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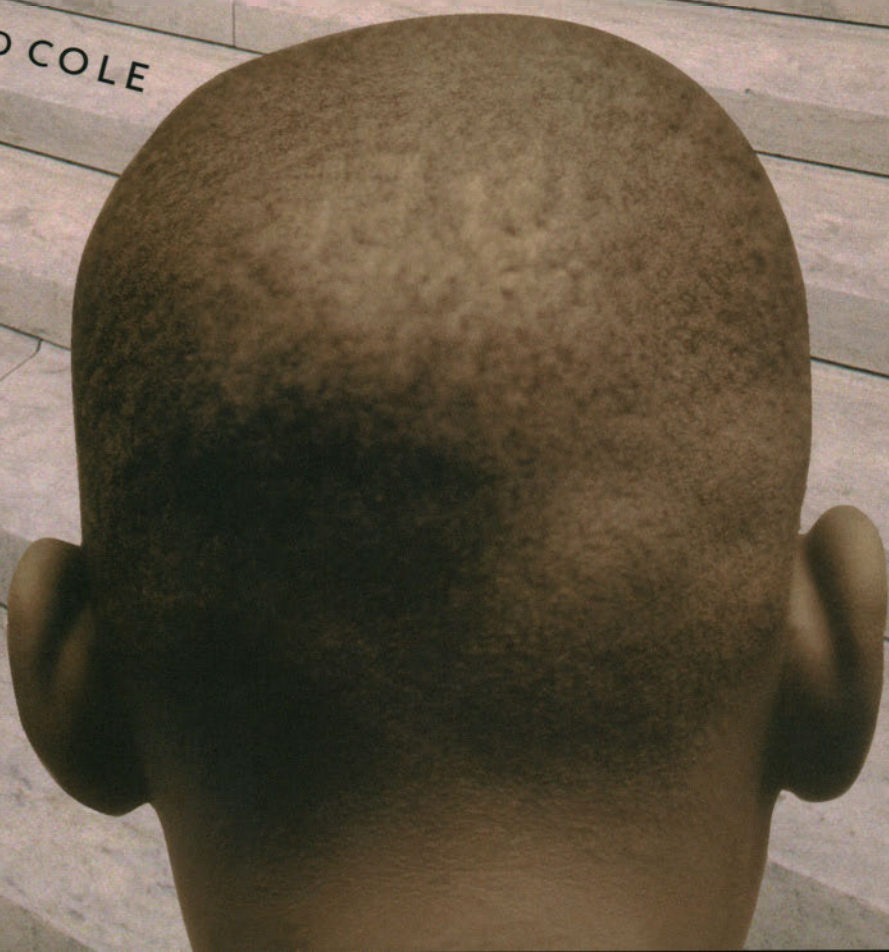
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NO

EQUAL JUSTICE

Race and Class in the American Criminal Justice System

DAVID COLE





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Contact: Eric Brandt
(415) 863-5163

NO EQUAL JUSTICE

Race and Class in the American Justice System

by David Cole

- In a survey of traffic stops by police in Volusia County, Florida, nearly 70% of those stopped were black or Hispanic, while only 5% of drivers on that highway were dark skinned
- In 1990, Kentucky spent more money on the University of Kentucky athletic budget than it did on providing criminal defense lawyers for the poor.
- 75-80% of criminal defendants are too poor to hire their own lawyer, yet in 1990 we spent only \$5.37 per capita on indigent criminal defenses, while spending 25 times that amount on the investigation and prosecution of the crime.
- Sentences for crack cocaine are 100 times more severe than sentences for powder:
 - Percent of people arrested for crack cocaine use who are people of color: 90%
 - Percent of people arrested for powder cocaine use who are people of color: 20%

These are just a few of the troubling statistics indicating that the American criminal justice system, while *theoretically* grounded on the premise that all are equal before the law, *in practice* is far from that ideal. In the blistering exposé **NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN JUSTICE SYSTEM** (The New Press; \$25.00 hardcover; February 15, 1999), author David Cole argues that these disparities are not merely flaws in the criminal justice system, but that our system of justice actually exploits these inequities to save on the costs of providing equal justice for all.

Cole, a professor at Georgetown University Law Center and legal affairs correspondent for The Nation, brings his keen understanding of constitutional law to the built-in biases of criminal law and procedure in America. Cole's argument is not simply that inequality in the criminal justice system has been ignored; rather it is that "our criminal justice system affirmatively depends on inequality." The privileged enjoy constitutional protection of their liberties, while the less privileged are denied the same protection in the name of preventing and punishing crime. Cole maintains that these double standards, many of them created or condoned by the Supreme Court, are both morally wrong and counterproductive. In the end, they *increase* the cost of criminal law enforcement. Legitimacy is the law's most effective tool in encouraging compliance; without legitimacy, we are left to the strong-arm tactics of longer and longer prison sentences. Accordingly, we have pervasive distrust of our criminal justice system, and the second highest per capita incarceration rate in the world, second only to Russia.

Each chapter in the first half of the book is devoted to documenting actual incidents and cases of these double standards, including:

- **Police Procedures** such as "consent" searches, traffic stops, and "quality of life" patrols that, sanctioned by the Supreme Court, are disproportionately used against minorities.
- **A Right to Counsel** that stipulates that all accused are entitled to a court-appointed attorney but does nothing to regulate the quality and efficacy of that representation.
- **Jury Discrimination** that uses "peremptory challenges" to strike potential jury members often based on the bias of race.
- **Sentencing Disparities**, including a discussion of the war on drugs, the death penalty, and mandatory minimums.

(more)

More than a devastating critique, NO EQUAL JUSTICE is also a passionate plea for change. After documenting the problems in the system, Cole explores their many far-reaching implications, particularly that a "criminal justice system based on double standards fuels racial enmity and encourages crime." The last chapter suggests that in order to solve the problem, we must restore the law's legitimacy by rejecting its double standards, and must develop community-based responses to the problem of crime. Otherwise, the worthy ideal of "Equality before the Law" is doomed to remain a phrase etched on courthouse facades rather than enacted within its walls.

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About the Author:

David Cole was named one of the forty-five top public sector lawyers under forty-five by The American Lawyer. He is a professor at Georgetown University Law Center, an attorney with the Center for Constitutional Rights, the chief litigator for Karen Finley v. National Endowment for the Arts, and a regular contributor to NPR's "All Things Considered," The Nation, and op-ed pages in major newspapers nationwide. He lives in Washington, DC.

Advance Praise for NO EQUAL JUSTICE:

"Cole puts teeth into the argument that America has two separate systems of justice—one for the privileged and educated, another for the poor and less educated, which often means black and Latino people living in inner cities. . . . Cole's book is a well-argued, passionate plea for a program to fight crime while honoring the constitution's protection of individual rights."

--Publishers Weekly

"David Cole shows that those who point out bias are not just paranoid and provides a wake-up call for others when he asks how we can expect poor and minorities to respect a system that does not respect them. No Equal Justice offers sound advice about how America can address these fundamental challenges."

--Marian Wright Edelman, President, Children's Defense Fund

"A work of intellectual clarity and profound moral power. David Cole has moved the issue of unequal justice from mere rhetoric to a position of democratic urgency. He has rendered a great service to the nation."

*--Roger Wilkins, Clarence J. Robinson Professor of History and American Culture,
George Mason University*

NO EQUAL JUSTICE RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM by David Cole

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David Cole

'Driving While Black'

Curbing race-based traffic stops.

When federal Judge Nancy Gertner in Boston reduced a black defendant's criminal sentence earlier this month on the grounds that his lengthy prior record may have been skewed by race-based traffic stops, her opinion drew national attention. But she did little more than acknowledge a phenomenon already widely known in the black community as "driving while black." Other lawsuits across the country successfully have challenged race-based traffic stops in the past decade. Yet the practice continues unabated. It is a problem that desperately needs more than piecemeal judicial attention.

In 1992, for example, the Maryland ACLU successfully sued after Maryland state troopers on I-95 stopped Robert Wilkins, a black man who happened also to be a Harvard Law School graduate and public defender. Maryland quickly settled the case and agreed to judicial monitoring. In 1995 the ACLU settled a similar lawsuit in Tinicum Township just outside Philadelphia. And in 1996 a New Jersey judge dismissed 19 traffic cases when the public defenders showed that police there had engaged in racially disproportionate stops.

Studies show a consistent pattern. Monitoring in Maryland showed that over a three-year period, 1995 through 1997, 70 percent of the motorists the police stopped on I-95 were black, even though black motorists made up only about 17 percent of the traffic and of the speeders on that road.

A 1992 Orlando Sentinel study based on police videotapes similarly found that while about 5 percent of the drivers on a Florida interstate were dark skinned, nearly 70 percent of those stopped were black or Hispanic, and more than 80 percent of the cars searched were driven by blacks and Hispanics.

Tapes of individual stops reinforced the statistics. In one of the relatively rare stops of a white driver, Sgt. Dale Anderson asks the motorist how he is doing. When the man

answers, "Not very good," Anderson replies, "Could be worse—could be black."

These practices undermine the legitimacy of the criminal justice system and thereby hamper law enforcement. The more that people believe the state is fair, the more likely they are to internalize its mores and play by the rules. By engaging in a practice that has made "driving while black" a common phrase in minority communities, police actually have fed the forces that encourage criminal behavior.

But decisions such as Judge Gertner's, while they send an important message, are not the best way to address this problem. When a judge relies on broad statistics to reduce an individual defendant's sentence, as Gertner did, her action inevitably raises questions about fit—even if as a statistical matter blacks are stopped disproportionately, how do we know that Alexander Leviner, the defendant before Gertner, was himself stopped because of his race?

At the same time, if we bar relief absent individualized proof that a driver was stopped because of his race, the issue rarely will be addressed. Problems of proof are extremely difficult to overcome in individual cases, even when the reality of disproportionate enforcement across the board is impossible to deny.

A legislative response is needed. A bill pending in Congress would require the Department of Justice to study the racial demographics of traffic enforcement across the country. But the bill does not go far enough. Police should be required to maintain and report to the public the



BY TIM BRINTON

racial characteristics of their traffic stops as a matter of course. The reason race-based stops have been tolerated for so long is that they remain largely hidden. Most police departments do not keep records of the racial breakdown of traffic stops, and those that do rarely make them public. The vacuum of information only fuels speculation about the scope of the problem.

Bringing the issue to light might itself reduce officers' reliance on race, especially to the extent that they are relying on relatively subconscious stereotypes. But in addition, national statistics would tell us whether this is a problem of national proportions. At this stage, the black community thinks so, but it is less clear that the rest of the country shares that concern. We need to stop putting our collective head in the sand with respect to what may be one of the most widespread examples of explicit official racial discrimination.

The writer is a law professor at Georgetown University and a senior justice fellow at the Open Society Institute's Center for Crime, Communities and Culture.