



# AMERICAN BAR ASSOCIATION

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**STATEMENT OF**

**H. THOMAS WELLS JR., PRESIDENT-ELECT**

**submitted on behalf of the**

**AMERICAN BAR ASSOCIATION**

**to the**

**SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND**  
**CIVIL LIBERTIES**

**COMMITTEE ON JUDICIARY**

**of the**

**U.S. HOUSE OF REPRESENTATIVES**

**on the hearing on**

**“OVERSIGHT HEARING ON THE LEGACY OF THE TRANS-  
ATLANTIC SLAVE TRADE”**

**DECEMBER 18, 2007**

Mr. Chairman and Members of the Committee:

Good morning. My name is Tommy Wells. I am here today in my capacity as president-elect of the American Bar Association and at the request of our current president, William Neukom. He sends his regrets that he is unable to attend this hearing and deliver the views of the Association in person. I am a partner and founding member of the law firm, Maynard, Cooper & Gale, P.C., in Birmingham, Alabama, and will assume the presidency of the ABA in August 2008.

The ABA supports, in principle, H.R. 40, which would authorize the establishment of a federally funded commission to study the impact of slavery on the social, political and economic life of our nation. The objectives of H.R. 40 are consistent with Association policy adopted in 2006. It supports the enactment of legislation to create and appropriate funds for a Commission to study and make findings relating to the present day social, political, and economic consequences of both slavery and the denial thereafter of equal justice under law for persons of African descent living in the United States, and if warranted, make recommendations on public policies or governmental actions to address such consequences. Our policy does not go into more explicit detail about the duties of commission, nor does it address how the commission should be structured or the scope of its investigative powers. These are matters more appropriately determined by Congress. H.R. 40, of course, addresses these procedural issues in detail.

As you have noted previously, Mr. Chairman, over four million Africans and their descendents were enslaved in the Unites States and its colonies from 1619 to 1865. In 1865, after the Civil War, Congress passed, and the states ratified, the 13<sup>th</sup> Amendment to the U.S. Constitution banning slavery outright in the United States.<sup>1</sup> A few years later,

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<sup>1</sup> 13<sup>th</sup> Amendment to the U.S. Constitution, 1865, Section 1 reads, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

the 14<sup>th</sup> Amendment was ratified, granting full citizenship to African Americans.<sup>2</sup> And in 1870, the 15<sup>th</sup> Amendment was ratified, guaranteeing the right to vote regardless of “race, color, or previous condition of servitude.”<sup>3</sup>

Despite the haste of the Reconstruction period, in which the nation ratified these amendments espousing principles of equality and full citizenship for all Americans, the post-Reconstruction era demonstrated how racism and racial bias could manipulate the justice system to undermine these constitutional principles and perpetuate widespread oppression for decades to come. This plague touched every level of the U.S. legal system, from local law enforcement to the highest federal court.

In 1896, the United States Supreme Court ruled in *Plessy v. Ferguson* that separating individuals based on race did not violate the 13<sup>th</sup> and 14<sup>th</sup> Amendments.<sup>4</sup> This decision sanctioned a system of racial segregation that summarily denied voting rights, employment opportunities, access to public accommodations, entry into military service, criminal justice protection, housing, education, police and fire protection, and due process of the courts for African Americans. By 1913, the federal government’s offices in Washington, DC and elsewhere were officially segregated, as were its restrooms and lunch areas.

In the early part of the 20<sup>th</sup> Century, there came to be two Americas, one that could rely on the rule of law and one that could not. In certain areas of the country, African-American men could be--and were--arrested for alleged criminal activity, tried under suspect conditions without legal representation, convicted on scanty evidence and forced into hard labor.

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<sup>2</sup> 14<sup>th</sup> Amendment to the U.S. Constitution, 1868, Section 1 reads, “All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

<sup>3</sup> 15<sup>th</sup> Amendment to the U.S. Constitution, 1870, Section 1. “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”

<sup>4</sup> *Plessy v. Ferguson* 163 U.S. 537 (1896).

Particularly egregious was the scourge of lynching. The terrorism tool of its day, lynching was a dreaded means of intimidation. While law enforcement stood by, lynch mobs terrorized this country, murdering nearly 5,000 African-American men, women, and children.<sup>5</sup> Thousands more African-Americans lost their homes, crops, property and means of support for their families in racially-motivated lynch riots.<sup>6</sup> When called upon, the United States Senate failed to pass anti-lynching legislation despite repeated exhortations by civil rights groups, sitting American Presidents, and the House of Representatives to take decisive action.<sup>7</sup>

Only in the last 50 years has the grip of legally-sanctioned racial discrimination begun to crumble. The 1954 decision of *Brown v. Board of Education* overturned *Plessy*<sup>8</sup> and our nation began to face racial discrimination directly by enforcing existing laws and enacting new ones to ban discrimination and ensure equality. Unfortunately, despite *Brown*, the passage of, the 24<sup>th</sup> Amendment to the U.S. Constitution,<sup>9</sup> the Civil Rights Act of 1964, the Voting Rights Act of 1965 and other anti-discrimination legislation, as well as decades of litigation; racial discrimination persists. Concerns remain regarding slavery and post-slavery discrimination and its effect on the present day social, political and economic conditions for African-Americans.

We all remember the rash of arsonist attacks against predominantly black churches in the South a few years ago. And just this past fall, with the unfortunate events in Jena, Louisiana, we were forcefully reminded that this nation still has work to do to eradicate racism and racial bias in our society and our system of justice.

As Justice Ginsburg stated in her concurring opinion in the 2003 U.S. Supreme Court decision in *Grutter v. Bollinger*, “It is well documented that conscious and unconscious

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<sup>5</sup> Statistics provided by the Archives at Tuskegee Institute.

<sup>6</sup> See Report by the Oklahoma Commission to Study the Tulsa Race Riot of 1921 (2001).

<sup>7</sup> S. Res 39 Resolution of the 109<sup>th</sup> Congress, 1<sup>st</sup> Session (2005).

<sup>8</sup> *Brown v. The Board of Education of Topeka*, 347 U.S. 483 (1954).

<sup>9</sup> Authorizing the right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax. U.S. Const. Amend. XXIV, § 1.

race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.”<sup>10</sup>

Racial disparities, no matter what their cause, exist in many facets of daily life.

The field of criminal justice is a case in point. In a major address to the American Bar Association in 2004, Justice Kennedy stated:

Nationwide, more than 40% of the prison population consists of African-American inmates. About 10% of African-American men in their mid-to-late 20s are behind bars. In some cities, more than 50% of young African-American men are under the supervision of the criminal justice system.<sup>11</sup>

As striking as Justice Kennedy’s numbers were, he did not exaggerate the problem. Upon arrest, blacks are three times more likely than whites to be imprisoned.<sup>12</sup> Even though African-Americans comprise only 13% of the American population, over 44% of the 1.4 million persons incarcerated in 2003 were black,<sup>13</sup> A report released by the Bureau of Justice Statistics found that a black male had a 1 in 3 chance of being imprisoned during his lifetime, compared to a 1 in 6 chance for a Latino male and a 1 in 17 chance for a white male.<sup>14</sup> Nearly 10% of black males age 25 to 29 are incarcerated compared with 1.1% of white males in the same age group,<sup>15</sup> and black females are five times more likely to be incarcerated than white females.<sup>16</sup>

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<sup>10</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Ginsburg, R., concurring).

<sup>11</sup> August 9, 2003 Address to ABA House of Delegates.

<sup>12</sup> National Urban League, *The State of Black America, 2005: Prescriptions for Change*, p. 33.

<sup>13</sup> Bureau of Justice Statistics, U.S. Department of Justice: Office of Justice Programs, *Bulletin-Prisoners in 2003*.

<sup>14</sup> Press Release, Bureau of Justice Statistics, *Prevalence of Imprisonment in the U.S. Population, 1974-2001* (Aug. 17, 2003) available at <http://www.ojp.usdoj.gov/bjs/abstract/piusp01.htm>.

<sup>15</sup> Bureau of Justice Statistics, U.S. Department of Justice: Office of Justice Programs, *Bulletin-Prisoners in 2003*.

<sup>16</sup> Bureau of Justice Statistics, U.S. Department of Justice: Office of Justice Programs, *Bulletin-Prisoners in 2003*.

Even though there is vast disagreement about the cause of racial disparities in the criminal justice system, few deny that the problem exacts monumental social, financial, and human costs on the individuals who are incarcerated, their families, and society as a whole. The ramifications of the disproportionate involvement of African-Americans in the criminal justice system extend to issues as significant as felony disenfranchisement, disqualification from public housing and welfare benefits, and the dissolution of families.<sup>17</sup> The financial costs to society are as predictable as the costs of building and maintaining prisons. When society incarcerates an individual it not only punishes that person, but also deprives his or her family of financial support. There are real costs imposed upon those who are dependent upon the economic support of a father, mother, or other family member who is incarcerated. These costs, which increase with the length of the sentence, are passed onto society.<sup>18</sup>

Racial disparities exist in other areas as well. Substantial disparities in earning potential, unemployment rates, poverty levels, and access to health care, to name a few, are also well-documented and result in immediate and long-lasting adverse consequences for our nation, as well as for the individuals involved.

Are any of these present-day racial disparities the lingering result of slavery and post-slavery discrimination? There are theories, but no one really knows. The treatment of enslaved Africans and of African-Americans in the post-slavery years has been a shameful chapter in American history, and it poses difficult questions about the present effects of past denials of justice. This is 2007 and no comprehensive federal study has been undertaken to methodically examine the evidence and analyze the issues. The question is not whether we need a commission, like the one proposed in H.R. 40; the question is, why have we waited so long to establish one?

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<sup>17</sup> See generally Invisible Punishment: The Collateral Consequences of Mass Imprisonment, Marc Mauer and Meda Chesney-Lind, editors (2002).

<sup>18</sup> Recent efforts, vigorously supported by the ABA, to reduce the disparity between sentencing guidelines for crack cocaine and powder cocaine may help to reduce these disparities in criminal sentencing, and we want to take this opportunity, Mr. Chairman, to thank you for your announcement that you will hold hearings on this issue next year.

Like the country as a whole, we at the ABA also have had a painful past. When our Association was first formed almost 130 years ago, African-Americans were denied membership. Decades passed before African-American attorneys were invited to join the Association. In fact, in 1925, the National Bar Association was formed by 100 black attorneys who were denied ABA membership. This was our shame, and we are addressing it. Our mission of being the “national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law," requires an unwavering commitment to equality under the law, diversity of the profession, and open analysis of the past and present.

The ABA has made strides to put its own house in order, as well as to work for improvements in our justice system and support the enactment of laws and governmental policies to advance our nation’s promise of equal opportunity and equal treatment under the law. We have created our own special commissions and task forces to examine our own practices in order to increase the participation of traditionally underrepresented groups in our own Association membership and leadership. The entities housed in our Center for Racial and Ethnic Diversity (Commission on Racial and Ethnic Diversity in the Profession, Council on Racial and Ethnic Justice, Presidential Advisory Council on Diversity in the Profession) continue to make regular reports and recommendations that are incorporated into the guiding principles of the Association. This is a continuing process, supported by our membership, our Board of Governors and our Association’s leadership, and it is having positive effects on the diversity and inclusiveness of our Association membership and in the profession at large.

We have made significant progress since the early days of the ABA, as is evident by the fact that in 2003, my friend, the Honorable Dennis Archer of Detroit, Michigan, became our first African-American President. I was honored to serve with President Archer as the Chair of the ABA House of Delegates the year he was our President. He was immediately followed by our second African-American President, Robert Grey of Richmond, Virginia, another good friend of mine.

In summary, I want to reiterate the American Bar Association's support in principle for H.R. 40. We admire your dedication and perseverance in advancing this issue, Mr. Chairman, and we stand ready to help you in whatever way we can.

Thank you for this opportunity to convey the Association's views.