminatory effect in the case and was motivated by a discriminatory purpose.[135] The Court also held that, "[t]o establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted."[136] While the legal arguments used by the Supreme Court were soundly based on precedent, this case represented an opportunity for the Court to take a stance against racial discrimination in the criminal justice system by breaking new ground and issuing a ruling that would have set a new precedent—one that would not allow the justice system to so easily dodge a racial discrimination claim.

A more recent example of the Supreme Court providing opposition to lower court efforts at correcting racially discriminatory results is *Felkner v. Jackson*.[137] In *Felkner*, the Supreme Court reversed a Ninth Circuit decision that determined a prosecutor's striking of two Black prospective jurors was sufficient evidence of purposeful discrimination.[138] The Supreme Court disregarded the Ninth Circuit's determination that the trial record showed disparate treatment of comparable jurors and held that the California Court of Appeal's ruling was "plainly not unreasonable."[139] The Court further stated that the Antiterrorism and Effective Death Penalty Act of 1996[140] imposed a high deferential standard for reviewing state-court rulings, demanding that state courts "be given the benefit of the doubt," and that the Ninth Circuit had no basis to reach the opposite conclusion.[141] In remanding this case in a nine-to-zero vote, the Court admonished the Ninth Circuit for its failure to mention the reason-

133. *Id.*

134. *Id.* at 465.

135. *Armstrong,* 517 U.S. at 465.

136. *Id.*

137. 562 U.S. __, 131 S. Ct. 1305 (2011) (per curiam).

138. Felkner v. Jackson, 562 U.S. __, 131 S. Ct. 1305, 1307 (2011) (per curiam).

139. *Id.* The Ninth Circuit reversed the California Court of Appeals which had upheld the trial court's decision that there was no evidence of purposeful discrimination. *Id.*

140. Antiterrorism and Effective Death Penalty Act of 1996, 104 Pub. L. 132, 110 Stat. 1214 (codified in scattered sections of the U.S.C.).

141. *Felkner*, 562 U.S. at __, 131 S. Ct. at 1307.

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ing applied by the lower courts in rejecting the *Batson* challenge, and for ruling in a dismissive manner.[142] Was the Supreme Court equally as dismissive in missing a chance to address a possible racially-motivated action by prosecutors and rejecting the Ninth Circuit's view out of hand? The prosecutor's explanation as to the peremptory strikes was that one juror, who had stated that he believed that police officers frequently stopped him while driving because of his race and youth, may harbor police animosity, while the other juror was a social worker and the prosecutor liked to keep social workers off his juries.[143] These explanations, while sounding plausible, offer plenty of room for obfuscating the truth. Was the Ninth Circuit's holding that the trial record demonstrated different treatment by similarly situated jurors reasonable? Perhaps the Ninth Circuit should have, indeed, explained its reasoning in more depth, but the Supreme Court allowed it no leeway. The Court's reliance on the deferential standard of the Antiterrorism and Effective Death Penalty Act of 1996 presents a problem for appellate courts in their efforts to correct an instance of possible racial discrimination in the criminal justice system.

F. *The Victims of Racial Injustice*

Who are the targets of racial discrimination in the criminal justice system? Generally, we speak about, debate, and attempt to eliminate racial prejudice as it relates to the people of a nation. However, any race that is not the majority race in a given community can be, and often is, subjected to racial prejudice. Thus, a smaller group of people that is comprised of a minority race within a country's populace can be the majority race in that community, and subject any people who are not part of that group to racial discrimination, thus turning a country's majority race into a racially-discriminated-against minority in a smaller context.[144] In most nations of the world, the possibility for racial discrimination exists in both

142. *Id.* In *Batson*, the Kentucky Supreme Court affirmed the conviction of a Black man who claimed he was deprived of equal protection given the elimination of certain potential jurors on account of their race. Batson v. Kentucky, 476 U.S. 79, 79 (1986). The U.S. Supreme Court reversed, holding that the "Equal Protection Clause forbids [a] prosecutor from challenging potential jurors solely on account of their race" and that to establish purposeful discrimination in the selection of a jury, the "defendant must . . . show that he is a member of a cognizable racial group, that [the] prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race and that . . . other relevant circumstances raise an inference" of exclusion due to race. *Id.*

143. *Id.* at 1306.

144. *See* Carol Morello & Ted Mellnick, *Minorities Become a Majority in Washington Region*, THE WASHINGTON POST (Aug. 30, 2011), http://www.washingtonpost.com/local/minorities-become-a-majority-in-washington-region/2011/08/30/gIQADobxqJ_story.html (reporting on the 2010 Census data and stating that: "Non-Hispanic Whites are a minority in [twenty-two] of the country's [one hundred]-biggest urban areas").

the larger and the smaller contexts, and one tends to increase the incidence of the other, in an apparently never-ending cycle. When addressing the concept of an entire legal system, in this case the criminal justice system, the larger view is the concern, but it is undoubtedly affected by, and inextricably tied to, the smaller view.

When we talk about racial discrimination in the criminal justice system in the United States, the target of this behavior is non-Whites, as 72.4% of the U.S. population identified themselves as single-race Caucasian in the 2010 Census.[145] The most recent census data indicates that, as far as single-race individuals, the balance of the population was comprised primarily of African-Americans (12.6%), Asians (4.8%), multi-racial people (2.9%), Native Americans (0.9%), and Hawaiian/Pacific (0.2%).[146] Hispanics, who cross racial groups, comprised about 16.3% of the population.[147] These five minority racial groups, and Hispanics, are the people who are subjected to the vast majority of the racial discrimination that exists in the United States generally, and in the U.S. criminal justice system in particular. The percentages cited above give perspective when analyzing statistics about crime, convictions, sentencing, and other results when examining racial discrimination in the U.S. criminal justice system.

Because African-Americans are the largest single-race minority in the United States and due to the fact that our nation has historically exhibited more severe racial tension between Blacks and Whites than between any other racial minority group, efforts at eliminating racial injustice in the United States tends to focus on the Black community. All of the examples of racial discrimination and prejudice cited above involve African-American people being discriminated against by Caucasians. However, the problem cannot be defined solely with respect to discrimination against Blacks, of course, as discrimination against the other minorities is also evident in American society in general, and in the criminal justice system specifically. While the examples involving Blacks, as noted above, could be generalized to apply to any minority race in the United States, and the inherent injustice would be no more or less severe, each race tends to have to fight its own particular legacies of racial bias, based on long-standing stereotypes that might make one race more or less prone than another to a particular type of discrimination. The 1992 case of Wayne Lo is an example of how racial stereotyping of Asians, and racial

145. *USA Quick Facts from the Census Bureau*, *supra* note 9.

146. *Id.*

147. *Id.*

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bias against them, can similarly infect the criminal justice system in the United States.[148]

On December 14, 1992, Wayne Lo, a nineteen-year-old Chinese-American, stormed the Bard College at Simon's Rock campus, and engaged in a shooting spree that resulted in the death of two people and the wounding of four others.[149] Whether or not he committed the crimes with which he was charged was not an issue in his subsequent trial; instead, the issue at trial was whether or not Lo was sane when he committed the crimes.[150] While the defense produced clinical psychologists who stated that Lo was a classic paranoid schizophrenic who did not understand the wrongfulness of what he had done and experienced bouts of suicidal depression, the prosecution was able to successfully convince the jury that Lo was a deliberate murderer who simply outsmarted people into believing that he was insane.[151]

Some would argue that the case of Wayne Lo is an example of Asian-American stereotyping according to either the "Yellow-Peril" or "model minority" theories, wherein the former suggests that migrant Asians are a contemptible people that pose a threat to low-wage White Americans and the latter holds that Asians possess a superior intellect and have assimilated better to true American values than other minority groups.[152] These theories have come into existence as a result of two distinct instances of immigration into the United States by the Asian community.[153] First, during the 1800s, many Chinese immigrated into the United States as low-wage-earning workers on farms and plantations, and as a result of being identified with these jobs, they became generally viewed by Whites as intellectually inferior, low-class in behavior, and subsequently a threat to job security for the American laborer.[154] Second, during the period

148. Rhoda J. Yen, *Racial Stereotyping of Asians and Asian Americans and Its Effect on Criminal Justice: A Reflection on the Wayne Lo Case*, 7 ASIAN L.J. 1, 1 (2000).

149. *Id.*

150. *See id.* at 23 (noting that racial prejudice could have led jurors to fail to consider the reasonableness of the insanity defense).

151. *Id.* at 27. The prosecution also depicted Lo as homophobic and a neo-Nazi who hated Blacks and Jews, even though none of his victims were among these groups of allegedly targeted people. *Id.* at 25.

152. *Id.* at 2–9. Under the model minority view, Asians must contend with the issue of being viewed as being part of the White community, but failing to gain any of the attendant benefits. *Id.*

153. Yen, *supra* note 148, at 6–7.

154. *Id.* (noting that, under this theory, Chinese immigrants became an even bigger threat to American job security when they began to leave the plantations and start their own small businesses).

after the amendments to the Immigration and Nationality Act in 1965,[155] which relaxed existing restrictions on Asian immigration, Asian immigrants came largely from the best educated and wealthiest groups of their native countries, many of whom were recruited not for the hard labor jobs that their predecessors filled, but as skilled workers and for professional positions.[156] The experiences of White America's interaction with these distinct groups of Asian immigrants, tending to be on opposite ends of the socio-economic spectrum, helped to shape the stereotypes noted in the respective theories.[157]

The latter "model minority" theory could have come into play in Wayne Lo's case, as the jury arguably ignored the findings and testimony of psychologists and friends as to the defendant's mental illness, and instead endorsed the stereotype of superior intelligence leading to expert conniving and a well-planned murder.[158] Lo was convicted of his crimes and sentenced to life in prison.[159]

While the case of Wayne Lo does not invite the same degree of sympathy as the cases of Willie Bennett and Clarence Brandley (who were wrongly accused or convicted of crimes based on racial prejudice) it does serve to illuminate the differences in the types of discrimination that any given minority might face in the U.S. criminal justice system. In addition, plenty of examples exist as to racial injustice against Asians and other minorities in America that are more analogous to what happened to Bennett and Brandley. For example, in January of 1993, police in Fountain Valley, California, misidentified Mark Kanshige, a Japanese-American, as a man wanted for attempted murder.[160] His photo was included in a facebook—a collection of photographs used to identify a suspect—perused for the purpose of picking out a suspect, and he was singled out by

155. Immigration and Nationality Act, Pub. L. 89-236, 79 Stat. 911 (1965) (codified as amended at 8 U.S.C. § 1151) (amending the prior act signed in June of 1952). Rhoda Yen refers to this Act in her Article (Yen, *supra* note 148) as the Immigration Act of 1965.

156. Yen, *supra* note 148, at 2–3 (claiming that under this theory, U.S. policymakers sought to attract Asians to fill scientific and technical positions, and thus immigration policy began to control the education and socio-economic levels of Asian immigrants in ways that had not been done for other minorities).

157. *Id.*

158. *See id.* at 28 (noting that both Lo's trial jury and his appellate judge concluded that Lo's mental illness, to whatever degree it existed, did not meet the legal standard of insanity, but that the father of one of Lo's victims came to believe, after the trial and appeal, that Lo was insane when he committed the crimes).

159. *Id.* (alleging that Lo's insanity defense probably would not have been rejected, and that he would not have received a life sentence if he had been White).

160. *Id.* at 18.

an eye witness.[161] Based on this unreliable lead, the police did not hesitate to believe that they had their suspect and forced his entire family out of their house in handcuffs while they searched the home for nonexistent evidence.[162] Eventually, Kanshige was exonerated by a jury after being incarcerated for six months and charged with murder.[163]

A more egregious example of racial injustice enacted against Asians through the U.S. criminal justice system is that of the 1982 killing of Vincent Chin, and the subsequent trials and other legal proceedings of his killers.[164] Chin's case highlights the process of how racial discrimination can come into play when a member of a minority is a victim in a crime, rather than a wrongly accused suspect or defendant.[165] Chin, a 27-year-old Asian-American, was assaulted by two unemployed autoworkers that waited for him outside a fast food restaurant and bludgeoned him to death following an earlier altercation.[166] To his assailants, two White men named Roger Ebens and Michael Nitz, Chin's offense was that he was Asian, as evidenced by the fact that as a provocation in an earlier altercation, Ebens kept referring to Chin as a "Chink" and a "Nip" and at one point shouted "it's because of you little mother f***ers that we're out of work."[167]

As the first altercation was ongoing outside a strip club, where Chin's friends were holding a bachelor's party in Chin's honor, Ebens retrieved a baseball bat and came after Chin, causing Chin and his friends to attempt to flee, with both Ebens and Nitz in pursuit.[168] Eventually they caught up with Chin, and Ebens hit Chin with the bat multiple times in

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161. Yen, *supra* note 148, at 18 (asserting that the "facebook" practice of identification of suspects is inherently racially biased against Asians because of the stereotypical belief that Asians all look alike and White Americans frequently cannot distinguish Asian faces from each other).

162. *Id.* at 18–19 (claiming that some Asian facebooks include photos of Asian-Americans who do not have criminal records).

163. *Id.* at 19. That same year, police in Garden Grove, California, illegally photographed and detained three Asian teenage girls, accusing them of being members of a gang solely because they wore baggy pants and seemed to be loitering by a public phone. *Id.*

164. *Id.* at 10.

165. *Id.*

166. Yen, *supra* note 148, at 10–11 (stating that Chin's assailants had instigated a brawl with him at a local bar before waiting for him outside the fast-food restaurant).

167. United States v. Ebens, 800 F.2d 1422, 1427–28 (6th Cir. 1986). Although Chin engaged in a physical battle at a strip club with Ebens earlier in the evening, and some of the circumstances that led to the final assault were in dispute at trial, Ebens was clearly the aggressor in the battle that took Chin's life. *Id.*

168. *Id.* Apparently seeing they were outnumbered four-to-two, Ebens and Nitz offered $20 to another man to help them "find and catch a 'Chinese guy'" amid their pursuit of Chin, lasting several blocks. *Id.* at 1428.

the head and back, dropping Chin to the ground.[169] Chin was subsequently taken to a hospital, where he was pronounced dead.[170]

Charged with second degree murder,[171] Ebens was prosecuted in a Michigan County Court, and eventually pled guilty to manslaughter, for which he was fined $3,720 and placed on probation.[172] The case gathered heavy publicity not only in Michigan but nationally, and public outrage at the lightness of the sentence was at its apex.[173] At trial, Ebens stated in testimony, "'I'm no racist. I've never been a racist,'" and portrayed the incident as nothing but a drunken brawl between the men, one of whom just happened to be Asian-American.[174] However, only one of the two combatants in this so-called drunken brawl wielded a baseball bat as a weapon, and only one of them was bludgeoned to death. Judge Charles S. Kaufman, who sentenced Ebens, rationalized his leniency:

> These [aren't] the kind of men you send to jail. We're talking here about a man who's held down a responsible job with the same company for seventeen or eighteen years . . . . These men are not going to go out and harm somebody else. I just [don't] think that putting them in prison [will] do any good for them or for society . . . . You don't make the punishment fit the crime; you make the punishment fit the criminal.[175]

Neither man was charged with perpetrating a hate crime.[176]

After the sentences were handed down and Kaufman gave his astounding explanation, activism amongst Asian-American communities nationwide increased dramatically.[177] In Detroit, an organization formed by Asian-Americans called American Citizens for Justice demanded that the

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169. *Id.* at 1428 (observing that whether or not Nitz held Chin while Ebens struck him with the baseball bat was in dispute at trial). The assault was finally stopped by police officers working security at the McDonald's. *Id.*

170. *Id.* (noting that doctors at the hospital attempted to perform emergency surgery on Chin, but he was removed from life support when his brain ceased functioning).

171. Robert S. Chang, *Dreaming in Black and White: Racial-Sexual Policing in The Birth of a Nation, The Cheat, and Who Killed Vincent Chin?*, 5 ASIAN L.J. 41, 55 (1998) (explaining that Ebens eventually entered into a plea bargain with prosecutors in his case).

172. *Ebens*, 800 F.2d at 1425.

173. *Id.*

174. Yen, *supra* note 148, at 11 (showing that Judge Kaufman seemed to echo Ebens's version of events).

175. *Id.* Upon hearing the judge's statement, Chin's mother replied, "'what kind of law is this? What kind of justice? This happened because my son is Chinese. If two Chinese killed a [W]hite person, they must go to jail, maybe for their whole lives . . . Something is wrong with this country.'" *Id.*

176. *Id.* at 12.

177. *Id.* at 11 (distinguishing that activism by the Asian-American community exploded while the decision was virtually ignored by White Americans).

U.S. Department of Justice investigate the case as a violation of federal civil rights law.[178] As stated by Judge Engel of the United States Court of Appeals for the Sixth Circuit in a later federal proceeding concerning Ebens, "[u]ndoubtedly because of [this] activity on behalf of the Chinese-American community, the United States Department of Justice, overruling the decision of the local United States Attorney not to prosecute, instituted proceedings under the Civil Rights Act in the United States District Court for the Eastern District of Michigan."[179] Judge Engel's assessment as to the reason for the existence of the federal civil rights case against Ebens was probably correct, but notably absent in the judge's statement as to why the case came about was the belief that the Department of Justice had felt that it had seen enough evidence in the case to justify bringing the charges before the court. Judge Engel could merely have been stating a sad reality about the case—and about the criminal justice system in general—or he could have been inadvertently revealing his own private bias regarding the case, or possibly both.

Eventually, both Ebens and Nitz were indicted on two counts of violating Chin's civil rights—one a conspiracy charge—and whereas Nitz was acquitted of both charges, Ebens was found guilty of one count of violating Chin's rights by willfully injuring him based on his national origin.[180] Ebens was sentenced to twenty-five years in prison for this crime, but on appeal, Judge Engel overturned Ebens' conviction on two grounds: (1) the lower court committed reversible error in refusing to allow evidence of inconsistent statements made by witnesses to Chin's killing as to the racist statements made by Ebens during the altercation, and (2) the lower court committed reversible error in permitting the testimony of a Black man named Willie Davis, who testified as a government witness that nine years earlier, in 1974, he was harassed with racial epithets by a man he identified as Ebens.[181] The court found that because the testimony "was too remote in time," the witness's identification of Ebens "was too indefinite to be probative," and the probative value of both pieces of evidence was outweighed by their potential prejudicial effects.[182] On remand, the lower court granted a motion for a change of venue, due to the enormous publicity the trial was getting, and transferred the case to the Southern

178. *Id.*

179. United States v. Ebens, 800 F.2d 1422, 1425 (6th Cir. 1986).

180. *Id.* at 1472.

181. *Id.* at 1431–34.

182. *Id.* (suggesting that the testimony of the witness Davis could have been admissible if it had not occurred so remotely in time to the incident at issue in the case, and noting that the comments to which Davis testified were directed to Davis, who was of a different ethnicity than the victim).

District of Ohio,[183] where Ebens was acquitted.[184] Ebens, because of the lenient sentence on his state manslaughter conviction, and because he'd posted a $20,000 bond pending his appeal of his federal civil rights conviction, never served a day in jail for killing Vincent Chin.[185]

IV. THE FOUNDATIONS OF RACIAL INJUSTICE IN THE UNITED STATES

Racial discrimination in the criminal justice system can, and does, affect all minority races in this country. Although the prejudices faced by one minority race and not another may be different, the results are generally the same: a deprivation of civil or human rights and a deprivation of justice. The above illustrations highlight that there is an undeniable prejudice in the U.S. justice system. So now the question still remains, what can be done to stop the injustice?

The challenge of dealing with and attempting to correct racial discrimination in the criminal justice system has been that the undertaking of the practice of law in its various forms—in judging, advocacy, counseling, etc.—requires interpretation and enforcement by humans, who are essentially imperfect beings that tend to develop and nurture biases.[186] Given that such beings have shaped the legal system in the United States into its current state, racial stereotyping has thus played a role in the administration and development of criminal law in the country.[187] The American legal system in general, given its reliance on the jury system, is particularly vulnerable to the effects of racial stereotyping; with the inevitable existence of some degree of either subtle or overt prejudice in people, how likely is it that a jury of any composition can deliver the promise of

183. *See id.* at 145–46 (noting that all of the public outcry and publicity surrounding the case would be significantly damaging to the jury selection process).

184. *See* Yen, *supra* note 148, at 11–12 (noting that Chin's mother, outraged by the outcome of the case against Ebens, left the country after the verdict and returned to China).

185. *Id.* at 11–12.

186. *See id.* at 12–13 (providing that "[t]he model minority stereotype . . . creates the erroneous assumption that Asians cannot be victims of racial discrimination, [and] produces potentially devastating consequences on the enforcement of crimes against Asian Americans"); Sommers & Ellsworth, *supra* note 59 (detailing the inborn sterotypes that color a jurors ability to judge guilt or innocence clearly).

187. *See* Yen, *supra* note 148, at 9–10 (noting that sociological research has only started to reveal the pervasive influence that racial prejudice against Blacks has had on the U.S. criminal justice system, including studies which conclude that racial stereotyping of Black defendants by prosecutors can greatly influence the perceptions of guilt developed by jurors). Few studies have analyzed the influence of such stereotyping of other racial groups in the field of criminal law. *Id.* at 10. Thus, expanded research on prejudice against other racial and ethnic minorities is essential to the eradication of racial discrimination in the criminal justice system, especially given that these minorities tend to be disproportionately subjected to the criminal justice system. *Id.*

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impartiality in the law?[188] This effect is a formidable obstacle to overcome.

A. *A Short History of the Search for Equality in America*

Before examining what can be done to eliminate, or at least begin to substantially mitigate, racial bias in the criminal justice system in the United States, some attempt to gain an understanding of racism's foundations in the U.S. legal system should be undertaken. The promise that law will be blind to prejudices has been a foundation of American society since it was established.[189] But for the better part of the first century of the existence of the United States this was of course not the case, as Blacks were enslaved and held no rights as citizens under the legal system in the United States. At the conclusion of the Civil War, however, some Whites and Blacks hoped that the distinctions that had been in existence based on the color of people's skin would fade away, at least insofar as public comportment was concerned.[190] By 1896, however, the legal and political significance of race had increased.[191] As the majority in *Plessy v. Ferguson*[192] failed to accept an equal protection challenge to the constitutionality of a Louisiana statute that required the segregation of Blacks and Whites in railway cars, Justice Harlan famously proclaimed in his dissenting opinion:

> The [W]hite race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.[193]

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188. *Id.* at 10–12 (2000) (proposing means by which Asian-American stereotypes can influence jurors and law enforcement officials). As stated by Samuel Sommers & Phoebe Ellsworth from the University of Michiagn:

> On most juries, the final verdict reflects the views of the predeliberation majority. The pervasive and deleterious effects of White juror bias . . . . [S]alient racial issues in a trial activate the normative racial attitudes held by White jurors. This appears to be true today just as it was before the Civil War.

Sommers & Ellsworth, *supra* note 59, at 202.

189. Yen, *supra* note 148, at 9. "It is dubious that the law has kept its promise of neutrality and objectivity, particularly since all law requires human interpretation and enforcement." *Id.*

190. Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 1938 (2000).

191. *See id.* at 1938 (discussing attitudes regarding race and "[W]hiteness" during Reconstruction).

192. 163 U.S. 537 (1896).

193. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

Harlan's point was that segregating the races did not offer equality to each race, but instead was a means by which to signify the superiority of one race and the inferiority of the other.[194] Now, more than one hundred years later, Harlan's dissenting view is the majority view, both as a societal and a legal matter, as segregation has become an evil concept, and is also considered to be presumptively unconstitutional.[195] However, Harlan's viewpoint that the Constitution is colorblind is now perceived by some as a coded statement of the perpetuation of the concept of racial inequality.[196]

In the wake of Harlan's pronouncement, American race law quickly evolved down two distinct paths at the outset of the twentieth century, one which embraced the ideals of equality and one which looked to divert equality through legal means.[197] The later used state law to further restrict the rights of minorities based on their race and distinctly opposed the concept of equality.[198] For example, during the early part of the twentieth century the U.S. Supreme Court adopted the doctrine that not only did Congress have the power to expel aliens, but that this power was not subject to judicial review.[199] As a result, in both *Chae Chan Ping v. United States*[200] and *Fong Yue Ting v. United States*,[201] the Supreme Court upheld the constitutionality of the Chinese Exclusion Act of 1882,[202] giving deference to a statute that prohibited Chinese nationals from entering the United States on purely on racial grounds.[203]

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194. Harris, *supra* 190, at 1926 (noting that Justice Harlan, in making his proclamation in his dissent, declared that "our [C]onstitution is colorblind").

195. *See id.* at 1926 (indicating that Justice Harlan's statement, "our [C]onstitution is colorblind" today serves as a guiding light in Supreme Court jurisprudence).

196. *See id.* at 1939–41 (2000) (discussing the view among various historians and scientists that certain races were inherently superior to others).

197. *Id.* at 1943.

198. *Id.* (noting that the power of Congress to expel non-citizens is not subject to judicial review).

199. Harris, *supra* note 190, at 1943. In the first few decades of the twentieth century, "the United States operated on the blatantly racist principles of exclusion and annexation in its foreign relations (and its quasi-foreign relations with [American] Indians)." *Id.* Through the creation of congressional "plenary power" doctrines, which limited the possibility of judicial review over these racist legislative actions, the Supreme Court paved the way for nativist racism in the form of exclusion and exploitation of non-Whites. *Id.*

200. 130 U.S. 581 (1889).

201. 149 U.S. 698 (1893).

202. The full name of the Act is An Act to Execute Certain Treaty Stipulations Relating to the Chinese, Ch. 126, 22 Stat. 58 (1882). The Act suspended the immigration of Chinese laborers for ten years. 22 Stat. at 59.

203. Harris, *supra* note 190, at 1943–44 (noting that the Chinese Exclusion Act could be viewed as a response to Reconstruction, as immigration from China to the western U.S. States had surged in the late nineteenth century).

The new constitutional principle of "equality was reconciled with demands for "[W]hite supremacy . . . under a . . . rubric of racial 'difference.'"[204] Though non-White citizens were formally entitled to equality under the law after the Civil War, the reality became something different.[205] This was a turbulent time when about four million people who had previously been considered legal chattel became legal citizens of the United States; when Whites in the western United States became increasingly hateful of the Chinese; when Whites and Mexicans fought over land and power in the southwestern United States; and when Whites were continuing to force American Indians off their lands.[206] Congress sought during the Reconstruction era to address these volatile issues by creating the Thirteenth, Fourteenth, and Fifteenth Amendments and a host of federal statutes designed to protect the civil rights of the individual—any individual.[207] The latter group of legislative acts, including the Civil Rights Act of 1866, attempted to dismantle existing state race law and forestall the creation of new state legislation designed to inflict racial oppression.[208]

Unfortunately, after just a few years the aforementioned legislation began to be undermined.[209] A lack of a solid foundation economically, and a lack of a sound enforcement legally, created an opportunity for a hostile Supreme Court to begin to eviscerate the rights created under the legislation of the Reconstruction, and for states to exercise their will against the goals of the Reconstruction.[210] And so, whereas the Reconstruction era

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204. *Id.* at 1943.

205. *Id.* at 1957–58 ("[T]he practical reality was an end to [B]lack hopes for emancipation."). The United States began heading down this path in the period known as the Reconstruction, during the years 1865 to 1877. *Id.* at 1930–31. in the words of historian Eric Froner, during the Reconstruction "Americans made their first attempt to live up to the noble professions of their political creed—something few societies have ever done." *Id.*

206. *Id.* at 1930–31 (indicating that state policies of allotment and removal undermined the economies and spiritual and cultural integrity of Native Americans).

207. *Id.* at 1931–32 (establishing that these three amendments served to abolish slavery; create a right of citizenship for all people residing in the United States; prohibit the states from abridging the privileges and immunities of any U.S. citizen, or depriving those citizens of equal protection under the law and due process of the law; and guarantee the right to vote for all men, regardless of their race).

208. Harris, *supra* note 190, at 1932 (revealing that this legislation, coupled with the Fourteenth Amendment, was intended to thwart the efforts of the southern states to recreate slavery, in effect, through state laws designed to restrict the rights and freedoms of Blacks).

209. *Id.* at 1933 (noting that important weaknesses in the political and legal framework of the laws of the Reconstruction era enabled this undermining).

210. *Id.* at 1933–34 (suggesting that another weakness of the Reconstruction framework that allowed its goals to be undermined was the novelty and grandiosity of its legal structure, which led to disputes among lawmakers concerning the importance and meaning

had struck a seemingly decisive blow to the old social and legal order, making clear that all people were entitled to be treated as part of a national community, with legal rights that could no longer be explicitly assigned based on a person's race, the decline back to a racially divided society in a legal sense began.[211]

Minority citizens, particularly Blacks, were left in much the same state that they were in before the Civil War, even though they had their freedom from slavery.[212] As the Court, perhaps cynically or resignedly, noted in *Plessy*, "[l]egislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties" that already exist.[213] The realities of the first half of the twentieth century bore these words out as seemingly prophetic.

The tide began to turn back in favor of equality among the races in the 1940s, when the United Sates began "to portray itself as a land of freedom and equality in light of decolonization and the Cold War."[214] In 1943, Congress repealed the Chinese Exclusion Acts,[215] thus beginning the renunciation of the plenary power to exclude minorities from citizenship based on race, which it had gained and wielded in the late nineteenth century.[216] After several other legislative moves which allowed citizenship to people who had been racially ineligible for naturalization, Congress also renounced its termination policy, which had previously left Native Americans without legal protection or recognition, by passing a series of federal statutes in the 1970s.[217] Minorities of all racial backgrounds were able to become U.S. citizens again, ostensibly with all of the attached rights of citizenship that Whites enjoyed.[218]

The tide continued to turn further back in favor of equality amongst the races during the 1960s, a period widely known as the Civil Rights

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of the Thirteenth Amendment and the intended content of the Fourteenth Amendment, as the language of these pieces of legislation was broad and vague).

211. *Id.* at 1937–38 (identifying the fact that many people who had learned to exercise their rights and privileges as Whites could do were not about to relinquish those rights and privileges, ensuring that the fight over the issue of race would continue).

212. *Id.* at 1957.

213. Plessy v. Ferguson, 163 U.S. 537, 543, 551 (1896) (stating also that a statute implying solely a legal distinction between the races, which must exist as long as Whites are distinguished from another race by color of the skin, does not have a tendency to destroy the concept of legal equality of the races, or establish involuntary servitude).

214. Harris, *supra* note 190, at 1996.

215. An Act to Repeal the Chinese Exclusion Acts, Pub. L. 78-199, ch. 34, 57 Stat. 600 (1943).

216. Harris, *supra* note 190, at 1996.

217. *Id.*

218. *Id.* at 1937.

era.[219] After the start of this period, the Supreme Court began to decide cases that would have significant implications in two key areas of civil rights concern: equal opportunity in education, and voting rights.[220] As a result, the issue of equality among the races was fought in the courts.[221] For example, whereas the Court in *Plessy* articulated a separate-but-equal doctrine, the Court changed its course on June 5, 1950 when it held that separate-but-equal was not constitutional in the higher education context.[222] In *Sweatt v. Painter*,[223] the Court held that a new state law school specifically created for Black students at the University of Texas failed to provide equivalent educational opportunities as those offered to White students at the same university, and thus the state, in failing to admit the plaintiff student to its existing law school, denied the student his equal protection rights as guaranteed by the Fourteenth Amendment.[224] In *McLaurin v. Oklahoma State Regents*,[225] the Court held that the University of Oklahoma's segregation policy, requiring Black students to use separate facilities from the White students, was also in violation of the Fourteenth Amendment.[226] Although in both cases the Court had been petitioned to reconsider the separate-but-equal doctrine as handed down in *Plessy v. Ferguson*, the Court declined to do so, choosing instead to rule only on the specific issues in the cases at hand.[227] While this failure

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219. *Id.* at 1983.

220. *Id.* at 1990, 1995.

221. Harris, *supra* note 190, at 1957.

222. *See* Sweatt v. Painter, 339 U.S. 629, 636 (1950) (reversing a judgment that denied mandamus to compel school officials of the University of Texas to admit the plaintiff, a Black student, to its law school); McLaurin v. Okla. State Regents, 339 U.S. 637, 642 (1950) (reversing a judgment of the United States District Court for the Western District of Oklahoma, which did not grant the injunctive relief sought by the plaintiff, a Black student seeking admission to a doctorate program at the University of Oklahoma). The Court assumed that the State would follow its holding that the university's denial of admission to the plaintiff on the basis of his race was unconstitutional; the injunctive relief sought by the plaintiff asked that his admission be ordered by the court. *Id.*

223. 339 U.S. 629 (1950).

224. *Sweatt*, 339 U.S. at 629 (stating that a new law school being opened exclusively for Black students could not practically qualify as providing equal opportunity for those Black students due to substantial differences in faculty size, library facilities, and faculty).

225. 339 U.S. 637 (1950).

226. *McLaurin*, 339 U.S. at 642 (holding that an Oklahoma statute requiring that Black students be required to sit in class, study, and eat apart from all other students was unconstitutional).

227. *See id.* at 638 (noting that circumstances of the Fourteenth Amendment prohibits States from treating individuals differently on the basis of race); *Sweatt*, 339 U.S. at 631–32 (stating that educational opportunities must be "substantially equal" for all in accordance with the Fourteenth Amendment). The Court in *Plessy v. Ferguson* held that an act that requires White and Black people to be provided with separate accommodations was not in violation of the Fourteenth or Thirteenth Amendments. Plessy v. Ferguson, 163 U.S. 537,

to obtain a full review of *Plessy* forced civil rights activists to pursue each case individually, slowing the progress of the civil rights movement, but signaling that the separate-but-equal doctrine would eventually be undermined.[228] These decisions paved the way for the landmark 1954 decision of *Brown v. Board of Education*,[229] a consolidation of four cases where Blacks were denied equal opportunity because of racial segregation.[230] The decision to strike down segregation policies in *Brown* was clearly applicable to public school systems in all states.[231] Finally, the concept of equality amongst people of all races was being enforced in the way that legislators had imagined in post Civil War America.

It took eleven more years, but the civil rights movement made progress in the criminal justice system when the federal government was called upon by Black activists to put an end to the murders of Black people by Whites; as southern states were unable to seat juries that would convict Whites of killing Blacks.[232] After years of political pressure having been put on the federal government to step in and use federal civil rights law to

552 (1950). The Court reasoned that when the government has provided its citizens with equal opportunities to improve and progress it has performed its functions in order to respect social advantages. *Id.* at 551. The court further reasoned that the legislation does not have the power to eradicate distinctions based on racial or physical differences. *Id.*

228. *See* Melvin I. Urofsky, *The Supreme Court and Civil Rights Since 1940: Opportunities and Limitations*, 4 BARRY L. REV. 39, 43–44 (2003) (mentioning that *McLaurin* was the first time that the Supreme Court encountered the core issue of segregation). Although Chief Justice Vinson attempted to develop a narrow opinion he noted the humiliation that was faced by George McLaurin. *Id.* He also identified the lack of intangible aspects that McLaurin's White counterparts received. *Id.* at 43. This opinion crafted a starting point to analyze the constitutionality of segregation. *Id.* at 44.

229. 347 U.S. 483 (1954).

230. Brown v. Bd. of Educ., 347 U.S. 483, 483 (1954) (holding racial segregation in public schools deprives minority students of equal opportunities in education even though the facilities and other factors may be ostensibly equal).

231. Urofsky, *supra* note 228, at 45 (noting that Kenneth Karst, a nationally renowned constitutional law scholar, proclaimed the *Brown* decision to be the "leading authoritative symbol for the principle that the Constitution forbids a system of caste"). The Court in *Brown* struck down policies of segregation in public school systems of Delaware, Kansas, South Carolina, and Virginia. *Id.* The Court stated that separate educational facilities were inherently unequal. *Id.* For discussion of racial discrimination in Texas via state financing schemes *see* Angela Maria Shimek, Comment, *The Road Not Taken: The Next Step for Texas Education Finance,* 9 SCHOLAR 531, 537 (2007).

232. On June 21, 1964 in Philadelphia, Mississippi, three civil rights workers were murdered during a voter-registration campaign for Black voters. Margaret M. Russell, *Cleansing Moments and Retrospective Justice*, 101 MICH. L. REV. 1225, 1241 (2003) (indicating that an earlier attempt on the life of one of the victims, Michael Schwerner, had been made as a result of his participation in a Black boycott of White-owned businesses and a voter registration drive in Meridian, Mississippi). What distinguished this case from the previous lynching-style murders of Blacks by Whites was the fact that two of the three civil rights workers were White northerners. *Id.* at 1242.

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extract justice in cases of whitewashed state murder charges, starting in earnest with the murder of Emmett Till in Money, Mississippi in 1955, the dynamics were finally in place to allow that pressure to bear fruit.[233] In *United States v. Price*,[234] the Court held the federal civil rights statute,[235] which makes it a conspiracy to prevent free exercise of any right secured for citizens by the Constitution a criminal offense, includes rights protected by the Fourteenth Amendment.[236] This decision paved the way for progress, because state murder charges were effectively transmuted into crimes that could be prosecuted by the federal government.[237]

B. *A Statistical View of the Problem*

Despite the progress noted in the brief history of racial bias in the U.S. courts since the Civil War, all of the examples of racial discrimination provided in Part III took place in the 1980s and 1990s. This is an obvious indication that racism is still alive and well, ready to rear its ugly head, and stand in the way of justice. However, those examples provide merely anecdotal evidence of racial discrimination in the criminal justice system in the United States. What is the extent of the injustice?

Data from various studies concerning the death penalty can provide insight into the extent that racial factors enter into decisions made in the U.S. criminal justice system. For example, in data from a national study published by the Death Penalty Information Center (DPIC) in Washington, D.C., statistics collected on executions from 1976 (the year the Supreme Court reinstituted the death penalty in the United States) through Sept. 20, 2010 show that "[o]ver 75% of the murder victims in cases resulting in an execution were [W]hite, even though nationally only 50% of total murder victims generally are [W]hite."[238] Given this significant a

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233. *Id.* at 1231. The murder of Emmett Till occurred during the same year that Rosa Parks refused to give up her bus seat to a White man. *Id.*

234. 383 U.S. 787, 801 (1966) (considering the issue of whether the defendants, by conspiring to release the three civil rights workers from jail for the purpose of intercepting them and killing them, violated 18 U.S.C. § 241).

235. 18 U.S.C. § 241 (2006).

236. United States v. Price, 383 U.S. 787, 800–01 (1966) (noting that the federal civil rights statute also extends to conspiracies engaged in by officials, either alone or jointly with private individuals).

237. *See* MICHAEL R. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-*Brown* South 163–64 (1987) (noting that two-and-a-half months before the FBI made the arrests concerning the disappearance of three missing Civil Rights workers in Philadelphia, Mississippi, the Justice Department had already assigned eight lawyers to the case, including one from the Civil Rights Division).

238. DEATH PENALTY INFO. CTR., *Facts About the Death* Penalty, http://www.deathpenaltyinfo.org/FactSheet.pdf (last visited Oct. 10, 2011).

misalignment of the incidence of the death penalty versus the incidence of murder affecting a given race, the race of the victim does appear to be a factor influencing the courts in sentencing decisions. According to a 1998 report issued by Professor David Baldus to the American Bar Association, ninty-six percent of states that reviewed the impact of race as a factor in deciding to sentence a defendant to death reported a pattern of discrimination based on the "race-of-defendant," the "race-of-victim," or both.[239] A 2005 California study and a 2001 North Carolina study also noted by the DPIC show a high correlation between death penalty sentences and the race of the victim.[240]

Another state study of note was issued by Professors David C. Baldus, Charles Pulaski, and George Woolworth regarding imposition of the death penalty in Georgia.[241] The Baldus study was used as the basis for the case argued by the petitioner in *McCleskey*, where the authors claimed that, using a model designed to control for thirty-nine nonracial variables, defendants charged with the killing of Caucasians were 4.3 times more likely to get the death penalty as defendants charged with the killing of African-Americans, and that African-American defendants were 1.1 times more likely to be sentenced to death as other defendants in cases involving all types of murder victims.[242] Taken together, the outcomes of these two results led to the conclusion that African-Americans who are convicted of killing Whites in Georgia are the most likely group to receive the death penalty.[243] Other analyses performed by Baldus indicated that, using raw numbers, defendants charged with the killing of Whites got the death penalty in 11% of those cases, while defendants charged with the killing of Blacks got the death penalty in only 1% of the cases.[244] In addition, the death penalty was imposed in 22% of cases involving a Black defendant and a White victim, and in only 3% of cases

239. *Id.* (noting that from the time the death penalty was reinstated, 15 White defendants had been put to death for murdering a Black victim, whereas 246 Blacks had been put to death for murdering a White victim).

240. *Id.* (providing also that, of the thirty-eight states who invoke the death penalty, ninty-eight percent District attorneys are White). The California report found that killers of Whites were more than three times as likely to get the death penalty as killers of Blacks, and four times as likely to get the death penalty as killers of Latinos; *id.* (citing authors Pierce and Radelet in the Santa Clara Law Review). The North Carolina report concluded that the killers of Whites were three and a half times as likely to receive the death penalty than killers of minorities. *Id.* (citing a study by Dr. Isaac Unah and Professor Jack Boger of the Univesity of North Carolina).

241. McCleskey v. Kemp, 481 U.S. 279, 286 (1987) (explaining that the Baldus report is actually the result of two sophisticated statistical studies that examined over 2,000 murder cases in Georgia in the 1970s).

242. *Id.*

243. *Id.* at 287.

244. *Id.* at 286.

with a White defendant and Black victim.[245] The Baldus study also revealed how prosecutors sought the death penalty 70% of the time in cases involving an African-American defendant and a Caucasian victim, and in only 19% of cases where there was a White defendant and a Black victim.[246]

In short, the data in studies such as those cited in the Baldus study cannot prove definitively that racial discrimination is systemic to any given criminal justice system.[247] However, such data shows trends and issues signals that are cause for alarm and scrutiny. The mere fact that examples of racial discrimination in the criminal justice system, as discussed above, exist, means that racial discrimination can and does happen in the criminal courts, giving cause to examine the matter and attempt to devise solutions that will prevent recurrences.

V. Potential Domestic-Based Solutions to the Problem

A. *Embrace the Jury and its Imperfections*

One suggested approach to mitigating the effects of racial discrimination in the American criminal justice system is to address the issue through the very aspect of the system that defines it: the jury.[248] Rather than seeking to find the utopian color-blind justice system, complete with its utopian color-blind jury, this approach acknowledges the racial bias that exists amongst people of different races, and puts this fact to use in an attempt to even out the effects of racial bias through the proposal of reforming the jury process by seating a racially mixed jury for every case,

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245. *Id.*

246. *McCleskey*, 481 U.S. at 287. Additional studies also point to the existence of racial discrimination in the U.S. criminal justice system. *See* Miller, *supra* note 16, at 235 (citing his study of the Duval County Jail, and of the criminal justice system overall, the author finds that the system disproportionately concentrates on African-Americans who have been charged with minor offenses); Allan Hutchinson, *Indiana Dworkin and Law's Empire*, 96 Yale L.J. 637, 662–64 (1987) (noting several statistical analyses comparing Blacks and Whites in terms of unemployment, poverty level, murder-victim rates, and infant death rates). However, as the Court Stated in *McCleskey*, the data in the study offered by the petitioner did not prove that racial discrimination occurred in his case, nor could it do so in any other case. *See McCleskey*, 481 U.S. at 287–89 (stating that the models used by Baldus use a statistical analysis that attempts to account for the independent variables that would exist in any given case).

247. *See McCleskey*, 481 U.S. at 289 (noting that the Court assumed the validity of the Baldus study in its analysis of McCleskey's claim that his Fourteenth Amendment rights were violated, but still ruled against him).

248. Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury* De Medietate Linguae*: A History and a Proposal for Change*, 74 B.U. L. Rev. 777, 802–03 (1994).

regardless of the race of the defendant.[249] For example, in Britain, after two decades in which defense attorneys were requesting that the court provide a means by which a multi-racial jury would be ensured, as a means of combating the aggressive use of the peremptory strike, a British judge agreed in 1980 to hold a pool of so-called stand-by jurors, to be used if necessary to create a racially mixed jury.[250] These potential jurors would be neither selected for the jury nor excused from it at the outset.[251] This approach lasted only nine years because, in 1989, a British Court of Appeal ruled that trial judges do not have the authority to set the composition of a jury.[252] The rationale of the Court of Appeal was that in Britain, although peremptory strikes exist and can influence the composition of a jury, the core of the jury selection process is random process since voir dire—the standard American jury selection process—is not used.[253] As a result, the use of standby jurors by a judge violated the underlying philosophy of the English jury selection system.[254]

Other proposals to address racial discrimination in the criminal justice system through modifying the jury selection process include: allowing minority defendants a certain number of peremptory strikes of majority jurors, taking affirmative steps to ensure that minorities are not underrepresented in the venire, and using affirmative peremptory choices to ensure that a defendant's peers are included on a jury.[255] However, such proposals generally run afoul of existing principles of the current jury selection process in the United States. For example, allowing peremptory strikes of majority jurors undermines a person's right not to be excluded from a jury based on race.[256] Presumably proponents of the

249. *See generally id.* (discussing the history of the jury selection process in the United States, including the creation of the law to prevent abuses of the use of the peremptory strike, and arguing that a better alternative to the elimination of the peremptory strike is the implementation of the proposals contained herein as to reforming the jury selection process).

250. *See id.* at 802–03 (identifying that this modification of the jury selection process enabled attorneys to utilize their peremptory strikes strategically to obtain a mixed jury).

251. *Id.* at 803.

252. *See id.* (finding in that same year, a trial judge had upheld the practice of using stand-by jurors to achieve racially mixed juries).

253. Ramirez, *supra* note 248, at 803.

254. *See id.* at 803–04 (commenting that, in 1994, courts in Hennepin County, Minnesota were debating whether they should require that every twenty-three member grand jury contain at least two minority members, or 8.7% of the total jury, as a result of the fact that 9% of the adult population was made up of minorities.)

255. *See id.* at 804–17 (providing that such proposals, under existing jury selection principles, may be the only chance in a given trial for a minority defendant to ensure that at least some minority jurors are members of a given jury).

256. *See id.* at 804 (indicating that allowing such a proposal would amount to protecting the rights of defendants at the expense of jurors' rights).

automatic mixed racial jury approach base their views on the assumption that people from different races will bring their unique experiences as a member of their race to bear on interpreting facts and assessing the motivations of behaviors.[257] And not on an assumption that a member of one race will favor members of his or her own race, and disfavor members of other races.[258] While such proposals may have merit in a practical sense, they face many obstacles in becoming realities.[259]

B. *Limit or Eliminate the Death Penalty*

Others have proposed either eliminating or placing a moratorium on the imposition of the death penalty as a means of addressing racial bias in its administration.[260] This approach, while ensuring that the injustice associated with judges and juries meting out the death penalty based on racial prejudice will be eliminated, tends to address a problem not by coming up with a solution, but by removing the practice that is subject to the problem. Such an approach loses sight of the issue of whether or not the death penalty should exist, because injustice to the innocent, or uneven administration of the death penalty, are only two factors affecting the question.

C. *Repurpose Existing Law*

As is evident from the proposals mentioned above, the problem of racial discrimination in the U.S. criminal justice system is not easily solved. Most studies concentrate on proving its existence rather than eliminating it. New use of existing law, and the creation and use of new law have proven to be, and are still perhaps, the best means by which to address the problem. An important example is the federal government's use of an existing civil rights law in prosecuting the Mississippi Burning crimes, as noted above.[261] Even though some criminal defendants in that case were acquitted, at least some measure of justice was achieved, where previously the states involved had been unable to seat an impartial jury due

257. *Id.* at 804–17.

258. Ramirez, *supra* note 248, at 804–17.

259. *See id.* (stating that such proposals may be criticized as not only failing to guarantee a racially mixed jury, but also as perpetuating stereotypes of races).

260. *See generally* Barry Scheck & Peter Neufeld, *DNA and Innocence Scholarship, in* WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 241 (Saundra D. Westervelt & John A. Humphrey eds., 2001) (recognizing that eliminating the death penalty would mitigate other problems as well, such as a general lack of adequate counsel for defendants).

261. *See* Russell, *supra* note 232, at 1245 (pointing out that the federal government prosecuted eighteen individuals in the Mississippi Burning crimes "in a federal civil rights conspiracy trial").

to the problem of racial prejudice.[262] The law used required that those who were convicted receive much lighter sentences than those which could have been imposed under state murder convictions, this approach was unsuccessfully in *Ebens*, but effective in the well-known Rodney King case.[263]

Another example is the creation and use of hate crime statutes to prosecute criminals in situations where local prejudice against minorities stands in the way of justice. Although this approach still has imperfections, due to the hurdles that need to be overcome in order to achieve a conviction,[264] these statutes could be revised in order to address their deficiencies at achieving justice. Effective prosecution of Ebens for a state or federal hate crime, especially under revised statutes, could feasibly have led to justice in that case.

The issues of prosecutorial abuses, including wrongful accusation and wrongful prosecution, could also be addressed through the use of existing legislation, and through revised legislation to strengthen these laws. This approach could have benefited Willie Bennett and Clarence Brandley, discussed in Part II above. In discussing legislating away prosecutorial abuses, the debate would surround the state's interest in providing prosecutorial leeway versus the state's need to protect its citizens from abuse by the law. Also, investigative abuses such as those inherent in both the Bennett and Brandley cases could be pursued more frequently and vigorously, thus serving as a preventive measure and a means of extracting justice in such cases of racial discrimination by the U.S. criminal justice system.

D. *Leverage Technology*

Finally, the continued evolution of forensic science—mainly the identification of DNA evidence—and its use in the criminal courts, can assist in reclaiming justice in the courtroom for racial minorities. An important aspect of the use of forensic DNA testing in criminal cases is that it can

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262. *See id.* (elaborating on the fact that the federal government prosecuted eighteen individuals, but only secured convictions for seven of them).

263. *See* United States v. Koon, 34 F.3d 1416, 1425, 1462 (9th Cir. 1994) (affirming the judgments of the United States District Court for the Central District of California, in which police officers Stacey Koon and Laurence Powell were convicted of violating victim Rodney King's federal civil rights by beating him during an arrest for driving under the influence of alcohol).

264. *See* Troy A. Scotting, *Hate Crimes and the Need for Stronger Federal Legislation*, 34 AKRON L. REV. 853, 878 (2001) (recognizing that among the problems of current federal hate crime legislation is that federal jurisdiction does not exist unless a victim has engaged in one of a group of federally protected activities, and a nexus between the activity and the crime exists).

not only exonerate the innocent, wrongfully accused, or wrongfully convicted, but it can also lead to the successful prosecution of the correct suspect.[265] Given that minorities are disproportionately affected by investigatory and prosecutorial abuses based on racial prejudice, the positive effects of the use of DNA science to correct for these wrongs will have a disproportionately positive effect on these minority victims of the criminal justice system.

E. *A Look to the Future*

The examples and data noted above show that the problem of racial injustice in the U.S. criminal justice system exists for various reasons, and points toward the level of its frequency and severity. In looking no further than the daily newspaper, evidence can be found that racial discrimination in the criminal courts persists. In April of 2007, a jury found four White defendants liable in civil court for the savage assault of a mentally disabled African-American man, Billy Ray Johnson, four years earlier.[266] The criminal trials led to convictions on only minor offenses; the most severe sentence imposed was sixty days in jail.[267] The civil verdict was for $9 million in damages.[268] While this case indicates yet another means by which victims of a racially discriminatory criminal justice system can gain a measure of justice, i.e., through the use of the civil courts, that is not the main illustrative point of the case. The take away from the above situation is that defendants will often not have the resources to pay the damages to the plaintiff, and therefore suffer no real consequences for their actions.[269] The case illustrates the gravity of the injustice done to the victim by the criminal courts. Here, a helpless African-American man was severely beaten by four White men, and the East Texas town of Linden could not find a judge and a jury to impose a sentence of more than thirty to sixty days of jail time.[270] Although a positive sign exists in the fact that the same town provided the civil courtroom and jury (mostly

265. Scheck & Neufeld, *supra* note 260, at 259 (setting forth the fact that of the first eighty-two DNA exonerations, DNA testing tied the crime involved to another person fifteen times, and that the incidence of this happening was likely to increase as databanks were updated and DNA testing became standard operating procedure).

266. Laura Parker, *A Jury's Stand Against Racism Reflects Hope for Change*, USA TODAY (Apr. 26, 2007), *available at* http://www.usatoday.com/news/nation/2007-04-26-texas-town_N.htm (noting that the civil jury consisted of ten White women, one White man and one Black man, and that the jury took only four hours to reach its verdict).

267. *Id.*

268. *Id.*

269. *Id.* (assuming the defendants would not be able to pay the $9 million because three of them were recent high school graduates, and the other was a young jailer).

270. *Id.* ("[Two defendants] pleaded guilty to injury to a disabled person and [were] sentenced to [thirty] days in jail. [The remaining two defendants] were convicted of minor

White) which led to the civil judgment.[271] Regardless, justice is still often elusive to racial minorities. What would the sentences in the criminal trial have been if four Black men had been convicted of aggravated assault of a mentally disabled White person in the town of Linden, Texas?

While cases like that of Billy Ray Johnson are still happening, and are likely to continue for some time, there is hope for the future. Those hopes spring from the acknowledgment of the existence of the problem of racial discrimination in the criminal justice system in the United States, in examining its gravity, in analyzing its underpinnings, and in using the law to eliminate it.

VI. INTERNATIONAL HUMAN RIGHTS LAW

A. *Jurisdiction and Relevance*

Racial discrimination has been barred under international human rights law since the inception of the human rights movement. The United States has been a party to much but not all of the major developments in evolving international human rights law from the beginnings of this law until today, starting with the creation of the United Nations in 1945 during the aftermath of World War II.[272] The current law that protects the human rights of an individual has evolved from beginings of the U.N. and its law that governs the responsibility of States for injuries to aliens.[273] The substantive rights protected by each of these bodies of law have converged in the decades since World War II,[274] leading to a greater overall

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charges in separate trials in 2005 and sentenced to [thirty] days and [sixty] days, respectively.").

271. Parker, *supra* note 266.

272. MARY ELLEN O'CONNELL ET AL., THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS 268 (6th ed. 2010).

> The U.N. is the first international organization with all but universal, world wide membership, charged with the responsibility for maintaining international peace and security, developing friendly relations among nations, achieving international co-operation in solving international problems of an economic, social, cultural, or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms.

Id.

273. *See* THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW: IN A NUTSHELL 132–33 (3d ed. 2002) (The U.N. Charter and the pledge by U.N. Member States "laid the conceptual foundation for the development of substantive human rights law and for making human rights a matter of international concern").

274. *Id.* at 140.

> Prior to the Second World War, human rights issues were, in general, not regulated by international law and, therefore, were deemed to be matters within the national jurisdiction of each State. The manner in which a State treated its own nationals was, with some exceptions, not a matter of international concern, and hence, an issue that other

protection of the individual from human rights violations of all types, including racial discrimination. The important difference between these two branches of law is that the law governing State responsibility for injuries to aliens protects rights asserted only by individuals who are not nationals of the offending State, whereas what has become commonly known as international human rights law protects all individuals against all such harms by a State, regardless of whether they are nationals of that State or not.[275] The distinction is that under one branch of law the individual is the aggrieved party, whereas under another law the complainant State is the aggrieved party—the State makes the claim of harm and wrongdoing on behalf of the individual.[276]

The establishment of the U.N. Charter signified the beginnings of the protection of the human rights of the individual.[277] The charter by which the U.N. was established contained many human rights provisions that distinguished it from earlier attempts to preserve and protect human rights, in that it guaranteed not only certain categories of human beings and certain types of rights, but instead all human rights for all people, without distinction as to race, language, religion or gender.[278] The U.N. Charter therefore created two interrelated obligations that served this purpose, the universal respect for human rights without limitation as noted above, and a pledge by all Member States to "take joint and separate action in cooperation with the Organization for the achievement of the purposes" of the human rights delineated under Article 55 of the U.N. Charter.[279] Thus, the U.N. Charter brought about a commitment on the part of the U.N. itself and of its Member States to promote both human rights and fundamental freedoms as legally binding obligations.[280]

In 1948, shortly after the U.N. was created, the Universal Declaration of Human Rights (UDHR) was developed by the Commission of Human

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States had no right to address on an international plane. Today, the manner in which a State treats its nationals is no longer *ipso facto* a matter within its national jurisdiction because such a large body of international law regulates the subject of human rights. *Id.* at 140–41.

275. *Id.* at 129–30.

276. *Id.* at 129. The concept of nationality is irrelevant in human rights law because the individual is deemed to be the subject of these rights. Nationality is of vital importance, however, under the law of State responsibility, because here the injury to a national is deemed to be an injury to the State of nationality. *Id.* at 129–30.

277. *Id.* at 132; *supra* note 42 and accompanying text.

278. BUERGENTHAL & MURPHY, *supra* note 273, at 132–33.

279. U.N. Charter art. 56; BUERGENTHAL & MURPHY, *supra* note 273, at 132–33.

280. BUERGENTHAL & MURPHY, *supra* note 273, at 133.

Rights (the Commission).[281] The United States was instrumental in developing the UDHR, as evidenced by the substantial influence of Eleanor Roosevelt, the chair of the Commission, and her U.S. advisors on the drafting process.[282] The UDHR became the principal instrument performing the protective functions regarding rights and freedoms spoken of, but not defined, in the U.N. Charter.[283] Despite the fact that the UDHR was a non-binding resolution when adopted, it has since come to be known as an authoritative interpretation of the rights that the U.N. and its Member States are obligated to advance under the U.N. Charter.[284] Additionally, support exists for the proposition that any State that pursues a policy targeting race, gender, language, or faith that denies groups or individuals the rights declared in the UDHR, violates the non-discrimination principle fundamental to the human rights obligations adopted by the U.N. Charter.[285] The UDHR contains a long list of general civil, political, economic, cultural signatories of and social rights, and supports the notion that the law should only limit these rights and freedoms in order to protect the rights of others and the general welfare.[286] Thus, all States that signed the UDHR have pledged to guarantee those human rights called for in the declaration and arguably, recognize the underlying power of the UDHR as customary international law.

Significant subsequent additions to the UDHR include the adoption by the U.N. General Assembly of the International Convention on the Elimination of all forms of Racial Discrimination (CERD) in 1965, which the

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281. Universal Declaration of Human Rights, *supra* note 18; Peter Bailey, *The Creation of the Universal Declaration of Human Rights*, UNIVERSAL RIGHTS NETWORK, http://www.universalrights.net/main/creation.htm (last visited Oct. 10, 2011).

282. *See* Bailey, *supra* note 281 (mentioning that Eleanor Roosevelt and her advisors from the U.S. State Department played a substantial role in the creation of the declaration).

283. BUERGENTHAL & MURPHY, *supra* note 273, 133.

284. *Id.* General support exists for the proposition that some of the rights delineated in the UDHR, including the right to not be racially discriminated against, have attained the status of customary international law. *Id.* at 133–34. Customary international law is defined as resulting from "a general and consistent practice of States that is followed by them from a sense of legal obligation." *General Principles of International Law: Customary International Law*, INTERNATIONAL JUDICIAL MONITOR, http://www.judicialmonitor.org/archive_1206/generalprinciples.html (last visited Oct. 17, 2011).

285. BUERGENTHAL & MURPHY, *supra* note 273, at 134.

286. Universal Declaration of Human Rights, *supra* note 18. BUERGENTHAL & MURPHY, *supra* note 273, at 134. The UDHR States:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Universal Declaration of Human Rights, supra note 18, at art. 29 ¶2.

United States ratified in 1994,[287] the International Covenant on Civil and Political Rights (ICCPR),[288] and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[289] These last two instruments, along with the ICCPR's Optional Protocol and Second Optional Protocol, the UDHR, and the U.N. Charter's human rights provisions, form the International Bill of Human Rights.[290] Although the United States has ratified the CERD and the ICCPR, it has not become a party to the ICESCR, and has thus failed to fully endorse the International Bill of Human Rights.[291] Nonetheless, the United States advocates the principles of the United Nations and the UDHR, and has been subject to all of the articles under the ICERD and the ICCPR, for decades.

Among the issues overseen by the constituencies of the U.N. is the prevention of racial discrimination in all of its forms and venues.[292] As a non-binding resolution, the UDHR provides no direct avenue of relief for an aggrieved party. However, given the role of the United States in shaping this important human rights document, the U.S. government can certainly be said to have an interest in seeing its principles carried out within the borders it governs, meaning that the United States, in order to be true to its stated principles in leading the drafting of the UDHR, should also be leading the way for the world in establishing a society free of racial discrimination.

Under the ICERD, ICESCR, and the ICCPR an individual citizen of a member State or a member State itself can bring a human rights complaint, including a complaint regarding racial discrimination, against another member State and be heard.[293] Such a complaint can be about racial discrimination, or other human rights violations.[294] This mecha-

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287. ACLU, FREQUENTLY ASKED QUESTIONS: CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (N.D.), *available at* http://www.aclu.org/files/pdfs/humanrights/cerd_faqs.pdf.

288. International Covenant on Civil and Political Rights, *supra* note 18.

289. International Covenant on Economic, Social and Cultural Rights, *supra* note 18.

290. BUERGENTHAL & MURPHY, *supra* note 273, at 135. The Second Optional Protocol advocates an abolition of the death penalty. *Id.*

291. *Status of the International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3.en.pdf (last visited Oct. 10, 2011).

292. International Covenant on Civil and Political Rights, *supra* note 18; International Covenant on Economic, Social and Cultural Rights, *supra* note 18. *See* Universal Declaration of Human Rights, *supra* note 18 (stating that every person is entitled to equal protection of laws without being subjected to discrimination).

293. *Human Rights Bodies – Complaint Procedures*, OFF. OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, http://www2.ohchr.org/english/bodies/petitions/index.htm#communcications (last visited Oct. 20, 2011) (describing the process for individual and State-to-State human rights complaints).

294. *Id.*

nism of seeking justice through international law is significant, as it provides a mechanism for relief of aggrieved parties beyond those provided in domestic courts.

As a result of its membership in the United Nations, the United States is subject to the regulatory mechanisms created by the U.N. Among these mechanisms are general human rights procedures that are based on the UDHR and general human rights law.[295] In 1946, the Commission on Human Rights was established under the U.N. Charter as a result of political pressure by forty-two United States non-governmental organizations.[296] The Committee not only performed its general procedure function, but also served as an expert body to function as the interpreter of States' compliance with the ICCPR.[297] The Commission on Human Rights was eventually abolished in favor of the Human Rights Council (HRC) in 2006.[298]

The Economic and Social Council also established a public complaint procedure in 1967 under Resolution 1235.[299] This resolution authorized the Human Rights Commission, now the HRC, to study situations that show a consistent pattern of human rights violations and issue a report.[300] Among the human rights violations specially delineated to be dealt with under the 1235 procedure is racial discrimination.[301] In addition, when the U.N. General Assembly created the HRC it directed that its main purpose was to address situations entailing human rights violations, including racial discrimination, and to make recommendations on them.[302]

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295. O'CONNELL ET AL., *supra* note 272, at 456 (explaining that even if a State has not ratified any treaties, it is still subject to U.N. human rights procedures if it is a party to the U.N. Charter).

296. U.N. Charter art. 68 ("The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions."); *United Nations: Human Rights Documentation*, UN.ORG, http://www.un.org/depts/dhl/resguide/spechr.htm (last upload Oct. 23, 2011). The body as established "by Economic and Social Council resolution 5 (I) of 16 February 1946." *Id.* Bailey, *supra* note 281.

297. BUERGENTHAL & MURPHY, *supra* note 273, at 137–38.

298. *United Nations: Human Rights Documentation*, *supra* note 296. "The Commission on Human Rights concluded its 62nd and final session on 27 March 2006; its work is continued by the Human Rights Council." *Id.*

299. Economic and Social Council Res. E/4393, Official Records, May 8-June 6, 1967, U.N. GAOR 42d Sess., Supp. No. 1, E/RES/1235(XLII), at 17 (June 6, 1967) (authorizing the Human Rights Commission to investigate any information it receives on flagrant human rights violations).

300. *Id.* at 17–18 (allowing the Human Rights Commission to produce studies of human rights violations it has examined).

301. *Id.* (including racial discrimination among violations of human rights).

302. *The Human Rights Council*, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, http://www2.ohchr.org/english/bodies/hrcouncil (last visited Oct. 17, 2011).

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These public procedures are buttressed by the enforcement of human rights under a private complaint procedure established by U.N. Resolution 1503, known commonly as the 1503 procedure.[303] This complaint procedure, carried out by the HRC, is a procedure that was established to address "consistent pattern[s] of gross violations."[304] Thus, the HRC can address cases under its complaint procedure that involve racial discrimination by a member-State. The newly-designed complaint procedure is meant to be an improvement on the 1503 complaint procedure used by the Commission on Human Rights from 1973 to 2005.[305]

Another important U.N. process is the Universal Periodic Review (UPR).[306] The Universal Periodic Review was established to review the human rights record of the 192 U.N. Member States every four years.[307] The UPR, a State-driven process, is administered by the Human Rights Council to ensure the improvement of human rights situation within each individual country.[308] As one of the main charters of the HRC, the UPR has been designed to ensure equal treatment of every country reviewed during the process when their human rights records and situations are assessed.[309] Racial discrimination is one of the issues addressed in these reviews, both in general and specifically with regard to a member-State's criminal justice system.[310]

In addition to these U.N.-based mechanisms and treaty bodies, other regulatory schemes have been created to enable nations and individuals

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303. *Human Rights Council Complaint Procedure, supra* note 293 (ECOSOC Res. 1503(XLVIII) was adopted on May 27, 1970); O'CONNELL ET AL., *supra* note 272, at 457 (asserting the U.N. Resolution established the 1503 procedure as a private procedure).

304. O'CONNELL ET AL., *supra* note 272, at *Id.* at 456 (explaining that individual human rights violations may be submitted to the Sub-Committee if domestic remedies have been exhausted and they are part of a larger gross violation).

305. MEGHAN ABRAHAM, A NEW CHAPTER FOR HUMAN RIGHTS: A HANDBOOK ON ISSUES OF TRANSITION FROM THE COMMISSION ON HUMAN RIGHTS TO THE HUMAN RIGHTS COUNCIL 67 (Eleonore Dziurzynski ed., 2006), *available at* http://olddoc.ishr.ch/handbook/Chpt5.pdf (stating complaint procedures have developed considerably since the 1970s when the 1503 complaint procedure was implemented); *Human Rights Council Complaint Procedure, supra* note 293.

306. G.A. Res. 61/251, ¶ 5e, U.N. Doc. A/RES/61/251 (Apr. 3, 2006). For a more detailed discussion of Universal Periodic Review see *infra* Part VI.E.ii.

307. *Universal Periodic Review*, OFFICE HIGH COMM'R FOR HUMAN RIGHTS, http://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx (last visited Oct. 10, 2011).

308. *Id.*

309. *Id.*

310. *See* International Convention on the Elimination of All Forms of Racial Discrimination, Note by the Secretary-General, Provision Agenda and Annotations, U.N. Doc. CERD/C/76/1 (Jan. 11, 2010) (lisiting the Universal Review as a topic of interest for an uncoming committee meeting).

to police the enforcement of international human rights law.[311] Among these mechanisms are the ability to bring a complaint in the International Court of Justice (ICJ),[312] and the ability to bring a charge in the International Criminal Court (ICC).[313] The ICC was created in 1998 for the purpose of hearing cases involving crimes against humanity, genocide, and war crimes, and this is still the case today.[314]

Each of the mechanisms and venues that govern racial discrimination has its own unique possibilities and limitations; however, all provide a level of hope for positive change. Which mechanism provides the best relief to the problem of racial discrimination in the U.S. criminal justice system? An examination of each of them provides some illumination.

B. *The Treaty Bodies: ICERD, ICCPR, and ICESCR*

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was adopted by the U.N. General Assembly in 1965 and entered into force in 1969.[315] The International Covenant on Civil and Political Rights (ICCPR) was adopted in 1966 and entered into force in 1976.[316] The International Covenant on Economic, Social, and Cultural Rights (ICESCR) was adopted in 1966 and entered into force in 1976.[317] Since the United States has not ratified the ICESCR, doubts regarding the sincerity of the United States to guarantee these rights for its citizens have been raised.[318] Prominent among the rights which the United States failed to guarantee to protect is that of the right of each of its citizens to live a life free of racial discrimination within the spheres of the ICESCR.[319]

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311. BUERGENTHAL & MURPHY, *supra* note 273, at 142–43 (stating prior to Protocol No. 11 the Committee of Ministers of the Council of Europe supervised the States' compliance with human rights laws).

312. *Id.*

313. *Id.* at 98–100.

314. *ICC at a glance*, INT'L CRIMINAL COURT, http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/ (last visited Oct. 10, 2011).

315. International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 18.

316. International Covenant on Civil and Political Rights, *supra* note 18.

317. International Covenant on Economic, Social, and Cultural Rights, *supra* note 18.

318. *See id.* (guaranteeing a multitude of human rights within the economic, cultural, and social spheres).

319. *See id.* at art. 2 (enumerating a number of economic, social, and cultural rights that nations should afford their citizenry without regard for race or color). This treaty recognizes that in order to protect the inalienable rights granted under the Universal Declaration of Human Rights, the citizens of Member States must live in an environment that allows them to pursue their economic, social, and cultural needs without restrictions on the basis of a label placed on them by society. *Id.* at pmbl., art. 2. Only without such restrictions will each citizen have the ability to pursue their freedom from fear and want. *Id.*

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At first glance the treaty bodies offer hope in the search for an effective solution to the problem of racial discrimination in the U.S. criminal justice system not provided by U.S. law. While the Civil Rights Act of 1964 prohibits discrimination against citizens on the basis of race in a comprehensive list of areas, it has never been enforceable against the U.S. federal government.[320] In addition, while the Act prohibits policies that result in a discriminatory impact on minorities, even in cases where no discriminatory intent exists, in the 2001 case of *Alexander v. Sandoval*,[321] the U.S. Supreme Court held that such discriminatory impact claims could not be brought in a court of law specifically to enforce Title VI of the Act, which prohibits discrimination in government-funded activities and programs, thus diluting the disriminatory impact argument in this realm.[322] Instead, such claims could only be pursued administratively.[323]

This decision further dilutes the ability to use statistical studies in pursuit of discrimination claims against the United States and its states, just as the previously cited case of *McCleskey v. Kemp* does.[324] However, the ICERD prohibits Member States from having policies that result in a discriminatory impact on minorities even without intent.[325] This means that the use of statistical data is allowed in alleging and attempting to prove discrimination in an institution such as the U.S. criminal justice system. The challenge in using the ICERD in this way to bring about positive change in the U.S. criminal justice system would be in finding effective means of enforcing it, as discussed below.

Given that the United States is a party to both the ICERD and the ICCPR treaties, a citizen of the United States or another country should be able to raise a complaint of racial discrimination against the United States, using the individual complaint procedure outlined in each treaty, and that complaint could specifically relate to racial discrimination in the criminal justice system.[326] However, despite ratification of these treaties by the United States, it ensured that it would not be the subject of an

320. U.S. HUMAN RIGHTS NETWORK & HUMAN RIGHTS AT HOME, THE CERD TREATY AND U.S. CIVIL RIGHTS LAW 1 (2011), *available at* http://www.ushrnetwork.org/sites/default/files/The_CERD_Treaty_and_US_Civil_Rights_Law_June_2011.pdf (prepared for the CERD Task Force of the U.S. Human Rights Network, and the CERD Subcommitte of the Human Rights at Home Campaign).

321. 532 U.S. 275 (2001).

322. Alexander v. Sandoval, 532 U.S. 275 (2001).

323. *Id.*

324. McCleskey v. Kemp, 481 U.S. 279, 312–13 (1987).

325. International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 18, at art 6.

326. International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 18, at art. 14; *see* International Covenant on Civil and Political Rights,

individual complaint by a citizen of any nation—including its own citizens—by not agreeing to the individual complaint procedure contained in either treaty.[327] This fact casts more doubt on the sincerity of the United States in protecting the citizens of the world from acts in violation of their human rights, perpetrated by the United States.

However, the fact that the United States has ratified and joined both the ICERD and the ICCPR means that where a citizen of another Member State has been victimized by racial discrimination by the United States, including within its criminal justice system, the Member State where the aggrieved party is domiciled can bring a complaint on behalf of that citizen to the U.N. under these treaties.[328] The investigative and ruling body responsible for such cases is the U.N. Human Rights Council.[329]

Given how far international human rights law has evolved since the end of World War II, such a complaint is viewed as a legitimate expression of concern about alleged violations of internationally accepted and recognized human rights not seen as an intrusion into sovereign affairs.[330] In addition, while the filing of a complaint on behalf of an individual citizen against another nation would amount to providing another layer of potential judicial relief for that citizen beyond the due process already existing in the State of citizenship, the filing of a complaint of systematic violations of human rights by one State against another would potentially have much greater, far reaching effects on the accused State by possibly leading to an adjudication that the offending State implement changes to its systems as a remedy for the problem. However, to date not a single complaint has ever been raised by one Member State against another with regard to a violation of the human rights of an individual or as a systematic practice.[331] For whatever reason—be it fear of repercussion or not wanting to risk jeopardizing diplomatic relations with an important trade partner—no State has ever filed a complaint against another State. Thus, this available mechanism for instituting positive change in the ad-

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supra note 18 (outlining the procedure through which a complaint may be brought to the attention of the appropriate committee by either a member-State or an individual citizen).

327. International Convention on the Elimination of All Forms of Racial Discrimination *supra* note 18, at art. 14; *see* International Covenant on Civil and Political Rights, *supra* note 18 (demonstrating the reservations the United States listed to various components in the treaty, including refusing to adopt the applicable complaint procedures for individual citizens).

328. BUERGENTHAL & MURPHY, *supra* note 273, at 137, 141.

329. *The Human Rights Council*, *supra* note 302.

330. *See* BUERGENTHAL & MURPHY, *supra* note 273, at 137, 141 (discussing how the way that governments handle their own citizenry has become a matter of international concern, rather than simply an internal issue not subject to outside review).

331. Hao Duy Phan, *A Blueprint For A Southeast Asian Court of Human Rights*, 10 ASIAN-PAC. L. & POL'Y J. 384, 403 (2009).

ministration of criminal justice in the United States will most certainly never be used.

As no viable mechanism for redress of racial injustice by the U.S. criminal justice system exists under these human rights treaties, is there any way in which the treaties can be used to hold the United States accountable and affect positive change? One possible recourse that may provide some hope for the future would be the requirement that each State Party submit periodic reports on its own record of performance to the treaty terms.[332] While each State upon ratification may or may not have noted reservations to any given treaty's provisions or have declared specific terms for ratification, a process of self-evaluation does exist as an obligation of a State Party to the treaties.[333] As an example, Article 40 of the ICCPR requires that each State submits a report every five years that defines the measures it has taken to protect the rights recognized by the covenant and on any progress that has been made in the exercise of those rights by its citizenry.[334] These reports are examined by the Human Rights Council in public meetings by dialogue with the representatives of the State being reviewed.[335] These meetings take place with relevant agencies and U.N. bodies in attendance and are designed to be constructive in nature, with ample time for discussion of factors related to implementation priorities and future goals.[336] Although only U.N. and State Party representatives may engage in the official dialogue of the process, various human rights advocates, such as non-governmental organizations (NGOs), can review the State reports and issue what is known as a shadow report or an alternative report, which present their own version of the reality of a situation.[337]

Shadow reports can play an important part in the review process of a State's self-evaluation report by providing the U.N.-reviewing body with an independent tool by which to assess a government's accountability for any violations of the rights protected in a particular treaty and to exert political pressure on those governments through exposure of any violations.[338] The NGOs which issue these reports, and which often conduct

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332. JULIE A. MERTUS, THE UNITED NATIONS AND HUMAN RIGHTS: A GUIDE FOR A NEW ERA 100 (2d ed. 2009).

333. *Id.*

334. International Covenant on Economic, Social and Cultural Rights, *supra* note 18; MERTUS, *supra* note 332, at 100.

335. International Covenant on Economic, Social and Cultural Rights, supra note 18, at art. 40 ¶¶ 2–4; MERTUS, *supra* note 332, at 100 (exchanging dialogue with the representative of the State being reviewed).

336. International Covenant on Economic, Social and Cultural Rights, *supra* note 18, at art. 40 ¶¶ 2–4; MERTUS, *supra* note 332, at 67.

337. MERTUS, *supra* note 332, at 68.

338. *Id.*

investigations of certain situations of alleged human rights violations, can hold in-depth knowledge of these situations that can be extremely valuable for reviewing bodies, especially if the NGO is based in the State under review.[339] Shadow reports by NGOs can also help inform the general public directly on various human rights violations that are taking place in a given State, leading to possible influence on that State's public policy and laws.[340] In the case of a specific issue, such as racial discrimination in a State's criminal justice system, an NGO shadow report, while not generally focused on every human right covered in a particular treaty, can be focus in on a problematic area requiring special attention.[341]

These review sessions conclude with the reviewing body's observations and recommendations to the State Party and, in some cases, follow-up procedures exist to help bring about compliance with a particular treaty.[342] The ICCPR, for example, has such a follow-up procedure.[343] After the concluding observations of a review have been presented, the Office of the High Commissioner for Human Rights (OHCHR) assists with the follow-up procedures, which have take the shape of a regional meeting with Member States.[344] However, due to the lack of resources and the questions regarding the procedure's effectiveness, these follow-up procedures are not in place for every human rights treaty.[345] Nonetheless, the treaty reporting process is an integral part of every "human rights treaty review system."[346] On the surface, the reporting process can provide impetus for change to have an effect on the domestic level.[347] This process generates opportunities for governments, individuals, and NGOs to engage in constructive dialogue regarding "national priorities, successes, best practices, and challenges in meeting national convention obligations."[348]

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339. *Id.*
340. *Id.* at 69.
341. *Id.*
342. MERTUS, *supra* note 332, at 69.
343. *Id.*
344. *Id.*
345. *Id.*
346. *Id.* at 71.
347. MERTUS, *supra* note 332, at 71.
348. *Id.* An important parallel should be drawn between domestic court challenges and those that take place on the international level, in particular, human rights challenges. *Id.* at 76. Just as is the case in the United States appellate system, wherein the U.S. Supreme Court generally only considers a case if all other domestic remedies have been pursued and decided upon, international human rights courts and other powerful national considerations have done the same in recent years. *Id.* The only exceptions to this requirement are cases where domestic court challenges have been unreasonably prolonged or are unlikely to lead to effective relief. *Id.* Other typical requirements are that a case cannot be considered if it is already under consideration by another international jurisdiction; if it is

C. *Procedure of Inquiry*

If the above mechanisms fail or prove inviable, one other mechanism exists which may provide relief to a complainant: a procedure of inquiry.[349] Under this procedure, if a particular human rights committee is given information about "'grave and systematic violations'" of a particular treaty by a State Party, that committee is empowered to seek a response from the State Party in question.[350] This procedure may lead to further inquiry by committee members, including an investigation and concluding with a report containing recommendations and comments.[351] After receipt of this report, the State Party is given the opportunity to respond within a six-month time-frame. One differential as to this procedure and the others discussed is that the findings and other communications throughout the course of the procedure are entirely closed and confidential and thus are not made public.[352] Some of these procedures have follow-up mechanisms that enhance the possibility of compliance by States in general.[353]

Other relevant influential factors in claims of human rights violations under treaty law are general comments,[354] thematic discussions,[355] and national plans of action.[356] General comments are published interpretations of content in human rights provisions contained in treaties.[357] These comments serve as recommendations that can provide guidance to State Parties in reaction to their self-monitoring reports, while at the same time influencing the development of human rights treaty obligations in general.[358] Thematic discussions are meetings among U.N. specialized agencies, NGOs, and other organizations that are either held on a regular basis to address general development of human rights norms or called to specifically address a particular topic of concern.[359] National plans of action are those steps that a State Party develops to enable the implementation of treaty commitments.[360] Such plans can be effective instruments not only in enabling a State Party to carry out its obligations, but also in

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filed anonymously; and, of course, if it is filed by a person or persons not under the jurisdiction of a "State that is a party to the Optional Protocol." *Id.*

349. *Id.* at 77.
350. *Id.* at 76.
351. *Id.*
352. MERTUS, *supra* note 332, at 77.
353. *Id.*
354. *Id.*
355. *Id.* at 78.
356. *Id.* at 79.
357. MERTUS, *supra* note 332, at 77.
358. *Id.* at 77–78.
359. *Id.* at 78.
360. *Id.* at 79.

help monitoring organizations to assess the degree of compliance with a particular treaty.[361] Thus, the general comment, the thematic discussion, and the national plan of action could all be used to help the United States address the complex issue of racial discrimination in its criminal justice system.

D. *Regional Human Rights Law Systems and the Inter-American System*

Three main regional human rights law systems currently exist in the world: the European System, the African System, and the Inter-American System.[362] Each was created by its own council or charter, and is governed by a treaty.[363] The European System is the oldest of the three, dating back to the drafting by the Council of Europe in 1950 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which entered into force in 1953.[364] Beginning in 1981, the African system is the newest. The Organization of African Unity, known now as the African Union, adopted the African Charter on Human and People's Rights, which entered into force in 1986.[365] Each system has jurisdiction over only those States which are parties to their associated treaties and individuals who are nationals of these States.[366] Each has its own court of human rights that hears claims made by individuals against

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361. *Id.*

362. BUERGENTHAL & MURPHY, *supra* note 273, at 141, 145, 151.

363. *See generally id.* at 143, 147-48, 152 (describing the general background of each of the three systems). The European system is governed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. *Id.* at 141. The Inter-American system is governed by both the Charter of the Organization of American States and the American Convention on Human Rights. *Id.* at 145. The African system is governed by the African Charter. *Id.* at 151.

364. *Id.* at 141. For the full text of Protocol Nos. 11 & 14 see *ETS no. 005-Convention for the Protection of Human Rights,* COUNCIL OF EUROPE, http://conventions.coe.int/Treaty/en/Treaties/html/005.htm (last visitied Oct. 23, 2011).

365. *Id.* at 151. For the full text of the Charter see *African Charter on Human and People's Rights*, AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS, http://www.achpr.org/english/_info/charter_en.html (last visited Oct. 23, 2011).

366. *Id.* at 143, 147–48, 152. "A State that now ratifies the European Convention accepts the Court's jurisdiction to hear cases referred to it directly by individuals and other States [sic] parties to the Convention." *Id.* at 143. Once a State has ratified the American Convention, the Inter-American Commission has jurisdiction over petitions directed against that State. *Id.* at 147–48. The African Charter creates and gives power to an African Commission on Human and Peoples' Rights to respond to inter-State and individual petitions. *Id.* at 152. The African Court on Human and Peoples' Rights was established in 1998 and put into force in 2004. *Institutional Background*, AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS, http://www.african-court.org/en/court/about-the-court/institutional-background/ (last visited Oct. 10, 2011).

States and States against States.[367] The Inter-American System is the combination of two systems with separate origins. One is based on the Charter of the Organization of American States (OAS) of 1948, which has its roots in the OAS Charter and developed into the Inter-American Commission on Human Rights.[368] The other organization is based on the American Convention on Human Rights, which was drafted in 1969 and entered into force in 1978.[369]

Only one of the three main regional human rights systems could potentially have jurisdiction over the United States[370] When the OAS Charter was amended in 1970 to make the Inter-American Commission an OAS charter organ, the constitutional and legal powers of the Commission strengthened, leading to the obligation on every Member State's part to promote all human rights stipulated in the American Declaration of the Rights and Duties of Man.[371] The power to ensure this obligation is complied with is held by the Inter-American Commission on Human Rights and the OAS General Assembly.[372] In discharging this obligation, the Commission accepts individual communications, undertakes on-site investigations, and prepares country studies.[373] These reports are published and reviewed by the political organs of the OAS hoping they will have an impact on the improvement of the conditions reported in the States under scrutiny.[374] Under this process, the United States, as a member of the OAS, could be investigated for human rights violations such as racial discrimination in the criminal justice system, potentially providing relief in the form of positive change just through public exposure.

The Inter-American Commission on Human Rights not only hears cases under the jurisdiction established by its authority under the OAS Charter, but also under authority established by the American Conven-

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367. *See generally* BUERGENTHAL & MURPHY, *supra* note 273, at 142–43, 147–48, 152 (describing the general background and jurisdictional powers of each system).

368. *What is IACHR?*, INT'L COMM'N ON HUMAN RIGHTS, http://www.cidh.oas.org/what.htm (last visited Oct. 23, 2011).

369. BUERGENTHAL & MURPHY, *supra* note 273, at 145–46; *What is the IACHR, supra* note 362.

370. *See* BUERGENTHAL & MURPHY, *supra* note 273, at 151 (explaining that the United States is not bound by the Inter-American Court's decision because it has not ratified the American Convention). Each system under the Inter-American System has its own judicial institution, with its own unique jurisdiction implications. *Id.* at 151.

371. *Id.* at 145–46; *What is the IACHR?, supra* note 368.

372. BUERGENTHAL & MURPHY, *supra* note 273, at 146.

373. *Id.*

374. *Id.*

tion on Human Rights.[375] The American Convention has been ratified by twenty-five of the thirty-five OAS Member States.[376] Among those that have not ratified it is the United States.[377] Once again, this raises doubt as to the sincerity of the United States to rigorously pursue the protection of the human rights of its citizens and other citizens of the world.

To adjudicate claims, the American Convention uses both the Inter-American Commission on Human Rights, which was established under the OAS Charter and the Inter-American Court of Human Rights.[378] The principle function of the Inter-American Commission under the American Convention is to deal with claims of violations of rights that the treaty guarantees.[379] In a move unique among human rights treaties, the American Convetion mandates that individual petitions be heard against Member States, while State-versus-State petitions are optional.[380] Therefore, once a State has ratified the American Convention, the new State has accepted the jurisdiction of the American Commission to hear claims of violations of human rights directed against that State by individuals.[381] However, a State may not file a complaint against another State under the American Convention unless both States have accepted the jurisdiction of the Inter-American Commission to hear claims by States against States.[382] Since the United States has not ratified the American Convention on Human Rights, it escapes judgment as to racial discrimination in its criminal justice system along with other issues examined by the Inter-American Commission.

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375. *Id.* at 145, 147 (describing the hierarchy of the OAS establishing the Inter-American Commission on Human Rights and the American Convention establishing both the International Commission of Human Rights and an Inter-American Court of Human Rights); *What is the IACHR?, supra* note 368.

376. BUERGENTHAL & MURPHY, *supra* note 273, at 146. Among the other Member States that have not ratified the American Convention, in addition to the United States, are Canada and Cuba. *Id.*

377. *Id.* at 146, 151. The decisions of the Inter-American Court "are potentially binding on member States." *Id.* at 151. However, the fact that the United States has not joined the American Convention excludes it from being bound by such decisions. *Id.*

378. *Id.* at 145, 147. Both, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, consist of seven members. *Id.* The members of the Inter-American Commission on Human rights are elected by the OAS General Assembly, whereas the members of the Inter-American Court of Human Rights are elected by the States that are parties to the Convention. *Id.*

379. *Id.* at 145, 147; *What is the IACHR?, supra* note 368.

380. BUERGENTHAL & MURPHY, *supra* note 273, at 147.

381. *Id.* at 147–48.

382. *Id.* at 148. In addition to meeting certain criteria, such as stating a prima facie case, all national remedies must be exhausted before a compliant can be admitted to the Commission. *Id.* at 149.

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The Inter-American Court also has the power to hear cases involving charges against a State Party to the American Convention.[383] This power is accrued to the Inter-American Court under its contentious jurisdiction, but this jurisdiction is optional for all State Parties.[384] Therefore, this jurisdiction must be specifically accepted by the State Parties involved before they can file cases or be subject to cases filed against them.[385] A major difference between the jurisdictions of the Inter-American Commission and the Inter-American Court is that individuals do not have standing to file cases on their own behalf before the Inter-American Court, whereas they can do so before the Inter-American Commission.[386] Only State Parties and the Inter-American Commission itself may bring cases before the Inter-American Court.[387] Before a case is admissable to the Court, all available domestic remedies must have been exhausted, and the Court may only deal with a case under its contentious jurisdiction if Commission proceedings in the case have run their course.[388] However, once a case has been referred to the Inter-American Court by either a State Party or the Inter-American Commission on behalf of an individual, that individual may argue his or her case before the Court without having to rely on a State Party or the Commission to represent him or her in the proceeding.[389]

Judgments of the Inter-American Court are not only final but also binding on the parties involved.[390] In addition, the Court has the power to enter preliminary injunctions, render declaratory decrees, and award damages.[391] These forms of redress provide additional hope for justice

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383. *Id.* at 148.

384. *Id.*

385. BUERGENTHAL & MURPHY, *supra* note 273, at 148.

386. *Id.* After a case is admitted to the Commission, the Commission is in charge of investigating the facts and attempting to have the parties reach a friendly settlement. *Id.* at 149. The Commission then prepares a report for the parties; if in three months the parties do not reach an agreement, the case will be either referred to the Court or the Commission will make a final determination that will be binding on he parties. *Id.*

387. *Id.* Individuals lack standing, and therefore, are prohibited from bringing a case before the Inter-American Court. *Id.* However, a 2001 amendment to the Inter-American Court's Rules of Procedure "gives individuals the right to argue their cases in the [c]ourt once the case has been referred to it." *Id.*

388. *Id.* at 150. *See In re* Viviana Gallardo, Inter-Am. Ct. H.R. (ser. A) No. 11, 1427 (Nov. 3, 1981) (hoping to "facilitate the speedy consideration of this case," the Costa Rican government waived the requirement to exhaust all domestic options). It was determined that while the complaint fulfilled the requirements for the exercise of the court's jurisdiction, since it had not yet been handled by the Commission, it could not be admitted. *Id.* at 1430.

389. BUERGENTHAL & MURPHY, *supra* note 273, at 148.

390. *Id.* at 150.

391. *Id.*

on the part of an individual who has been victimized by human rights violations of a State Party. But in the case of an issue like racial discrimination in the U.S. criminal justice system, no relief is available to the injured party through the Inter-American Court's contentious jurisdiction, thereby highlighting the failure of the United States to be a party of a significant advancement in the enforcement of human rights obligations within its borders.

The Inter-American Court also has advisory jurisdiction, which gives it authorization to render opinions that interpret the American Convention and other human rights treaties in the Inter-American system.[392] This advisory jurisdiction can be invoked by all member States of the OAS, regardless of whether they have ratified the American Convention or any other treaty, when attempting to address human rights violations on behalf of their citizens.[393] Thus, this could be an important available tool in enabling both States and individuals to seek to gain a nonbinding ruling on charges of human rights violations, which would at least bring the issues involved before the world. Theoretically, even the United States would be subject to this advisory power of the Inter-American Court. Such exposure can possibly have an effect on gaining redress or correcting a situation due to political concerns and pressures.

A significant test of the jurisdiction of the Inter-American human rights system over the United States took place in 2001,[394] and it illuminates the question of the power of the Inter-American Commission to effect change in the U.S. criminal justice system through the exercise of influence. In the case of Juan Raul Garza, a U.S. citizen on death row in Texas, several human rights advocates petitioned the Commission on Garza's behalf to commute his death sentence.[395] The petitioners claimed that by allowing into evidence the fact that Garza was a suspect in four yet-to-be-adjudicated cases in Mexico during the sentencing phase of his U.S. murder trial, and by subsequently sentencing Garza to death,

392. *Id.* at 148.

393. *Id.* The advisory jurisdiction of the Inter-American Court is "more extensive than the advisory jurisdiction of any international tribunal in existence today." *Id.*

394. *See* BUERGENTHAL & MURPHY, *supra* note 273, at 150 (referring to *Garza v. United States*, a case involving a "U.S. national on death row in Texas [who] filed a petition with the Commission seeking a decision that the introduction of certain evidence during his sentencing violated his rights to life, equal protection and due process").

395. Garza v. United States, Case 12.243, Inter-Am. Comm'n H.R., Report No. 52/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 1-2 (2001). The petition indicates that Mr. Garza was "was tried and convicted by a jury in the United States District Court, Southern District of Texas, under U.S. federal law on three counts of killing in the furtherance of a continuing criminal enterprise, among other offenses, and sentenced by the same jury to death." *Id.* at ¶ 24. However, "Mr. Garza does not challenge these convictions, but rather takes issue with the punishment that he has received for these crimes." *Id.*

the United States District Court for the Southern District of Texas violated Garza's human rights to life, due process, a fair trial, and equal protection of the law under Articles I, II, XVIII, and XXVI of the American Declaration of the Rights and Duties of Man.[396] The Commission found the case to be admissible under its jurisdiction because Garza had exhausted all domestic remedies.[397]

The Commission ultimately found the United States responsible for violating Garza's human rights under Articles I, XVIII, and XXVI. The United States was recommended to commute his death sentence, and "review its laws, procedures and practices to ensure that persons who are accused of capital crimes are tried and sentenced in accordance with the rights under the American Declaration, including in particular prohibiting the introduction of evidence of non-adjudicated crimes during the sentencing phase of capital trials."[398] In a subsequent proceeding in the U.S. Court of Appeals for the Seventh Circuit, Garza argued that the determination of the Commission was binding on the United States because it was a party to the treaty creating the Inter-American Commission.[399] The court held that although the United States signed the American Convention that created the Inter-American Commission, the signing "d[id] not create private rights enforceable in domestic courts" for U.S. citizens, and the Commission only had authority to make non-binding recommendations to the United States, given that the United States never ratified the treaty.[400] Therefore, the court held that under U.S. law Garza "has not presented any substantial ground on which relief

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396. *Garza* at ¶¶ 2, 24 (2001). *See* American Declaration of the Rights and Duties of Man, Ninth International Conference of American States, 1948, O.A.S. Res. XXX, article I.

> Every human being has the right to life, liberty and the security of his person. 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 . . . Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil right . . . 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.

American Declaration of the Rights and Duties of Man , *supra* at art. I, II, XVIII, XXVI.

397. *Garza* at ¶¶ 3, 20 (2001). *See* Garza v. United States, 528 U.S. 1006 (1999) (denying "[p]etition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit"); United States v. Garza, 165 F.3d 312, 315 (1999) (denying certificate of appealability).

398. *Garza* at ¶ 3.

399. Garza v. Lappin, 253 F.3d 918, 918 (7th Cir. 2001).

400. *Lappin*, 253 F.3d at 924. Garza argues the United States was bound by the Inter-American report. *Id.* However, Justice Wood notes that "[b]y their very nature, non-bind-

could be granted in his habeas corpus petition," thus denying the requested stay of execution.[401] Perhaps to further cement the lack of authority of the Inter-American system of human rights and the Organization of American States over the United States, the court further stated that the American Declaration of the Rights and Duties of Man was an "aspirational document," that "did not on its own create any enforceable obligations on the part of any of the OAS [M]ember [N]ations."[402] Thus, by not ratifying the American Convention the United States avoided the intrusion of international law into its domestic affairs, and it also made clear that it was not ready to be influenced by the advisory authority of the Inter-American Commission of the Organization of American States.

E. *U.N.-Charter-Based Mechanisms*

All State Parties to the U.N. Charter are subject to general human rights procedures based on general human rights law and the provisions of the UDHR.[403] These procedures are carried out by the forty-seven Member States of the Human Rights Council.[404] The individuals who sit on the Council in representation of their States are diplomats, and these HRC proceedings are highly politicized.[405] In the face of this drawback, the Council can theoretically take a variety of actions in cases brought before it, including passing resolutions highlighting the degree of concern about certain human rights violations and appointing a special rapporteur to further investigate potential human rights violations occurring in a

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ing recommendations to a government on how to conduct its affairs would appear to be addressed to the executive and legislative branches, not to the courts." *Id.* at 926.

401. *Id.*

402. *Id.* at 925.

> More recently, the OAS has developed an American Convention on Human Rights, which creates an Inter-American Court of Human rights. Under the American Convention, the Inter-American Court's decisions are potentially binding on member nations. The rub is this: although the United States has signed the American Convention, it has not ratified it, and so that document does not yet qualify as one of the "treaties" of the United States that creates binding obligations.

Id.

403. O'CONNELL ET AL., *supra* note 272, at 456. "Until recently, those provisions were established and carried out by the Commission on Human Rights, but in 2006 the Commission was replaced by the Human Rights Council, composed of 47 States elected by regional blocs." *Id.* The Council consists of diplomats who meet at least three times a year, and who subject themselves to Universal Periodic Review, a self-regulating process that examines the human rights records of each council member. *Id.*

404. *See id.* (explaining that all forty-seven members to the U.N. charter can be the subject of the general U.N. human rights procedure based on general human rights law and the provisions of the Universal Declaration).

405. *Id.*

country.[406] For a case to be heard by the Human Rights Council under general U.N. procedures, the charges must entail "consistent patterns of gross violations."[407] The U.N.'s HRC does not consider cases alleging single incidents of human rights violations.[408] Thus, an individual who believes he or she has suffered human rights violations related to racial discrimination in the U.S. criminal justice system would have no recourse under general U.N. procedures governing human rights. However, a State could theoretically charge the United States with systematic gross violations of human rights with respect to the administration of justice in the U.S. criminal justice system. Given the diplomatic composition of the HRC and the highly politicized nature of its general proceedings, such a charge is extremely unlikely. Thus, general U.N. procedures are not a viable avenue to a solution to the problem of racial discrimination in the U.S. criminal justice system.

i. Procedueral Remedies

The 1235 procedure established by the Economic and Social Council has similar characteristics and drawbacks as the U.N. general procedures outlined above. As a public procedure conducted by the HRC, this mechanism for addressing human rights violations in the criminal justice system of the United States would entail the extremely unlikely event of a nation bringing a charge against the United States of racial discrimination. Realistically speaking, what nation would want to bring scrutiny unto itself by risking a retaliatory action under the 1235 procedure by the United States or another State? In the forty-four years since the establishment of the procedure, the United States has never been subjected to a charge under the 1235 procedure.[409]

In addition to the public procedures, a private procedure known as the 1503 procedure is available to injured parties.[410] Under the 1503 procedure, charges of individual human rights violations may be submitted to the HRC, provided the charges are part of a pattern of gross violations that are similar in nature to the individual violations charged.[411] In addition, injured parties must have exhausted all domestic remedies in order

406. *See id.* at 456–57 ("One of the most useful innovation of the U.N. system has been the creation of 'thematic' rapporteurs or working groups who focus on specific violations or human rights problems, rather than countries.").

407. *Id.* at 456.

408. O'CONNELL ET AL., *supra* note 272, at 456.

409. ABRAHAM, *supra* note 305.

410. O'CONNELL ET AL., *supra* note 272, at 457. (indicating the availability of a private procedure for injured parties); *supra* notes 303–05 and accompanying text.

411. O'CONNELL ET AL., *supra* note 272, at 457.

to be eligible to submit their cases to the HRC.[412] As part of the procedure, once a case is found to have merit, a private process takes place in an effort to remedy the violations charged.[413] While this process could theoretically induce the United States to make changes in its criminal justice system, the result is unlikely until the United States shows an indication that it is open to the influence of other State Parties. Although the procedure's confidentiality makes it difficult to obtain definitive data on the number of times States have been subjected to it, a review of available public information on the 1503 procedure, which is largely composed of academic commentaries and Human Rights Watch reports, indicates that the United States has only been subject to a 1503 procedure once, in 1997, and that this particular case was discontinued by the Human Rights Commission before its consideration was completed.[414]

ii. Universal Periodic Review

Of all of the international law mechanisms that have come into existence since world wars accelerated the international human rights movement, the newest mechanism is the Universal Periodic Review, a procedure established by the United Nations in 2006.[415] The initial idea behind the UPR was to subject the forty-seven States that compose the Human Rights Council to extensive and regular reviews of their human rights records to prove their worthiness to sit in judgment of the records of other States.[416] The UPR now entails reviewing the human rights record of each of the 192 U.N. Member States. Although the UPR was first established as a process by which the HRC was to review the human rights compliance record of each U.N. member every two years,[417] the frequency was later changed to once every four years.[418]

In the early stages of the execution of this process, the reviews have tended to last only a few hours and have not entailed the level of depth envisioned when the process was initially established.[419] These results could be due to the diplomatic and political nature of the UPR, which by

412. *Id.*

413. *Id.* (describing the process implemented in an effort to remedy a human rights violation). This process can take more than one year to complete. *Id.* Despite the amount of time required, this process has been effective in changing State behavior regarding violations of human rights. *Id.*

414. ABRAHAM, *supra* note 305.

415. O'CONNELL ET AL., *supra* note 272, at 456 (describing the Universal Periodic Review process); *supra* notes 306–10 and accompanying text.

416. O'CONNELL ET AL., *supra* note 272, at 456 (providing the underlying motive behind the creation of the Universal Periodic Review).

417. *Id.*

418. *Universal Periodic Review*, *supra* note 307.

419. O'CONNELL ET AL., *supra* note 272, at 456.

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definition could call into question its validity and its veracity. On the other hand, these early results could be viewed as a natural extension of an undue suspicion of the parties involved. The reviewing and reviewed States are never all trusted allies. Rarely would a Council Member State want to be so open as to admit its shortcomings and be willing to follow the advice of a group of nations, which also have significant shortcomings in the human rights realm. At this point in the world, no State can claim to be a model of compliance to human rights obligations.

The recent Universal Periodic Review of the United States can be illuminating as to the prospects of this process in addressing and improving the human rights record of the United States, both generally and specifically with regard to its criminal justice system. As part of the UPR process, the United States released its self-evaluation on August 23, 2010.[420] The U.S. report stated, "[t]he United States has always been a multi-racial, multi-ethnic, multi-religious society. Although we have made great strides, work remains to meet our goal of ensuring equality before the law for all."[421] The United States then proceeded to congratulate itself for having an African-American as President and as Attorney General, while acknowledging that these developments "would not have seemed possible" thirty years earlier.[422]

Later in the report, to its credit, the United States remarked that, "[t]he United States recognizes that racial or ethnic profiling is not effective law enforcement and is not consistent with our commitment to fairness in our justice system."[423] In any remedial program regarding any problem that might exist in human behavior and societal evolution, this statement would amount to a necessary first step: an admission of the problem, or, at least, an admission of part of the problem. The United States then went on to cite old laws enacted to prevent racial discrimination in various venues and forms, namely Title VI of the Civil Rights Act

420. Working Grp. on the Universal Periodic Review, Human Rights Council, National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1, 9th Sess., Nov. 1-12, 2010, U.N. Doc. A/HRC/WG.6/9/USA/1 (Aug. 23, 2010).

421. *Id.* at ¶ 29.

422. *Id.*

423. *Id.* at ¶ 50. Racial profiling in the United States is particularly prevalent in traffic stops, and has recently become more of an issue in the "country's effort to combat terrorism." *Id.* In recognition of these problematic areas, the United States has constructed remedies to racial profiling. *Id.* at ¶¶ 51–54. The United States appears to be addressing racial profiling issues on various levels, which include: federal statutes and regulations prohibiting racial discrimination, to governmental reviews regulating both national and international obligations to eliminate racial discrimination. *Id.*

of 1964 and 42 U.S.C. § 14141.[424] However, all of the examples described above illustrating how racial discrimination actually plays out within the workings of the U.S. criminal justice system took place decades after the enactment of the Civil Rights Act of 1964, and the statistics cited above regarding disparity amongst the races of U.S. citizens in criminal convictions also derive from studies completed within the past decade, indicating not that the United States has formally acknowledged the problem at least since 1964, but also, equally as important if not more so, that significant problems of disparate treatment of racial minorities under the law still exist in the United States.

Perhaps some significance can be attached to the passage of 42 U.S.C. § 14141. Passed in 1994, this statute makes it unlawful for any governmental authority or law enforcement official to discriminate against individuals in the administration of juvenile justice.[425] This statute further provides the Attorney General with the right to "obtain appropriate equitable and declaratory relief to eliminate the pattern or practice" against any such party deemed to be in violation of this statute.[426] One comprehensive report by Carl Pope and Richard Feyerherm, covering over two decades of the juvenile justice system, notes that if police decisions are biased at the juvenile justice stage, this places minority youth at greater risk of later discrimination, including higher retention of minorities in the system.[427] Thus, this new law appeared to address a timely issue when it was passed. However, while the statute is a step forward, the fact that it stands alone, without accompanying law that addresses racial discrimination on a broader basis, means that it remains in part only an example of what can be done domestically to eliminate racial discrimination on the U.S. criminal justice system, and not an attempt to comprehensively solve the overall problem.

The United States has recently taken one positive step to address an area of potential racial discrimination, stating in its report to the United

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424. *Id.* at ¶ 50. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. §§ 2000d–2000d-7 (2006)) (enacting provisions designed to prohibit racial discrimination in any program receiving federal funding, with the purpose of enforcing the Civil Rights Act); 42 U.S.C. § 14141 (2006) (allowing the Attorney General to attain equitable and declaratory relief in a civil action against law enforcement officers who violate a juvenile individual's Constitutional rights, specifically preventing acts of discrimination).

425. 42 U.S.C. § 14141 (2006).

426. *Id.*

427. MILLER, *supra* note 16, at 69–72. Miller points out that "prison populations [are] likely to reach three to five million within the next decade," and he predicts this will lead to an emphasis on identifying the "predisposed" criminal. *Id.* at 234–35. Miller implies that this typology will rationalize, and lead to the majority of African-American men being incarcerated. *Id.*

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Nations on August 3, 2010 that President Obama approved a law intended to reduce "sentencing disparities between powder cocaine and crack cocaine offenses, capping a long effort—one discussed at our UPR consultations—that arose out of the fact that those convicted of crack cocaine offenses are more likely to be members of a racial minority."[428] Whether or not this development took place directly and solely as a result of the UPR process, it does seem to have happened as a result of dialogue that has taken place between the United States as a State Party and other State Parties or NGOs regarding that very issue in one or more forums, including the UPR process.

The 2010 Human Rights Council Working Group on the Universal Periodic Review recorded scrutiny from many of the forty-seven Member States' on human rights in the United States,[429] including China, which expressed concern about "gaps in human rights legislation" and the United States not yet becoming a "party to a number of core international human rights instruments."[430] This very point by China, a country not known for a stellar record of upholding its own human rights obligations, may be the most pertinent comment made by all States in the working group report, as the shortfall in ratifications of treaties noted earlier has prevented the United States from being subject to many mechanisms of enforcement of human rights law.

Of the eighty-three paragraphs of comments that comprise much of the report of the working group, twenty-two referenced problems with racial discrimination, fifteen of which were specifically related to the U.S. criminal justice system.[431] Given the myriad other issues that were highlighted by Member States, such as allegations of torture-use by the U.S. govern-

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428. Working Grp. on the Universal Periodic Review, *supra* note 420, at ¶ 50. The report indicates the United States' recognition of civilian concern regarding the criminal justice system and "racial disparities in sentencing," but notes a commitment to upholding the Constitution "in a manner consistent . . . with the rights and dignity of all citizens." *Id.* at ¶ 57.

429. *Id.* at ¶¶ 22–23 (recording India's, Bangladesh's, and the Republic of Korea's concerns with the U. S.s' human rights policies internationally, and the treatment of foreign migrants in the United States). Haiti and Bahrain focused their scrutiny on solutions to human rights problems, specifically inquiring about the feasibility of the United States establishing a national human rights institution. *Id.* at ¶¶ 46, 78.

430. Working Grp. on the Universal Periodic Review, *supra* note 420. As an example of one of the gaps in legislation China finds most concerning, China referenced the U. S. law enforcement agencies' tendency to use excessive force. *Id.* at ¶ 21. China also took issue with the higher incidence of poverty among African-Americans, Latinos and Native Americans. *Id.*

431. *See id.* (listing generally the main complaints and acknowledgements of each country regarding human rights in the United States). A significant number of countries inquired about the United States' continued use of the death penalty, many encouraging the United States to declare an official moratorium on executions. *Id.* at ¶ 21.

ment, and the fact that the United States is one of the few remaining major powers to still invoke the death penalty in its justice system,[432] issues regarding racial discrimination in the administration of justice were most likely set aside by many member States in lieu of these other issues.

The Working Group report includes 228 recommendations, many of which call for United States ratification, without reservations, of key international treaties, and an end to racial discrimination in all its forms[433] While the call for ratifications is specific, the racial discrimination recommendations tend to take the form of Vietnam's, which calls upon the United States to, "make further efforts in order to eliminate all forms of discrimination and the abuse of authority by police officers against migrants and foreigners, especially the community of Vietnamese origin,"[434] thus merely calling attention to the issue on behalf of its citizens without stating what specific action is recommended for the purpose of solving the problem. The very fact that the United States has not ratified many of the core human rights treaties, and has disregarded the advice of the Inter-American Commission on Human Rights with respect to the death penalty invoked upon Garza in the case cited above, means that even the specific recommendation on treaty ratification will go unheeded. In response to the recommendations, for example, the United States emphasized its condemnation of racial and ethnic profiling, its committed to proper treatment of prisoners, and its maintenance of safe, humane prison facilities, all in compliance with international and domestic law,[435] as recommended by Bolivia in the Working Group report,[436] pointing out that its domestic laws are already consistent with the recommendations, and that routine reviews of policies and procedures are conducted to ensure no racial profiling occurs.[437] No reason exists to believe that the United States will discontinue this type of response to the recommendations of the international community regarding human rights law issues in general, and regarding racial discrimination in its criminal justice system in particular.

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432. *Id.* A few countries credited the United States with improving its death penalty policy, through methods such as excluding offenders under eighteen and those with intellectual disabilities. *Id.* at ¶¶ 75, 77.

433. *Id.* Each country's recommendations focused on different treaties and organizations, however the general theme of the recommendations was Stated by Bolivia: "[C]omply with the protection of the right to non-discrimination . . . ." *Id.* at ¶ 92.

434. *Id.* Vietnam also made recommendations speaking particularly to discrimination against migrants, foreigners, and students, exemplifying a lack of international human rights support on the part of the United States. *Id.* at ¶ 47.

435. Working Grp. on the Universal Periodic Review, *supra* note 420.

436. *Id.*

437. *Id.*

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VII. Conclusion: What Actions Can Address Racial Discrimination in the U.S. Criminal Justice System?

The existence of racial discrimination in the U.S. criminal justice system is not a premise that is agreed-upon by legal scholars. Some have argued that disparities in conviction rates and the severity of sentences between minorities and the majority Caucasian population of the United States are merely reflections of the disparity of the crime rates committed by the various racial segments of U.S. society. While others have argued that the statistics, which show a disproportionate conviction rate of U.S. citizens who are Caucasian versus racial minorities, are truly indicative of a criminal justice system that discriminates against people based on their race.[438] Regardless of the meaning of those statistics, whether they tell of a higher rate of crime committed by minorities, or instead are representative of enforcement of crime tainted by racial bias, a problem definitely exists and has been noted on both sides of the debate. Minorities have a representation in the various stages of the U.S. criminal justice system that is disproportionate to their relative populations.[439]

The examples of cases above are presented in an effort to show exactly how racial discrimination can and has played a part in the manner in which the U.S. criminal justice system is administered with regard to racial minorities in the United States. Presenting solutions to the problems illuminated by these examples, and to the problem of disproportionate representation of minorities in the U.S. criminal justice system, has proven to be a much more challenging task. One argument for why such solutions are so difficult to find is contained in the premise that to the extent that racial discrimination continues to permeate all aspects of societal interaction in the United States, and for as long as this will be so, racial discrimination will continue to exist to that extent in the U.S. criminal justice system. The United States, in its March 10, 2011 response to the Working Group report, stated that it may never realistically achieve

438. *See* Heather Mac Donald, *supra* note 1 ("The [B]lack incarceration rate is overwhelmingly a function of [B]lack crime."); *see generally* Miller, *supra* note 16 (exploring statistics evidencing racial differences in the criminal justice system, with the rate of minority prisoners rising in the later stages of the system).

439. Drug Policy Alliance, Breaking the Chains: Communities of Color and the War on Drugs, From Crisis to Power: Breaking the Chains of Addiction 2 (2010), *available at* http://www.drugpolicy.org/docUploads/fact_sheet_health.pdf. The report points out laws that directly impact certain minority groups, such as federally recognized tribal lands subjecting Native American offenders to longer sentences under the federal system, and higher penalties for crack cocaine versus powder resulting in more African-American offenders serving longer prison sentences. *Id.* Disproportionately, Drug Policy Alliance reports African-Americans as comprising 13% of all drug users, yet account for 35% of all offenders arrested for drug possession, 55% of all those convicted, and 74% of all those incarcerated. *Id.*

the "literal terms" it has been urged to strive for, remarking that the United States intends to continue doing what it already does, without supporting the recommendations that underState the success of ongoing efforts.[440] The burgeoning and evolving field of human rights law, as discussed at length above, will continue to provide pressure on the United States to greatly improve its criminal justice system by continuing to pass new laws that protect minorities from racial discrimination, and educate its administrators such that prevailing attitudes evolve to the point of being bias-free. The solution is in the hands of the U.S. government, and it can be realized.

440. Working Grp. on the Universal Periodic Review, *supra* note 420. The United States responded to some countries defensively, stating certain recommendations were inaccurate and contrary to the spirit of the UPR. *Id.* at ¶ 4. Responding with dismissal of certain recommendations, the United States gave little credit to the "ideals" represented in the commentary and highlighted the fact that the country has already implemented the necessary efforts that were discussed in the UPR Working Group. *Id.* at ¶ 3.